

Cardiff University

The communicative theory of
punishment and the problem of
dangerous offenders

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Abstract

A communicative theory of punishment is justified because it expresses censure and engages with the offender as a deserved response to the wrong that has been committed. The communicative theory treats all offenders as rational, autonomous agents capable of understanding and engaging with moral discourse. The focus of this thesis is R A Duff's communicative theory of punishment which states that punishment as communication should involve what he calls secular penance, this aims to encourage the offender to repent, reconcile and reform. In this thesis I will present an argument in support of Duff's communicative theory of punishment. However, the theory does not adequately deal with the punishment of dangerous offenders. If the communicative theory became practice then dangerous offenders would be subject to the same punishment as other, non-dangerous offenders; this does not seem to adequately address the seriousness of their ongoing behaviour. Even more problematic is that it appears that the punishment of dangerous offenders could not be justified at all within a communicative theory. I argue that there is a solution to the problem of dangerous offenders which is broadly consistent with Duff's communicative theory, if a system of non-punitive detention is accepted.

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Introduction

“You can judge a society by how it treats its prisoners”, a quote widely attributed to Dostoevsky, begins to illuminate an awareness that the moral standing of the state is intimately connected to the system of punishment that it creates and enacts. The quote exposes the idea that treating prisoners in a way that seeks to humiliate and inflict undue pain or suffering, reflects critically on the state itself, not just on the system of punishment within that state. (Smith, 1759 (2010)) The organisation of the nation state, and its relationship with citizens, is intimately linked to how it chooses to punish those who break the rules of that nation.

It is generally accepted that a system of punishment is required in any organised and coherent nation state, although this is not a given and there are individuals who have attempted to justify the abolition of punishment as a concept. (Duff, 2001 p30-35) Setting this view aside, when a nation state comes into being a set of rules, or laws, are created in order to allow citizens to live in a way that, at the very least, means they are protected from harassment going about their business. A coherent structure of laws however, provides a framework that reflects the values, shared beliefs and norms of society which goes further than merely ensuring the safety of those living with the nation’s borders. The rules of the state, articulated through the fabric of the criminal justice system, sets out the state’s expectations about the behaviour of citizens (Hart, 2008 p5; Simester & von Hirsch, 2014 p19-32) and also the penalties that can be expected if the behaviour of individuals falls short of these expectations. It is this system of penalties, embodied through state punishment that will be the focus of this thesis.

Punishment, by its very definition involves the imposition of harm or suffering on another, and when it is the state that is inflicting that suffering then there should be a clear and robust justification which explains in what circumstances, and in what way, the state has the power and authority to do this. Although this type of justification may not always be explicitly, or coherently, articulated by the state, there has been a body of work examining the philosophical underpinning of punishment. Theories of punishment have tended to focus on the defence of a single general justifying aim of punishment which provides an overarching justification for all aspects of the criminal justice system. (Matravers, 2013; Duff, 2003 chp 1) Contemporary philosophical theories can broadly be grouped into one of three approaches. The justification of punishment by the state as a means of deterrence; this consequentialist theory justifies the imposition of punishment on citizens by the state as a means to prevent future crime. There are also a group of theories that aim to rehabilitate those who commit crimes. This group justifies punishment as a means of correcting or educating offenders against similar future behaviour, again broadly with the view to prevent further offending. Finally there is a group of theories which take a retributive approach. These types of theories justify punishment by the state with reference to the idea that the offender *deserves* to be punished because they have broken the law and therefore committed a crime. (Matravers, 2013)

In this thesis I will look primarily at a theory of punishment which can be described as broadly retributive in nature, in that it seeks to justify punishment as a deserved response to the past action of committing a crime. In doing this I will also discuss other theories of punishment, contrast them with the retributivist position and provide a review of retributive and consequentialist theories of punishment. The theory that I will support in

this thesis justifies state punishment as a communicative endeavour and I will take a particular view on the theory developed by R A Duff. The specific thesis that I am going to defend is that a communicative theory of punishment can successfully address the difficult issue of the punishment of dangerous offenders. I will show that a communicative system of punishment would flourish in a society where those who have committed a crime and been convicted of that crime, are punished but are also treated as rational, autonomous agents and are punished in a way that supports social justice, fairness and moral awareness. A communicative justification of punishment is one in which offenders are treated as valued members of community and are welcomed back into that community when they have served their punishment. I will then seek to expound the problematic issue of the punishment of dangerous offenders and argue that a communicative theory of punishment can be consistent with dealing with this particular type of offending behaviour.

In order to achieve this I will examine the communicative theory of punishment articulated by Duff with particular reference to his book *Punishment, Communication and Community*. In *Punishment, Communication and Community*, Duff outlines his communicative theory of punishment, which has a strong focus on reducing the reliance of the criminal justice system on punitive sanctions such as long term imprisonment and fines, in favour of punishments that are more meaningful such as community based punishments. This leads Duff to question whether a communicative theory of punishment can punish dangerous offenders in a way that satisfies the ordinary member of society's sense of natural justice. Can an offender that is judged to be dangerous or one which has committed crimes that are deemed to be dangerous, be punished in a way that ensures that they receive the punishment that they deserve for that crime whilst at the same time, satisfying

the real concern from the community that unchecked, such offenders could go on to commit additional dangerous and harmful crimes. Is a communicative theory of punishment capable of reconciling these two issues?

In the first two chapters I will articulate and defend the communicative theory of punishment of Duff, and I will look at why one should subscribe to this broadly retributivist theory over other theories which are justified by their appeal to their preventative efficacy. I will go on to expand on the argument that the punishment of dangerous offenders *is* a particular problem for communicative theories such as Duff's. The definition of a dangerous offender is pivotal to the argument on how they can be punished within a communicative theory and in the third chapter of this thesis I will take a close look at how Duff defines the dangerous offender. His definition of the dangerous offender in *Punishment, Communication and Community*, as a serious violent offender that displays a persistent pattern of such behaviour is crucial to the way in which he envisages such offenders could be punished. In Chapter Four I will argue that the treatment of so called dangerous offenders today in many states is unjust, and theories such as Duff's should be examined with a view to overhaul the method of punishment for dangerous offenders. Although this thesis is a philosophical thesis, any theory of punishment should attempt to be translatable into the real world and Chapter Four shows that many of the approaches taken to date to address the problem of the punishment of dangerous offenders, such as the Criminal Justice Act 2013 in the UK, have resulted in unjust sentencing practice. In *Punishment, Communication and Community*, Duff is clear that the system of punishment that we have in the UK today does not meet the requirements of his broadly communitarian philosophy.

In the second half of the thesis I will begin to look in detail of how a communicative theory of punishment could maintain its character and key themes and yet still provide a satisfactory account of punishment for dangerous offenders. A key feature of communicative approaches to punishment is the principle of proportionate sentencing; indeed it is this principle that undermines any attempt to sentence dangerous offenders with harsher sentences than non-dangerous offenders. In Chapter Five I will argue that proportionate sentencing is an essential component of communicative theories and will come to show that sitting outside the principles of proportionality is not a viable option for a communicative theory of punishment.

In Chapters Six and Seven I will give a detailed account of the notions of harm and culpability in sentencing, and I will argue that in sentencing all offenders, including dangerous offenders, within a communicative theory of punishment an assessment of harm and culpability is essential. In the run up to the conclusion of my argument I will examine Duff's proposed solution to the sentencing of dangerous offenders; selective special detention. (Duff, 2003; Duff, 2004) This is an idea that is rooted in the theory that incapacitating offenders is an effective method of preventing the harm that is caused by dangerous offenders. I will place Duff's conception of incapacitation within the context of the wider debate on the incapacitation of offenders and I will argue that Duff is not successful in his defence of selective special detention.

The final chapter of my thesis will argue that there are two possible solutions to the problem of dangerous offenders for the communicative theory of punishment of Duff. These are an original contribution to the current body of work on communicative theories of

punishment. The first solution suggests that a longer sentence consisting of a removal from the community, i.e. a long prison sentence, is what is deserved by the dangerous offender. I argue that they could be given a harsher sentence than would normally be given for the offence for which they are charged. This is justified because they have been through the process of punishment as communication previously and therefore it is reasonable to assume that they should be aware of the harm caused by their actions. They are, in effect, more culpable than non-dangerous offenders. The second possible solution will argue that dangerous offenders do not possess the requisite moral control or rational consideration to be punished at all. They are not responsive to the communicative approach and they are not moved by the moral considerations necessary to make such communication productive or useful. Such persons cannot be assumed to be the rational autonomous citizens that Duff insists all citizens are, including offenders. It is therefore possible to incapacitate such dangerous citizens in a non-punitive sense in order to prevent further harm being caused to the community. I will conclude that the second option, although fraught with problems for the communicative theory, provides the best solution for the communicative theory.

This final chapter sets out why the notion of dangerousness that I propose is distinct from Duff's and thus an original contribution to the body of work on dangerousness and communicative theories of punishment. Duff maintains that dangerous offenders are rational autonomous agents capable of understanding and engaging in moral communication. In my conception of the communicative theory, dangerous offenders are either more culpable than non-dangerous offenders or they do not have requisite moral control to justify the communication of censure. I introduce the idea of the dangerous citizen which creates a new conceptual apparatus that allows the state to separate the

justification of the punishment of offenders from the incapacitation of dangerous citizens.

This leaves the communicative theory free to justify the punishment of non-dangerous offenders as the communication of censure and to satisfy the constraints of proportionate sentencing. The dangerous citizen is outside of the scope of the communicative theory and therefore removes the problem of dangerous offenders.

I will also leave open the possibility that the first and the second solutions could complement each other and could be seen as part of a spectrum of approaches for dealing with dangerous offending behaviour. There could be a category of dangerous offenders who could be subject to enhanced penance as outlined in the first solution, before the decision is made that they are a dangerous citizen as per the second solution.

To summarise, in this thesis I will argue that communicative theories have a serious problem in addressing the punishment of dangerous offenders and I will argue that what we do now to punish dangerous offenders is unjust and so a poor reflection on our community. I will argue that Duff's solution to the problem of dangerous offenders is not viable and I will suggest two possible options to overcome the problem.

Chapter 1

A Theory of Punishment

In order to construct a theory of punishment there needs to be a clear justification as to why the state can punish and why punishment should involve any degree of hard treatment or deprivation for those who are punished. (Duff, 2003) In these first two chapters I will argue that punishment can be justified because of its communicative efficacy. Before a defence of communicative theories of punishment, this chapter will examine a popular and widely supported justification of punishment which is broadly consequentialist in character. I will argue that the consequentialist justification of punishment does not provide a suitable or credible justification of punishment and I will come on in the next chapter to argue that a more compelling justification can be found in a theory of punishment that sees punishment as communication with a particular reference to the theory of R A Duff.

I will argue that a consequentialist justification of punishment is sub-optimal due to a set of problems; the most pressing being that the consequentialist justification seems to treat the offender as a means to an end, rather than as an end in herself. Through this argument against the consequentialist justification of punishment I will argue that where other theories of punishment fail, the communicative theory, as articulated by R A Duff can succeed. In contrasting the communicative theory of punishment with the consequentialist justification I will provide a compelling case for supporting the communicative theory. This is important to the overall aim of the thesis because I cannot begin to argue that there is a problem for communicative theories with the punishment of dangerous offenders if I have

not provided a justification of the communicative theory and successfully argued that this theory of punishment should be supported over other competing theories.

Punishment, by its very definition, involves the imposition of a degree of unpleasantness or suffering on the person being punished. In most societies this can involve the loss of liberty and freedom or a deprivation of material resources for the convicted offender, whatever the precise nature of the punishment it is generally accepted that punishment should impose a sanction on the recipient that is uncomfortable. Punishment also involves a degree of compulsion for the offender; the punishment is *imposed* on the offender through the criminal justice system. The offender is required to comply with the terms of the punishment and there could be additional sanctions for non-compliance. Distinct to the nature of punishment within a nation state, rather than more informal punishment, is that it is an action imposed by the state as a response to a crime.

Because punishment necessarily means imposing uncomfortable, unpleasant or harsh treatment on citizens, more often than not against their will, the practice requires justification and legitimisation, especially when that punishment is carried out by the state on behalf of the community through a criminal justice system. Theories of punishment therefore require a general justifying aim which can also serve the purpose of underpinning other aspects of the criminal justice system, such as policies relating to the sentencing of offenders. The general justifying aim of punishment nearly always needs to be augmented with an explanation as to why punishment should or does, involve a degree of suffering or unpleasantness for the offender, rather than merely being symbolic in nature (like a telling off for a child).

1.1 The consequentialist justification of punishment

One possible way to construct a defence of punishment by the state on its citizens could be to say that the use of punishment is justified because it is an effective method of preventing future crime. Theories which appeal to the crime preventative efficacy of punishment do so by suggesting that the act of punishment is necessary and useful because punishment can result in the desirable consequence that less crime is committed. If punishment has the effect of reducing the overall amount of crime within a community then it also reduces the overall amount of suffering or harm in a community; harm which is caused by the commission of crime. The hardship and suffering that punishment can inflict on those punished is balanced against the actual and potential suffering and harm that is prevented. This is a simplistic account of a consequentialist theory of punishment. (Braithwaite & Pettit, 1990; Duff, 2003 p3-13) Punishment, which inflicts hardship on others (those being punished), is justified by appealing to the future benefit (good) that will be experienced by the community as a whole as a direct result of the reduction in crime. In utilitarian terms the suffering caused by punishment is less than the suffering that would be caused by crime, thus justifying punishment because it has the overall effect of reducing the amount of suffering and therefore increasing the amount of happiness or well-being, or whichever term preferred to capture the overall utility.

There are a number of ways it could be supposed that punishing an individual will prevent future crime. The thinking goes something like this: the person who is being punished will be put off committing more crime in the future because of the fear of receiving further punishment. The individual who is the recipient of the punishment is deterred from committing future crimes which should lead to less crime being committed

by that specific individual (Honderich, 2006) and so less harm being inflicted on the potential victim of those future crimes. One particular proponent of this type of view is Ted Honderich, who in rejecting many of the traditional justifications of punishment concludes that punishment should only be justified in so far as it discourages certain types of behaviour and so, the justification lies in the consequences achieved by state punishment.

In addition to the individual deterrent effect of punishment, certain types of sentence could also prevent crime from being committed if the offender receives a prison sentence or some other sentence which restricts their ability to move freely in society. For example, imprisonment, tagging or community sentences which have a requirement to be in a certain place at a certain time. In these instances the person being punished is said to be incapacitated and is unable to commit any further crimes, thus reducing the amount of crime carried out by that individual. I will come to look in depth at both a consequentialist and retributive justification for the use of incapacitation as a form of punishment in Chapter 8.

In addition to individual deterrence and individual incapacitation, the consequentialist theory also argues that punishment will result in other potential offenders being deterred from committing crimes. The thinking here is that those who are tempted to commit a crime will see the punishment being received by the others and will then decide to desist from committing any crime themselves; this is known as general deterrence. Citizens who may be tempted to commit a crime will see the unpleasant and uncomfortable consequences of committing crime (i.e. the punishment) and will be persuaded that this is too great a price to pay and will therefore be deterred from committing future crimes themselves. (Farrell, 2003) This general deterrence argument is one that is supported by a

number of philosophers, and not just those who are purely consequentialist in their thinking, such as Farrell who puts together a robust defence of general deterrence. Other theories of punishment such as the communicative theory of Andrew von Hirsch, who I will refer to throughout this thesis, state that punishment and specifically the use of hard treatment in punishment can provide a deterrence to others who may be considering undertaking crime. Von Hirsch refers to this as a prudential supplement to the overall communicative aim of punishment. He argues that as human beings we are, by our very nature fallible and so the threat of punishment provides us with an additional incentive not to commit crimes. (Von Hirsch, 1993 p12-13) Seeing others endure a harsh punishment, or even just the mere threat of having such a punishment imposed upon us may in fact deter the potential offender from committing a crime in the first place. The public nature of any punishment could also act as a deterrent to the rest of the community. The aim of punishment and the justification for a state imposing punishment is that it will reduce the number of crimes committed and so reduce the amount of harm caused to the individual victims of crime and the community as a whole.

1.2 What's the problem with the consequentialist approach?

There are a number of serious problems with justifying punishment on the basis of crime prevention. In this section I will look at number of the main arguments against using crime prevention as a means of justifying punishment, this will lead me on to articulate an alternative, more retributive justification of punishment.

One argument against the consequentialist justification of punishment is that this approach fails to create a meaningful connection between crime and punishment. Using a future goal (crime prevention) to justify punishment for crimes that have been committed in

the past fails to create a strong enough link between the crime and the punishment. (Duff, 2001 p7) This is particularly problematic for the justification of punishment supporting the general deterrence effect. In order to create the general deterrence effect it is necessary that punishments are public and that the criminal justice system is seen to be issuing punishments in response to a crime. Deterrence can only work if punishment is sufficiently visible and unpleasant enough to put potential offenders off committing more crimes. To create this impact, however it is not entirely clear why it would be necessary that those who are punished have committed the crime for which they are being punished.

The same deterrence effect could be created by imposing sanctions on a person who has no connection with the crime. The punishment would still be justified however, as long as future crime is prevented. All that is necessary is the creation of a public perception that the person responsible for the commission of a crime has been apprehended and punished via the criminal justice system. This could be sufficient to create the deterrence effect that is required by the consequentialist in order to justify the use of punishment. It is easy to imagine a situation where the police investigation fails to identify the perpetrator of a high profile crime but still wishes to ensure that other members of the community are not tempted to commit the same sorts of crimes because they think that they could get away with it. The police could then arrest and process an innocent person who is then given a harsh sentence to act as a deterrent to other potential offenders. As long as a steady stream of defendants moves through the criminal justice system and are punished and are *seen* to be punished, the aim of preventing future crime through general deterrence could just as easily be achieved by punishing innocent people than by punishing those who have committed crimes. If punishment is justified as a means of preventing future crime then it

does not really matter *who* is punished, whether guilty or innocent as long as the aim of crime prevention is pursued and or, achieved then the punishment is justified.

The idea that punishment should only be imposed on a person guilty of an offence has a strong intuitive connection to the idea of what is just and what is fair. Punishing a person who is innocent and known or suspected to be innocent, because it could prevent future crime through deterrence does not conform to a commonly held sense of what is just. A system of justice should create a necessary connection between the crime committed and the punishment being received.

It is assumed, however, that the consequentialist would not want to accept the situation where the punishment of innocent citizens is compatible with the justification of state punishment. So the consequentialist theory needs to address the question of whether those who are guilty of a crime *ought* or *can* be punished. The consequentialist could say that although the overall justification of punishment is made through appealing to the preventative impact of punishment, in addition to this central justification another requirement is also needed which states that it is imperative to adhere to the idea of justice. They could therefore add a side-constraint to the theory and say that punishment, although its main aim is to prevent future crime, can only be justified where the recipient has been found to be guilty of an offence. (Duff, 2001 p11)

The other option for the consequentialist is to state that punishment of the innocent would have an overall negative impact on society. The cumulative effect of punishing the innocent would result in more suffering, because the suffering of those punished would presumably be over and above that of the guilty, due to the injustice. The impact on society as a whole would be to create more unhappiness or to reduce the well-being of the

population. Therefore, punishment of the innocent would not be justified under a consequentialist theory, even if the practice did prove to reduce the level of crime.

The difficulty with both of these potential methods of preventing the punishment of the innocent is that they seem to add complexity to the theory of punishment where it is not needed. The idea that the punishment of the innocent would cause more overall suffering than would be prevented by the impact of deterrence, would surely have to involve a complex calculation of the happiness (or non-suffering) caused by punishment and crime prevention. This kind of calculation would be nearly impossible and questions would have to be raised about its accuracy even if it was possible.

These are not the only problems that any deterrence theory has to deal with. It is not clear that a system which justifies punishment because of its preventative efficacy needs to adhere to the principle of proportionate sentencing. I will give a brief outline of the idea of proportionality in sentencing here but devote Chapter 4 to a deeper explanation and to arguing that it is an essential principle for the communicative theory of punishment. The basic principle proportionality can be characterised in the following way: if an offender A commits a crime X and offender B also commits crime X then as long as the circumstances are commensurate then the sentence that offender A receives should be the same as, or the equivalent to, the sentence that offender B receives. (Von Hirsch, 1993 p17-19)

In justifying punishment the deterrence theory works on the basis that punishment implemented *now* will prevent crime in the future; the overriding aim of the sentence is to prevent crime. Therefore, the sentence that an offender receives is the means to achieving the aim of crime prevention. It is possible, and indeed may even be preferable, that to achieve the aim of crime prevention that sentences are disproportionate. So offender A and

B could receive very different sentences for the same offence. These different sentences could be acceptable within a system that is justified on the basis of crime prevention, if it could be reasonably calculated that these sentences would be the most effective and least harmful method of preventing future crime. It could be that offender B is a well-known person in the community and when B receives a prison sentence this would make the news and so it would act as a deterrent to a wide group of people. If offender A receives a prison sentence for the crime, then perhaps fewer people within the community would hear about it, so the impact of this sentence would be minimal in terms of deterring future potential offenders. Different sentences would further the aim of preventing crime in the general population (general deterrence) and it could produce less suffering because only one offender has to endure a long prison sentence.

Or it could be the case that Offender B is a prolific offender and has a string of convictions for petty theft, therefore a 1 year prison sentence is used to deter Offender B from committing further similar offences (individual deterrence) and also to prevent Offender B from committing more crimes for the term of the prison sentence (incapacitation). For the consequentialist it is not necessary nor required, to ensure that the sentences received by offender A and offender B are proportionate in relation to each other or in relation to the relevant offence, as long as they fulfil the aim of preventing crime. (Von Hirsch, 1993 p20-28) In fact, it may suit the aim of preventing future crime to have a system that allows disproportionate sentences.

Although the consequentialist theory could justify and even prefer, not to adhere to the principle of proportionality in the strictest sense, it could be that the deterrence theory suggests that proportionality is taken into account when sentencing, along with a range of

other factors. Crime prevention could be the main aim of punishment, but proportionality could be a prescribed consideration in the sentencing process. This could mean that punishments should seek to act as a deterrent to the individual and the wider population, but that punishments must not be radically disproportionate to each other, or disproportionate in relation to the seriousness of the offence. (Lacey, 1988 p194) In this way the deterrence theory could side step the criticism that failing to follow the principles of proportionality when sentencing does not provide consistency and fairness in sentencing. I will argue later in the thesis however that proportionality in sentencing is a necessary requirement for justice because it enables a fair system of sentencing that is predictable and understandable for citizens and treats offenders in a fair and just way.

Consequentialist theories of punishment which aim to justify punishment because it will prevent future crimes through deterring offenders from breaking the law are reliant on the supposition that punishment does *actually* deter individuals from committing crimes and I look at this issue in depth in the chapter on incapacitation. This is dependent on a belief that, unchecked by interventions such as punishment, those citizens who have already committed a number of crimes are likely to do so again. When a member of the community breaks the law and is found guilty of an offence in a properly constituted court, they receive a punishment. For the consequentialist this punishment is justified because it is likely to prevent that offender (and/or the wider population) from committing future offences, thus reducing the amount of crime committed and so reducing the overall levels of suffering or increasing the overall amount of happiness, or good.

The consequentialist approach is dependent on an assumption about the prevention of future behaviours, and this raises a number of questions. How can the criminal justice

system possibly predict future offending, and how can punishment influence this potential offending behaviour? There are often cases where it appears to be all too predictable that a particular offender will go on to commit future crime if not incapacitated in prison or by other means, such as tagging. In these cases those who go on to be the victims of crime quite rightly, look to the criminal justice system and ask 'why was nothing done? It was obvious that offender A was going to go on and commit further crimes.' Statements such as these are often made with the benefit of hindsight, however predicting future offending behaviour in a robust way that stands up to scrutiny is not an easy task, as I will argue in Chapter 8.

For the consequentialist theory, justifying punishment because of its preventative qualities may require something a little more robust than a judgement that offender A's future criminal behaviour was 'obvious'. In order to address this problem, the consequentialist theory could look at work which has been done seeking to predict whether an individual offender is more or less likely to commit future crime. (Duff, 2004) If an accurate prediction of future offending behaviour was possible, then punishments could be varied in order to prevent the most crime. Offenders that are judged most likely to commit future crime could receive a harsher sentence than those who are deemed to be less likely to commit future crime. In this way the maximum amount of crime could be prevented for the minimum amount of punishment being received. A methodology could be developed that creates a statistical profile of the key personal, environmental and geographical characteristics that are most common in those who offend or are most likely to re-offend. Offenders who match this profile, or have a high correlation to this profile could receive

harsher sentences to increase the likelihood of preventing the maximum amount of crime.
(Duff, 2004)

If we were to examine the characteristics of offenders and in particular repeat offenders in the UK and USA, it is likely that the type of characteristics that would be seen would cover areas such as poor employment status, chaotic family situations, drug or alcohol use, membership of a minority community, and membership of gangs. This sort of statistical profiling could also show that offenders are more likely to live in economically deprived urban areas, have low educational achievement and literacy rates, often due to sustained absence from school and in addition would have a history of mental illness and personality disorders. (Berman & Dar, 2013 p19) These are the sorts of characteristics that are prevalent in the prison population in the UK today. It could be that those offenders which have all or a good proportion of these characteristics could be justifiably given a longer or harsher sentence as it is these offenders that are more likely to go on to commit further crimes. If the overall aim of punishment is to prevent crime, through incapacitation or through deterrence then imposing harsher sentences on those offenders who fit this profile could be an efficient way to achieve that aim. This sort of profiling could arguably result in a reduction in overall crime but would also result in a fundamentally inequitable system of justice with punishments not adhering to the principle of proportionality and members of certain social and racial groups being punished more harshly than others as a direct consequence of belonging to that group. In aiming for the prevention of crime, a consequentialist approach to punishment could result in the creation of a fundamentally inequitable criminal justice system which punishes offenders on the basis of their membership of certain groups, or possession of certain traits.

1.3 The means to an end argument

In addition to these problems there is an argument that exposes a more fundamental flaw in this type of consequential justification of punishment. Justifying punishment through crime prevention risks the state treating offenders as a means to an end. This is clearly a version of the Kantian argument which states

Act in such a way that you treat humanity, whether in your own person or in that of another, always at the same time as an end and never merely as a means. (Kant, 1948 (1993))

As members of a community each of us should treat the people within our community and beyond as ends in themselves not as a means to achieving some separate, independent end. It is a maxim that chimes with our sense of natural justice, that we each have our own goals and goods and that these should be respected. All members of the community should be treated as individuals who are valued in their own right, with their own set of desires, goals and ambitions which they should be free to pursue (within the framework of the law) and as such, all members of the community should be treated as agents capable of making their own rational decisions to further those goals. This does not mean that a goal that is dependent on others cannot be pursued, Kant argues that individuals cannot be used “*merely*” as a means to achieving a separate end, but it does require that when this is the case then the rights of the individual cannot be sacrificed for the pursuit of a goal that is separate to the goals of the individual or that fundamentally impinges on the rights of the individual. (Duff, 2001 p28)

It seems evident that in the pursuit crime prevention the consequentialist runs the risk of treating the individual offender as a means to this end not as an end in themselves. The end in question is the prevention of future crime and by punishing the offender in order to deter other members of the community from committing crimes then the offender is clearly treated as a means to further that goal. If it is accepted that harsher sentences do indeed lead to a reduction in crime, then the consequentialist theory is justified in imposing harsher sentences (in relation to those received by other offenders in similar circumstances and in relation to the relative seriousness of the crime). If offender A receives a certain sentence because it would result in a greater number of potential offenders being deterred from committing future offences then the rights of offender A to receive a proportionate punishment could justifiably be set aside in favour of the pursuit of the aim of preventing crime in the wider community. (Duff, 2001 p131-143) Determining a punishment because it would better achieve the consequentialist societal aim of preventing crime is clearly treating offenders as a means to an end, the end being crime prevention.

This argument is relevant when looking at the general deterrence of crime; the offender given a harsh sentence in order to deter others from committing similar crime is being treated as a means to preventing others from engaging in similar behaviour, that end being obviously separate from the ends of the offender. But does the same argument hold for punishments that are aimed at preventing future criminal behaviour of the individual offender being punished (individual deterrence). It could be argued that preventing future offending behaviour of the individual is addressing the overall societal aim of preventing crime, because that one offender has been deterred from committing additional crime.

It could be argued that the punishment is for their own good, as well as the good of the community as a whole. It could be interpreted that preventing offending behaviour is an end for the individual offender, whether or not they necessarily agree with that end, it is still an aim that is directly related to them alone. Let us consider offender A who receives a £100 fine for petty theft and offender B who receives a 2-year sentence for a commensurate theft. Offender B has committed a number of similar offences in the past and it is decided at sentencing in order to ensure that offender B does not commit any more thefts for the duration of the punishment then a 2-year prison sentence is appropriate to meet the aim of preventing future crime. As seen above with the issue of offender profiling, Offender B is receiving a harsher sentence, not because the crime they have committed is more or less serious than that of offender A, but because there are factors (separate from the actual crime for which offender B is answering) which lead to the assumption that offender B will go on to commit more offences.

It can be argued that even though the aim is to prevent only the potential future crime of offender B this still treats offender B as a means to achieving an end that has not yet happened, is not related to the theft in question and is so not as treating Offender B as an end in himself. If the punishment of a 2-year prison sentence was imposed because this is what offender B *deserved* for the theft committed then the punishment could be justified. It could be, for example, that the current offence also involved violent behaviour by Offender B making the offence more serious and so would deserve a harsher sentence. In a system that allows disproportionate sentencing to achieve the separate aim of crime prevention at an aggregate community level, then 2-year sentence imposed on Offender B has not been imposed upon the offender because it is what they deserved. It has been

imposed on Offender B to prevent the commission of future crimes with no relation to the crime that has actually been committed beyond that crime being a catalyst to legitimise the prevention activity and this aim is a separate end. It would seem then, that using crime prevention as a justifying aim of punishment results in sentences that treat offenders as a way of achieving a separate goal rather than as treating offenders as members of the community who have rights and are autonomous individuals.

1.4 Conclusion

In this chapter I have given a critique of a generalised version of the consequentialist justification for a theory of punishment, with specific reference to the arguments that propose punishment as a means to prevent crime and so prevent harm and suffering. There are of course other justifications for punishment which are broadly consequentialist in nature, including those which justify punishment as a means to rehabilitate offenders or provide moral education. Even these types of justification fall foul of the same sorts of arguments because they are still based on the idea that punishment could prevent future crime. It is this aspect of the justification that is ultimately its undoing; in relying on a separate future aim the theories fall foul of the means to an end argument.

I do not propose to go into more detail in outlining argument against the purely consequentialist approach here, I will refer to the arguments presented in this opening chapter throughout the thesis to support the idea that punishment can be justified as a means of communication with the offender.

Chapter 2

A communicative theory of punishment

In the previous chapter I argued that a consequentialist theory of punishment is vulnerable to a number of flaws, and fails to adequately or convincingly justify the use of punishment by a nation state. I will argue that there is an alternative theory that is broadly retributive which justifies punishment as a communicative endeavour with the offender, the victim and the community and has specific reference to the past action which is the crime that has been committed. The theory can be described as a backward looking theory, in contrast with the forward-looking theory of the consequentialist. In this thesis I will focus on the communicative theory of R A Duff who sees the justification of punishment as having a direct relationship with the past offence that has been committed, but is also concerned with aspects of future conduct of the offender, and aims to persuade the offender to cease further criminal actions. (Duff, 2003) In this chapter I will argue that Duff's communicative theory provides a coherent and just legitimisation of punishment.

2.1 Retributive Theories of Punishment

Duff's communicative theory of punishment can be described as a broadly retributive in nature, in so far as the punishment received by the offender is a deserved and direct response to the wrong that has been committed; so justification of punishment is dependent on a backwards look at the crime rather than the consequentialist forward looking theory which justifies punishment because of the effect that the punishment will have at some future point. Duff's theory however, does not explicitly place itself in the

retributive camp, and does not subscribe to some of the more difficult aspects of retributivist theories (Duff, 2003) which have led to a widely held view that retributivist theories can result in overly harsh and draconian systems of punishment. (Hudson, 2000 p205-209) Duff indicates in *Punishment, Communication and Community*, that the partisan distinction between the consequentialist approach and retributivist theory has not necessarily moved the debate on the justification of punishment any further forward.

Despite this, retributivist theories are clear that the act of punishment results from the commission of a crime and thus punishment is justified as a deserved response to that crime unlike that of the consequentialist theory where there is not necessarily a clear connection between the crime and punishment, as shown in Chapter 1. What is *deserved* is often characterised for the retributive theory as the suffering of the offender. (Lacey, 2013) Essentially the offender deserves to be punished (whether that is constituted explicitly as suffering or not) *because* of the crime they have committed (Berman, 2013). Those that deserve punishment are those that commit crimes, this is the clear link between a crime being committed and punishment. For the retributivist the offender has broken the rules which are articulated through the law, and the deserved response to that action is punishment. (Duff, 2003)

2.2 Duff's Communicative Theory of Punishment

For a communicative theory of punishment, although it is retributive in the sense that the punishment is the deserved response to a crime, the punishment is justified by virtue of its communicative nature. It is this communication that is the deserved response to the crime. But *why* do offenders deserve punishment, and also *what* it is that they deserve? Duff

argues in *Punishment, Communication and Community*, that the *what* is fairly straightforward because what is communicated with offenders is censure (or blame) that is a deserved response to their crimes. Punishment is the way in which blame for the wrong doing is communicated with the offender. The question of *why* can also be addressed by the communicative theory. The law sets out what the state expects of the conduct of its citizens. (Feinberg, 1926 p61-64) When a member of the community acts in a way that is outside of those expectations in a way that flouts the values of that community, then it is incumbent on the state to condemn that behaviour (although at this stage it is not a given that this condemnation should come in the form of punishment). If there was no censure, no response to those actions that break the law, then this indicates that the law is not taken seriously by the state. Duff states

The criminal law declares certain kinds of conduct to be wrong – to be criminal. But if the law, or the society in whose name it speaks, is to mean what it thus says, it is committed to censuring those who nonetheless engage in such conduct. To remain silent in the face of their crimes would be to undermine – by implication go back on – it's declaration that such conduct is wrong. (Duff, 2001 p28)

Duff goes on to say that censure is owed to the victims of crime, in order to act as an acknowledgement that they have been wronged. Although the communication with the offender is specific to them as an offender and it is the means by which the offender is told that they have broken the rules of society. Censure also acts as a means by which public expression is given to the concept that this action is something that the community at large considers to be wrong and that an individual within that community has been wronged. It shows the community as a whole that their values that are articulated through the law, are being taken seriously.

How this communication is achieved and in what circumstances the communication takes place is an essential part of how punishment is justified. This point is particularly important because punishment, as conceived by Duff, is not merely an *expression* of censure from the state via a punitive sanction; it is a communicative process in which the offender is invited to participate. So this punishment is less like the state wagging a disapproving finger and more like a conversation between state and wrongdoer. (Duff, 2003) An expression of blame implies that the communication is one way, from the state to the offender. Communication of censure should, however, be participatory process. For Duff this means involvement by the offender in a form of secular penance which has three distinct steps; repentance, reform and reconciliation. (Duff, 2001 p106-112) These concepts are central to the communicative process with the offender. These three distinct but interlinked processes provide the offender with the opportunity to fulfil the backwards looking process of repentance for the crime that has been committed and a further opportunity to communicate with the victim and the community at large in the process of repentance, through the punishment. The process also allows the offender to look forward into the community through a reformatory undertaking and the chance to be reconciled with the community at the end point of the punishment.

In order for this to be meaningful and realistic expectation it is vital that the offender is able to understand the process that they are involved in and are communicated with in a language and form that they not only understand but are able to engage with. (Duff, 2001 p118) In *Punishment, Community and Communication* and also in *Trials and Punishment*, Duff considers the entire criminal justice system as part of the communicative process and assesses whether the system as it functions currently in the UK and USA enables offenders to be engaged in this richer sense of communication. He concludes that the system as it is

today is too complex and inaccessible. From police procedures to the language of the law used by lawyers and judges, the current system is not conducive to the type of engagement and understanding that would be required for all offenders to become fully engaged in the communicative process. (Duff, 2003; Duff, 1991)

It is through engagement in the communication process that the offender would be asked to understand, consider and reflect on the censure that they have received and engage with the process of repentance, reform and reconciliation. (Duff, 2004) Duff is explicit that the offender possesses the autonomy, free will and rationality to engage actively in this communication. Duff is clear that the engagement in the communicative practice has to be offered to the autonomous, rational offender and characterises this reflection and consideration as a form of secular penance.

Secular penance is a critical aspect of the communicative process for Duff, although he is keen to create distance with comparisons made with penance in a religious sense. (Duff, 2004) Although the term may be expedient, the notion itself is indispensable to create the sense of deep reflection on the wrong that has been committed and also the methods by which that reflective state is achieved. The penitent act is and must be a serious and considered venture where the offender is asked to repent, to be truly sorry for the harm that they have caused: to reconcile, to become reunited with the community that they have wronged; and to reform, to desist from such behaviour in the future. (Duff, 2001 p107-112) This process engages the offender with the idea that the process of communication is aiming to have an impact on their behaviour in the future, to allow them to be reconciled with their community and live and share in their values.

Duff uses this notion of penance as part of the justification for the use of penal hard treatment as a method of punishment, rather than a merely symbolic gesture such as an

apology. It could be argued that the communicative process could be achieved without any deprivation or hardship for the offender. (Matravers, 2013) The hard treatment which is the embodiment of the punishment, is the method used, in the communicative process to encourage the offender to take the reflective process seriously. It is the physical manifestation of the apology that the offender gives to the community. A merely symbolic punishment to communicate censure would not be sufficient to induce a penitent response in the offender. This aspect of the theory sets it apart from other communicative theories, such as that of Andrew von Hirsch, who is highly critical of use of secular penance because it is seen as a step too far by von Hirsch who considers this as interfering in the internal life of the individual, somewhere that the state has no business. (Duff, 2004; Von Hirsch, 2003)

The notion of secular penance offers an explanation as to why punishment should involve a degree of suffering for the offender, as this will sharpen the focus of the offender and aid their understanding and reflection that the crime they committed was serious and required a serious response, as well as providing the physical representation of the apology that is due to the victim of the crime. (Duff, 2003) This is not to say that the punishments supported by Duff would be unnecessarily harsh or commensurate to those within our present system of punishment. Duff's theory envisages shorter custodial sentences, and although he does not move entirely away from prison sentences he does advocate substantially improved conditions in prisons and a dramatic reduction in the reliance on prison as a form of punishment. Punishment should also be more sophisticated in the way that they reflect the nature of the crime committed, through increased use of methods such as community punishments. (Duff, 2001 p104-106) For Duff the punishment needs to be a good fit with the crime if it is to communicate censure in a meaningful and understandable way.

In anticipation of criticism levelled against the idea of punishment as secular penance Duff stresses that the offender is free not to engage in this process of repentance as is their right as an autonomous agent. Duff seeks avoid the criticism that offenders are being forcibly rehabilitated or trained in some way to conform to a particular view of the good. The point of secular penance is to give the offender the opportunity to repent, reconcile and reform. Through this process they are given the opportunity to consider what they have done, but it is for the offender, as an autonomous, rational agent to decide whether to engage in the process or not. (Duff, 2003) In leaving the offender free to make their own decision consistency is achieved with the liberal-communitarian position of Duff's theory. It is the expectation that members of the community are able to think rationally, make decisions based on that rational thought and by and large be left alone by the state to make those decisions free from coercion.

2.3 The Community

If punishment is to be successfully justified as communication which encourages a form of secular penance, then Duff is clear that this is dependent on a certain view of the function and structure of society. Duff's normative theory could not be implemented in our community today. For the communication of censure to have real and rich meaning then the individual who is being communicated with, and citizens more broadly living in our society need to be seen as, and crucially to *feel* part of a community that shares a set of values which have a direct influence over the law and their lives. A commitment to, or at very least an understanding about, those values is part of what should make an individual a member of a community, this needs to be set within the idea of autonomy and freedom of the individual. Without this then it is hard to see how the offender could be engaged in the

process of communication because it would hold no meaning for them, there would be little understanding that their action has broken the trust and values of the community. If the communication is meant to express censure and invite the offender to participate in the communication and engage in penitent reflection, then it is important that the offender understands what the values of the community are and feels that they have a stake and a vested interest in maintaining and upholding those values.

Duff outlines this view in *Punishment, Communication and Community* as a liberal-communitarian conception of society. Placing a theory of punishment within the framework of communitarian principles is not unique to Duff nor to retributive approaches. Nicola Lacey's theory, a consequentialist leaning theory also relies on a conception of society built on rich and close human relationships and a communitarian political philosophy. (Lacey, 1988 p199) Duff embraces the notion of community in a rich sense and he certainly does not wish to be seen as repeating much of the "penal rhetoric" around the use of the term community. (Duff, 2001) This is a society that is dependent on the rich relationships between members of the community, and recognises that as people we are, by our nature, gregarious and interdependent but that also recognises the autonomous rights of the members of that community to pursue their own idea of the good. This leaves room for the retributivist view that the rights of the individual cannot be sacrificed for the good of the community as a whole, as could be the case in the consequentialist view of the punishment outlined above. (Duff, 2001 p52) Duff likens the liberal-communitarian society to an idealised version of an academic community, where there are certain areas of your life which other members of the community have a right to be interested in and to take an interest in, like teaching or research undertaken by the academic. There are however, other areas of your life that members of this community do not have a legitimate interest in, such

as your personal relationships outside of the academic community if they have no bearing on your work. (Duff, 2001 p42-46)

A liberal-communitarian society values the shared goals of the collective but leaves room for the rights of the individual and pursuit of individual interests. The rich bonds of the community however ensure that by breaking the law, and flouting the shared and understood values of the community makes it clear that the state punishes on behalf of the community. This idea that the state is acting on behalf of the community when punishing offenders, is shared by Ciocchetti in 'Punishment, Reintegration and Atypical Victims' who summarises this in saying "[t]he community responds to crimes by developing a shared public view, embodied in the criminal law as it is both written and enforced." (Ciocchetti, 2004) The communitarian-liberal position develops punishment as an institution as part of that community which is specific to the offender through communication of censure and the offer of secular penance but also one that is reliant on the shared view of the community. Duff states that punishment aims to:

communicate and to persuade the offender to accept a substantive understanding of his crime as a particular kind of "public" wrong – a wrong, that is, against it's individual victim..... but also, through the victim, against the political community whose criminal law he has violated and to which both he and the victim belong.

(Duff, 2001 p39)

Here Duff is setting his communicative theory firmly within the context of a particular normative concept of the community and implicit in this must be the idea that the law is written and enacted by the state in a way that is coherent with that conception of society. It is this concept of the community that gives the state the legitimacy and the appropriate moral position to punish offenders. It also provides a framework for the key notion that

punishment is a communication of censure on behalf of the community in response to an infringement of the values that they collectively understand and share. In order for this to be the case then the state itself, as an institution which embodies the legislator, the police, prisons, probation service and the court service etc, must be truly representative of the community, reflect the values of the community and act in a way that is just and reflects equality.

What is clear in Duff's theory is the notion that all citizens including the offender are valued members of the community, that they are equal members of society and that censure is being communicated to the offender because they are a member of the community; it is not a case of them (the offenders) and us (the community) and that we as the good guys impose suffering on them because they are the bad guys. What is explicit throughout *Punishment, Communication and Community*, is that the offender is and remains a member of the community even when being punished, and that ordinarily membership of the community is not forfeited by the commission of a crime. Suspension of rights as a community member is a characteristic of some retributivist theories of punishment. In effect offenders forfeit their full rights as a consequence of criminal behaviour and could even face expulsion from the community. (Duff, 2001 p14-16; Lacey, 1988 p22-25) Punishment as communication for Duff is thus firmly rooted in an understanding of individuals, whether victim or offender, as being a members of the same community with a shared set of values and understanding about those values, albeit incorporating individual notions of the good.

2.4 What would punishment as communication look like?

For the communicative theory, punishment is a deserved response to a crime, and the law is the means by which the shared values of the community are articulated. In the communicative theory of punishment the communication of censure acts as a demonstration to the community that the state is serious when it says (through the law) that certain actions or behaviours are not acceptable. Penal hard treatment is the means by which the offender is invited to take part in a form of secular penance as suggested by Duff, which will enable the offender, if they chose, to accept the wrong that they have done. This richer, more sophisticated conception of the function of punishment as a means of communication makes the nature of the punishment itself vital. The sentence that is given out to the offender must effectively reflect censure in a way that is understood by the offender and also encourage the process of repentance. So it is essential that punishment conveys this to the offender and that the communication is understood by the offender. This is in part achieved through a sentencing theory that reflects the communicative endeavour and this is embedded in the application of the principle of proportionality of sentencing. Proportionate sentencing is so central to the communicative theory that I have devoted an entire chapter to this later in thesis however it is useful to provide an overview here in addition to the comments already made in Chapter 1.

Duff's communicative theory of punishment needs to adequately reflect the principle of proportionality of sentencing because the sentence is the means by which censure is communicated. The sentence therefore, should not be overly oppressive or harsh, nor lenient and should allow the offender to engage in repentance, or not, according to their own deliberation. It is essential that the punishment is a substantive fit for the crime (Duff, 2001 p143) and conveys the appropriate amount of censure due to the offender in relation to the crime that has been committed

Duff looks in detail at the issue of proportionality of sentencing in *Punishment, Communication and the Community* and the emphasis that is placed on proportionality reflects the importance of the principle for communicative theories of punishment. Andrew von Hirsch, who has also written extensively in support of a communicative theory of punishment, provides an excellent and insightful exposition of proportionality in *Censure and Sanctions*. Duff sums up the position of proportionality for the communicative theory and says

[if] punishment is to be for an offense, its character and severity must surely be determined by the offense for which it is imposed. (Duff, 2001 p132)

The level and character of the censure must reflect the level of seriousness of the offence in order to appropriately communicate to the offender, the victim and the wider public, the seriousness of the crime and so the level of blameworthiness of the offender. If the sentence that the offender receives is too lenient or harsh, then the punishment cannot accurately communicate the right amount of blameworthiness. There are difficulties with the principle and the practical implementation of proportionality in sentencing, not least in determining what constitutes a proportionate sentence. I will come on to discuss these in detail and ultimately argue that the communicative theory of punishment must adhere to the principle of proportionality. (Duff, 2001 p142-143) For Duff and other theories that use communication as a general justifying aim of punishment, proportionality is a necessary component of sentencing because it is the means by which the appropriate amount of censure can be communicated with the offender.

Duff acknowledges the importance of proportionality to his theory and also wants to create a system in which punishment as communication could encourage offenders to view their punishment as a form of secular penance. In order to achieve this, punishment needs

what Duff calls, a substantive fit between the punishment and crime. This is not to say that the theory takes an “eye for an eye” approach to sentencing (Duff, 2001 p142-143) but what it does do is seek a more sophisticated, rich and meaningful sentence which could induce the kind of penance that Duff seeks. This approach requires a level of flexibility in sentencing which gives the option to tailor the punishment to the crime in a way that reflects the censure that the crime deserves. This could pose a problem for strict adherence to the principle of proportionality, because the nature of proportionality means that in some sense the same crimes require the same punishments. Duff must therefore design a system of sentencing that is proportionate so it communicates the appropriate amount of censure, but that also allows for substantive fit with the individual circumstances of the crime and offender, in order to allow for the offender to engage in the process of secular penance. Duff sums this up in the following way,

What matters about crimes is not just their seriousness but their character as public wrongs. What matters about punishments is not just their severity but their character as responses to such wrongs. Negative proportionality thus gives sentencers more room to attend to the concrete particularities of the crime, without worrying about rendering it commensurable with all other crimes in terms of its seriousness. (Duff, 2001 p139)

A negative conception of proportionality ensures that the sentences are not disproportionate, rather than insisting that they should be proportionate, and are able to reflect the nature of the crime in question, without having to insist on having exactly the same punishment for the same crime. In order for the communicative nature of the punishment to reflect the appropriate amount of censure and for the required substantive fit between crime and punishment, sentences cannot be rigid in a way that impede the

communicative aim. I will provide a framework for this kind of sentencing theory later in the thesis.

Punishment, Communication and the Community looks at the type of punishments that would satisfy proportionality but also fulfil the penitent function of punishment and ensure that substantial fit between individual crimes and punishments. This intimate connection between the crime and punishment is an essential aspect of the communicative theory, in a way that is not essential for the consequential theories of punishment. This connection between the crime and punishment is crucial because it is the way in which the offender comes to understand the nature of the wrong they have committed. The sentence not only needs to reflect the communicative process they also need to be consistent with the liberal-communitarian underpinning of the theory. For Duff this means punishments such as “probation, Community Sentencing Order, and criminal mediation and reparation programs” (Duff, 2001 p149) should be used for many crimes that would in our current system result in a custodial sentence. These types of punishments are suited to the process of communication and the desired secular penance, because they are conducive to encouraging offenders think about the crime that they have committed. These punishments tend to be community based bringing an understanding to the offender that the crimes they have committed are intimately linked to their place in the community. Probation and community based sentences are rooted in the community and can involve reparation from the offender to the community. This type of punishment not only communicates to the offender that they have committed a crime for which the appropriate response is to pay something back the community, but it also communicates in a visual and public way, to the community that the offender is undertaking this task as an apology for the wrong that has been committed. (Duff, 2001 p109) These kinds of punishments fulfil all the aims of the

communicative theory; they let the offender know that they have committed a wrong, for which the deserved response is censure, this censure involves harsh treatment that is beyond a mere symbolic censure. The punishment demonstrates to the community that the crime is being taken seriously and the type of punishment elicits the kind of penitent response that is an option in the communicative theory.

Prison in contrast explicitly removes the offender from the community. The censure that is expressed by prison is reserved for the most serious of wrongs. What prison communicates to the offender, victim and the community is that the wrong that has been committed is of such a serious nature that the offender needs to be physically removed from the community. They are not able to continue their lives in the community, for a time. Duff is comfortable with the use of imprisonment as an appropriate punishment, because it communicates a very serious level of censure, so it should be reserved for only the most serious of crimes. (Duff, 2001 p148-152; Von Hirsch, 1993) Imprisonment is obviously the kind of punishment that would be appropriate in the sentencing of dangerous offenders due to the nature of their crimes but I shall argue that the modest way in which Duff envisages using imprisonment as a sentence does not seem to be an appropriate response to the serious nature of the crimes committed by the most dangerous of offenders.

2.5 Criticisms of Duff's Communicative Theory of Punishment

Duff's communicative theory has been broadly outlined in this chapter and I argue that this presents a credible and attractive alternative to the consequentialist theories of punishment. Any theory however, needs to address criticism and an obvious criticism, even from those who also support communicative theory such as Andrew von Hirsch, is that in asking the offender to engage in a process of secular penance represents an intrusion into

the soul of the offender. It could be argued that the state, and certainly a liberal political state, has no business being involved in the moral consciousness of its individual citizens. The state may have a legitimate role in creating an environment which ensures that its citizens are free to go about their business un-harassed (Honderich, 2006) however, there should be limits on what the state should be involved with. (Lacey, 2013)

According to von Hirsch to try to persuade the offender to repent, takes the state's relationship with its citizens too far. When describing the idea of secular penance von Hirsch likens it to the relationship that a monastic order has with its monks. A monastic order is a closed community that has at its centre a code of strict moral values which all those who join sign up to willingly. They have a single shared concept of the good and part of the agreement in joining and maintaining membership of the order is to conform to living in a way that is consistent with the moral rules that are an integral part of the order. If one of the monks, as a member of that community breaks that moral code then it is, quite rightly, the business of the head of that order, the abbot, take a close interest in the moral conduct and internal moral attitude of the wayward monk. The abbot has a mandate to undertake that role given to him explicitly by the members of the community who have agreed to living in this way. (Von Hirsch, 2000) Engagement in penance following rule breaking in the monastic order involves a time of reflection and an element of punishment, which is part of the process for reconciling the rule breaker with the rest of the community and to bring a richer understanding of the moral rules of the order. Andrew von Hirsch thinks that the notion of asking offenders to engage in secular penance is no different to the circumstances in the monastery and this is not how the state should relate to its citizens in the modern nation state. Von Hirsch agrees with Duff in that the state has a legitimate concern when it comes to the conduct of its citizens and censuring citizens for conduct that breaks the law is

acceptable, there is no role for the state, however, in the internal moral deliberations of the citizen. (Von Hirsch, 2003)

There are however, fundamental differences between the state and the analogy of the monastic order. Yes, both the state and a religious order are in some sense a defined community, but membership of a monastic order is optional. If a monk has a loss of faith or disagrees with the values of that order, then they have the option to leave and to live in a different environment, whether that be in society more generally or within another religious community that better reflects their personal conception of the good. It is not the same in the modern system of the nation state. By and large members of a state are born into citizenship and have little opportunity to move to other countries if they happen not agree with its values. Movement between states does of course, occur but this opportunity is often restricted to those who can afford it or those who are forced to flee for economic, political and religious asylum. Even in these extreme circumstances it is neither easy nor cheap to move between political states. (Duff, 2003) Monks within the order consent to having their community taking in-depth concern and interest in their internal moral self. Thus requiring penance as part of punishment is an option that they have explicitly consented to, this is not the same in a nation state. Citizens living within the state have not explicitly consented to having the state taking a view on their internal moral considerations and for von Hirsch, using secular penance through punishment encroaches into the moral individual in an unacceptable way.

The value systems of a modern state are far more limited in their scope than a monastic order and rightly so. The values that can be judged to be collective values within a liberal state tend to be broad in order to encompass a wide range of beliefs and conceptions of the good. Moral values within a monastic order will be far more overt with limited scope

for divergent conceptions of the good, these shared values are what binds the monastic community together and define the community. Having a broad set of values within the nation state means that rule breakers do not usually threaten the fabric of the community. If a monk breaks the moral code of the monastery, however, because this tends to be integral to the identity of the community, then it is a serious threat to the stability and character of the order. If values are broken in a liberal society it does not necessarily mean that the individual has been separated from their own good because there is room for multiple goods unlike in the monastic order. (Duff, 2003)

Duff acknowledges that attempting to persuade offenders to repent and becoming involved in the internal moral attitude of individuals will not sit well with strict liberal conceptions of the state. His theory is dependent on a liberal-communitarian view of the community which sees a richer relationship between individuals and the state comprising of an understanding of set of shared community values. A strong argument put forward by Nicola Lacey, who also supports a communitarian view of society albeit within a more consequential focused theory of punishment, is that it's a fundamental part of human nature to need community to flourish. Our reliance on others is an essential part of what makes us persons, thus we should not shy away from others and the state having a deeper interest in our views and moral consideration. (Lacey, 2013 p173) Duff maintains that there needs to be a strong and interconnected community for communicative theories to work in practice, and sees that there is no reason that a conception of a liberal-communitarian society could also encompass liberal values, primarily preserving the rights of the individual within that community structure. There is not necessarily a contradiction in having a community with rich relationships and shared values that also values the autonomy of

individual whilst still leaving room for there to be flexibility for individual conceptions of the good. (Duff, 2003)

Even with this richer conception of society Duff still seems to have a problem. If the state is asking the offender to engage in secular penance, to repent, reconcile and reform and to consider their moral conduct through punishment then it does seem that the state is playing abbot and intruding on individual autonomy. Duff does state that at no point is the punishment forcing offenders to engage in secular penance and repent. The punishment is merely communicating the message of censure and inviting them to consider and understand the wrong that has been committed against the victim and the community. The offenders are not compelled to repent, the punishment communicates censure and the harsh or unpleasant treatment encourages secular penance with a view to repentance. At the heart of this criticism is the thought that this sort of communicative enterprise would not work in the real world and has unrealistic expectations of the relationship between the offender and the state. Duff's answer to this is that just because a theory is impractical it does not mean that it is wrong. As a society we should be striving to reach the ideal, if that is the correct way to go but he acknowledges that there would have to be substantial changes to our society if the communicative theory of punishment is to be implemented. (Duff, 2003; Duff, 2001)

A further question for the communicative theory of punishment to answer is what if the offender has already repented, reconciled and reformed? Does this mean that they do not have to undergo punishment since the goal of communication has already been achieved? (Von Hirsch, 2003) Hard treatment, the putative aspect of punishment is designed to aid the process of penance and to send a message to the community that the offender is aware of the seriousness of the offence and is apologising through the

undertaking of punishment. If the offender does not undertake the punishment, because they say that they have already repented, then this message cannot be conveyed and the reconciliation with the community is not completed. Duff is also insistent that true repentance does not take an instant, "it requires time and effort" (Duff, 2001 p119) Hard treatment gives the offender the time and the incentive to put that effort in and to demonstrate that they understand the seriousness of their actions. If the offender is given a symbolic punishment because they say that they were sorry for committing that offence and appear to be repentant, the offender would then be sent back out into the world. If this happens then it may not even be possible for them to be fully reflective and engage in the process of repentance. Living one's life in the community would take over and the offender would not think about the crime that they had committed deeply enough to satisfy the penitent process. Taking part in the act of punishment and losing something (whether that be time, money or liberty) enables the offender to fully reflect and focus their mind on what they have done. Finally, due to the principle of proportionality it is essential that the level of punishment conveys the level of censure. If lenience is shown in sentencing to those who have repented then the message about the seriousness of the offence will not be communicated to the offender, victim or community at large. (Duff, 2003; Duff, 2001)

What then of the offender who does not repent and does not engage in the process of repentance, reconciliation and reform? Does this mean that the punishment has failed? Duff answers this by saying that the punishment has succeeded in the aim of communicating with the offender and that at least an attempt was made to persuade the offender to understand. The state owes it to the offender to treat them as an autonomous moral agent, capable of understanding their mistake even if this is not successful. By communicating censure and offering the opportunity to repent the state has treated the

offender as a rational moral agent who is capable of understanding and repenting, regardless of whether they do or not.

2.6 Conclusion

This chapter has provided an argument in defence of Duff's communicative theory of punishment. Duff's theory of punishment is justified because it communicates the notion of censure to the offender; there is a process of secular penance undertaken through punishment which is aimed at the offender going down a path of repentance, reconciliation and reform. The offender is a part of the community and is treated as such, as an autonomous rational agent capable of moral communication through the process of punishment. Their punishment represents a public apology for the crime they have committed and when they have completed their punishment they are accepted as a full part of the community. This conception of punishment is set within the context of a rich community, who take interest in the lives of all members of that community, who are free to pursue their own conception of the good but are linked by values that bind them together. Punishments themselves are less focused on removal from the community through imprisonment but are more focused on allowing the offender to repatriate for their wrongs and aid the communicative endeavour.

Chapter 3

What is a Dangerous Offender?

In the previous chapter I set out an argument in support of Duff's communicative theory of punishment. Duff's theory characterises crime as a public wrong and justifies punishment as a deserved response to a crime because it communicates censure to the offender and seeks to engage with the offender. Duff's account of a communicative theory of punishment is grounded in a liberal-communitarian view of the society that respects the autonomy, freedom and privacy of all citizens and assumes that members of society are capable of making their own rational choices. The liberal-communitarian society is imbued with rich values that are shared and understood across the community, which allow for individual conceptions of the good and respect the rights of all citizens within the community. (Duff, 2001 p54)

Having argued that the communicative theory of Duff is preferable to other theories of punishment, in particular consequentialist theories, in this chapter I will argue that the punishment and sentencing of a particular group of offenders, dangerous offenders, causes certain problems for the communicative theory. I start the chapter by analysing Duff's definition of the dangerous offender and how this particular group of offenders is characterised within the communicative theory. For Duff, dangerous offenders are those who have shown persistence in committing serious violent offences. The nature of their offending behaviour is so serious and severe that it could be seen as an attack on the shared values of the community itself because it so disregards those shared moral standards. How dangerous offenders are defined is crucial, not only to establishing who should be punished

as a dangerous offender but also how they can be punished and sentenced, and to answering the question as to whether they *should* be punished in a different way to non-dangerous offenders.

In the second half of this chapter I will go on to argue that there are two particular issues for Duff to address when looking at the punishment of dangerous offenders within the communicative theory. Firstly, it could be that these kinds of offenders cannot be communicated with in the kind of way that Duff envisages and are unpersuaded by the moral considerations that are necessary for the justification of punishment as communication (Lippke, 2008). Secondly, and the issue that Duff highlights himself is that the requirements of proportionate sentencing within the communicative theory of punishment means that it is not possible to sentence dangerous offenders in a way that provides sufficient protection for the public and specifically the victims of crime or potential victims of crime. (Duff, 2004) It could be the case that an offender is defined as being dangerous, and is given the same sentence for a crime as an offender who is not defined as dangerous, due to the requirements of proportionality. Is this a sufficient response to dangerous offenders?

3.1 A Definition of Dangerous Offenders

Many criminal justice systems across broadly liberal democratic nations have a definition of what constitutes a dangerous offenders or dangerous offending, as part of their framework of laws. (Pratt, 1997p 8-35; The Criminal Justice Act 2003) The growth of the concept of dangerous offenders can be seen in English speaking societies from the mid-nineteenth century onwards and was prompted by changes in the concept of the proper functions of the state and an expansion of the reach of the law. The changing nature of society through

that period prompted many states to legislate for an expansion of their role to manage the perceived risks posed to the community from so called dangerous offenders. (Pratt, 1997)

Much of the development of legislation during the nineteenth century was aimed at tackling the risk posed by dangerous offenders who were primarily perceived to be repeat property offenders rather than violent or sexual offenders. The Prevention of Crime Act in 1908 in the UK was one of the first pieces of legislation that specifically made allowance for the sentencing of such dangerous offenders to longer, even indeterminate prison terms. (Pratt, 1997 p52-53) The law surrounding the definition of dangerous offenders and the sentencing of these offenders has been changing, expanding and developing ever since.

In the next chapter I will look at the history of the sentencing of dangerous offenders which touches on how such offenders are defined. Here however, I will first concentrate on an analysis of Duff's definition of dangerous offenders, and why it is partly this definition which causes dangerous offenders to be a problem for the communicative theory of punishment. Duff states that the dangerous offender is a persistent criminal who commits serious and violent crimes against the person. The offender's serious and violent criminal behaviour must amount to a persistent pattern of serious and violent criminal behaviour. (Duff, 2001p170-175; Duff, 2004) It would not be sufficient that an offender has committed several, unconnected and disparate crimes over a lifetime even if those crimes are violent in nature. In order for the offender to be considered as dangerous then there must be a clear pattern of serious and violent criminal activity that amounts to what could be called a serious violent criminal lifestyle.

Due to the potentially serious consequences for the sentencing of such offenders Duff considers that empirical evidence of persistence in criminal behaviour is a prerequisite

for an offender to be considered as dangerous. For Duff, the conclusion that an offender is dangerous could not be reached without there being a very compelling reason. The offender will have resisted past efforts to dissuade them against offending behaviour, through appropriate censure. (Duff, 2001 p 170-174) And despite this, the dangerous offender is still viewed as fully responsible, culpable and answerable for their crimes.

The dangerous offender must be doing more than just causing persistent *harm* to others. The pattern of criminal behaviour must be of such ferocity that their actions amount to an *attack* on others within the community. This distinguishes the dangerous offender from those who may unintentionally cause persistent harm to others. The dangerous offender must have the appropriate kind of intention to undertake the offending behaviour and must be fully aware of the harm that will be caused in taking that action. The nature of intentionality of the offender will be looked at in detail in chapter 7. The distinction is made by contrasting the behaviour of the dangerous offender with that of a drunk who insists on driving when under the influence of alcohol. The drunk may do this habitually and her actions clearly have the potential to cause harm to other members of society but this kind of behaviour does not constitute an attack on the shared values and the moral fabric of society. (Duff, 2004) The intention of the drunk is not necessarily to cause harm to others, even if the actions that are undertaken have that consequence. It must be the intention of the dangerous offenders to cause such harm through the commission of a series of serious and violent offences.

Duff does not think that there should be, or could be a tick list of offences or behaviours that could be used in order to assess whether a person is a dangerous offender, something which many criminal justice systems try to achieve. (The Criminal Justice Act

2003). Having a list of offences that are considered dangerous restricts the capacity of the legal system to use judgment. In *Punishment, Communication and Community*, however, Duff does provide examples of the *type* of criminals that could be seen as dangerous offenders, all of which could demonstrate the required pattern of a criminal lifestyle.

The Terrorist: this is the criminal who launches sustained and violent attacks to achieve their own political aims;

The Hard Man: this is the member of an organised criminal gang who has engaged in a career of violence;

The Thug: this is the person who, although not a career criminal, takes part in regular physical attacks on other people;

The Sexual Predator: this is the persistent sexual offender who attacks victims on a regular basis, often preying on vulnerable women;

The Paedophile: this is the offender who commits sexual and violent acts against children. (Duff, 2001 p165)

Supplementing this list Duff states that such criminal dangerousness can be defined as,

the possession of character traits (dispositions, attitudes, patterns of motivation) which will manifest themselves in serious criminal conduct in the kinds of situation which their possessor is likely to find himself. (Duff, 2004 p154)

The dangerous offender demonstrates these character traits through the empirical evidence of persistent serious violent criminal behaviour tantamount to an attack on society. This explanation of dangerousness provides Duff with a means of saying that dangerousness is a

property of the offender in the present; it is not a prediction of how the offender may or may not act in the future. This definition sees the offender as having a disposition towards dangerousness which will manifest itself when that offender is placed in circumstances and situations where they could have the opportunity for displaying that behaviour. This element of the definition of dangerousness seems to be suggesting that there is a sense in which dangerous offenders could not necessarily act in any other way, because they possess this disposition.

So criminal dangerousness within the context of the communicative theory is possession of certain dispositions and motivations combined with the likelihood those situations or circumstances would occur where it is possible, or likely to actualise those motivations and dispositions into criminal conduct. The mix of dispositions, motivations and situation has led in the past, and could lead in the future given the right circumstances, to the commission of serious violent crimes, but it is not inevitable that the offender will find themselves in such circumstances in the future. For example, if a man takes pleasure from forced sex with women without their consent and has the motivation to undertake such action, but he never sees a woman again then he is not going to be able to realise that intention to commit rape into the action of committing rape. The man will still have the motivation and intention which would make committing this crime likely should he ever come into contact with women again, but he does not. Thus it is not inevitable that the criminal will commit serious violent offences in the future. If the man has displayed this behaviour repeatedly in the past and there is empirical evidence of such action, for which the offender has been convicted and punished, and if the offender has undergone punishment (and for Duff this means the process of secular penance) which has had no

impact on the behaviour of the offender, who demonstrates sufficient motivation and intention to commit similar offences, then the offender could be considered as dangerous as a present condition. When Duff characterises an offender as dangerous he is not making a prediction whether they will go on to commit future serious violent offences, what he is saying is that the offender has dangerousness as a present condition. (Duff, 2004)

Duff contrasts his view of criminal dangerousness with those constructed by consequentialist theories of punishment which seek to characterise dangerousness with reference to the future behaviour of the offender. (Duff, 2001) The dangerous offender is someone who needs to be prevented from undertaking future crimes so attempts are made to predict the future behaviour of the offender in order to justify methods of punishment that would restrict such behaviour. Theories that justify punishment with reference to the prevention of future crime could and do make predictions about the future behaviour of offenders as a justification to label them dangerous and so punish them with extended sentences in order to prevent such behaviour. (Duff, 2004)

Given that Duff explicitly repudiates the notion of treating offenders as a means to a separate end, as I showed in the previous chapter, crime prevention is not a position that Duff could take in the justification of the punishment of dangerous offenders, or any offenders for that matter. The justification of punishment purely because of its efficacy in preventing harm, whether from dangerous offenders or not, would not be consistent with Duff's overall theory. That is not to say however, that Duff does not wish to reform the behaviour of offenders, and that is the clear intention in the process of secular penance and the expectation that offenders will repentant, reform, reconcile. Through the commission of a persistent pattern of serious, violent criminal activity the dangerous offender is

providing evidence about their responsiveness, or lack of responsiveness to the penitent process and this evidence provides the basis for the conclusion is that an offender is a dangerous. (Duff, 2001 p164-165) The conclusion about the dangerousness of the offender is not made due to desire to predict the possible dangerous behaviour of the offender at some future point in time.

3.2 The Presumption of Harmlessness

In the liberal-communitarian community envisaged by Duff all citizens must be “presumed to be harmless”. (Duff, 2004) The presumption of harmlessness is part of the rich set of relationships that exist between members of the community; it amounts to a trust in the nature of members of the community, not to do harm to one another intentionally. Citizens who have committed an offence, and have undergone punishment should also be presumed as harmless when they are accepted back into the community and have been seen to have gone through the process of repentance, reform and reconciliation. (Duff, 2004) It should not ordinarily be assumed that because an offender has committed crimes in the past that this means that they will commit future offence or that they pose a threat to the community. Members of a liberal society will inevitably have to accept a level of crime to protect the autonomy and freedom citizens from overtly draconian remedial actions by the state to prevent crime. (Duff, 2001 p 83; Lacey, 2013) The vast majority of members of the community should be presumed harmless and so be free to continue their lives without fear of being imprisoned to prevent some future crime taking place.

When considering the definition of the dangerous offender it is reasonable to ask whether the presumption of harmlessness is unconditional. (Duff, 2004) Can a citizen who persistently engages in violent attacks against other citizens continue to be presumed

harmless? Duff tentatively thinks not and states that the right to be presumed harmless can be lost through empirical evidence of a persistent pattern of serious violent criminal attacks, in other words the dangerous offender is no longer presumed harmless. When the presumption of harmlessness is lost then an offender can be seen as a dangerous. The presumption of harmfulness is not a prediction of the potential of the offender to commit crime in the future; it is part of the present condition of the offender. (Duff, 2001; Duff, 2004)

The definition of a dangerous offender as a present state of the offender moves away from an approach which identifies certain groups of offenders as dangerous because they display certain factors in their lives. It is presumed that these factors will make them more likely to go on to commit future crimes, and so the justification for punishing these offenders with lengthy prison sentences is to protect the public from these dangerous criminals. (Duff, 2004) It is of course, possible to say that certain factors are common amongst prolific, serious offenders such as drug taking, membership of gangs, or unemployment and possession of these factors could be viewed as a possible route for accurately predicting future dangerousness. The consequentialist theory, because it has the aim of reducing crime, or minimising the harm caused by crime, frames the definition of dangerousness in a way that seeks to prevent future dangerous behaviour. To achieve this reduction in crime those who wish to make a prediction about the potential for offenders to go on to commit further crime, use this information to generate a sentencing theory which gives extended sentences to these types of offender. (Greenwood, 1982) I will explore this idea in depth in Chapter 8 when looking at the incapacitation of dangerous offenders.

3.3 Concerns for Duff's Account of Criminal Dangerousness

There are a number of difficulties with Duff's account of what constitutes criminal dangerousness. These challenges will be examined below and I will argue that Duff's definition of a dangerous offender is consistent with his overall theory of punishment but is also the catalyst for the problems that the communicative theory has with the punishment of dangerous offenders.

In order for an offender to be judged as dangerous Duff makes it clear that there has to be a persistent pattern of offending that is evidenced by previous serious violent offences for which the offender will have been convicted and sentenced and will probably have already received a relatively long prison term as a punishment for serious crime. In *Punishment, Communication and Community* Duff states that no single criminal act could lead to the conclusion that a citizen is a dangerous offender. (Duff, 2001 p167) It is not possible to say that an offender is dangerous without affording them the opportunity, as a rational autonomous agent, to repent, reconcile and reform through the process of communicative punishment. In addition to this he does not support the idea that previous offences provide a rationale, in and of itself to extend the sentence for a current offence. Therefore, the so called '3 strikes and you're out' policies which have been seen in both the US and UK legal systems are not consistent with the communicative theory of punishment. (Duff, 2001 p167; Von Hirsch & Ashworth, 2000 p191-197) In order to be considered as a dangerous offender then there has to be empirical evidence of a persistent pattern of past and present offending that can be seen as showing "utter and continuing disregard for the values on which our community depends." (Duff, 2004 p161)

Given this definition of 'dangerous', the first problem that I will consider is the idea that it is possible to conceive of a single act of violent criminal behaviour that is so terrible

as to lead a reasonable person to believe that the perpetrator of that crime is, by the standards of normal society, dangerous. Consider single acts of violent and extreme terrorism that are linked closely to a firm conviction to a certain ideology which drives the criminal behaviour. Crimes such as the shootings in Paris in November 2015 or the spate of terrorist attacks in the UK in 2017, are of such seriousness and of such a scale, that they represent what could be conceived as an attack on the values of society. If those who committed such crimes had no evidence of previous serious violent offenders would the community be prepared to say that these kinds of criminals are not dangerous?

A key part to this question is whether dangerousness is considered as a future threat or as a present condition. Duff defines dangerousness as a present condition by virtue of the persistent nature of the offending, but that the punishment of offenders in general, through the process of repentance, reform and reconciliation should seek to influence the future behaviour of the offender. If it is the case that the punishment of dangerous offenders is in part to seek reform then labelling offenders dangerous who have committed a first serious violent offence could be justified if it is evident that the motivations behind the criminal action was one that would and could be repeated. To exemplify this point compare the example of the terrorist above with an offender who has killed family members in a dispute over money. The actions of the terrorist are motivated by a deep seated conviction that supporters of their cause are at war with a nation state and the acts that they are committing are justified by virtue of their beliefs. It is reasonable to suppose that the radicalised terrorist unless they undergo a complete change in thinking is dangerous now and could continue to be a threat and will not be motivated by moral engagement through the process of punishment. They arguably have no connection to the community which they

are attacking. The murderer however, although the crimes are very serious is not motivated by a desire to undermine the position of the state, and despite having committed murder could be viewed as being unlikely to do this again, given the very personal and specific circumstances of the offence. Is it reasonable to think that both of these offenders should be presumed harmless when they have completed their punishment? Does the motivation of the terrorist mean that they are a dangerous offender? I would tend to suggest that the motivated terrorist, even if they have committed a single offence should be considered as dangerous.

The second issue relating to the persistence of offending as evidence for a judgment of dangerousness is what happens when considering crimes such as inciting violence, conspiracy or orchestrating violent offences. Evidence of a pattern of past and present offending of the types that Duff requires for a judgment of dangerousness would not be available as empirical evidence when looking at the leader of the extreme ideology or the head of a criminal gang for example. It would not be them who would be committing the right types of crimes (violent offences against the person), it would be people working for them or following the ideology. It may be that they are committing offences in our current system of law, inciting violence, conspiracy and the like, but it is not clear that these kinds of offences would count as crimes that would lead to the necessary evidence that a citizen has moved from the presumption of harmlessness to the presumption of harmfulness.

This leads to a third question relating to the nature of persistence of offending; at what point does the presumption of harmlessness become a presumption of harmfulness? Duff states that this is reached when the past and present offending shows a total disregard for the shared values on which society is based. But, when does the balance tip between

repeat offending and dangerous offending and which values could we refer to and how would we characterise the notion of this harm?

3.4 Response to these Problems

The responses to these problems concerning the definition of dangerousness according to Duff are expanded on throughout this thesis, particularly when considering sentencing theory. Duff is clear that dangerous offenders are not offenders who have committed only one offence. (Duff, 2001 p167) Indeed he is supportive of the position of another key proponent of communicative theories of punishment von Hirsch, who argues that it should be possible for first time offenders to receive a more lenient sentence rather than repeat offenders receiving a harsher sentence. (Von Hirsch, 2000 p193-194) The argument to support this view considers that as humans we are fallible and this approach allows for the possibility that an offender has had a moment of madness or a serious deviation from their usual character.

For Duff the definition of dangerousness leads to the conclusion that the offender should be subject to a special form of incapacitation which would be a longer custodial sentence that would be usual (see Chapter 8). Thus evidence of dangerousness from only one offence, however serious, would not be sufficient to justify the detention of the offender outside the normal rules of sentencing. (Duff, 2004) Non-dangerous offenders who have committed a serious violent crime would already receive a substantial custodial sentence following consideration of the harm caused and their culpability (see Chapter 6 and 7). Offenders need to be given the opportunity to repent, reconcile and reform, even those who have committed very serious violent offences; an opportunity that all rational, autonomous citizens are given when they have committed a crime. It could also be argued

that this is part and parcel of living in a liberal democracy and a certain level of crime must be accepted in order for a democratic system to flourish.

It is also the case that there is scope within our existing legal system to take into account the punishment and sentencing of offenders who do not carry out serious violent crimes themselves but instead orchestrate and/or incite such crimes. And there is a certain amount of understanding within sentencing guidelines for those who are manipulated by such offenders through the consideration of mitigating factors such as duress. The empirical evidence needed to reach the conclusion that such offenders were dangerous would be a persistent pattern of such offending which caused serious harm to others through the commission of such offences. Duff sets the bar high for proof of dangerousness (Duff, 2001 p170-175) and the same would be the case for these types of offenders. The definition is constructed in such a way that creates a small limited group of offenders who could be considered dangerous which does not preclude offenders who incite others to commit serious violent crimes that cause extensive harm to other members of the community.

The issue of when an offender moves from a presumption of harmlessness to a presumption of harmfulness is more problematic. The presumption of harmfulness leads to the offender receiving an extended sentence for the crime for which they are currently convicted. So presumably the presumption of harmfulness would either have to have been in place before the offender was convicted (so after a previous punishment and release it was decided that the offender was now presumed harmful rather than harmless so future offences would then be subject to a different sentence) or the judgement of harmfulness could come at the point of sentencing based on the empirical evidence provided by the previous crimes and punishments of the offender to the courts.

Duff insists that there should not be a set of indicators or assessments as to what makes an offender dangerous and is equally non-prescriptive as to when the presumption of harmlessness becomes the presumption of harmfulness. (Duff, 2004) There are however, examples of the type of offender that Duff envisages are dangerous (Duff, 2001 p164-165) and the offender must have committed a series of serious violent crimes which are the empirical evidence of a dispositional property of dangerousness. These provide the basis for a decision as to when an offender moves to being considered harmful and so dangerous. This does not however, provide a process by which the presumption of harmfulness occurs.

The types of offences that could be considered as serious and violent and what constitutes an attack on society would also benefit from a short examination. It would seem that on a superficial level it is self-evident what kind of offences would constitute serious and violent offences that are *mala in se* (wrong in and of itself), crimes that are against the person and which cause the greatest level of harm. Less clear is what constitutes an attack on the values of the community and why the persistent commission of violent crimes amount to an assault on society. (Duff, 2001 p165-172) It is a requirement of Duff's communicative theory of punishment that it operates within a liberal-communitarian society and the law should be a reflection of the values of society. The law does not create wrongs, it defines certain actions as wrong, but those wrongs should be a reflection of the values of society. The law is then reflective of the prevailing norms and values of the society. To persistently flout those laws could be seen to be attacking the norms and values of society, in addition to the harm caused to members of that society who are the victims of those crimes.

There are indeed certain crimes *mala in se*, for example unprovoked violent attack with intent to commit murder, which would obviously be in violation of the values of any liberal society. There are also crimes that are dependent on the values of the present society which may not be viewed as serious, or even a crime, at different times. In Duff's list of possible examples of dangerous offenders is the sexual predator. (Duff, 2001 p165) No one would argue that violent sexual attacks on women are acceptable in any society. However, it was not so long ago that in the United Kingdom homosexuality was viewed by the majority of citizens as a serious sexual crime. As times change the values of the community change as so what is viewed as dangerous changes. (Pratt, 1997) Therefore what could be seen as persistent criminal behaviour that constitutes an attack on the values of the community will also change. Duff's theory seeks to change not only the criminal justice system, but also how the community more broadly interacts. (Duff, 2001 chp5) If this is the case then it will be clearer as to what the values of society are and then how they are violated through dangerous offending behaviour. Dangerousness seen as an attack on the values of the community requires a strong community position and clear acceptance as to what the values of society are and how the law reflects those views. If it does not do these things then what constitutes a persistent attack on society through offending behaviour is open to different interpretation.

3.5 Dangerous offenders; the fundamental problem for the communicative theory

The nature of the definition of dangerous offenders may have been subject to political change for over a century but there has been consistency in that it has been deemed necessary by successive governments in the UK and other nation states, to *have* a definition

of the dangerous offender. (Pratt, 1997) It seems that the state and the law acknowledge that there are a group of offenders who are extraordinary in their commission of crime and so should be extraordinary in their punishment. Why then does the existence of these kinds of offenders pose a particular problem for communicative theories of punishment such as Duff's?

In essence there are two, more serious challenges for the communicative theory of punishment posed by dangerous offenders, aside from the issues already discussed in this chapter.

- (1) The definition of dangerous offenders could lead to the conclusion that this group of offenders are wholly un-motivated by moral consideration or discourse, which is the basis for punishment as communication.
- (2) That the sentencing requirements of communicative theories of punishment with particular reference to proportionality in sentencing make it very difficult to punish dangerous offenders with sufficient severity to protect the public, victims and potential victims from harm.

I will take these two problems in turn and argue that they both cause a fundamental challenge to Duff's communicative theory of punishment.

3.6 Dangerous offenders are not morally competent

The problem for Duff in the first of the issues highlighted above lies in the very nature of the theory of punishment as communication. Within the theory there are a set of offenders who are defined as dangerous and who are also viewed, and have to be viewed, as autonomous, rational agents capable of making their own decisions and capable of taking responsibility

for their actions. (Duff, 2004) They have to be able to engage in moral discourse in order for punishment as communication to be justified, if they are not capable of taking responsibility for their actions (including their criminal actions) then they are not capable of being subject to punishment as communication. (Lippke, 2008) The definition of the dangerous offender could be interpreted to suggest that dangerous offenders are completely unmoved by the type of moral communication that punishment is meant to embody. (Lippke, 2008) Given the persistent nature of their offending and the repeated attempts at communication through punishment, do these offenders care about that communication at all or understand the censure that the punishment is representing? If this is not the case can punishment as communication be justified for dangerous offenders? Are these dangerous offenders the autonomous and responsible agents that Duff states that they are? (Duff, 2001 p 173)

In addition, the characterisation of dangerous offenders having the dispositional property of dangerousness, which is likely to manifest itself in criminal action should the appropriate circumstance occur, indicates that these offenders are not capable of acting in any other way. (Lippke, 2008) If this is so then by asking them to desist from such behaviour, punishment as communication is asking them to change their character, something which they have shown through past attempts at punishment, that they are not capable of doing. Punishment as communication, and expressing blameworthiness that is aimed at engaging in moral discourse about that behaviour with a view to reconciliation and reform is not likely to be understood and so it not likely to be successful. In defining dangerous offenders in this way is Duff really saying that these offenders are not rational, autonomous members of the community?

3.7 Can a communicative theory of punishment adequately punish dangerous offenders?

If for the moment it is assumed that dangerous offenders are rational autonomous agents and they are capable of engaging in the process of punishment as communication, a further question for the communicative theory of punishment is whether the theory can create a sentencing framework that can punish dangerous offenders in a way that meets the needs of the community to be protected from the harm that such offenders inflict on others?

For the purposes of identifying the problem of dangerous offenders for the communicative theory assume for the moment that I have successfully argued that the seriousness of a crime could be judged using an assessment of harm caused to the victim(s) and/or the community, and the intention or culpability of the offender (I will come on to argue this in detail later in the thesis). Some crimes do cause more harm than others, whether that be to the community as a whole or to a specific individual or number of individuals. The culpability of the offender also ranges from intent to knowledge to recklessness and an assessment of the culpability of the offender should play a central role in a judgement about the seriousness of the crime. In order to organise sentences as appropriate punishments that communicates censure, a system of ranking based on the relative seriousness of the offences committed, along with culpability can be used to determine the sentence that an offender receives on conviction. (Von Hirsch & Jareborg, 1991; Von Hirsch, 1993 p31; Chapter 7) Such a sentencing system could be devised to rank the seriousness of crimes against one another to ensure that sentences and so the communication of censure, is appropriate and proportionate. (Von Hirsch, 1993 chp2) The sentencing of offenders could be organised in a way that the seriousness of the crime

(through an assessment of harm and culpability) is commensurate with the seriousness of the sentence, making the punishment proportionate to the crime.

If it is decided that there is a sub-class of offenders who are more dangerous than other offenders then the sentencing system of any theory would have to take this into account. If Duff's conception of the communicative approach to punishment was adopted within a communitarian-liberal society, then the result would be a change in the idea and application of what punishment means and what it aims to achieve. (Duff, 2001 chp7; Lacey, 1988 chp8) Such a system of sentencing which justified punishment because of its communicative qualities would lead to a change in how offenders across the board are punished, including a significantly reduced reliance on imprisonment as a means of punishment and an increase in the use of community based sentences. (Duff, 2004) The reduction in the use of imprisonment would be two fold; firstly a reduction in the number of offences that attracted a custodial tariff and secondly a reduction in the length of prison sentences when they were used as a punishment.

The problem for communicative punishments is then evident. In a system that relies on sentences being proportionate and being less reliant on the use of imprisonment, in addition to the requirement that the offender only be punished for the crime for which they have been convicted at that time means that the dangerous offender would not necessarily be punished any more harshly than any other offender. What concerns Duff is what a society says to a person who is a victim of violent crime at the hands of a newly released prisoner who had received a short term of imprisonment under the communicative system, and then upon release commits this further violent crime? In this case it would be an understandable response from the victim to ask why that offender was not kept in prison

for longer if it could be reasonably assumed that the offender would commit further offences as soon as he/she was let out. (Duff, 2004)

Duff acknowledges this as a significant problem for his theory. (Duff, 2001 p174) He does try to down play its significance as an issue and states that in reality the numbers of dangerous offenders would be very small. Duff is clear that within a liberal polity there has to be an acceptance of a certain level of crime in order to maintain the autonomy of citizens and uphold liberal values, because if the communitarian-liberal society was not able to accept a level of crime then it could quickly slide into a draconian state with a lack of fairness and tolerance. The problem for communicative theories is achieving the right balance between an acceptable level of crime and the rights of citizens to be free from harm and be able to go about their business without fear of harassment and violent attack. Duff asks whether society is being asked to make too great a sacrifice, in allowing dangerous offenders to have minimal prison sentences, in order to maintain a liberal-communitarian society and to support the proportionate system of sentencing. (Duff, 2001 p171)

The problem for communicative theories of punishment including Duff's is that it does not seem to be possible to punish dangerous offenders with a harsher sentence without violating the principle of proportionality (see chapter 5). It could be the case that two offenders have committed the same crime and been convicted of that crime but that one offender is deemed to be dangerous whilst the other is not dangerous. The dangerous offender will have demonstrated a persistent pattern of serious violent crimes, with the present offence being only a further example of this behaviour. The non-dangerous offender has also been convicted of the same serious violent crime, but this is their first offence. The non-dangerous offender has not demonstrated a disregard for the shared

values of society through the commission of a series of serious violent offences, but has been convicted of the same crime as the dangerous offender. The problem for the communicative theory is that in order to adhere to the principle of proportionality the two offenders should receive the same or similar sentence because they have committed the same crime. Can a communicative theory be justified in sentencing the offender that is categorised as dangerous to a longer prison sentence than the offender who is deemed as not dangerous?

3.8 Conclusion

These two problems are central issue to be addressed by the communicative theory of punishment. What is the status of dangerous offenders? Are they the rational autonomous agents that are capable of moral discourse and so, capable of being punished under the communicative system? If they are not then how can dangerous criminal behaviour be managed? If they are rational and autonomous then how can dangerous offenders be punished in a way that protects society and adequately reflects the very serious nature of their offending? These are the issues which I will address through the remainder of this thesis.

Chapter 4

Dangerous offenders and how they have been punished

In the previous chapters I have argued in support of Duff's communicative theory of punishment, but shown that his definition of dangerous offenders creates fundamental problems for Duff when dealing with the punishment of dangerous offenders. In this chapter I will look at the history of the punishment of dangerous offenders. Firstly to place Duff's theory of punishment within the context of previous attempts to punish dangerous offenders and secondly to see if there are clues within the existing, or previous attempts to punish dangerous offenders which could provide a solution for Duff. I will conclude that the punishment of dangerous offenders to date has proven to be a history of mistakes and unintended consequences. This should prove to be a lesson for Duff and any attempt to implement his theory of punishment.

Duff states that his theory of punishment should be one that could be enacted but that it would be impossible to do this from a point of neutrality. (Duff, 2001 p175) If a criminal justice system is to be changed to fully reflect the communicative aims of punishment then it would be ideal to scrap the existing system and start again, but this would be an impossible task and any implementation would have to be within the context of current principles, policies and public expectations. It is therefore vital to look at how dangerous offenders have been treated in modern democratic nation states because this will provide the basis for any change to the communicative practice of punishment. In this chapter I will contrast the way that dangerous offenders have been punished in modern

times, with the way that they *could* be punished under a system based on a communicative theory of punishment. I will also identify issues for Duff's theory of punishment that are exposed by looking at attempts in modern criminal justice practice to address dangerous offenders, namely the conflict between the rights of all citizens in a liberal community, including offenders, and the right of citizens to be free from the harm that could be caused by dangerous offenders.

Examining *how* dangerous offenders are punished and sentenced under the current criminal justice system, primarily in the UK but also in other western European countries and the USA also necessarily includes an analysis of *why* it is that dangerous offenders are punished the way they are. In the UK we are privileged to live in a free and democratic political system and as such how we punish offenders, including dangerous offenders, should rightly reflect and be reflected in, the prevailing norms, values and views of the community in that political society. Communicative theories and indeed any theory of punishment which seeks to be practically implemented as criminal justice policy, needs to take the participatory nature of democracy into account when developing and arguing for their theory. (Sen, 2009) That is not to say that theories should slavishly adhere to the current norms of society, indeed a crucial point of presenting theories in any field in public policy is to challenge the status quo and present an alternative view of the principles underpinning the prevailing system. However, in constructing an argument in defence of a theory it would be foolish not to consider the views of the community into which the theory could be implemented.

In an ideal democratic system the views of the community as a whole should be reflected in the way punishment is implemented, tolerated and endorsed (through the

electoral system). As I have said that does not mean that the status quo should always be maintained and that there is not significant room for improvement through open debate and the creation of opportunities to put forward an alternative view. I also understand that we do not live in an ideal world in which the will of the community is perfectly channelled through participation in the democratic process. What it does mean however, is that the community view should rightly be taken into account. Put simply, how people living within the community feel about crime, its impact and how people who commit those crimes are punished, cannot be ignored when constructing a theory of punishment. Duff acknowledges this in the last chapter of *Punishment, Community and Communication*, by saying that if his theory was ever to be successfully implemented then it would not be possible to completely rebuild the criminal justice system, it would have to be developed incrementally building on the system that is already in existence. (Duff, 2001 chp5) It is also worth noting that in practice it is uncommon to see seismic shifts in policy such as criminal justice that are wholly accepted by the community. A basic principle in much of the thinking in public policy implementation argues that to make successful policy change then the community needs to understand and accept the principles underpinning the policy before that policy can be successfully implemented. (Rutter, et al., 2012) Examples of this include the success of policies on drink driving and the smoking ban. Both policies had widespread public support prior to and during implementation, which has ensured the success of implementing long term cultural change underpinned by legislative change.

What I will show in this chapter is that by and large, the prevailing political concerns and societal fears are reflected in the practise of punishment. I do not intend, in this thesis, to discuss the issue of how those concerns and broad societal views are formed and

established and by whom. It is however, useful to look at how the practice of dealing with dangerous offenders has been influenced by the community and to examine how dangerous offenders are currently managed within the criminal justice system in the UK today. The impact of the community's view is particularly important to Duff, because without a significant shift towards the liberal-communitarian community that Duff envisages then the theory of punishment as communication remains as a theory. (Duff, 2001 chp5)

4.1 A history of dangerous offenders

The way that dangerous offenders have been punished through the history of the criminal justice system has changed and developed and this is partly due to the changing view of what constitutes a dangerous offender and what constitutes a dangerous crime. As I have shown already in the chapter looking at a definition of a dangerous offender, how dangerous offenders are categorised and defined plays a very important part in how dangerous offenders are then subsequently sentenced and punished. John Pratt, in his book which charts the history of the dangerous offender, *Governing the Dangerous*, takes us through an illuminating whistle stop tour of the changing nature of the dangerous offender and usefully demonstrates how the prevailing societal position has a significant influence over the definition of what is dangerous. Pratt outlines the birth of the notion of the dangerous offender in late 19th century criminal discourse and shows that at this stage of the evolution of the idea of dangerous offender, the definition was primarily aimed at recidivism with a particular focus on property crime and the rise of the criminal classes. (Pratt, 1997) This view had changed from that of the beginning of the 19th century where the fear of the "dangerous classes" (Pratt, 1997 p15) who would bring about the destruction of the state and society as we know it, was prevalent and influential on the type and nature

of punishment. As the 19th century drew to a close the fear of the dangerous criminal began to take hold and the target of this dangerous criminal was not the state and society as a whole, but rather the “innocent subjects” who were exposed to the crimes of these dangerous criminals. According to Pratt this approach to the punishment of dangerous offenders coincides with the move in government towards a more paternalist and protectionist approach of the state in the latter stages of the 19th century. It was thought that the state needed to play a greater role in protecting its citizens from harm. Thus the harm that could be caused by a habitual criminal, who was considered as a dangerous criminal, was a legitimate area of concern and intervention for the government. Protecting citizens from the harm that could be caused to them by dangerous offenders was thought to be a task that the state should take seriously and earnestly.

It was not until inter-war period of the 1930s that the concept of dangerous offenders shifted emphasis to encompass ideas that we would be more familiar with today. It was from this period onwards that the idea that crimes against the person and sexual assault and particularly sexual crimes against children, were considered to be dangerous. (Pratt, 1997 p70) Pratt sums up this development of the notion of the dangerous offender as follows:

In the era of the initial dangerousness legislation, goods had been an important signifier of the kind of person we were thought to be and the whereabouts of our place in the societal hierarchy; over the last few decades though, as goods have become mass produced and replaceable, the form and shape of the human body has come to assume this signifiatory role. (Pratt, 1997 p141)

As the view in society of what was important changed, then the view of what was considered to be dangerous behaviour changed. Actions that threatened what was collectively regarded to be important are perceived as dangerous. What is not considered at length by Pratt is the idea that those who made the law during the 19th Century, and arguably for much of the 20th Century, were those who held positions of power and privilege. What is deemed as important to them (particularly when looking at dangerousness as prolific property crime) was not necessarily what was important to the majority of those who lived in the wider community. Certainly the vast majority of the population had no influence over criminal justice policy and their views would not have been considered directly in developing penal policy. Therefore, the changes to the definition of dangerousness, and how dangerous offenders were punished in reality reflects the views of the privileged elite in society during the early development of criminal justice policy on dangerousness.

4.2 Sentencing Dangerous Offenders

Not only has the view of what constitutes dangerous offenders and offences changed over recent criminal justice history, how those offenders have been punished by the criminal justice system has also developed and altered. Sentencing of dangerous offenders and the way that the criminal justice system approaches the punishment of dangerous offenders has evolved in parallel with the concept of dangerousness itself. The use of indeterminate sentences and preventative detention for example was seen as a solution to the punishment of dangerous offenders by law makers through the 19th and early 20th century. (Pratt, 1997 chp3) The use of punishment in order to detain offenders within prison to prevent the further commission of crime is a reflection of the prevailing view that a primary aim of punishment was the protection of society from habitual criminals, a view that is still held by

many today. In the 19th and 20th centuries it was common across English speaking jurisdictions to seek extended prison sentences for dangerous criminals (dangerous by virtue of the number of previous crimes committed rather than the seriousness of those crimes), often for relatively minor crimes. Indeed it was considered that some violent crimes, if seen as being committed as an isolated incident, were due to some anomaly in the otherwise normal behaviour of an individual. Rather than seeing the commission of a violent offence as an indication of generalised dangerousness it was thought that the offender had merely had 'a rush of blood to the head' and thus violent offences did not necessarily attract a more serious or onerous punishment. (Pratt, 1997 p74)

A review of the use of preventative detention sentences in England and Wales in 1932 however, revealed that the use of such sentences were not universally popular with the judiciary. There seemed to be a view developing that,

the way to achieve reform of the individual prisoner was to introduce some of the industrial training and education initiatives that were now in use in English borstals.

(Pratt, 1997 p74)

This change in emphasis and purpose of punishment is in line with a move towards a greater consideration of the motivations of dangerous offenders and an increased awareness, and use, of psychological techniques. This not only influenced the definition of dangerousness but was also used to seek new approaches to punishment. There was the view that the conditions in prisons for those who were facing long sentences should not be overly harsh and should provide some type of mental stimulation and a reason to live. This is a view that had also been popular in the mid-19th century, when Jeremy Bentham's ideas for improvement for prison conditions were put into practice with the building of both Millbank

and Pentonville prison, both based on a design that allowed for light and air to be available for inmates. (Pichard, 2009) For many people this humanitarian attitude toward punishment may be somewhat surprising and not necessarily congruent with the popular view of draconian punishment and of particularly grim, dark and dangerous Victorian prisons. It should be pointed out however, that the majority of prisons at this time were terrible places, even the new prisons that had separate rooms and facilities for inmates, had harsh regimes of solitude, albeit there was discussion about improving the conditions in these prisons for the benefit of the prison population. (Pichard, 2009)

It would be remiss at this point not to mention the use of the death penalty as a punishment for dangerous offenders through the 19th and 20th century. This is a topic that has been the subject of much discussion and debate and I do not propose to add to that body of work in this thesis. However, for my purposes in looking at the punishment of dangerous offenders, it is interesting to note that there were over 200 crimes for which the death penalty was a possible punishment at the beginning of the 19th century, the majority of which would be classed as minor crimes by modern standards. The use of the death penalty became less popular during the first decade of the 19th century with judges opting for imprisonment or transportation as an alternative. It was not until 1832 and The Punishment of Death Act etc, that the death penalty was removed from the statute as a punishment for theft, amongst other minor offences.

The use of the death penalty as a punishment throughout this period prompts a number of observations relevant to the punishment of dangerous offenders. In modern times the death penalty is the most serious type of punishment, so serious that it is not available as a sentence in many countries across the developed world and when it is used,

or has been used in the recent past, is only imposed as a sentence in the most serious of circumstances. That such a punishment was not reserved for only the most serious or dangerous offences in the early 19th century but was used as punishment for crimes such as theft and property crime, is indicative of the value of human life versus the value placed on physical possessions. It could be concluded that during the early 19th century the value of human life was not seen the same way that we see it today and therefore the death penalty was not viewed in the same light as it is in the modern era. Or alternatively it could be the case that the offences for which the death penalty was a punishment, including theft and crimes against property, were viewed as serious and dangerous offences and so deserved the most serious punishment. Either way, the use of the death penalty as a punishment changed through the period of the mid-19th century as the number of crimes for which it was an available punishment decreased to murder and treason in the UK.

A further significant shift in punishment for dangerous offenders occurred in 1965 when the death penalty was finally abolished for the majority of crimes, save some specific crimes including treason and a number of military crimes, which were not removed from the statute until 1998. The changes in the number of offences that have attracted the death penalty as a punishment for dangerous offenders in a sense, tracks the attitude of society towards certain serious crimes and the punishment of dangerous offenders. Moving from being a possible sentence for over 200 offences to abolition of the use of the death penalty in the UK, demonstrates a substantive change in attitude towards the death penalty in our society and also tracks a shift in the approach to the sentencing of dangerous offenders.

The purpose of this section has been to show that the definition of what is considered dangerous, as an offender or a specific offence, has changed and developed

alongside changes in society and the state that creates and shapes the criminal justice system. Society and the views of the community should have an influence on public policy more broadly and specifically on issues relating to criminal justice. It shows that when looking at dangerous offenders the views of communities, the state and the criminal justice system can and do change and shift over time. This gives hope to those who seek to reform the system, such as Duff, because it demonstrates that the criminal justice system that is currently in place can be changed and that these changes can be supported by the community. It should also act as a warning to those who are in positions of power and influence, to be mindful that the view of society toward punishment, particularly in respect of the death penalty, can and does influence criminal justice policy. The state should seek to avoid the sort of societal bias and prejudice that could impact on the design and implementation of punishment of dangerous offenders in a way that is discriminatory and unjust.

4.3 Dangerous offenders today and their punishment

The conception of the dangerous offender in the 19th and first half of the 20th century that I have sketched above is somewhat different to the view of dangerous offenders today. There are of course, recurring themes which I will highlight, but a change in the attitude of the community as a whole, not just in the UK but across Western democratic nations, has had a significant impact on the view of dangerousness and the way in which dangerous offenders are managed within the criminal justice system. Crime and punishment has become one of the defining political topics of the modern era, with political parties across the spectrum acutely conscious of the need to appear to be clear and robust on the issue. This is typified by the famous *tough on crime, tough on the causes of crime* speech from Tony Blair, in his

second address to the Labour Party as the leader at their conference in Brighton in 1995.

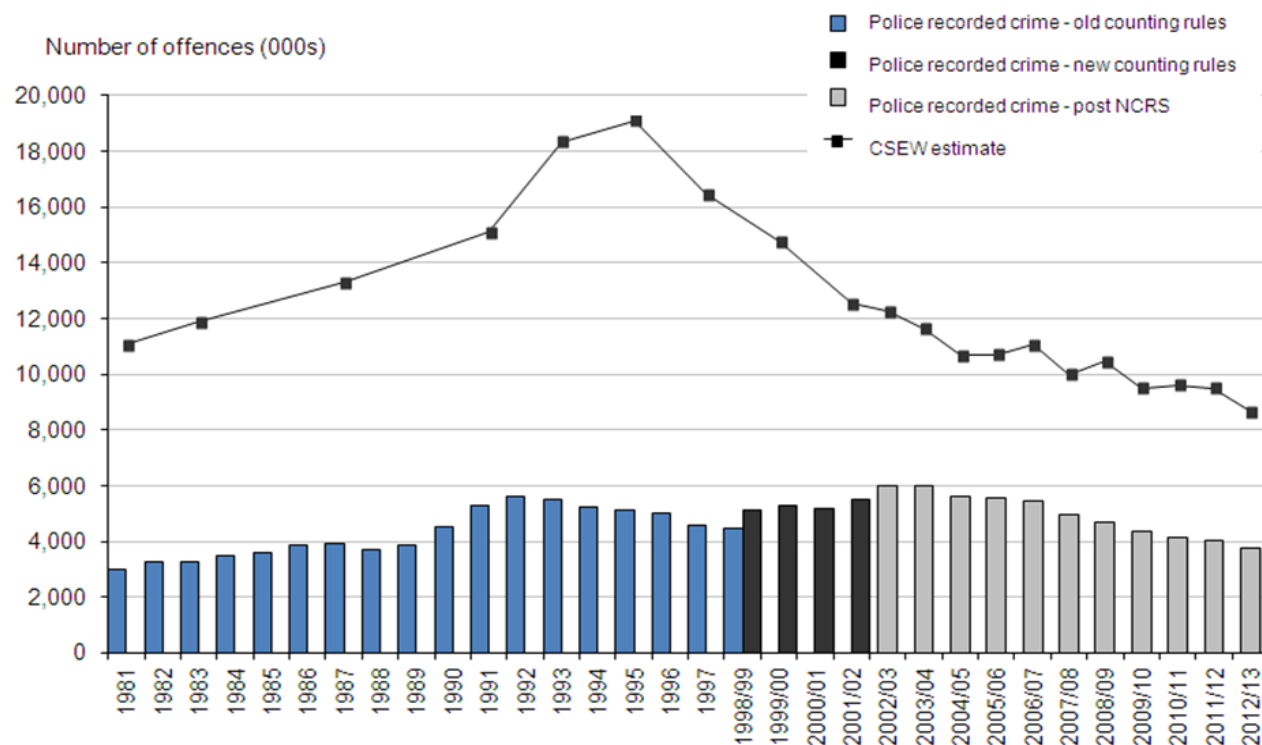
The rebranding of Labour into New Labour saw the party's position on criminal justice policy shift significantly to the right, politically speaking, which could be viewed as a perception by the Labour Party that voters support political parties who take a tough stance on crime.

The political influence over criminal justice policy, and specifically in the area of sentencing and punishment, has partly been fuelled by the perceived increase in the crime rate and an increase in the fear of crime by the public. There is an argument that has been made by Pettit and Braithwaite that the fear of crime should have an impact over the severity of punishments and that the concerns of the public should prompt politicians to act accordingly. (Braithwaite & Pettit, 1990 p153) This approach would certainly be counter to the principle of proportionality in sentencing which I will look at shortly however, it has long been recognised that the fear of crime is an important issue and perceived risks associated with crime is something that has been measured by the British Crime Survey for over 25 years. The Crime Survey of England and Wales (previously known as the British Crime Survey) is used in the UK today alongside official government crime statistics to give a broader picture of crime in the UK as it captures crimes that are not reported or recorded. The survey manages this by sampling UK citizens and asking them about their experience of crime, including the fear of crime and their perception of the level of crime. This creates a vital source of information in addition to the actual numbers of recorded crime, and tells us what the community feels about crime and how crime impacts on their lives. In this context it is interesting to note that despite crime rates having fallen substantially since the mid-1990s, the percentage of people who would feel very unsafe walking home in the dark has

remained broadly the same since the early 1980s.¹ (Recent crime statistics published by the Office for National Statistics supports the view that crime has been falling since a peak in the mid-1990s, despite figures released in 2017 and 2018 which suggest that there has been an increase in the levels of police recorded crime of 10%. These statistics however, are not designated as National Statistics due to problems with recording the data. It is partly due to changes in the requirements in recording this data that could account for the 10% increase. There is some debate as to whether there has been an increase in the level of some offences such as violent knife crime in certain areas of the UK, although a study by Cardiff University suggests that violent crime has remained static since 2016. (Office for National Statistics, 2017; Sivarajasingam, et al., 2018)) Setting these issues aside, the disconnect between the level of crime and the fear of crime tells us that the fear of becoming a victim of crime has remained steady despite the evidence that the probability of actually become a victim of crime has decreased.

The Sentencing Council for England and Wales demonstrates this decline in both recorded crime and incident of crime according to the Crime Survey of England and Wales, in the graph below.

¹ One of the questions that the Crime Survey for England and Wales asks is whether the respondent would feel safe if they walked home in the dark on their own.



Source: Crime Survey for England and Wales- Office for National Statistics, Police recorded crime - Home Office

As the graph shows crime in England and Wales peaked in 1995 and has been decreasing in the UK since that time. This trend in crime rates has also been seen across the industrialised world. The USA, for example, experienced this phenomenon earlier than the UK and has seen falling crime rates since 1990. During the same period the prison population in the UK has doubled. Since 1993 the number of people residing in prisons in the UK has risen from 44,246 to 86,048 in 2012 and now hovers just over 85,000 as of January 2016. (Ministry of Justice, 2016) It could be suggested that as there is a direct causal link between the increased prison population and the crime rate falling. Thus leading to a view, popular with some elements of the media and political parties, that the decrease in the crime rate is due to a policy decision to take a tougher stance on crime and punishment, and by tougher I mean an increased in the use of prison as a form of punishment. It is however, generally accepted that the increase in prison population is not a valid explanation for falling crime rates. This is primarily because the fall in crime rates during this period is a global

phenomenon and not confined to countries with high, and increasing, prison populations, such as the UK and the USA. Crime rates in Scandinavian countries has also fallen or plateaued, without seeing corresponding rise in the prison population.² It seems that the fall in the number of recorded crimes is a trend that it being experienced across the developed world and assuming that there is a causal link with increased use of imprisonment as a punishment is too simplistic an explanation for this substantial reduction in the incidence of crime. This is relevant to the discussion on the punishment of dangerous offenders because there is a view that the only way to effectively deal with dangerous offenders is to put them in prison in ever increasing numbers and that if this does not happen then the community will be at risk. Indeed this is a view that Duff wrestles with. (Duff, 2001p164-175) However, if it is the case that the increased use of punishments such as imprisonment has no impact or a limited impact on offending rates, particularly in relation to dangerous crimes, then this needs to be taken into account when constructing a methodology for the punishment and sentencing of dangerous offenders.

If the statistical evidence shows us that crime rates have broadly been declining since 1995 and there is a general acceptance that this is not as a result of an increase in the use of prison as a form of punishment then what can explain this phenomena? As you would expect there are a number of theories as to why crime rates are decreasing across Western democracies. It could be tempting to suggest that this is due to a change in the style and approach to policing. Implementation of approaches such as a zero tolerance seen in parts of the USA and the UK are not universal across all countries that have experienced a reduction in recorded crime so it seems unlikely that this could offer an explanation.

² Finland's prison population is 60 per 100,000 of population, with the USA at 786 per 100,000 of population.

Other explanations have focused in improved technology which has had an impact on areas such as domestic burglary and car crime. Improvements in car locking systems, domestic security and the widespread use of technology such as CCTV have made the successful commission of such crimes harder. It has also been suggested that improved technology has shifted crime more toward cybercrimes, which may be more hidden and as such under reported. The increased availability and affordability of many consumer products may also be a contributing factor for the overall reduction in many crimes, a theory that fits with statistics which are showing a less pronounced reduction in recorded crimes against the person compared with crimes that come within the theft category.

A more radical theory has also been emerging over the last few years which is considering the impact that exposure to lead may have on brain development. It is known that exposure of children to lead at a young age does have an impact on development and can lead to lower intelligence and increased violent tendencies. This impact takes twenty years or so to manifest. The reduction in the use of lead in products such as paint and also in petrol which was seen in the 1970s and 80s could be an explanation as to the reduction in crime rates that are now being experienced by developed countries. (House of Commons, 2013)

A publication from the Crime Survey of England and Wales, extracted below, summarises some of the possible factors that could have led to this reduction in crime over the period between the mid-1990s and the present day, and indeed it may be the case that all of these factors work in combination to impact on crime rates.

- Economic activity, such as consumption, output of the economy, the unemployment rate and the proportion of females in the labour force.

- During 1990-1992 the UK was suffering a recession. This led to economic hardship which can be linked to increases in levels of crime in the early 90s. From 1996/97 onwards the economy was growing, which is thought to have contributed to the decrease in property crime since the peak in 1995.
- Demographic variables, such as population size, proportion of young males in the population, divorce rates.
- Research has also shown that the numbers of males aged 15-24 in the population are associated with increases in recorded property crime rates – this demographic group is most likely to commit crimes. (Jansson, 2007)

What is interesting of course within the context of this thesis, is that even with this fall in the crime rates the fear of crime remains high and this will have an influence on the way criminals are dealt with in the criminal justice system and in particular dangerous criminals, in order to satisfy the public that *something is being done* about crime. Whatever the explanation for the reduction in recorded crime which has been seen across developed countries since the 1990s, there does seem to be a general consensus that the increase in prison population and the use of ever harsher forms of monitoring and community sentences is not the main factor that is influencing crime reduction. It is most likely there are multiple social and economic influencing factors working in combination which is having an impact on the crime rates. (Levitt, 2004)

4.4 The sentencing of dangerous offenders

Even with this research and knowledge available about the reduction in overall crime rates over the last 20 years (despite the recent potential increase in crime) the political influence

on the criminal justice system in the modern era has had a profound impact on the way that offenders are punished. A stark and relevant example can be seen when looking at sentencing of dangerous offenders and specifically the use of Imprisonment for Public Protection; IPPs. Earlier in the chapter I highlighted the use of preventative detention in the 19th and early 20th century, until a review in the 1930s revealed that the sentence was unpopular and underused by the judiciary. Despite this historical evidence of the problems associated with preventative detention, in a response to the perceived increase in fear and concern of the increase in violent, sexual and terror crimes, the then Labour government introduced indefinite prison sentences for certain serious offenders who were detained to protect the public until such time as they were perceived not to present a threat to society. This was implemented through the Criminal Justice Act 2003 and the sentences were applied to offenders after April 2005. The implications of the introduction of many aspects of the 2003 Criminal Justice Act have been controversial and far reaching in terms of criminal justice policy. The Act created tension between the government and civil liberty groups, particularly in relation to stop and search powers given to the police. Subsequent government reports have levelled criticism towards the Act. (Criminal Justice Act 2003) (Strickland, 2016)

IPP sentences were specifically designed to incapacitate offenders who were deemed to be a danger to the public. The system of sentencing up to that point could impose lengthy prison sentences including life sentences, for a certain defined set of crimes. However, the system did not easily allow for extended sentences for those offenders, who had committed serious crimes (falling short of the life tariff) but who were considered to be dangerous. The Criminal Justice Act 2003 was heavily influenced by a review of sentencing

carried out by John Halliday, commissioned by the Labour government between 2000 and 2001. Halliday concluded that there had been a dilution of the basic sentencing principle that the seriousness of the crime should determine the seriousness of the sentence (a key principle in proportionality in sentencing) and this had led to a confused picture in sentencing. (Halliday, 2001) The title of the review, which was *Making Punishments Work* is indicative of the thinking behind the review: that punishment must achieve something with the implication being that punishments were not achieving the desired outcome at that time, i.e. protection of the public.

The work of Halliday³ and the subsequent legal underpinning from the 2003 Act created provision for offenders who committed certain specified offences to be detained in prison for an indeterminate amount of time, until it could be satisfactorily demonstrated that the offender no longer posed a threat of causing serious harm to the public through the commission of further offences. The sentence was determined by the court, on the basis of the belief that the offender posed such a risk to the public and the decision to release the offender was determined by a parole board to be undertaken whilst the offender was in prison. The role of the parole board was to consider whether the offender had demonstrated that they no longer posed a threat to the public.

The offences that could attract the tariff of an IPP were serious specified offences and in addition

³ It should be noted that the Halliday Review also advocated the introduction of restorative justice methodologies, which can be seen as a progress step in criminal justice thinking at the time.

the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences.

(Criminal Justice Act 2003 chapter 5, section 225, 1(b))

This clause is contained within a section entitled “Dangerous Offenders”. So for the purposes of this Act, it is in practice a definition of a dangerous offender: someone who has committed a serious offence and is deemed by the court to be a risk to the public. This chapter of the 2003 Act also gives powers to the courts to impose extended prison sentences for certain serious offences, again where it is considered by the court that the offender in question poses a risk of committing further offences that cause harm. Offences that cause harm are specified as serious sexual or violent offences that cause serious harm either physical or psychological.

The Act also provides a legislative basis for an assessment of dangerousness. This assessment is based on the two principles as outlined above; the offender must have committed a serious violent or sexual offence and pose a risk to the public through the commission of further offences. Guidance was provided for the courts in relation to how such an assessment of dangerousness could be made. The Act states that the court *must* take into account any relevant information that it has at its disposal in relation to the “nature and circumstances of the offence” and the same for any other offences that the offender has been convicted of in any part of the world. (Criminal Justice Act 2003) There is also a clause which specifically mentions the formation of a pattern of behaviour. (Criminal Justice Act 2003 chapter 5, section 229, (1) and (2)) If you recall from the discussion on what constitutes a dangerous offender, this is not dissimilar to the considerations that Duff takes into account when he defines dangerousness. He considers a pattern of dangerous criminal

behaviour that could be perceived to be an assault on the values of the community. (Duff, 2001 p165 and p170)

The serious offences specified in the 2003 Act that could have triggered the use of an IPP are extensive. The list covers a variety of serious violent and sexual offences, short of murder as this offence already attracts a life sentence tariff. There are offences such as manslaughter, kidnap, cruelty to children and serious sexual offences all of which a reasonable person would consider as being serious offences (although not necessarily all committed by dangerous offenders). These offences could cause considerable harm to others if committed in certain circumstances.⁴ There are other offences in the schedule of specified offences that are more controversial in terms of their clear connection to dangerousness. Offences such as threats to kill are included, and burglary with intent to cause damage. In themselves, offences such as these are not dangerous in the sense of causing actual and serious harm (of a physical nature) to the victims. They could however, be considered as part of a pattern of dangerous behaviour. Again, thinking back to the conception of the dangerous offender from Duff, he builds a picture of a pattern of dangerous behaviour, which constitutes what could be considered as an assault on society. In this sense it could be argued that offences such as threats to kill, which cause no bodily harm in a physical sense but do cause psychological harm, could be indicative of a pattern of dangerous behaviour that demonstrates that the offender in question is dangerous. I will consider the short comings of this approach on a practical and principled level shortly.

⁴ Manslaughter, for example, could be considered a non-dangerous offence, in the terms outlined by Duff, in some circumstances. The sort of circumstances I am thinking of would be an offence committed as a one off act perhaps related to alcohol which would be totally out of character for the offender in other circumstances. This would not mean that the offence would not attract punishment, merely that it would not be considered as dangerous.

The Criminal Justice Act 2003 attempted to design legislation that provides the criminal justice system with a statutory definition of dangerousness. Firstly through defining what sort of offences could be considered dangerous; secondly by outlining what sorts of information the courts need to look at when considering whether the commission of such offences constitutes dangerousness. This was to be determined via information about the commission of the offence in question, information about previous convictions and evidence in relation to a pattern of dangerous criminal behaviour. Finally the Act gives the courts the provision to detain dangerous offenders until such time that they can show to the relevant authorities that they are no longer dangerous. This law provided the circumstances and tools to define and punish dangerous offenders more harshly than other offenders who had committed similar offences, in a way that incapacitates them with the aim to prevent the offender from committing further offences of a dangerous nature which could harm individuals and the community.

What this piece of legislation did was try to address one of the problems that dangerous offenders pose to Duff's theory of punishment; the effective sentencing dangerous offenders. If a dangerous offender is given a short sentence for the individual crime for which they have been convicted, or not given a custodial sentence at all and then go on to commit further offences, how do you justify that to the victims and families of the victims, of the further offence? This approach of detaining offenders until such time as they are no longer considered dangerous, also addresses the issue of dangerous offenders who just do not consider that they have committed a dangerous offence. An indeterminate sentence, with an assessment before release, gives the offender time for consideration and reflection and provides a framework for the state to assess whether this has happened

before releasing a dangerous person back into the community. In principle this initially appears like it could provide a good system for the punishment of dangerous offenders.

4.5 The problem with indeterminate sentences

I will come on to consider the philosophical issues with the principle of the imprisonment of offenders for an indeterminate length of time for the purposes of incapacitation, but before that I will consider the practical issues of such an approach for dealing with dangerous offenders. The problems with IPPs as set out by the Criminal Justice Act 2003 were eventually acknowledged and the policy of imprisonment for public protection was reversed in 2012. This reversal was not applied retrospectively, however, so in 2015 there were still over 4,500 inmates in prisons serving IPPs. At its peak in 2011/2012 there were over 6,000 people serving IPPs in prisons in the UK. There were a number of valid reasons given by the then Conservative Liberal Democratic coalition government for the repeal of aspects of the Criminal Justice Act 2003 that covered IPPs. Many of these reasons are outlined in a 2008 review of the sentencing of IPPs carried out by the prisons and probation inspectorate (Lloyd & Calderbank, 2014) and then further articulated in a publication by the House of Commons library service. (Strickland, 2016) Both of these publications highlight fundamental problems with the system of imprisonment for public protection. Following a number of reforms to the Criminal Justice Act 2003 under the Labour government in 2007, the Conservative Liberal Democrat government abolished IPPs through The Legal Aid, Sentencing and Punishment of Offenders Act 2012, although this legislation also contained specific provision for dangerous offenders.

The problems with IPPs can be grouped into two areas, firstly problems with the legislation itself and secondly problems with the application of the legislation. Looking at the

legislation in itself, the Commons library report states that the legislation was too broad in its scope. The definition of what constituted a dangerous offender and the list of crimes which could be considered dangerous for the purposes of this sentence were not sufficiently succinct to be a useful and practical guide to the courts when considering imposing an IPP. This resulted in many offenders who had committed relatively low level crimes being given IPPs. There was no minimum tariff for imprisonment stated in the legislation and therefore this resulted in a large number of IPPs with short tariffs. The removal of the discretion of judges to impose IPPs in the case of those offenders who had committed a second specified offence was also criticised, as this removed the power of the judiciary to sentence offenders to a determinate sentence with a defined release date which did not require an assessment by a parole meeting to decide whether the offender was fit for release. If you recall the lack of discretion of judges in imposing preventative sentences was also highlighted in the report into similar sentencing practices in the 1930s.

The impact of these two issues led to a number of problems with the application of the sentencing in the first instance. As the House of Commons Library report states

IPP sentences were being imposed in respect of offences at the less serious end of the spectrum, creating management problems in the prison system due to the large numbers of prisoners serving indeterminate sentences following expiry of their tariffs. (Strickland, 2016)

The application of IPPs appeared to be failing to impact upon the target groups for which the legislation was devised, namely dangerous offenders instead the focus had shifted to larger numbers of low level offenders. This in turn created significant pressure on both the prison system and the parole system. The prison population spiked and the system was not

prepared for an increase in prisoners that were on short tariffs that required the same sorts of support as those who were serving more lengthy sentences. In order for the parole system to make a judgement that prisoners were suitable for release, there needed to be support, training and so forth, so the prisoners on IPPs could demonstrate that they were no longer dangerous. Lack of provision and an increase in the numbers of prisoners waiting for assessment, meant that many prisoners were in the system longer than would have been necessary. (Strickland, 2016) This could be seen, and has been seen, as an unjust way to punish offenders and an injustice in the criminal justice system. It has also been suggested that this has had a profound impact on the mental health of prisoners, partly due to the confusion and lack of clarity over release dates and assessments. (Jacobson & Hough, 2010 p6-7)

It seems that the criticisms levied at IPPs as implemented under the Criminal Justice Act are ones that are practical, or arise from the problems with the practical application of the provisions in the Act. It could be argued that if the prison service and parole service had been given sufficient training, personnel and resource then in theory IPPs would have been seen as a useful means of punishing and incapacitating dangerous offenders. The same could also be said of the development of IPPs as a punishment through the Criminal Justice Act, i.e. had the legislation and guidance on when to use IPPs been clearer and narrower in its focus then the use of indeterminate sentences could have been effective.

What is absent in the official government discourse on the use of IPPs is whether or not their use is justified as a form of punishment. I will devote an entire chapter to the use of preventative detention (incapacitation) and what Duff has to say about it later in this thesis as it is an avenue that Duff uses to deal with the sentencing of dangerous offenders. I

will however, start that discussion here because it is clearly a problem that has surfaced throughout the debate in the criminal justice system about how society should and how the state could punish dangerous offenders.

There is particular problem with preventative detention for theories of punishment that sit on the retributive side of the punishment debate. For the retributivist, and also for any mixed theory that has a nod to retributivism, the theory is based on the notion that punishment must be deserved and in order for it to be deserved then the offender must have done something (committed a crime) in order to be deserving of punishment and the deserving behaviour must relate to a specific crime. (Lippke, 2008) The issue arises because the point of preventative detention, and central to the idea behind the clauses in the Criminal Justice Act that cover IPPs, is that the sentence is stopping the offender from committing further offences by removing them from society, and thus limiting the harm that they could do to members of the wider public; it looks forward to prevent future harm. Essentially preventative detention locks the offender up for crimes that they have not yet committed which is effectively punishing them for crimes that they will or could, commit in the future should they be at large in the community.

As I have shown in Chapter 1, this would not necessarily be a problem for the consequentialist theories of punishment. Those who justify punishment as a means to prevent crime and the harm that crime causes, could say that this is a cost effective way of preventing harm to the potential victims of the crimes that the dangerous offender could commit. Whilst the offender is in prison then they are incapacitated and unable to commit crimes in the community, although they could still commit crimes in prison. Imprisonment for the purposes of incapacitation is therefore problematic for the theories which have the

notion of desert at their centre, because the punishment that is imposed upon the offender is not necessarily based on the harm caused by the crime they have actually committed or the culpability of the offender with reference to a particular action. Instead it is based on the assumption that the offender will commit crimes in the future. Although Duff states that he has both backward looking and forward looking elements within his theory, the main thrust of punishment as communication looks to censure the offender for crimes that they have committed, therefore the idea that offenders could be incapacitated as a form of punishment for crimes that they have not yet committed, but could possibly commit, is clearly problematic.

Kathleen Auerhahn, in her article on selective incapacitation, looks at a number of problems for punishment which seeks to incapacitate offenders. She states that, “[p]reventative detention is defined as the confinement of persons based on a prediction of future dangerousness.” (Auerhahn, 1999 p710) She goes on to show that assessing future dangerousness is not only very difficult and it is also unreliable. What is clearly difficult in assessing whether or not offenders are likely or not, to commit future crimes is that if they are incarcerated then we can never be sure that they would go on to commit more offences. It could easily be the case that an offender is put in prison because they are deemed dangerous however if they were allowed to return to the community would not have committed any further offences. By incapacitating the offender for an extended period beyond a standard sentence, the ability of the offender to demonstrate to the community that they have changed or that they have understood that their actions are seen as wrong by the community is severely limited. This fails to treat offenders as rational agents, capable of making the moral decision not to commit an offence. Preventative detention does not

give the offender the chance to make decisions about the commission of offences that have not yet taken place. Punishment for preventative detention assumes that a certain type of person, classified as a dangerous person, will not change their character or their behaviour and the assumption is made that they will continue to offend. By imprisoning the offender before they have actually committed an offence then this gives the offender no opportunity to take responsibility for changing and no opportunity to make the decision not to commit further crime. There is little incentive for the offender to take such responsibility because the state and the community has effectively written them off.

In her article Auerhahn also goes on to discuss the issues associated with practically making an assessment of the future dangerousness of an offender. Evidence tends to show that offenders become less criminally active as they get older. The age profile of offenders in prison shows that the majority of the prison population are males below the age of 39. (The Ministry of Justice, 2016) There could be a number of reasons for this trend. It could be the case that previous convictions have influenced offending behaviour throughout life, or it could be that the domestic circumstances of offenders change as they get older and this influences their choices. Whatever the underlying reasons for this trend, by making a prediction of future dangerousness, it could be the case that the individual who is deemed dangerous and as a result given an extended preventative sentence, would never go on to commit any further offences.

There is also an assumption made when attempting to predict future criminal behaviour that the level of criminal activity will remain constant throughout the criminal career of a given offender, this however is generally not the case. For the majority of offenders, offending behaviour is sporadic. Offending behaviour is very much influenced by

local circumstance for the individual, factors such as family and friends, job status, alcohol and drug problems have an impact on offending. Even if an offender is assessed as dangerous this does not necessarily mean that they will go on to offend in future, because it may be the case that the circumstances that need to prevail in order to provide the catalyst for offending behaviour do not occur. This is an area that I will discuss in depth later in the thesis.

4.6 Conclusion

In this chapter I have shown how the criminal justice system has attempted to deal with dangerous offenders through the modern era. This has been influenced by the contemporary view of what is seen to be a threat to society and the community. In the 19th century the biggest threat to society was seen as crimes against property and ownership, this meant that offenders committing crimes against property and theft were classified as dangerous offenders and were punished and sentenced accordingly. This has morphed through the decades to reflect the increasing fears of the community about crimes against the person. Dangerous offenders became and, broadly remain, those offenders who commit serious and violent offences against the person.

I also looked at how the punishment of dangerous offenders has become increasingly political in nature. I used the creation of IPPs through the Criminal Justice Act 2003 to show how governments have attempted to address the issue of the punishment of dangerous offenders in a way that sought to allay the fears of society about crimes committed by dangerous offenders. This approach has ultimately failed, for the reasons that I outlined above. However as I move through this thesis I will revisit the idea of incapacitation and preventative detention. A rethink of the idea of preventative detention

may provide Duff with a means of dealing with dangerous offenders within the content of punishment as communication.

Chapter 5

Proportionate Sentencing

In this chapter I am going to argue that a proportionate approach to sentencing is crucial to the communicative theory of punishment and also that this has a direct bearing on the punishment of dangerous offenders. I will outline what proportionate sentencing means, its place within theories of punishment and how it supports the fair and just punishment of dangerous offenders. I will argue that the communicative theory of punishment has to be committed to the principle of proportionate sentencing and that this has a fundamental impact on how communicative theories of punishment approach the sentencing of dangerous offenders. I will also argue that proportionality in sentencing has a central role to play in the practical application of criminal justice policy in contrast to the imposition of indeterminate sentences, such as those seen in the previous chapter through legislation such as the Criminal Justice Act 2003.

5.1 Proportionate sentencing and its place in UK criminal justice policy

Proportionate sentencing is a familiar idea in theories of punishment and in criminal justice policy across the UK and the US. In 1990s the criminal justice system in England and Wales shifted in favour of a proportionate approach to sentencing placing the idea at the heart of the principles underpinning the guidelines for sentences. Since this time, however, there has been a slow erosion of these principles through subsequent legislation, such as the Criminal Justice Act 2003. The aim of that legislation appeared to be to increase the severity of

sentences for offenders that were considered to be dangerous in an attempt to prevent crime rather than adhere to the principle of proportionality.

In 2010 the Sentencing Council for England and Wales was created, replacing the Sentencing Guidelines Council and the Sentencing Advisory Panel, with the aim of improving consistency and transparency of sentencing. The role of the Sentencing Council is to provide guidance to the courts in relation to sentencing. The expectation is that these guidelines will be followed, unless it can be shown that it is in the interests of justice not to do so. As part of its core function the Sentencing Council outlines what it sees as the main aims of sentencing and the principles by which sentences should be issued. The Council states that:

A Sentence aims to:

- **Punish the offender**

Punishment can include being jailed, having to do unpaid work in the community, obeying a curfew, or paying a fine.

- **Reduce crime**

This means both preventing the offender from committing more crime and putting others off from committing similar offences.

- **Reform and rehabilitate offenders**

A sentence also aims to change and offender's behaviour to prevent future crime. One way of doing this could be to require an offender to have treatment for drug addiction or alcohol abuse.

- **Protect the public**

A sentence aims to keep the public safe from the offender and from the risk of more crimes being committed by them. This could be by putting them in prison, restrictions on their activities or supervision by probation.

- **Making the offender give something back to people affected by the crime**

This could be for example, by payment of compensation or through restorative justice. (The Sentencing Council for England and Wales)

These principles were underpinned by legislation in the Criminal Justice Act 2003. (The Criminal Justice Act 2003, 44, section 142)

The first aim of the sentencing principles, as articulated by the Sentencing Council is to punish the offender. This aim is consistent with the view that the punishment must be *for* a crime, and this punishment is what the offender deserves as an appropriate response to the wrong that has been done. As one moves down the list of the principles it can be seen that the focus of sentencing shifts towards the prevention of crime. The second bullet is explicit in saying that crime reduction is a key aim of punishment, both in preventing the specific offender from committing more crimes (individual deterrence) and putting other potential offenders off committing similar offences (general deterrence). The fourth bullet point states that an aim of sentencing is to protect the public from offenders and the risk of more crimes being committed by the offender; crime prevented through incapacitation or through other restrictive sentencing approaches, such as tagging or curfews. Having crime reduction as a central focus of sentencing is more usually associated with a consequentialist approach to punishment, as I outlined in the opening chapter of this thesis, however many theories state that punishment can partially be justified due to its preventative efficacy.

Andrew von Hirsch's communicative theory of punishment justifies the use of hard

treatment, punishment which involves an element of suffering, because it can reduce crime, although he is at pains to stress that this is not the main justification of punishment and should not drown out the communicative impact of punishment. (Von Hirsch, 1993 p12-13)

It seems that the five aims of sentencing as set out by the Sentencing Council are attempting to cover the broad range of possible justifications for punishment and aims of sentencing, also citing rehabilitation and a restorative element to sentences in addition to retribution and crime prevention. It seems that the Sentencing Council, in trying to set out these wide ranging principles are overly ambitious and create a potentially confusing starting point for the principles by which punishments are decided.

Many theories of punishment could take proportionality of sentencing into account, but could see proportionality as only one of a number of factors that should be taken into account when sentencing. The Sentencing Council guidelines however, do not make it clear whether proportionality is a defining principle of sentencing or if is one of a number of principles that need to be considered when a court passes sentence. As I will come on to explain, communicative theories of punishment must have proportionality as a defining feature of sentencing, rather than, as with the Sentencing Council guidelines, merely have proportionality as one factor, amongst many others.

5.2 Proportionality and communicative theories of punishment

Duff's communicative theory justifies punishment because it communicates with the offender and engenders a form of secular penance. Punishment is being imposed on the offender as a direct response to a specific crime that has been committed and the punishment must be what is deserved by the offender for the wrong-doing. The link with

the condemnatory nature of the punishment is essential to separate it from other forms of monetary or resource deprivation, such as taxes or quarantine; the punishment deprives the offender as it embodies the blame that is placed on the offender in response to the wrong that has been committed. In the opening chapter I showed that this approach is in contrast with a broadly consequentialist theory which justifies punishment because of the positive impact that punishment could have on future events, such as crime prevention. Desert theories have a certain intuitive attraction because they seem to satisfy a human desire for the offender to answer for the wrong that they have committed. The punishment can be seen by the victim and the community as a deserved response to the wrong that has been done to them individually and/or collectively. The punishment is the embodiment of the desert and signifies that the offender is to blame for the wrong that they have committed. The other attractive aspect of retributive theories is that it acknowledges the direct relationship between the crime committed and the punishment received.

A communicative theory of punishment, such as Duff's, is retributive in that punishment must be *for* the crime that has been committed and the punishment must be deserved by the offender. The punishment is the vehicle by which censure is communicated to the offender. The act of punishment, sanctioned by the community and enacted by the state, communicates to the offender that they have done something wrong and apportions blame for the act to the offender. Therefore, punishment is justified as the communication of deserved censure. (Duff, 2001 p30) Duff goes further than merely saying that punishment is justified through its communicative effect, he also justifies the use of hard treatment in communicative terms by saying that the hard treatment should be used to focus the mind of the offender on the wrong committed and induce a type of secular penance in the

offender.⁵ The punishment should encourage the offender, through the act of communication of censure to reflect on and repent for the wrong that they have done. The aspiration of repentance is not a feature of all communicative theories and this element introduces a forward looking aspect to Duff's theory, as there is an expectation that repentance will lead to modified behaviour in future.

A central pillar of the communicative theory is that the censure expressed to the offender through communication treats the offender as a moral agent capable of making rational decisions. (Von Hirsch, 2000 p170) The censure puts the blame for the wrongful action firmly at the door of the offender, allowing them to take responsibility for what they have done, allowing them to repent (in the case of Duff) or at least to acknowledge their crime as a wrong, as a rational moral agent who is a member of the community. The communication of censure talks to the offender, as a moral agent and does not punish them because of the impact that the punishment may have on any future offending (a consequentialist approach) and does not try to force a change in behaviour, as in rehabilitative theories as though training an animal. The communication of censure seeks to treat the offender as an end in themselves and not as a means to some other, independent end.

It is the very nature of couching punishment in terms of the communication of censure that weds the communicative theory of punishment to the principle of proportionate sentencing and gives proportionality a central role in the theory. To communicate censure to an offender is to convey to them a level of blameworthiness for

⁵ Communicative theories have to justify the use of hard treatment as a form of punishment because it could be said that communication of censure could easily be expressed through a symbolic or verbal gesture or expression of blame rather than punishment such as prison, fines or community sentence.

their actions. By apportioning blame in this way it treats the offender as a rational agent, who is capable of being blamed for their actions. Therefore the level of the censure must reflect the level of blameworthiness and so the seriousness of the wrong. The seriousness of the punishment (which is the censure) must mirror the seriousness of the crime committed or it risks conveying the wrong message to the offender, it would distort the communication of appropriate blame. A disproportionately harsh, or lenient sentence, would send the message that the crime was more, or less serious than it is. Andrew von Hirsch succinctly sums this up when he says,

If punishment embodies blame then how much one punishes will convey how much the conduct is condemned. (Von Hirsch & Ashworth, 2000 p172)

To impose a more lenient or harsher sentence on an offender would increase or decrease the level of censure expressed and so attributes a different amount of blameworthiness to the offender. The communicative impact of the punishment justifies the punishment. If the punishment does not communicate censure to the offender in a way that reflects the seriousness of the wrong they have committed then it undermines the justification of punishment as communication.

5.3 Proportionate Sentences

Proportionality is central to the idea of communicative theories of punishment but what does it mean to say that a sentence should be proportionate? The principle of proportionality starts by saying that punishments should show equivalence by virtue of the relation they have to other punishments; referred to as ordinal proportionality. (Von Hirsch, 1993) Ordinal proportionality needs to happen in three ways. Firstly offenders should be

punished at least as severely as other offenders who have been punished for the same type of offence. Punishing offender A more leniently than offender B for the same offence, in communicative terms would be to say that offender B is somehow more blameworthy than offender A. Offender A has committed a petty theft and is found guilty after a fair trial, she receives a fine of £100. Offender B has also committed petty theft and following a guilty verdict at trial receives a sentence of 1 year imprisonment. The message that this conveys to the offenders in question, to the victims of the crime (if there are any) and to the rest of the community is that offender B is somehow more blameworthy, has committed a more serious crime than offender A (so has either caused more harm or is more culpable). If the offender is neither more culpable nor causes more harm, then the sentence for offender B seems to run counter to our intuitive notion of fairness and justice.

It seems to be an essential element of natural justice that if offender A and offender B have committed the same type of offence and are equally culpable and have caused equal harm, then they should receive the same severity of punishment. The level of censure expressed and communicated to both offender A and offender B should be the same because both offenders have committed the same sort of offence. I will consider later how offender B could actually be more blameworthy than offender A, even if they have committed the same offence.

Secondly, the punishment should reflect how the community via the justice system, views the seriousness of the crime committed. The harshness of the sentence is a visible and public embodiment of the seriousness of the wrong that has been committed. (Duff, 2001) The state has made clear through the law that certain actions are prohibited, in undertaking such an action the offender is punished according to the law and the

seriousness of the punishment gives a clear signal to the community that tells us how seriously the state takes the commission of such an action. Therefore the more serious the offence, the more severe the punishment and so the greater the censure expressed and the more seriously the state and the community views that offence. The idea that the more serious the offence the more serious the punishment is embedded into our societal view of justice. What if it was discovered that offender A not only committed a petty theft but in the commission of that crime also stabbed and killed the shop assistant from whom she was stealing. Following the trial process offender A receives a £100 fine for both offences. The sentence of a fine very obviously does not reflect the seriousness with which as a society we view the crime of murder. (Duff, 2001 p133) The sentence of a fine will show to the community that the crime of killing a shop keeper during a theft is not viewed as a very serious crime, as it has not attracted an appropriately harsh punishment.

Conversely what if offender B receives a 5 year prison sentence for a petty theft alone? This sentence also seems to be grossly disproportionate in relation to the seriousness of the crime that has been committed and in addition to being disproportionate to the sentence that has been received by offender A for killing the shop keeper. Again, the harshness of the punishment does not match an intuitive perspective of the level of seriousness of the crime. The punishment needs to have some proportionate relationship to the view of the community, via the state, as to the seriousness of the crime. In the case of nations that practice participatory democracy this is entirely appropriate and just, but such a view of proportionality could be less appropriate in oppressive states.

There needs to be some sort of mechanism which enables the seriousness of the crime to be reflected through the seriousness of the punishment. This is essential for the

communicative theory of punishment because the punishment is communicating censure to the offenders; a sentence which is proportionate to the crime communicates the right amount of censure to the offender and reflects the seriousness by which that crime is viewed by the community and state. It is only through this that the offender will be afforded the ability to reflect on the seriousness of their actions, if the punishment is not proportionate then the offender will not be able to effectively engage with the process of repentance, reconciliation and reform, (Duff, 2001 p107-112) because the blameworthiness of the offender will not have been conveyed through the punishment.

Finally, proportionate sentencing requires that there should be appropriate spacing between rank orders of punishments and crimes. (Von Hirsch, 1993 p18-19) The gaps between the seriousness of the punishments are sufficient to reflect the variations in the seriousness of offences. (Duff, 2001 p133) If we think about the aim of the punishment, to communicate deserved censure to the offender, then there has to be suitable spacing between punishments of varying seriousness. Offender A has been found guilty of murder and receives a life sentence for the crime and offender B is found guilty of common assault and receives an 11 year sentence for the crime. The spacing between the 11 year sentence for common assault and the life sentence (commonly a 14 year sentence according to the system in the UK), does not seem like an appropriate gap between the harshness of the sentences in a way that reflects the variance between the seriousness of the crimes. An ideal proportionate system of sentencing could seek to rank the seriousness of offences in order to apply the appropriate and proportionate sentence. (Von Hirsch, 1993 p6; Von Hirsch, 1987) It would seem correct to rank murder as a more serious crime than assault but there also needs to be a suitable reflection, through the sentence, of how much more

serious murder is than assault. (Von Hirsch, 1993) Meeting all these three requirements when sentencing ensures that sentences are relatively (ordinally) proportionate.

Meeting the requirements of ordinal proportionality is evidently a requirement for communicative theories. Ordinal proportionality in itself, however, does not give a view as to what a proportionate sentencing system *is* or what a justice system that adhered to the principles of proportionality would look like. The principles of proportionality as outlined so far could result in a system of punishment which although was clearly ordinally proportionate internally, did not represent a fair and just system. The requirements of ordinal proportionality could be met within a system that punished the least serious offences, such as parking offences with a 1 year prison term and the most serious offences, such as murder, being punished by the death penalty. As long as the same types and seriousness of offences were punished by the same severity of sentences and there were appropriate spacing between those sentences then the principles of ordinal proportionality would be broadly met. Such a system would be proportionate in an internal sense, relative to itself but would not necessarily be just or fair to citizens, including offenders. In order for the criminal justice system to avoid this type of system there needs to be some methodology which matches sentences and offences in a way that sufficiently reflects the seriousness of the offence and the seriousness of the sentence which is also viewed as fair and just. One way of doing this is to create an anchor point for sentencing. (Von Hirsch, 1993 chp2) If a fixed point can be determined for one or more offences then other sentence-offence matches can be made, as long as that fixed point is reflective of notions of justice and fairness. This requires what is known as cardinal proportionality and is the notion that a punishment is directly proportionate to the crime not merely proportionate in the

sense that it is relative to other punishments, crimes or offenders, rather that the sentence and appropriate crime have some sort of direct relationship. (Von Hirsch, 1993 chp2)

The obvious question to consider when looking at how to achieve cardinal proportionality is of course, where do we place that anchor? Duff, in *Punishment, Communication and Community*, suggests that in a general sense the community does have some intuitive notions, as rational moral agents, about what a fair sentence would look like and this could be a starting point for creating the beginnings of a loose rank order of sentence-offence matches. As with the example of offender A and B earlier it seems intuitively unfair for offender B to get a year in prison for petty theft and equally a justice system that handed out a fine for a murder would look like unjust. Examples such as these would surely be disproportionate in any system, even if they were relatively proportionate to other sentencing decisions. (Duff, 2001 chp4, 1.1) This begins to show us what sorts of sentences that would be disproportionate, what they do not do however, is give us a definite idea about what the fixed anchor point would be.

5.4 Proportionality and Just Systems

Proportionality in sentencing should play a defining role or at the least a significant role, in any justice system. For communicative theories of punishment adherence to the principle of proportionality at least in its negative sense (so sentences are not disproportionate) is not only desirable, as part of a just and fair system of punishment, but is an essential element. (Von Hirsch, 1993 chp2) Part of the reason for this connection between proportionality in sentencing and communicative theories of punishment is because of the relationship between the censure expressed and the sentence given; the wrong type of sentence communicates the wrong level of blameworthiness and so does not effectively

communicate with the offender. In addition to this element there is also something to say about the connection between a proportionate system of sentencing and the creation and maintenance of a just system more broadly. A just and fair criminal justice system should treat offenders as rational agents capable of making decisions and punish those offenders when it is appropriate and in a way that is fair. Duff articulates the idea in his theory of punishment that the communication of censure is *with* the offender who is a rational agent, and a proportionate sentence is the means by which this communication occurs. (Duff, 2004)

The idea that there is a connection between proportionate sentencing and justice can be explored and defended further by considering the intuitive simplicity to the idea. If the question was asked to the average person what is required from punishment, they would most probably answer that they would want to see those responsible for the wrongful act being held to account for the wrong. If you delve a little deeper they may also say that the offender should pay-back in some way for what they have done. Being held to account and compensating for the wrong that has been committed leads us to the question of how this could be achieved and how the process can be fair to the victims, the community and the offender. The idea of punishment being proportionate to the crime seems to satisfy this intuitive concept about what a system of punishment should be doing. Punishment justified by its communicative qualities holds the offender directly to account for the wrong that has been committed, the punishment says to the offender: this is what you have done and this is what the community (and the victim) feels and thinks about it through the expression of censure. Having a proportionate approach to sentencing ensures that punishment is the process by which the offender pays for the crime through a

deprivation of their own in a way that is commensurate to the wrong that has been committed. The punishment communicates the right amount of censure for the crime and the offender is punished in a way that ensures that they are held responsible for the crime that they have committed. A theory of sentencing that does not accept proportionality as a principle (either in a positive or negative sense⁶) when sentencing runs the risk of creating an unjust system of punishment. (Von Hirsch, 1993 chp2)

A way of articulating this idea further is to ask what the impact would be of having a system which routinely allows, or supports, sentences to be disproportionate. The effect on the individual offender of a disproportionately harsh sentence is potentially devastating on a personal level. Although any punishment can have a significant influence on an offender, a prison sentence in particular results in the offender suffering a loss of liberty, restrictions on their physical movements and restrictions on their ability to make and act on their own decisions. Imprisonment, and other restrictive types of punishment, such as tagging and curfews, also severely restricts the ability of the individual to be an active member of the community, to earn money and maintain close family connections. All of these activities are what allows members of the community to go about their lives in an unencumbered manner and are generally considered as part of basic human rights. (The Human Rights Act 1998) To deprive citizens of these rights is clearly a serious course of action. Whether imprisonment and severely restrictive punishments, are an appropriate response to any offence is not a discussion that I am going to embark on here, what is certain is that the imposition of such punishment on an offender who does not deserve such a harsh sentence (not deserved in the sense that the punishment is disproportionate to the crime) is surely unfair and unjust.

⁶ Positive proportionality says that a proportionate sentence must be imposed, whereas negative proportionality being where a sentence should not be disproportionate.

The impact of disproportionate sentencing extends further than the injustice suffered by the individual offender, and their families and friends, there are implications for the justice system as a whole, particularly when disproportionate sentences are a regular feature of that justice system. There are many countries in which disproportionately harsh sentences are part of the normal operation of the justice system. Such countries habitually issue harsh sentences to offenders for what would be considered relatively minor crimes in the UK, or punish certain groups in a comparatively disproportionate or discriminatory way.⁷ There are countries in which citizens, and visitors may be issued with a prison sentence for kissing in public or a woman could be convicted of a crime for driving a car or for being raped. Although these sentences may be known and predictable to the citizens of those countries, and may or may not be relatively proportionate (so a short jail term for kissing in public may actually be relatively proportionate in a system which has a life prison sentence for theft and capital punishment for murder). These sentences however, do not necessarily satisfy the notion of absolute or cardinal proportionality and do not adequately reflect the seriousness of the offence, or wrong committed.

The impact of systems which routinely use disproportionate sentences can be potentially catastrophic for the sustainability and stability of that society as a whole. A general distrust of the justice system can result in a general distrust of an entire system of the state. This kind of distrust in the mechanics of the state to act in a fair and just manner has been seen as a contributory factor in uprisings such as those seen in the Arab Spring of 2010 and 2011. Sentences that are handed out in an arbitrary fashion and heavily politically influenced, which seemingly have no reference to the severity of the offence or are not

⁷ There are internationally recognised standards for trials and punishments which are covered Human Rights Act 1998 in article 6 and 7.

commensurable to previous sentences, can cause citizens to be fearful and distrusting of the justice system in any country or society. The potential impact of this could be tensions between the police, and other instruments of the state such as the armed forces, and court system and the community that they are seeking to protect this can lead to a wider feeling of distrust with the state.

Disproportionality in punishments and specifically sentences is a phenomenon that is not only confined to countries which are perceived to be oppressive. In August 2011 four nights of rioting were seen across cities in the UK and although the motivation of the rioters has been contested, research from Oxford University has suggested that those responsible for the riots were primarily from economically deprived areas that had poor relations with the police. This led the researchers to the conclusion that poor community cohesion and a lack of trust in the justice system was partially responsible for the unrest. (Kawalerowicz & Biggs, 2015) Sentencing for those convicted of involvement in criminal activity associated with the riots were disproportionate to sentences received for similar offences which were not related to the rioting. Offenders sentenced in magistrates courts for offences relating to the riots were four times more likely to receive custodial sentences than offenders sentenced to similar offences with no relation to the riots. (Lewis, et al., 2005) This was a result of an explicit policy by the UK government to tackle what it perceived to be the root cause of the unrest, which was gang culture, a view that is not altogether supported by the most recent research on the causes of the unrest outlined above.

Although the aim of the harsh punishment of the perpetrators of the rioting was to deter further unrest, the policy did not result in a reduction in gang activity more broadly despite the specific policy to deter such criminal activity. (Centre for Social Justice, 2012)

The disproportionate nature of the sentences given to the rioters generated comment in the press and wider social media, with the more left-wing media organisations criticising the perceived unfairness of the sentences. The aim of the harsh sentences associated with crime committed during the riots was clearly to set an example to those involved in the riots and to the community as a whole, both in demonstrating a tough stance on rioting and also to deter other potential rioters. The result of the use of disproportionate sentencing however was to cause criticism of the perceived unfairness of the state's response to the riots and their lack of perception of the underlying causes of the behaviour. The danger of taking such an approach to sentencing is not only to cause mistrust in the criminal justice system as a whole, but also in communicative terms the punishment in these cases could be seen to be expressing the wrong level of censure or blameworthiness to the offenders, victims of crime and to the community.

A proportionate system of sentencing which is fair, and is seen to be fair with punishments that reflect the seriousness of the offence can create a justice system which is supported and trusted by citizens. This is not the only positive influence that can result in explicitly creating and promoting a proportionate sentencing system. Applying a proportionate sentencing system supports the creation and maintenance of a fair and equal society through treating all offenders in the same way regardless of ethnicity, sex, religion, race or economic background. When the relation between the crime and the punishment is based on desert then a proportionate sentencing system naturally follows. If the relationship between the crime committed and the punishment received is not so intimate, and is predicated on the desire to achieve a separate independent end (for example, crime prevention) then the personal attributes and/or the circumstances of the individual

offender could have a significant impact on the type or seriousness of the punishment. Punishing offenders in a manner that is deserved for their crime, rather than some other reason, to reduce crime by deterring other offenders for example, means that the more serious the crime the more onerous or harsh the sentence. The seriousness of the crime is determined by looking at the act committed, the culpability of the offender and the harm that is caused to the victim (if there is one). It is by using these measures that a suitable punishment is determined. A system of punishment which directly links the crime committed with the punishment received in a way that apportions the correct amount of blame on the offender based on the crime committed does not become swayed by any other aims. It is this that supports equal treatment between offenders.

5.5 Proportionality as an influencing factor

I have argued in this chapter that there is a central role for the principle of proportionality in sentencing and I have also supported the claim that this is particularly important for a communicative theory of punishment because the sentence is the embodiment of the censure that punishments convey. But should proportionality be the only consideration when a judge sentences an offender or should it be only one of a number of factors that should be taken into consideration when setting out a sentence for a given crime; should proportionality be the determining influence on sentencing or merely a limiting influence on the sentence? As I outlined earlier, in the UK the Sentencing Council for England and Wales has five purposes of sentences, with consideration of the proportionality of the sentence being only one amongst other considerations, including deterrence, when a judge issues a sentence. Is this the right approach?

In addition to proportionality there are other factors that can be, and in practice are considered when determining sentences. The weight that is attributed to proportionality is determined by the stated aims of the criminal justice system. So for example if the overarching aim of a system of punishment is to prevent future crime then an effective way of going about that would be to look at which factors or characteristics of an individual or group, tend to be associated with criminal activity. When determining a suitable punishment for an offender these characteristics and factors could be used to predict whether an offender is more or less likely to commit future crimes. (Duff, 2004) Offenders who have drug addiction problems, or are members of a gang, or who do not have regular employment, or live in a certain area, may be, statistically, more likely to engage in future criminal activity. (Ashworth & Wasik, 2004) A system of punishment which aims to reduce future offending could therefore, issue harsher sentences to offenders with these characteristics in order to reduce crime in the future thus meeting the stated aim of punishment.⁸ Offenders who are in possession of these factors could therefore, be more likely to receive custodial sentences and remain in prison longer than offenders who do not display these characteristics.

Aside from the practical problems associated with predicting the probability of future offending based on statistically relevant characteristics of offenders (Von Hirsch, 2000 p98) basing punishment on the circumstantial and personal factors of an individual offender would no doubt lead to discrimination against certain groups of citizens, particularly those from economically deprived backgrounds, citizens from ethnic minority groups, those with poor educational attainment and those with mental health problems as

⁸ The theory being that if an offender is incapacitated then they are not able to offend, thus using prison sentences for such offenders rather than other methods of punishment such as community orders or fines means that crime, in theory, is reduced.

these groups of citizens are statistically most likely to be offenders and to re-offend. (Prison Reform Trust, 2017) If the severity and type of sentence is determined by factors other than proportionality then not only does the sentence fail to convey the correct level of blameworthiness to the offender and the community, it could also result in a system that is fundamentally unjust and imposing harsher punishment on those who are the most disadvantaged in our society. Basing sentencing on desert principles therefore, is more likely to reduce discriminatory sentencing, because factors which could be used to predict possible future offending are not taken into consideration when sentencing. (Hudson, 2000 p205) The only factors that are considered when issuing the sentence are the blameworthiness of the offender, the seriousness of the crime and the harm caused to the victim.

There is however, a view that using proportionality when sentencing creates the so called “just sentence in an unjust society”. Barbara Hudson is of the view that certain factors, such as economic deprivation should be considered as a *mitigating* factor when sentencing and that taking a purist approach to proportionate sentencing does not support equality because it fails to take into account the problems faced by those who are deprived. Hudson rightly highlights that to punish strictly under the theory of proportionality presumes that all agents are “equally in possession of free will”. (Hudson, 2000 p206) Having no reference to the circumstances of the offender, or the type and nature of the offence, makes the assumption that all members of the community have a level playing field and that the decision to offend or not to offend is a choice. Hudson argues that in some circumstances, specifically economic deprivation, this is not the case and this argument

could of course be extended to those with low-level mental health problems that do not manifest as serious enough to attract mitigation on the grounds of diminished responsibility.

Hudson cites examples such as the single mother who does not declare to the benefits authorities that she has an early morning cleaning job and the young offender who commits burglary but has never had the opportunity to get a job. For these members of the community committing crime is not undertaken as a matter of choice, it could be argued that these crimes are committed as a means of creating a decent standard of living. Hudson makes a distinction between crimes which are associated with deprivation, such as theft, and more violent offences, which according to her tend not to be associated with economic deprivation. This leads her to the conclusion that when sentencing for certain types of crimes the culpability of the offender is lessened because of their economic circumstances. She states that “[e]conomic duress could be a prima facie defence in cases where the perpetrator has no income at all, or has no access to or control over their supposed income.” (Hudson, 2000 p208)

Hudson does however, maintain a reference to proportionality in sentencing whilst allowing for the circumstances of the offender to be taken into account when punishing. She does this by explicitly stating that in circumstances of economic deprivation the culpability of the offender is reduced so severely that they could not properly be considered as having acted according to free will. It is certainly the case that there is significant economic inequality in many countries including the UK. I would argue, however, that this is no reason to deviate from the principle of proportionality in the way she suggests. Although it is doubtless the case that some crimes committed by offenders from economically deprived backgrounds are committed due to those circumstances, it is surely not always the case that

their economic circumstances lessen their ability to exercise free will. Indeed by committing a crime they are indeed demonstrating free will. The offender recognising that their economic circumstances are poor and that despite knowing that it is morally the wrong thing to do, other factors outweigh this for them and in order to address this they will commit a crime. How could a justice system take this into account? A system which is underpinned by proportionality has a level of prescription when issuing sentences and it's not clear how such a system would handle cases of offenders from deprived backgrounds where this deprivation did not play a part in the commission of an offence. The danger here is that people from economically deprived backgrounds are split into the deserving and undeserving poor, a scenario which Hudson was keen to avoid. Defence lawyers would surely strive to show that their client was motivated by economic deprivation in order to reduce their sentence.

Having a reduced sentence for offenders from economically deprived backgrounds because they are deemed to be less culpable also seems to suggest that economic deprivation means you are less responsible for your actions, and could therefore fail to treat a significant section of society as morally responsible agents. This would be difficult to incorporate into a communicative theory of punishment, because acknowledging all citizens as rational agents capable of making decisions and exercising their free will to accept, or not accept the communicative message is essential. Without this then communication is impossible with a significant proportion of offenders. Economic deprivation may be an *explanation* as to why someone commits an offence without implying that they are less able, or impaired in some way, from acting as morally responsible agents. By giving economically deprived offenders a reduced sentence this conveys the message that they are

less blameworthy and less responsible for their actions. It may be the case that the single mother does not declare her job to the benefit agencies because she cannot afford to do so, however it does not mean that she is not capable of knowing that it is wrong. As a person capable of moral agency, she knows it is wrong, but she does it anyway because she needs to. This may act as an explanation for her offence but it cannot make her less culpable. Communicating a different message through punishment suggests that she is not a person who is capable of making her own decisions, and is not a morally responsible member of the community.

In drawing together her argument Hudson rightly points to the economic inequality within society as a factor in the commission of crimes however, she fails to sufficiently make the link between this fact and the influence that this should have on sentencing. The culpability of the offender is not affected by the economic circumstance of the individual in the same way that it is by the mental capacity of the offender or situations such as duress. In the case of mental incapacity, clearly the offender does not have the capacity to make judgements in the same way as other people (although this will vary according to the exact nature of the mental health issue) and it could be said that they are not capable of exercising free will. It is the case however, that in situations of economic deprivation that the offender is aware of the difficult circumstance that they are in and makes a decision to commit a certain act in order to alleviate their circumstance; a level of awareness is required to undertake such a decision which is not evident in many cases of reduced culpability due to mental incapacity. This makes it very difficult to say that the sentence given to offenders in economically deprived situations should have reduced sentences.

This is not to say that I believe that the current inequalities which exist in the UK and USA today should be ignored, on the contrary. However I do not believe that the way to address these issues is through punishment of offenders which differentiates between economic circumstances, or any other such factors (race, religion or gender). Society needs to create a level playing field meaning that the single mother who is defrauding the benefit system does not feel that she has to do this in order to make ends meet and I will come on to say more on this in the final chapter.

5.6 Conclusion

In this chapter I have argued that proportionality plays a central role in the communicative theory of punishment. It is this central role that creates one of the fundamental problems for the communicative theory of punishment and the sentencing of dangerous offenders. Proportionality of sentencing means that the punishment received for a given crime must be broadly the same for anyone who commits that offence. That is not to say that the punishment needs to be exactly the same but what it needs to do is communicate the same amount of censure. If the same amount of censure is not communicated then the offender will have received an unfair punishment. The problem for communicative theories then is how can they adhere to the principle of proportionality whilst sentencing dangerous offenders, those who commit a persistent level of serious violent crimes, to longer or harsher sentencing in line with their dangerousness? The question that also needs to be addressed for the communicative theory is how can proportionate sentences be determined and what do they look like? The next two chapters will argue that a proportionate sentence needs to be determined by the harm caused by the crime and the culpability of the offender committing that crime. This will lead me to seeking a solution for Duff for the sentencing of

dangerous offenders by suggesting that perhaps the culpability of the dangerous offender is greater than non-dangerous offenders and thus justifying a longer or harsher sentence.

Chapter 6

Harm

The argument presented so far is that dangerous offenders are members of the community whose criminal behaviour is of such intensity that it amounts to an assault on the values of the community. They are the offenders for whom previous punishment has had no impact on their attitude towards their criminal behaviour and if a communicative theory of punishment became practice, these dangerous offenders would have failed to be moved by the process of secular penance. (Duff, 2001 p165) Their pattern of criminal behaviour is relentless. Why this is particularly difficult for communicative theories of punishment is because in justifying punishment by virtue of its communicative qualities, in order to express censure to the offender the theory relies on the notion that all members of society, including dangerous offenders, are rational agents capable of understanding and engaging in the communication if they so choose. Dangerous offenders seem to represent a subset of the community that do not respond to communication or desist from their assault on the values of society and are either, wilfully unresponsive to communication or are not capable of rational decision making.

If this is the case then communication as a punishment for these dangerous offenders is defunct; why continue to punish these offenders if they cannot or will not understand? Dangerous offenders are also those who have committed the worse sort of crimes on individual victims and the community at large, punishing these types of offenders in the same sort of way as other offenders does not seem to resonate with the need of the community to see dangerous offenders get their just deserts, and does not seem to

effectively achieve protection for the community from these offenders. For the communicative theory of punishment, however, punishing these offenders more harshly than other offenders is not an option, given the commitment to the principle of proportionality in sentencing. It would seem like the state would be saying that they are beyond help and so are no longer accepted in the community as equal citizens. Where then, does this leave the communicative theory of punishment? How can a communitarian communicative theory of punishment hope to deal with the reality of the punishment of dangerous offenders?

In this chapter I will begin to set out an argument as to how the communicative theory of punishment could start to approach the punishment of dangerous offenders. In order to achieve this I will start by looking at the notions of harm and culpability. These two concepts are central to how punishment is enacted and how sentences are determined. That dangerous offenders deserve to be punished is a given within the context of the communicative theory with the caveat that they are processed appropriately through a fair and well-organised criminal justice system. What I will argue in this chapter and the next is that the harm caused by crimes and the culpability of the offender committing crimes rightly determines the sentence given to offenders, and this may also extend to dangerous offenders. Defining and characterising the harm caused by crime and the culpability of the offender will start to unfold the idea that dangerous offenders could be punished in a way that is appropriate in light of their behaviour, fair within the context of a shared set of community values and a proportionate response which acknowledges the role of victims of crime.

I will provide an analysis of the notion of harm and argue that it has a crucial place in the determination of punishments. This is important to the overall argument for how Duff's communicative theory could deal with dangerous offenders, because of the central role that harm has in determining proportionate punishments. I'll outline in this chapter why criminal harm is different to other types of harm and I argue that Andrew von Hirsch's living standard analysis (Von Hirsch & Jareborg, 1991) provides the most plausible and practical way of determining how harm supports the principle of proportionality in sentencing. I will analyse the appeal of the living standards analysis and its internal coherence, and identify any limitations. I will then suggest that this creates a model for the determination of sentences for dangerous offenders within Duff's communicative theory of punishment. This is within the context of understanding that Duff is explicit that he does not want to create a rigid ranking of offences or punishments in order to meet strict proportionality but requires a more nuanced approach that allows for a substantive fit between crime and punishment. (Duff, 2001 p141-143) I will outline the same sort of analysis and argument for the central role of culpability in the next chapter and then knit these two together to create a suggested model in which dangerous offenders could be sentenced in a proportionate and coherent way.

6.1 The Role of Harm and Culpability

There are examples of penal systems from across the world that place the notion of harm and culpability at the centre of their criminal sentencing system. Probably one of the most well-known examples is that of the Swedish penal code enacted in 1988. (Von Hirsch, 1987 p27-28; Von Hirsch, 2000 p240-252) The thinking behind the development of the Swedish system came from an acceptance that a limited use of imprisonment as a means of

punishment played an important role in a wider understanding of social justice within the community, a view that is firmly supported by Duff. (Duff, 2001 p148-152) The system as a whole had its roots firmly planted in the principle of proportionality in sentencing. Andrew Von Hirsch provides a useful summary of the system in *Principled Sentencing*. In describing the Swedish system he states,

The proposal's central concept is that of a crime's penal value, and the draft begins with a general definition: 'The penal value (straffvarde) of a crime is determined by its seriousness'. To determine a crime's seriousness, the statute goes on to state, special regard should be given (1) to the harmfulness of the conduct and (2) the personal culpability of the actor. This definition – of seriousness in terms of the conduct's harm and culpability – is standard in the recent literature on desert. (Von Hirsch & Ashworth, 2000 p244)

It may seem obvious to state that the degree of punishment of an offender for a specific offence should be based on the seriousness of the crime and that the seriousness of the crime can be determined by the harm caused to the victim and the level of responsibility that the perpetrator of that offence should take for causing that harm. This approach however, does not necessarily reflect the systems of sentencing that are seen in other states or criminal justice systems. As I have showed in the previous chapters the approach to determining the sentence received by an offender can be, and is, determined by a whole host of other factors in addition to, or outside of, harm and culpability. This is particularly the case with sentences handed out with the aim of deterring future offending which could have little or no regard for the seriousness of the offence committed. As was seen when looking at the Criminal Justice Act 2003 and indeterminate sentences, there are numerous

examples of sentences that have been imposed on offenders in order to protect against the possibility of future offending, with little reference to the seriousness of the actual offence that had been committed or to the level of harm that the offence caused to the victim or victims, or to the community at large.

What Duff would like to see is punishments that have a “substantive fit” (Duff, 2001 p142) with the crime that has been committed. This is not to say that sentencing should seek an eye for an eye approach, but more that the sentence is constructed in a way that enables the process of reconciliation, repentance and reform. In order for this to happen there needs to be an understanding of the crime and its impact through looking at the harm that it has caused to the individual and/or to the community.

6.2 Harm

A considered and just system of law will seek to clearly state which actions, acts, or attempts at undertaking such acts or actions, are prohibited. (Duff, 2009 p82-89) It is a method of ensuring that all members of the community have the chance to live in a way that is consistent with the aims and values of the community at large and it is a chance for the state to be unambiguous about its expectation of citizens. By and large, although not exclusively, the law seeks to prohibit actions that cause harm to members of the community, either in terms of physical, economic and psychological harm. This is not to say that the law should or does, seek to prohibit all actions that are harmful to members of the community, either in terms of harm caused to oneself or towards others. There are many actions, or inactions, that cause harm which are not prohibited in the law. I have no doubt that adultery for example causes harm however this is the type of behaviour which is deemed to be within the personal rather than public sphere and is not subject to legal

prohibition. This is not to say that states and governments do not try to influence the behaviour its citizens in order to prevent harm, the British Government's so called 'nudge unit' sought to influence rather than prohibit harmful actions and behaviours. (Syed, 2015) There are, however, qualities of criminal harm which make it distinct from other types of harm.

6.3 The Limits of the Law

I do not propose to enter into a detailed debate here about the limits of the law; this would constitute a full thesis by itself, it is useful however, to look at what it is that makes the harm that is caused by criminal behaviour different from other harms and how that harm should be reflected through the law and influence the type of sentence (censure, for the communicative theory) which such behaviours attract. John Stuart Mill's 'harm principle' is one of the most well-known and well-used attempts to define a limit for the scope of the law and harms that are caused through criminal action. He stated that "[t]he only purpose for which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm to others." (Mill, 1962 chp1 paragraph 9) Although there have been numerous attempts to create more sophisticated and complex definition of the limits of the legal power of the state over its citizens, this line from Mill still seems to succinctly sum up a common sense view of what the law should do; prevent harm. The harm principle as articulated by Mill also obviously reflects the liberal principle of limiting the control or influence that the state should have over the individual, the aim here is concerned with ensuring the liberty of the individual, protecting the individual from interference from the state, as well as ensuring that harm to others is minimised.

The sort of harm that Mill was concerned with is very much the harm caused to the physical person rather than that which causes hurt feelings or offense. Even if we restrict ourselves for the time being to looking at only physical harm, criminal harm *does* seem to have a special status and it constitutes a distinct sort of harm from other harm. There is obviously something very different between the types of harms that are caused accidentally and those harms that are caused intentionally in the commission of a deliberate action. (Simester & von Hirsch, 2014 p11; Duff, 2009 p106) Children for example, will rightly feel more aggrieved when pushed on purpose by another child in the playground as opposed to an accidental knock during the course of play. Although the physical outcome, the bruised knees, will be the same there is a different reaction to harm caused deliberately as a result of the intentional action of another. More often than not the child's reaction will be to point out that it's not fair; not only are they hurt in a physical sense, but they have also experienced a sense of injustice as to the cause of the pain because the harm has been caused by an attack.

So what does this mean in terms of the sentencing of offenders? What is meant when we talk about this kind of harm? How can criminal harm be characterised and recognised as harm that is deserving of censure for the perpetrator? Since the development of the harm principle by Mill, there has been work that looks at harm in a criminal sense, most notably the work of Joel Feinberg in his series of books on the *Moral Limits of the Criminal Law*. In the first of the series of four books he looked specifically at *Harm to Others* within the context of criminal harm. Feinberg explores in detail what types of harms should be the subject to prohibition through the law. He uses *his* conception of the harm principle in order to achieve this; he echoes Mill in articulating that the actions of individuals should

only be limited or prohibited in order to prevent harm. The harm that Feinberg is talking about, the types of harm in which the law and the state should be rightly interested in, are those actions and behaviours that cause genuine harm, rather than the type of harms that could be classed as “annoyance, inconvenience, hurt or offense”. (Feinberg 1987 p188)

Feinberg articulates the idea that the law does not concern itself with trifles; *de minimis non curat lex*. This addresses an intuitive approach to the sorts of harm that the state through the law should concern itself with. This general maxim avoids getting into complex descriptive definitions of what is a criminally caused harm. It would seem sensible to suppose that the incident described above – the child pushed over by a playmate – is not something that should be the concern of the law, even if the incident results in harm that was caused deliberately. This is clearly an instance in which the harm caused could come under the definition of “annoyance, inconvenience, hurt or offense” (Feinberg 1987 p188) rather than a substantive harm. This of course, is completely sensible when the discussion is about playground antics, but this type of classification of harms becomes more problematic if the criminal justice system is looking at a similar sort of altercation between adults, or between an adult and a child.⁹ Classifying the harm caused between two children in the playground as a non-criminal harm seems correct but this may not be so clear cut in an altercation in other circumstances, even if the actual physical and emotional harm is the same. This is due to the different agents involved and the circumstances. In order for this to be a workable principle there needs to be a more sophisticated understanding of the types of harm that the criminal justice system should take an interest in through the law, and how sentencing is impacted upon by these types of harm.

⁹ I will discuss further the requirement for the agent to be an adult in order to be criminally culpable in the next chapter.

Feinberg does outline a more nuanced concept of harm which addresses the issue of what *types* of harm should be the business of the criminal justice system. He achieves this through describing the impact that criminal harms have within that context, using what he describes as welfare interest criterion. (Feinberg, 1987 p57-58) What Feinberg is attempting to achieve is creating a set of principles to assess harms caused by criminal actions, and the aim of the work is to look at what harms consist of and then use this to consider which harms are the proper scope of the criminal law. Feinberg argues that there can be an organisation or grading of harm caused by criminal actions and behaviours, based upon a ranking of the importance of the interests that are impacted upon by crime. The harm caused by such actions is due to the limiting impact that the criminal behaviour has on the choices of the victim as an agent who would otherwise be free to pursue their own idea of the good. The key point in this conception of harm is that the interests of the agent have been infringed upon and it is this infringement which affects their ability to choose his or her own way of living and thus causes harm to the victim. The most important interest, according to Feinberg, would be physical safety because if the physical ability of the agent is adversely impacted upon in a significant way, then the ability of that agent to pursue his or her chosen way of life is severely restricted. Feinberg also highlights welfare interests such as security, which again he views as essential to the capability of the individual to live the life that they would seek. Bottom of the grading of welfare interests is what Feinberg refers to as accumulative interests which are those which would supplement the welfare and security interests. Essentially the harm that the law should concern itself with are those types of harms that would impact on the agents' choices in life. (Feinberg, 1987; Von Hirsch & Jareborg, 1991)

This view of harm does seem appealing as it addresses harm within the context of how individuals seem to live their lives. If our ability to pursue our lives is restricted in some way by the deliberate action of another, one would certainly feel that it would have a detrimental impact on life. There is however, an obvious issue for Feinberg in his conception of what harm is; the idea of what constitutes a welfare interest will differ between people on an individual basis and also on a cultural and community basis. (Von Hirsch & Jareborg, 1991) It is clear that the law cannot work in a highly personalised way and it would be impossible for the criminal justice system to function in such a way. It would mean that every victim of crime and potentially the multiple victims of individual crimes would have to have their lives examined to determine their own welfare interests and whether they were infringed, with a view to assessing the grading of harm caused in each case. This is obviously an unsustainable approach to sentencing within a busy and functioning criminal justice system.

Feinberg attempts to overcome this particular issue by suggesting that what needs to be looked at is the 'standard person' who should be protected by the law from 'standard' types of harm to their 'standard interests'. (Feinberg, 1987 p188) In other words, there are assumptions that can be made about the general types of welfare interests which are needed in order to secure the ability of 'the man on the Clapham omnibus' to pursue his or her own ultimate interests and idea of the good. For Feinberg these are the types of interests that transcend cultures or particular communities. He states that;

(t)he standard person has certain standard welfare interests including for example, interests in continued life, health, economic sufficiency, and political liberty.

(Feinberg, 1987 p188)

These types of welfare interests seem to be a reasonable generalisation of the areas that need to be fulfilled in order for members of the community to pursue their own ultimate individual interests, although they may be necessary and sufficient in different measure and combination.

Assessing harm in this way however, still seems to lack some of the essence of what harm actually feels like. Although on the surface it seems that a look at standard harms caused to the way that people make choices has merit, Andrew von Hirsch points out that this seems to miss something when talking about the harm that is caused. What makes a vicious assault harmful is not necessarily because the life choices of the victim have been limited, that is not what makes the actual physical injury painful. There is more to it than that. (Von Hirsch & Jareborg, 1991) When looking at assessing the harmfulness in a criminal assault, the actual physical or emotional pain that has been caused to the victim is important in addition to the impact on the life chances of the victim.

Von Hirsch goes on to say that the welfare criteria, as outlined by Feinberg, does not go far enough in making a distinction between types of harms. (Von Hirsch & Jareborg, 1991) By this he means that the welfare criterion are not sufficiently formed to grade harms in terms of seriousness, which is essential if the conception of harm is going to be used to make an assessment of the sentence deserved for an offender based on the harm caused by the commission of the crime. It is clear that Feinberg did not necessarily intend his conception of harm to be used in this way, and for him there are many interdependencies between the harms when it comes to making choices about life. (Feinberg, 1987) So having good health is a welfare criterion that is necessary to allow the individual to make a choice about how they live their life. Having good health however, is not all it takes to enable us to

choose how we should live a good life. Having security and some form of financial subsistence is also necessary. It therefore makes it difficult to use the welfare criterion if the aim of looking at harm is to produce a grading of seriousness of criminal harms.

Finally on the idea of harm according to Feinberg, analysing harm within this context is more problematic for a theory that is broadly, although not dogmatically desert based. The basis of the harm principle and the idea of welfare criterion for Feinberg is set against a backdrop of the philosophy of Mill and so utilitarian. Feinberg uses this as a methodology to outline the harm principle and to set limits of the law. He is clear that the harm done in prohibiting some behaviours would be more than the harm prevented by prohibiting such actions. This counts not only in terms of the harm inflicted by the punishment but also in the cost of the policing time, court time, punishment costs in pursuing such criminal activity. This is certainly a consideration for any theory of punishment that would like to operate beyond the theoretical. However for the communicative theory, punishment is a deserved response to the crime, so the punishment itself needs to be proportionate to the crime. The form of that punishment, the sentence, should be based on an assessment of the harm caused by the crime and the culpability of the offender rather than considerations of whether the harm caused by the punishment outweighs the harm caused by the commission of the original crime. Feinberg rightly seeks to limit the scope of the law and I agree that the law should not concern itself with trifles, however, the punishment of the offender should be proportionate to the crime committed and one which treats the offender as a rational agent and seeks to acknowledge the harm caused to the victim or victims.

6.4 The Living Standard Analysis

Feinberg's conception of harm does begin to provide a coherent outline of what harm could look like in the criminal context. However, it does not seem to provide enough clarity to provide a basis for looking at how to construct a sentencing system within a communicative theory of punishment. I argue that considering the harm caused by the crime, and the culpability of the offender is paramount to gauging the harshness of a punishment that is proportionate to the seriousness of the crime committed. This ensures that the sentence is proportionate and so communicates the right amount of blameworthiness or censure. So if Feinberg's welfare criterion cannot provide communicative theories with a framework for grading the seriousness of the harm caused in the commission of a crime then what is the alternative?

Andrew von Hirsch and Nils Jarborg address this issue in their 1991 publication referenced above, *Gauging Criminal Harm* in which they outline an alternative view of harm and how their concept of harm could be used to assess the seriousness of the impact of a crime, which in turn could be used to provide the basis for the determination of a sentence as a punishment for that specific crime. In order to achieve this they outline what they refer to as the living standard analysis. The idea of the living standard focuses not on the ability, or lack of ability, to make choices, as Feinberg does, rather than on whether the individual has the means or capability to achieve a certain quality of life. (Von Hirsch & Jareborg, 1991)

The living standard analysis seeks to provide a more realistic view of what it means to be harmed by a criminal action. (Von Hirsch & Jareborg, 1991) For Feinberg the harm in the criminal act comes from the impact that it has on something separate and distinct from the harm itself; so the harm *is* the impact that the criminal action has on the choices that the individual could make. This is exemplified by Von Hirsch and Jarborg when they draw

the distinction between their conception of living standard and Feinberg's welfare criterion in highlighting why we respond differently to mayhem (an American legal term for the disablement or disfigurement of the person) and burglary. As an individual one would feel that more harm is caused by mayhem than burglary and this is not because we have had our choices adversely impacted upon by the mayhem. It's because of the actual disfigurement or disablement that has impacted upon our quality of life by mayhem more so than having our possessions stolen from our home and our privacy invaded in a burglary. The pain that the individual feels in the act of mayhem is not sufficiently described by the idea that our choices have been reduced or limited in some way. (Von Hirsch & Jareborg, 1991; Von Hirsch, 1993 p31)

This concept of harm may at first seem to be similar enough to that of Feinberg to fall foul to a criticism that is levelled against Feinberg's welfare criterion; that what constitutes a certain quality of life, or living standard, may differ between people. As I come to further describe the living standard analysis in more detail it will become clear that that this is not the case, as this idea of harm is not about the needs or wants of the person in the sense of individual separate beings. It is about individuals, in the broad sense, having the means and ability to accomplish a whole variety of life goals without being specific about what those goals are or how they are achieved or by whom. Von Hirsch states however that "the ultimate focus is not on the extent of the choice but on the quality of life which those interests support." (Von Hirsch & Jareborg, 1991) The actual quality of that life could very well be different for different people. It is still true however, that the individual would find that disfigurement caused harm to them, not only because their choices were limited but

because it causes them actual pain and this impacts directly upon their quality of life, whatever that life may actually consist of.

Von Hirsch and Jarborg give a detailed account of harm and they use this account to develop the living standard analysis as a means of creating a grading of harms caused by criminal action. This grading of harms could then be used to map against corresponding sentences as punishments for criminal behaviour. Why is this useful to look at within the context of the punishment of dangerous offenders within Duff's communicative theory? Von Hirsch's also supports a communicative theory of punishment and although they differ on a number of areas there is a synergy between the theories that allows for the use of von Hirsch's living standard analysis to plug a gap in sentencing theory of Duff in *Punishment, Communication and Community*. Duff does not give an extended account of criminal harm, but he does reference von Hirsch's living standard work and the account of harm associated with the living standard. (Duff, 2001 p158) A crucial difference between their theories however, is that von Hirsch supports a positive approach to proportionality and Duff opts for a negative application of the principle. In practice this means is that von Hirsch is comfortable with creating a fairly rigid ranking between crimes and sentences to create guidelines for those responsible for sentencing to ensure that the principle of proportionality is adhered to. (Von Hirsch, 1993 chp2; Von Hirsch, 1987 prt3 sec6) Duff's approach is slightly more relaxed and he considers that there could be a number, or range of punishments which would be suitable for sentencing for similar crimes of similar seriousness to ensure the substantive fit that he is seeking between crime and punishment. (Duff, 2001 p147, 158) Even with this difference in approach von Hirsch's living standard analysis, discussed more below, provides a framework for this looser approach to

sentencing supported by Duff. Duff himself talks of supporting Tonry's "zone of discretion" (Tonry, 1996; Duff, 2001 p158) in which a number of sentences could be suitable, or good enough to ensure both proportionality and substantive fit. The living standard analysis, coupled with an assessment of the culpability of the offender that I will outline in the next chapter, could comfortably provide this range of sentencing whilst not providing a strict ranking of punishments that is inflexible and does not give sufficient scope for the creation of the substantive fit between crime and punishment.

One of the key purposes of the law is to provide a framework for the protection of members of the community so people within a community can lead their lives in safety, with shelter and certain level of material possessions to make life more interesting and enjoyable. (Von Hirsch & Jareborg, 1991) This conception of the purpose of the law is richer than the idea I expressed earlier in the chapter, that the law is merely there to protect citizens from harm. Given that it is this range of things that the law aims to protect for its citizens then, according to the living standard analysis approach, it makes sense to assess the gravity of criminal harms with reference to the importance that we, as a community, would place on those interests.

What needs to be clear here is that the law should embody the values that the community sees as *its* values and those which are worthy of protection through the law. This approach allows for a variation in the ultimate life goals of individuals which is based on standard interests rather than personalised interests. So the harm caused by a burglary, for example, would not be measurably increased, for the purpose of the living standard analysis, if the items stolen were of particular sentimental value to the victim. The harm caused from a burglary would be a standard harm, based on a standard assessment of the

harm caused by this type of crime, rather than an assessment of actual harm caused to the individual. (Von Hirsch & Jareborg, 1991) To think otherwise would be impractical to implement as a policy of assessing harm for the purpose of making a judgement about the seriousness of a crime. If the law sought to make a judgement of the individual harm caused by the commission of every crime then the criminal justice system at various stages would have to make assumptions about values and social practice. This is not to say however, that the living standard analysis looks at the aggregate consequences of harm akin to a utilitarian view of the harm caused by crime. The assessment of harm is still focused on the commission of a specific crime rather than of types of crime in general.

Jareborg and von Hirsch outline a quite specific view of how harm could be graded in their paper, which von Hirsch later summarises in *Censure and Sanctions*, and they start with looking at how the living standard analysis could be organised. They acknowledge that this type of exercise will always be somewhat arbitrary but in order to exemplify how this could be achieved they outline four living standard levels. The living standard levels are divided in the following way.

Level 1 - Subsistence level – this level is merely the survival of very basic human capacities to function. This level addresses the preservation of cognitive and physical functions. An example of harm at this level is being killed, maimed or made completely destitute. Living standard at level 1 has no relation with any comfort in life, nor does this level concern itself with privacy and self-respect which are not considered at this level because it is possible to survive, at a subsistence level without them.

Level 2 - Minimal well-being – this living standard level represents a basic level of comfort and dignity. This means more than barely getting by, as it would be at the level of subsistence hence living standard level 2 gives recognition to some comfort and self-respect along with the provision of shelter and food.

Level 3 - Adequate well-being – as you would expect as the levels increase the living standard become more consistent with what would be considered a better life with an adequate level of comfort and dignity. This level constitutes a comfortable existence, with an aspect of privacy and the avoidance of demeaning treatment.

Level 4 - Enhanced well-being – this is the highest living standard level and at this level the quality of life is significantly above what would be considered as merely adequate. This higher level represents a substantially enhanced level of comfort.

Marginal impact – it is acknowledged within the living standard analysis that there are some crimes have little or no impact on the victim's quality of life, for example a petty theft so there is provision for harms that have little or no impact on the living standard of the individual, even though they could be classed as criminal harm. (Von Hirsch & Jareborg, 1991)

The purpose of this exercise is not necessarily to capture the precise nature of the harm, in individual criminal cases it is more “to gauge the degree to which the given intrusion affects the person's living standard”. (Von Hirsch & Jareborg, 1991 p17) By exemplifying the levels of a standard of living in this way, a system is being developed which can be used to rank or gauge how criminal harms impact upon these levels (which represent the way people live) with a view to then looking at an appropriate communicative response to that harm in the form of a punishment.

It is possible then to rank the seriousness of crimes against the harm that they cause at the different living standard levels. If crime causes harm to a victim at level 1 living standard, at a subsistence level, then the crime is gravely serious. This is because the harm has affected the ability of the victim to exist at even that subsistence level; it has impacted upon the individual's ability to function at even this very basic level. Another crime, for example, that interferes with the quality of life at level 3 is clearly less serious as it is impacting upon the victim's living standard at a higher level so is less harmful and so on and so forth across all the levels in the living standard analysis. Again, the architects of the living standard analysis acknowledge the subjective nature of the chosen four levels. Von Hirsch and Jarborg have achieved sufficient spacing between the living standard levels to be able to clearly make a distinction between harms which is important, if they were too detailed in their exemplification of the harm, or if there were more levels which created additional complexity and detail, then it would make the process of assessing harm across the levels more difficult because it may not be clear which level a harm impacted upon and the decision making would become more subjective. (Von Hirsch & Jareborg, 1991) The creation of unnecessary complexity is a concern that Duff raises with the development of strict grading system. (Duff, 2001 p158)

There is a danger that the lack of detail across the 4 levels may not be able to address subtleties between harms caused. So for example a rape would impact at level 1, but a rape with a particularly violent assault would generally be viewed as more serious. There is not a level 1 plus however, and it seems inappropriate to make this type of crime an impact on level 2. In order to overcome this there is room for variations within the grades, so in level 1 there could be a range within that level from bare survival to minimal survival.

So the rape without a violent assault may be at the lower range of level 1 and the rape with a violent assault would be a higher within the range of level 1. There is a sense in which the levels should be seen as a continuum both within each level and between them. Von Hirsch and Jarborg point out that;

[c]riminal harm consists in the intrusion into legally protected interests, and its seriousness depends on the importance of the interests involved. We are gauging those interests' importance in terms of the significance for someone's living standard. (Von Hirsch & Jareborg, 1991 p18)

The levels within the living standard analysis go part way to exemplifying how criminal harm impacts upon its victims. In order to develop a holistic view of the harm that is caused by criminal harm von Hirsch and Jarborg also outline the variety areas of a person's life in which criminal harm can have an effect and they call these interest dimensions. These are (1) physical integrity, so the health and safety of persons and the avoidance of physical pain. This interest dimension could be impacted upon at all of the living standard levels, so from very serious physical harm or death at level 1 down to minor injuries caused by, for example, a push at level 4. There is also (2) material integrity so amenities such as food, drink and shelter and again this could have an impact across all the levels from being made destitute to experiencing a minor loss of belongings. (3) Freedom from humiliation, this interest dimension is to do with how you are treated by others rather than how you feel about yourself, so it does not cover self-esteem due to how you feel in a way that cannot be influenced by a crime committed by someone else. And finally (4) privacy and autonomy, this dimension represents how people seek preferences for a good life of various kinds and is a requirement for living standards at the higher levels, but not at the lower levels.

Although it is unpleasant not to have privacy and autonomy it is possible to live without them, in a way that it is not possible to live at anything but at a very subsistence level if you have been rendered in constant physical pain because of the criminal actions of another.

(Von Hirsch & Jareborg, 1991; Von Hirsch, 1993 p31)

As with the living standard levels themselves, this list of interest dimensions could be extended but von Hirsch and Jarborg feel that they have described interest dimensions that are generically already legally defined. The last two interest dimensions, freedom from humiliation and privacy and autonomy, are only concerned with level 2 and above because they are not necessary for a subsistence level of living standard. Within this conception there is of course, an assumption that citizens have living standards that range across all of the living standard levels.

So how would the use of the living standard analysis work in practice? In *Censure and Sanctions*, von Hirsch usefully looks at a case of a standard burglary and applies the living standard analysis to gauge the harm caused in order to inform the sentencing of the perpetrator. (Von Hirsch, 1993 p31-32) A standard household burglary would involve an impact on two of the interest dimensions, material amenity and privacy. The impact on the victim's material amenity would involve the loss of whatever items or property were taken during the course of the crime and also any damage that was caused by the act of the burglary. The privacy aspect of the harm caused would consist of the loss of privacy that has occurred by having had the offender enter the home of the victim without permission. The level of intrusion into the living standard of the victim in each of the dimensions would be assessed, as the privacy dimension can only be impacted upon at the less serious levels this

would constitute a level 3 or 4 and the material loss would be assessed as to the impact of the loss of the possessions taken.

A more serious example would be a murder in which A kills B, which could potentially be a crime committed by a dangerous offender. This criminal action of A destroys at the subsistence level which is rated as level 1, within the physical integrity dimension (and arguably all the other dimensions because it is not possible to have any living standard at all when dead). The case of murder is fairly clear cut when looking at the physical dimension but how would the living standard analysis deal with a less clear cut impact on the physical dimension? Imagine the situation in which A beats up B, in what constitutes an assault. This crime would obviously impact upon the physical integrity of the victim. This could be living standard level 4 or it could be at a lower level, in terms of the physical discomfort even if that is time limited in the sense that this would not be painful indefinitely. In addition there would also be an impact on the freedom from humiliation for the victim in addition to the physical integrity because being assaulted in this manner is generally regarded as humiliating, this could be level 3. Here each of the interest dimensions are assessed against the standard levels to come to a conclusion about the harm caused to the victim by the criminal act.

The examples above show that the impact of crime is often complex and so making a precise assessment of harm will also be complex, something which Duff is keen to avoid in this theory of punishment. (Duff, 2001 p158) Even a seemingly simple crime does not necessarily merely affect just one aspect (interest dimension) of the living standard of the victim. If we consider the aim of this exercise, to gauge the harm caused by crime on the victim with a view to use this information to apply a communicative and proportionate

punishment on the offender, then it becomes apparent that there needs to be a means of looking at the combined impact of the criminal harm across a range of interest dimensions. There is a fairly straight forward way of doing this and von Hirsch and Jarborg exemplify this in their paper with the use of graphs to plot the impact on the four levels for each dimension. A suggested way of doing this is to apply the living standard analysis to each of the dimensions impacted upon and chart the highest harm rating and the secondary impacts are also charted. The theory is that if there are multiple harms across a number of interest dimensions then the overall harm becomes more serious. This provides the beginnings of a methodology to grade the harm caused by the criminal action. There is a suggestion that there are a number of ways in which this could be achieved, such as a points-scale, for example rating the level of harm at some point along a scale between 1 and 100. Von Hirsch and Jarborg however, in keeping with the levels outlined for the living standard and interest dimension opt for five gradients – grave, serious, upper intermediate, lower intermediate and lesser. These gradients are then easily mapped against the living standard levels with grave mapped against subsistence; serious against minimal well-being and so on down the levels with lesser indicating that living standard not affected. (Von Hirsch & Jareborg, 1991)

Although mapping harm in this way may appear complex, it is not prohibitively complex and does provide a good framework for sentencing according to harm which will give proportionate sentences. The levels and gradients outlined by von Hirsch and Jarborg could easily provide zones of sentences, from which to choose the sentence that is a substantive fit with the crime in the way that Duff requires. (Duff, 2001 p142) In this sense the living standard analysis satisfies the need to have proportionality in sentencing whilst also providing flexibility.

This is not to say that the living standard analysis approach does not have limitations. There are some obvious difficulties when looking at harm caused across the spectrum of crimes and victims. For example in the case of a standard assault (standard in the sense of involving one victim and offender) the impact on the physical integrity of the victim, although serious is time limited. There is a temporal dimension to crime, which could mean looking at the time between the commission of the crime and the bringing to justice for the offender, or it could mean, as in the case of the assault that the actual impact of the crime itself is time limited; the bruises fade and the pain lessens. It is therefore sometimes problematic to judge when the impact of the crime would end and what temporal framework should be used when looking at the harm caused. (Von Hirsch & Jareborg, 1991)

So the harm caused by a crime to a victim may not just be about the immediate impact of the crime, so the bruises from an assault could fade within a few days, but the crime could also have a long term impact. For example, the humiliation caused by the assault might last a lot longer than the physical results of the assault. This raises the questions on when the impact is assessed and how long should the impact be taken into account when sentencing?

Von Hirsch and Jarborg raise this as an issue themselves and attempt to take an intuitive, practical approach to the problem. They talk about how a person would ordinarily think and talk about their well-being in temporal terms, they state that it makes no sense to ask a person how their year is, but people do regularly ask how your day is. (Von Hirsch & Jareborg, 1991) This indicates that they think that there should be a time limited approach to assessing the harm caused by crime but a day does not seem to be adequate to assess the impact on the living standard of a person that is affected by a criminal harm. It also makes little sense if that impact is assessed across 10 years or a lifetime. It is not entirely

clear that von Hirsch and Jarborg do address this issue adequately. If a harm has a long lasting impact, and it is clear that there will be a long term impact, for example a crime that causes death or life changing injuries, then it seems evident that this is a more serious harm than an assault that causes temporary physical pain or material loss. The temporal aspect of the harm should be taken into account in the living standard analysis and could be incorporated into an assessment of the seriousness of a harm, without having to go beyond an assessment of harm in standard terms.

There are also some areas in which the living standard analysis does not easily provide a workable conception of the harm caused by criminal actions. This is acknowledged by von Hirsch and he cites the example of crimes that involve more than one victim. (Von Hirsch, 1993) Many crimes that are committed have more than one victim and many have numerous victims. It may be possible to apply the living standard analysis to an assault involving one offender and two victims, as the impact on each could be calculated, but this then begs the question of how this would affect the punishment that the offender received. Would the offender get double the sentence because there were two victims and therefore more harm? This would clearly seem unworkable but also it seems to be important to take multiple victims into account when assessing the harm caused by a crime. In an example where there was more than one victim but not numerous victims, it could be possible to treat the assessment of harm in the same way as would be done when looking at multiple interest dimensions. The harm for both victims could be assessed in the same way that different interest dimensions are, and then brought together using a single scale to make a judgment about the overall harm caused by that individual offender.

Von Hirsch however uses examples in which it would not be practical to apply this approach, such as a pharmaceutical company who issued a drug knowing that it would cause harm to those who took it there would be multiple victims that all have their living standards impacted upon. (Von Hirsch & Jareborg, 1991) Capturing the extent of the harm caused by the criminal action by looking at the living standard impact on one of the victims does not capture the wide range of the impact of this kind of crime. In the same sense totalling up the impact on all the victims in order to assess the harm for the purposes of sentencing does not seem to be appropriate either. It would also be difficult to adequately assess the harm that is caused by a criminal action when the impact on the individual was small but the overall crime is large. A further example used to exemplify this category of crime is the company that fraudulently makes a few pence each from millions of individual victims. The crime would amount to the theft of millions of pounds and the loss to the general public would be great, but the impact on the individual victims would be minimal. Von Hirsch also refers to crimes such as tax fraud and crimes against animals and the environment as not being suitable for the living standard analysis approach. Von Hirsch and Jarborg conclude that “[t]here is no unitary account that can explain the harm dimension in all kinds of crime.” (Von Hirsch & Jareborg, 1991 p34)

6.5 Conclusion

Even with the acknowledgment that the living standard analysis does not provide a comprehensive approach to assessing all types criminal harm, for the purposes of seeing how it could be possible to sentence offenders within a communicative theory it does give a framework for proportionate sentencing. Indeed if Duff’s approach is followed, which does not require an exact grading of harms to determine the precise proportionate sentence then

the problems with the living standard analysis do not pose a particular concern. The living standard analysis can provide a useful way of assessing the harm caused by a crime within a range. This allows sentencers to look at harm caused by a crime in a general sense and make an assessment of which punishments could be an appropriate response to a specific crime.

In order to provide a comprehensive approach to how to determine a sentence, however, it is not just harm that needs to be considered. The harm caused is one aspect of how to achieve a proportionate sentence; the other is the culpability of the offender, which I will come on to in the next chapter.

Chapter 7

Culpability

The previous chapter provided an analysis of the concept of harm caused by criminal action and put forward an argument for using the living standard analysis, developed by Andrew von Hirsch and Nils Jarborg to assess the impact of harm in order to determine a proportionate sentence for offenders. In order to identify a proportionate sentence for an offender, there should be an assessment of the harm caused by the criminal action and also the culpability of the perpetrator. This will allow those enacting the sentence access to a range of possible sentences which could be chosen as punishments which will express the appropriate amount of censure to the offender, and for Duff, provide a substantive fit between the crime and the punishment in order to support the aims of repentance, reconciliation and reform.

In the previous chapter I outlined how criminal harm could be assessed and I outlined a methodology developed by von Hirsch and Jarborg, to grade harms in a way that expresses the concept of harm so as to capture the impact of that harm on the living standard of the victim. According to von Hirsch the living standard analysis could be used to provide a defined ranking of harms which could then be matched to a sentence, the seriousness of the harm caused the harsher the sentence required. (Von Hirsch, 1993 chp4) I argued that the living standard analysis can provide an appropriate framework for looking at the impact that crime has on its victims in terms of the harm caused, without having to construct a stringent and complex ranking of every crime. The impact of the crime on the

victim could be used to create zones of harm caused which could be matched to a range of sentences which could provide the substantive fit to the crime, which also reflects the principle of proportionality. Using the harm that is caused by a crime to make an assessment of the sentence required for an offender is not sufficient however to meet the principle of proportionality or to apportion the appropriate amount of blame on the offender. In order to get the full picture then an assessment needs to be made of the culpability of the offender.

In this chapter I will provide an analysis of a contemporary view of what it means for an offender to be culpable for a crime. I will argue that a grading of culpability can be developed in the same way that the living standard analysis grades harms. I will then argue that these two elements can be brought together to create a methodology which means that sentences can be determined in a way that is proportionate to the crimes they relate to and so express the correct censure to the offender. This can be achieved in a way that is consistent with Duff's view of proportionality in its negative sense, providing a framework for evaluating harm and culpability enabling punishments to match crimes in the way that Duff envisages. I will then raise the question of whether this method of discerning a sentence can be extended to the dangerous offender. The analysis of harm and culpability may provide a way of addressing the sentencing of dangerous offenders, by suggesting that dangerous offenders could be more culpable because they should reasonably be expected to be fully aware of the impact of their offending and I will come to examine what this means in detail in Chapter 9.

To achieve this I will analyse what it means to be culpable in the law in the UK and the US today. I will look at the possible different levels of culpability, and I examine the

relationship between responsibility, blameworthiness and culpability. After this I will look at the difference between using the culpability of the offender as opposed to the character of the offender in apportioning blame and sentencing. Making an analysis of culpability is worthwhile for two reasons, firstly culpability is something that the law has already taken an extensive interest in, so time and rigor has already been put into refining what it means. Secondly, as Duff makes clear, the communicative theory of punishment needs to be more than a theory. (Duff, 2001 chp5) For there to be a realistic possibility for punishment to be conceived of as communication in our society, then there will need to be extensive change in the way that the system currently works. Therefore aspects of the current system that can be used and built upon should be used and built upon. This would minimise the disruption caused by change and allow for the adjustments in policy and practice to happen in an incremental way. Culpability is one of those areas of the existing system that could be built upon and incorporated into a communicative theory of punishment.

Andrew von Hirsch states that part of the reason he developed the idea of the living standard analysis was because there had been little examination of the idea of criminal harm in philosophical writing unlike the idea of culpability which has been extensively examined in modern criminal law. In *Censure and Sanctions*, he asserts that substantial law already gives us clues on how a theory could begin to gauge criminal culpability in a similar way in which he has graded harm in the living standard analysis.

7.1 What is culpability?

The culpability of an offender is an examination of how fully and to what extent an offender is 'responsible' for the criminal act that has been committed. I will come on to look at the use of the term responsibility and whether it is the right sort of terminology shortly, but in

layman's terms the idea of the nature and the extent of the responsibility of the offender is a determining factor in whether they can legitimately be blameworthy for the harm caused through the commission of a criminal action. If we think back to the example that I used in talking about harm; the child who is deliberately pushed over in the playground is more aggrieved about the grazed knee than the child who falls over and grazes their knee in an accident. This is in part because the injury is caused by another who is deemed to be responsible for the injury. To extend this example further the child who pushes another in the playground, having planned the push in advance with the aim of the push being to cause the grazed knee, seems to be more responsible for the harm caused than the child who pushes the victim to the floor, causing the same injury, but with the intention of preventing the victim being hit in the face by a stray football. The child who causes the injury with the intention of affecting the pain on another is seen to be more culpable for that injury than the child who causes the same pain but for an altruistic motivation.

In order to satisfy the principle of proportionality in sentencing, even a negative view of proportionality, the deliberate, planned push is deserving of a more serious punishment, and blameworthiness than the push that was intended to prevent a further harm for the victim. Even though the injury (in the sense of the physical manifestation of the action; the graze) is the same in both cases, the assessment of the harm *and* culpability makes a difference to the punishment for the action. In this case the actual injury is the same, but the harm caused to the victim will be different, if the harm caused by the grievance at being deliberately hurt and the humiliation that goes along with that is taken into account. The culpability of the perpetrator is greater in the deliberate injury. The greater the harm and

the culpability in the commission of the crime, the more harsh the punishment should be to reflect the blameworthiness of the offender and the seriousness of the harm.

7.2 Culpability in Practise

I will now provide an analysis of how culpability is used in the criminal justice systems of the USA and the UK, who use the notion of culpability in similar ways. As I have stated above there is enough in existing law on culpability to usefully utilise this to develop a framework analogous to that seen in the previous chapter on harm. This analysis of culpability will also provide a lexicon with which to further discuss the role that culpability has in the sentencing of offenders and specifically dangerous offenders which I come on to in Chapter 9.

The example of the child being pushed in the playground is clearly not a full enough analysis of the idea of culpability and its impact on sentencing, so I will now outline and critique the current usage of culpability in the law and how this can be used, and is used, to influence sentencing. There is an array of terms that are regularly used when discussing the culpability of offenders. The level of culpability expressed through these terms ranges from the highest possible blameworthiness via intentional actions, to acting with purpose and/or with knowing, through to recklessness and negligence or indifference to the consequences of actions and finally to acting with carelessness. Andrew von Hirsch usefully provides a summary of the use of these legal terms for what he calls “non-lawyers” in *Past or Future Crimes*. He defines a purposeful act as one which is the culmination of the action that the person sets to achieve, “[i]f Smith sets about to kill Jones, and does so this is a purposeful killing.” (Von Hirsch, 1987 p71) Smith has the intention to kill Jones, Smith undertakes an action of his own free will that actually does kill Jones. The same act of killing is achieved knowingly if Smith is aware that his action will kill Jones, even if this was not his main

objective in doing so. To summarise the example that von Hirsch uses Smith has the intention to commit a robbery and shoots Jones in the course of that robbery. The primary aim of the action by Smith was to undertake the robbery, not to murder Jones, even though Smith knew that the action (of shooting) would result in the killing of Jones. There was no intent prior to the robbery to kill Jones, but Smith would reasonably have known that in shooting Jones then he could or would kill him. (Von Hirsch, 1987 p71)

The same action is undertaken recklessly if Smith should have known and it would be reasonable to suppose that he should have known, that his action could have caused the death of Jones, without having any intention of killing Jones or anyone else. So for example if Smith tries to shoot an animal in a crowd of people and happens to kill Jones rather than the animal, Smith acted recklessly and despite having no intention of killing Jones, Smith's action did result in the death of Jones. And finally negligence, this is where the action is undertaken with *disregard* to any perceived risk and again that it would be reasonably supposed that such risk should have been anticipated. (Von Hirsch, 1987 p71-72)

All these concepts examine the level of intention that is attributed to Smith in the killing of Jones and represent a different level of culpability for a criminal action. These examples highlight the importance of the intention of the agent when making a judgement as to the culpability of the offender. The idea that this intentionality of the action is linked to the agent's responsibility for the action is accepted in criminal law, as Moore, who has written extensively on the matter, outlines;

As the laws of both crime and torts recognise, doing some wrongful action because one intended to do it merits greater blame and more severe sanctions than doing that same wrongful action recklessly or negligently. (Moore, 2013 p181)

Intention requires the agent to have mens rea. Mens rea is a condition of criminal responsibility which entails that the knowledge of the circumstances of the criminal action is evident and/or that the perpetrator had reasonable, or should have had reasonable foresight of the consequences of that action or actions.

A key aspect of having the appropriate mens rea is that the action, or in some cases inaction (omissions), must be undertaken voluntarily. (Hart, 2008) This in itself may sound intuitive, because this is the sort of term that is used for common place discussions about responsibility for action. It is not, however a simple statement to say that an action is voluntary. First it should be noted that many offences do not require mens rea for the agent to be held culpable for the crime, these are known as crimes of strict liability. (Hart, 2008; Duff, 2009) Crimes in this category are those where actus reus is sufficient to be found guilty of the offence. So the mere undertaking of the act itself is all that is needed for the offender to be found guilty of the crime, with no need to inquire about the voluntariness or intentionality of the actions of the perpetrator. In these cases there is no need to demonstrate that the act was voluntarily undertaken or that the offender was aware of the action that they undertook was an offence. These offences are by and large less serious offences. Whether the perpetrator is aware, or should reasonably expected to be aware, of the crime they are committing and the potential consequences will be important when I come to look at how Duff might be able to tackle the sentencing of dangerous offenders.

So what does it mean to undertake an action voluntarily? In *Punishment and Responsibility*, Hart states that human actions are complex and how an individual comes to undertake a voluntary action is in itself complex. Trying to coherently articulate the commission of a voluntary action could, according to Hart, go something like this; a person

must form an intention, then control the physical action (moving of arms and legs and so forth), then the voluntary action requires an understanding of what you are doing and that by doing that thing, a specific action will happen. This is a complex set of requirements and according to Hart it is not entirely clear that this is what actually happens in the commission of a voluntary action. What Hart seems to be expressing is the idea that so-called voluntary actions may not be quite as considered by the agent, and so as voluntary as they may seem. Even if they are voluntary with the appropriate intentions etc, then it is difficult to describe the process in a way that could be applied in court to prove that an action was voluntary or not. (Hart, 2008 p30, p98-99)

In addition to inquiring into the voluntary nature of the action to assess the culpability of an offender, it is also reasonable to ask where does the intention to do an action (criminal or otherwise) come from in the first place? This raises a question of whether the intention formed by the agent itself has a cause (assuming that the intention is the cause of the action) and this leads to asking if the agent is acting with free will. If it is to be supposed that the actor in the commission of a crime, undertakes that action voluntarily then it does seem that the assumption is that the actor has free will and is perfectly at liberty to unilaterally perform that action or not, according to their own volition. The action of the offender can only truly be voluntary (in the sense of not being coerced by others but also in the sense of the offender voluntarily forming the intention to commit the action and then undertake that action) if the offender does have free will. There are of course those who deny that this is the case and thus argue for an entirely different view of justice and criminal responsibility. Nietzsche for example held the position that the law is a means of social control rather than being an upholder of any moral values that could be seen as more

than merely a construct of that particular society. Thus the idea that the criminal is acting within a moral framework and when committing a crime that runs contrary to the values of society are thus deserving of punishment, fails to understand the nature of the human condition. Nietzsche considered that punishment is a useful tool to ensure societal harmony, but it cannot be seen as a means to correct abhorrent behaviour because the behaviour of the offender could not have been any other way. (Sedgwick, 2013 chp4)

Although there is significant debate over the significance of free will to criminal responsibility this thesis is premised upon a communicative theory of punishment which presumes offenders have acted upon their own free will. (Duff, 2001) As such I will assume for the purposes of the remainder of the thesis that agents in the general sense are capable of free will. I will come to show however, that it *could* be the case that *dangerous* offenders could not act any other way than they do, and in that sense are not wholly responsible for their actions. Because of this imminent argument, it is essential at this stage to set out what it means to undertake actions, including criminal actions in a voluntary and intentional way.

To steer the discussion back to culpability, it could be that part of the requirement for a voluntary action, and thus an essential part of culpability, is that the actor has the right kind of intention (i.e. the intention to commit that specific action) and that the action taken is an expression of that intention. In order for culpability to be of the most serious sort (that the action must be purposeful) then it needs to be preceded, or connected to, volition or a pre-existing desire. The offender must act intentionally in order to be fully blameworthy, and certainly it could be said, and Duff would agree, that if an offender is to be considered a dangerous offender then they need to be culpable in this most serious way. (Hart, 2008)

p140-141) When an action is carried out intentionally it is this explicit intention of the offender which increases the overall blameworthiness of the agent.

So I have shown that in order for an action to be voluntary then it needs to be intended and that the actor has the right kind of intention. If that actor undertakes the actions voluntarily and with the right kind of intention then it could be said that they are responsible for that action. It is often stated that the offender is responsible for the harm caused, as I showed in the previous chapter on harm, and this is used as a justification for attributing blame for that harm. The actor intends the action, the action is undertaken and therefore the actor is responsible for the harm caused by that action. Being responsible for harm in the criminal sense is different however to being responsible for harm in any other sense; again let's turn to the example of the child being knocked over accidentally in the playground. Child A, who knocks over child B can be said to be responsible for the harm as it is their action that has caused the harm. This is not the same as saying that child A can be blamed in a moral sense for that harm however. There is a distinction between being responsible for the action that causes the harm and being responsible in a criminal sense. Turning again to Moore, he states that when talking about criminal harm "to be responsible for a harm is to be morally blameworthy for that harm." (Moore, 2013 p182) In this case child A is not morally blameworthy for the harm caused to child B, even though they have caused the harm. Criminal responsibility comes with the correct intention for causing the harm and the necessary and associated action which actually does cause the harm; it is this type of moral blameworthiness that denotes criminal responsibility.

Moore, in his article in *The Philosophical Foundations of the Criminal Law*, gives a detailed analysis of what is required to be criminally responsible for harm and I will briefly

summarise that analysis here. Later in the thesis I will use this analysis to provide substance to the argument that dangerous offenders are not necessarily *criminally* responsible and so morally blameworthy, even though they may be responsible for the harm that they cause. To summarise Moore's argument on criminal culpability in the most serious sense, the person must be a moral agent, and capable of rational autonomous thought and action. So they must be deemed to have the appropriate mental capacity and they cannot be a child in order to be criminally culpable. That moral agent is then guilty of the wrongdoing in the sense that the action they undertook was voluntary, that action caused an event or outcome, and that event or outcome is prohibited by the law. Also essential is that there is no reason why the moral agent had any permission or excuse to undertake the prohibited action. The moral agent is culpable if they are motivated by an intention to cause the prohibited event or outcome, or they should have reasonably believed or known that the event or outcome would be caused, and finally that the intention of the moral agent was formed in reasonable conditions which would have given the agent the opportunity not to perform the action. (Moore, 2013)

Responsibility in this criminal sense focuses again on the voluntary nature of the action, the intention and motivation of the actor. Moore states clearly that the agent is culpable in the most serious sense if they had an intention to cause the harm. This is not to say that an agent is not responsible for harm if they do not have this intention, even in the criminal sense, but this kind of intention to undertake the specific criminal action is needed if the agent is culpable of the most serious of crimes. To exemplify what is meant by this, consider a case that has been highlighted by the media in the UK. A driver of a lorry was found guilty and received a ten year prison sentence for killing a family in a car that he hit

whilst driving his lorry. The crash was caused by the driver because he failed to notice that the cars in front of him had stopped in traffic as he was looking at his mobile phone. He caused the crash and was responsible for killing the family, but he did not *intend* that his actions cause the death of the family. He was responsible in the sense that his actions caused the deaths and he was culpable in the sense that he should reasonably have been expected to understand that his actions *could* cause such a crash. He was therefore, reckless in looking at this mobile phone whilst driving and he was blameworthy for the deaths of the family in this manner. He did not, however, have the appropriate kind of intention to be culpable for the deaths in the most serious sense. He did not intend the deaths and so could not be culpable for murder. Intending that criminal harm be caused engenders increased culpability over and above foreseeing harm or being willing to risk harm will happen. Moore states, "It is in this way that intention is the marker of the most serious culpability, and in this way that intention increases overall blameworthiness." (Moore, 2013 p183)

In addition to the intentional state of the agent in committing a crime it is often asked what motivated the offender to act in the way that they did and this too has a bearing in some instances on the type of responsibility that the agent has for the act and so the kind of punishment they deserve. Looking at how involuntary acts are described is useful for showing the difference between motivational states and intentional states. Involuntary acts, such as decisions and actions that are undertaken under duress, are regarded in the law as intentional actions. The difference between being fully criminally responsible or not, comes when looking at the motivational state of the agent. The law would ask whether the agent was culpable for the action and they would be, in the sense that they did have the intention to undertake the action and they did perform that action. It could however, then be asked

what was the motivational state of the agent? If the agent undertakes a criminal action for example, A steals all the money from the safe in the bank that they work in and this is done whilst A's family are all being held at gun point. A reasonably believes that her family are all going to be killed if she does not steal all the money from the safe. In this instance A is acting under duress and although A has the intention to steal all the money, and does take all the money, A would lack the right kind of motivation for the most serious kind of culpability or even to be culpable for the criminal action at all. In this instance A would be said to be acting under duress and would not be culpable in the same sort of way as B who intended to steal the money, did so and was motivated by wanting to live a luxury lifestyle. In these cases the intention and the action are the same but A is not culpable for the crime in the same way as B. Refer back to Moore's description of what makes someone responsible for a crime; it would seem that A was not given a fair opportunity to act in a different way.

In addition to having the right kind of intention and motivation, in order to be able to say that an agent is culpable in the most serious sense, it needs to be clear that the intentions formed by the agent have an object and that object matches the intention. What this means when looking at the commission of a criminal act, is that for the agent to be culpable in the most serious way then the intention of the agent needs to match the actual crime committed: the object. When A picks up the gun to shoot B at that moment (or at least in the moment directly preceding the commission of the act) A needs to have the intention to kill B to be culpable for the crime of killing B. It would not be enough for A to have the intention to injure or scare B, and then go on to kill B. To be culpable in the specific most serious sense then A has to have the intention to kill B and then kill B using the gun. In

these cases the intention to do some other action (or object) would not be enough to be culpable at the highest level; they would be culpable in a lesser sense. Think of the offender who kills someone in the commission of a robbery, the intention was to undertake a robbery; this was the object of the intention, the killing was not the object of the intention. In order to be culpable at the highest level, then the crime intended needs to be the crime committed. As Moore states the “[p]rima facie, the object of the prohibited intention must match the actus reus of the type of offence charged, not any other offence.” (Moore, 2013 p194)

An obvious problem for criminal prosecution, and then the determination of the sentence based on the harm caused and culpability of the offender, is the know-ability of the mind and so the intention of the agent. In order to assess the culpability of an offender then it would be neat if the criminal justice system had access to the thoughts and content of the offender’s mind, in order to make a sound judgement about their intention and whether it matches the object. This knowledge is currently not available, so courts rely on the evidence that is available to make inference about the intention of the offender. It is possible to make an assessment about the intention of the offender from evidence from the offender themselves, from evidence from others or from making assumptions on the basis of the actions of the offenders. So if A had stated to C that they intended to kill B and then goes ahead and does kill B, then it can be assumed that A had the intention to kill B and did in fact carry out that action. Or it could be that A had a sufficient motivation for killing B (B had stolen all of A’s money for example), and then does kill B, again it could be assumed that A had the right kind of intention to kill B. There are ways in which it is possible to make an assessment about the intention of an offender prior to committing offences.

There are clearly different characteristics of intentionality which represent different states of knowledge of the action undertaken and its consequences. All of these aspects need to be examined when making an assessment of the culpability of the offender and as I stated above, there are some familiar terms with regards to the states of intention in relation to criminal harm. These levels could be constructed into a framework of grading in a similar way that I outlined in the previous chapter on harm for use in the living standard analysis. These levels of culpability as they are broadly conceived of in the criminal law in both the US and UK and are outlined below.

Specific intent – this characterises the most explicit type of intent to cause the precise physical action that was envisaged to be caused by the agent.

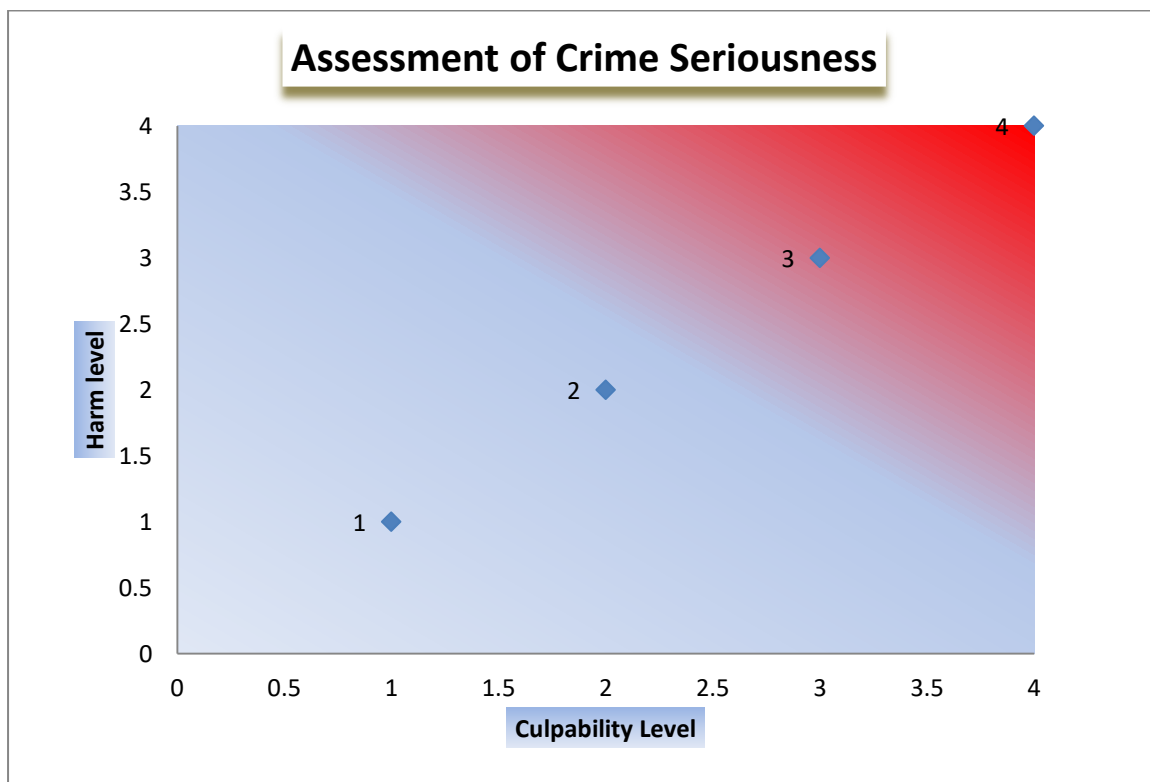
Knowledge of or general intent – to have intent which is general, rather than specific, then the agent has to have the intention to commit a crime with a belief to certainty that an outcome would occur but not necessarily the exact harm that occurs.

Malice or recklessness – this is the belief by the agent that there is a risk, but not having the specific or general intent to cause the exact harm.

Negligence – with cases of negligence then the agent should have believed there is or was risk.

Strict liability – cases of strict liability do not require that the agent be shown to have any intent with regards to the outcome. Examples of this kind of crime are driving without insurance and similar such crimes. (Moore, 2013 p200)

The most serious level of culpability for the commission of a criminal act requires the highest level of intention and motivation from the offender. What can be seen in looking at the level of culpability outlined above is that the seriousness of the culpability is lessened as you move down the scale and (outside of those offences of strict liability) could be mapped against the levels of harm outlined in the previous chapter to create a grid system where it would be possible to assess both culpability and harm together to provide a guideline for the types and seriousness of sentence that would be appropriate for crimes of differing harm and culpability. This is something which von Hirsch suggests could be done and outlines in the design of sentencing frameworks in *Censure and Sanctions*, and for harm in *Past or Future Crimes* (p23). If such a grid system were constructed it could look something like this:-



The horizontal axis of this graph shows the four levels of culpability, leaving out the level that denotes crimes of strict liability, 1 being the least serious type of culpability with 4

being the most serious. The vertical axis represents the living standard analysis conception of harm again level 1 to 4, with 1 being the least serious harm and 4 being the most serious. (Reversed from the level sequence envisaged by von Hirsch and Jarborg where 1 was the most serious harm and 4 the least serious in order to allow for comparison with the levels of culpability within in the graph.) It is then possible to plot the harm and culpability of individual crimes on the graph following an assessment of both. I have included 0.5 of the levels as well in order to be more precise. So simply put point 1 as depicted above is a low culpability level and a low harm level so it can be assessed that this is a low seriousness crime, the graph moves through higher levels of culpability and higher harm caused, this increases the seriousness of the crime until we get to the red shaded area and point 4, which denotes the most serious crimes. The crimes which have a high level of harm caused and culpability of offender, these in the red zone would be most serious offences would attract the harshest sentences. The culpability levels outlined above and the living standard analysis from the previous chapter could be used to make an assessment as to which crimes are the most serious, both in terms of the harm caused and the culpability of the offender. Plotted on this graph it could be determined which crimes should attract the most serious sentences, according to which square or squares they fall on the graph. This method, suggested by von Hirsch could provide a practical way of ensuring that sentences meet the principle of proportionality and so convey the appropriate amount of censure.

7.3 Character or Culpability

This chapter has been devoted to an analysis of the role that culpability plays in assessing the seriousness of a crime and using this judgement combined with an assessment of the harm caused to determine the severity of the sentence. As I have shown above it would be

possible to map the harm caused by the crime in conjunction with an assessment of the culpability of the offender to help the decision making of sentencers, ensuring that the punishment was proportionate to the crime in a way that expressed the appropriate amount of censure to the offender, and to the community. If the punishment is disproportionate then the amount of censure communicated with the offender does not match the blameworthiness of the offender and thus does not reflect the kind of censure deserved by the crime. This is within the context of Duff's view of proportionality, which as I have shown aims to ensure that the sentence is negatively proportionate, rather than a strict view of proportionality, so a range of sentences all of which could be proportionate, or at least not disproportionate, should be made available to sentencers. (Duff, 2001 p137-139) One of the problems that this presents in the punishment of our most serious and dangerous offenders, is that the desired punishment may not be the same as the deserved punishment according to the methodology outlined above. By this I mean that if the harm caused and the culpability of the offender is assessed with reference to the crime for which the offender is currently being punished, then the resulting zone in which proportionate sentences sit (see the graph above) may not present those deciding on the sentence with what would be considered a harsh enough sentence for dangerous offenders; dangerous offenders being those who have a persistent pattern of serious violent offending behaviour. Although I have made the case for the use of harm and culpability in the assessment of the severity of the sentence ensuring adherence to the principles of proportionality, there are alternative methods of assessment used in the criminal justice system today that could have an impact on the view of the culpability of the offender. In this short section I will analyse the use of the idea that the character of the offender has a bearing on the culpability of the offender. This is a theme that I will expand on in the next chapter as well. Here,

however, I will argue that using the character of the offender to justify harsher punishment is open to significant challenge and does not clearly sit within the principle of proportionality. In the forthcoming chapters I will suggest that a different concept of culpability and the dangerous offender might provide a solution to Duff's problems with the sentencing of dangerous offenders.

It is clear from what has already been outlined in this chapter that the culpability of the offender is seen in direct relation to their conduct in a specific situation, conduct that takes place at a specified time and place, i.e. when the criminal action took place and the moments preceding it. The questions asked are, what was the offenders' motivation, what was their intention and did this directly translate that to the action that has taken place? This satisfies the desert-based element of Duff's theory of punishment, in that the question of the culpability (and/or guilt) of the offender is thought of in relation to the crime that they have committed and are currently answering for. This is not the case when an assessment of an offender's character is also taken into consideration. Information about the character of the offender, or accused person, could include evidence of so called 'bad character' (Lacey, 2013) as was seen in the Criminal Justice Act 2003 which was examined in Chapter 4. This type of evidence could include information about previous convictions, but could also be information about membership of certain groups or gangs. This kind of evidence is used to support assertions of bad character in the offender, for example evidence of a violent disposition could be demonstrated by proof of previous convictions for violent offences, or complaints made or arrests without convictions. It could also extend, as I will show below, to evidence of violent tendencies which could be provided by being associated with other people who have convictions for past violent behaviour. What courts

may do is show that having previous violent convictions or membership of a certain gang may be evidence that the offender is more culpable. These considerations are then used to make a judgement that the actions of the agent were in some way more blameworthy than would be if the offender had not shown evidence of such behaviour. Nicola Lacey believes that the use of an assessment of the character of the offender rather than the culpability of the offender is seeing somewhat of a resurgence in sentencing policy and practice. Lacey states that

“[t]he rationale for allowing evidence of bad character is obvious enough: it is that past manifestations of bad or vicious character are relevant to the proof of responsibility.” (Lacey, 2013 p157)

There are examples of where judgements of character are used in the criminal law of the UK today to determine sentences post-conviction, and in determining guilt. The Criminal Justice and Courts Act 2015 has introduced a mandatory custodial sentence for a second conviction of possession of an offensive weapon or bladed article. The introduction and use of such mandatory sentences extends the assessment of culpability of the offender beyond a judgement about culpability for the crime that the offender has been convicted of in this instance, to take into account the past behaviour and conduct of the offender at some other time for which, presumably, they would have already been punished. The second conviction for the offence of possession of the weapon is seemingly evidence enough of the bad character of the offender, which then results in a sentence that may be more harsh than if the offender had not demonstrated such previous behaviour. The thinking behind the mandatory element of the sentence is clear; it is hoped by the state that this would act as a deterrent from future offending by those who have been convicted of a first offence, but is

also sends the message that those who demonstrate this kind of behaviour on more than one occasion are more blameworthy in some way. This mandatory element of the sentence clearly does not fit comfortably with the idea of proportionality in sentencing, as was outlined in Chapter 5, or the idea that offenders should be punished on the basis of the harm caused by the crime currently under consideration and the culpability of the offender in those circumstances.

There are other ways in which evidence of bad character can, and is, used in the criminal justice system of the UK today particularly in relation to the sentencing of offenders. The idea of guilt by association, or joint enterprise is enshrined in the Serious Crime Act 2007 and allows for those who assist or encourage a serious crime to be sentenced for the crime, even though they are not the agent committing the offence. It is also not necessary for the assister or encourager to be physically present at the scene of the crime although it has been more usual for this particular piece of legislation to be used when looking at convictions for serious crimes committed by gangs involving multiple people at the scene of a crime when it is not always clear who has actually been the perpetrator. Here the evidence that the person in question has a bad character comes from their association with others who also have a bad character. There has recently been a high court appeal in the UK to overturn a number of convictions of joint enterprise. These actions have to date been unsuccessful. The mere fact that a person is a member of a gang and was at the scene of a serious crime committed by a gang member is sufficient for a conviction for a serious offence. It would seem that this is partly because this could be evidence of their character and are therefore deemed responsible in a way that a non-gang member would not be. In these cases the direct culpability of the offender is not necessarily taken

into account when convicting or sentencing. Although the legislation is clear that the person involved in the joint enterprise must be aware or at least not unaware, that the offence is taking place. This does not seem to be sufficient to satisfy the ideas outlined above that culpability is directly related to the intention of the agent in addition to the voluntary nature of the commission of the action. In cases of joint enterprise it does not seem clear that the agent has the right kind of intent, or that she has any direct control over the action of the person committing the actual crime, and not in the sense that it is voluntary.

In addition to the crime of joint enterprise, the Serious Crime Act 2007 also creates the provision for crime prevention orders, which allow for the restriction the activities of those who have been convicted of a serious crime, or if it is reasonably suspected that the order would prevent the commission of a serious crime. Such restrictions include where the subject of the order can go, how they arrange their finances and with whom they communicate and by what means. This is a further example, in the modern criminal justice system, of evidence of the so called bad character of the offender being used to place restrictions on them. The kinds of restrictions which are allowed through the orders could be seen as tantamount to punishment, even after the offenders' sentence has been spent and/or before they have committed an offence at all. I am not questioning the fact that the state has the right and a duty to protect the public and to prevent serious crime where possible. This should however, be balanced against the rights of an individual to be accepted back into the community following the serving of a sentence and not to be punished prior to the commission of an offence.

It would seem that the imposition of such orders is done on the basis of evidence of the bad character of the person, rather than on an examination of the knowledge, actions

and intentions of the agent and then censure being attributed on the basis of the harm caused and culpability of the offender. As Lacey outlines,

It is assumed that it is a fundamental of criminal law in a liberal democracy that criminal responsibility pertains only to voluntary acts (or more rarely omissions), and that this is inconsistent with the criminalisation of status. (Lacey, 1988 p161)

When looking at provision under the 2007 Act, and other legislation which requires mandatory imprisonment for multiple offences as outlined above, it is clear that the status of individuals is used as a means to identify guilt rather than an assessment of whether the commission of a voluntary criminal act has taken place. This is also true of the criminalisation of groups of people, such as prostitutes or homeless people, which despite being covered in an act of parliament dating back to 1824 is still used in modern times. More recently it has been the case that groups such as illegal migrants and terrorists are being convicted because of their status as part of this group of people. These types of laws allow for the punishment of members of certain groups of people because of their status as a member of such a group. This is seemingly diminishing the role of culpability for the actual crime in the conviction and sentencing of offenders.

Increasing a sentence because of the status of a person as being part of group could also extend to the sentencing of dangerous offenders. As I will show in the next chapter attempts to justify the incapacitation of dangerous offenders is often done with reference to their status as being dangerous, which depending on how you frame the definition of dangerousness, often relies on evidence such as that outlined above for those of so called bad character. The position with dangerous offenders, however, is slightly different perhaps because it is clear that in many cases involving those who are characterised as terrorists or

dangerous offenders a serious crime has indeed taken place. As Lacey highlights however, it seems to be the case that in these instances the offenders are afforded extra blameworthiness and so harsher or longer sentences because of their status as dangerous. (Lacey, 2013) As I highlighted in the chapter looking at how dangerous offenders are treated today, provision is made in legislation in the UK to allow for additional or extended sentencing for those who are convicted of an offence when that offence is racially motivated or motivated by hate for other groups of the community, or there is evidence of previous convictions. The issue with this approach, particularly in relation to indeterminate sentences, is that it poses a particular issue for communicative theories of punishment because of the need to adhere to the principle of proportionality.

There are two main difficulties with using a judgement of a person's character to determine the harshness of a sentence rather than their culpability of the crime; firstly it does not seem to fit with the principle of proportionality, even if taken in the negative sense as Duff does; and secondly it assumes that those of bad character or the dangerous are more blameworthy somehow for the offence than those who have no evidence of dangerousness or bad character. The first of these is difficult to overcome, however if the second of these problems is tackled then the first ceases to be a problem.

7.4 Conclusion

I have argued in this chapter that to be culpable in the most serious sense the offender needs to have the right kind of intention to commit the crime in question and this intention needs to match the object of that intent. They need to be motivated in the right way, the action needs to be voluntary and they need to be responsible for that action morally. If the offender commits the crime with all of these elements in place then they can be said to be

culpable in the most serious way. They are in full knowledge of what they are doing and what will happen if they undertake that action. If this is then coupled, and for the purposes of sentencing, with the living standard analysis as outlined in the previous chapter, then it would be possible to construct a view that if a criminal acted in a way that meant that they caused the most serious kind of level one subsistence level, harm *and* they were culpable in the most serious sense, then they could be said to have committed the most serious kinds of crime and so would be deserving of the harshest sentence. Now it could be the case that this most serious and dangerous kind of crime is committed by dangerous offenders. It could then be said that these kinds of crimes should attract the harshest kinds of sentences available and that this would be entirely in line with the principle of proportionality. There is a sense however that this approach, giving these kinds of offenders the harshest sentence, would still not address the issue of the character of dangerous offenders and what Duff refers to as a virtual assault on the values of the community by their repeat offending. How then can progress be made on the punishment of dangerous offenders within a communicative theory of punishment? I will try to address this in the next chapter when I look at the role that Duff sees for the incapacitation of dangerous offenders.

Chapter 8

Incapacitation

In this chapter I will outline Duff's argument that in some very specific circumstances dangerous offenders, those offenders who have demonstrated a pattern of persistent serious offending could be incapacitated.¹⁰ Duff tentatively suggests that this incapacitation could be justified within a communicative approach to punishment. The justification for incapacitation sits in parallel to the sentencing of the majority of other offenders which could be based on an assessment of harm and culpability as outlined in the previous two chapters. I will argue that Duff's argument for the incapacitation of dangerous offenders is not satisfactory and in the next chapter I will show that there could be other avenues that a communicative theory could pursue to achieve the same end. Before I outline Duff's justification for incapacitation and why I suggest it does not work, I will look at the provenance of the idea that certain offenders should be incapacitated, which will enable me to place Duff's view within the context of the wider debate of incapacitation.

8.1 Sentencing theory for Duff

A central pillar of Duff's theory of communicative punishment is that punishment is a form of secular penance aimed at repentance, reconciliation and reform. Duff's theory is broadly retributive and so backward looking (i.e. a deontological approach which states that punishment is a deserved response to a crime). He is also clear that there is an element of

¹⁰ Incapacitation within this context means the removal of offenders from the community, most likely to prison, the result being that they are incapable of offending against the community and its members whilst incapacitated.

the theory that is forward looking. This is evident through the process of penance which will necessarily involve the offender reaching an understanding that the future conduct of the offender as a moral agent should ideally be modified. The principle of proportionality is also crucial to the communicative process of repentance. Proportionality in sentencing is achieved through the nature and seriousness of the punishment reflecting the appropriate level of censure. In order to attain this, the sentence, must be at the very least proportionate in an ordinal way (relatively proportionate) if not necessarily in a cardinal sense (absolutely proportionate). The way to attain this kind of proportionate sentence has been outlined in the previous two chapters through undertaking an assessment of the harm caused to the victim, or victims, of crime and the culpability of the offender who caused the harm. The harm done during the commission of the crime is assessed, ideally through using the living standard analysis and a judgement is made about the culpability of the offender. (Von Hirsch & Jareborg, 1991)

In order to make a fair and just calculation of the type and level of punishment that is appropriate for each crime then harm and culpability need to be taken into account and an appropriate sentence decided upon and enacted. Although harm and culpability are considerations in most just systems of punishment, the extent to which these factors are given precedence over other factors, such as the deterrent efficacy of sentencing, is variable. I have shown that other considerations could be, and are, taken into account during sentencing, such as the impact that the sentence could have on broader crime reduction aims or an assessment of the character of the offender, and I have argued that such factors should not make up part of the deliberation of the sentence.

This analysis outlines how a criminal justice system could develop and implement a sentencing structure which has proportionate sentences. This model of punishment works for the vast majority of offenders and a system could be developed that formally acknowledges and outlines the necessary process for taking harm and culpability into account when choosing sentences for offenders. The model could be drafted in guidance for courts, and other parts of the criminal justice system, and sentences that adhered to these guidelines could be proportionate in the sort of way envisaged by communicative theories of punishment. The sentence would, therefore, express the sort of censure required and in the case of Duff's theory, encourage the type of penitent endeavour that would help offenders to understand their wrong and bring them to see that such action should cease.

Where does this conception of sentencing theory leave the sentencing of dangerous offenders? Duff argues that the issue with the sentencing of dangerous offenders is that the method of determining a sentence outlined above, may not be appropriate in cases where the offender is dangerous. (Duff, 2001 p170-175) What would we say to the family of a victim and the victim themselves, of a dangerous offender who goes on to commit another serious crime after they had served the standard sentence for their crime? How can we account for the lack of response and engagement from those offenders who display a pattern of offending but seem uninterested, or incapable of repentance, reconciliation and reform? A familiar response is to say that these offenders should be in prison indefinitely, meaning that they would be unable to commit any offence against a member of the public. An example of this, which we have already looked at, is the indeterminate sentences in the UK under the Criminal Justice Act 2003. The thinking behind the mandatory sentences outlined in the Criminal Justice Act, and other types of incapacitative approaches to

sentencing is nearly always with a view to prevent more crimes from being committed. Does this provide a solution to the problem of dangerous offenders?

8.2 Incapacitation: a solution to dangerous re-offending?

The idea that offenders, and not just dangerous offenders, should be incapacitated, thus preventing them from re-offending is not a new idea in criminal justice theory. There is however, limited research into the efficacy of incapacitation. If a criminal justice system or a theory of punishment is to successfully justify the use of incapacitation because of its crime prevention qualities then it is important that efforts are made to demonstrate the efficacy of the method, alongside consideration as to whether it is ethically justifiable. I will give a brief analysis of a proportion of the research that has been undertaken on incapacitation in this section and will then come on to look at the issues, and controversy, that this research has generated before I come on to discuss Duff's differing view on incapacitation. I will argue against the justification of incapacitation as a means of crime reduction, on the basis that there is little evidence to suggest that it works as a method of crime reduction and even if it did reduce crime, incapacitation for crime reduction is not consistent with the principles of justice and autonomy within a liberal society nor with the key principle of proportionality.

The idea behind incapacitation is simple enough; those who are responsible for committing crimes should be removed from free access to the community as a means of preventing future crimes being committed by that individual. They would, of course, be able to commit crimes whilst incapacitated against those who are around them, either in prison or in whatever facility or capacity through which they are removed from the community. They will largely not be able to commit crimes against the general public (the exception to this could of course be cybercrime or crimes which involve instructing or coercing others to

commit crimes). The thinking is therefore that through the process of incapacitation harm will be prevented from being inflicted on other members of the community by offenders for the duration of their incapacitation. The justification for incapacitation is most often consequential in nature, in that the aim of incapacitating an offender is to prevent crime, and so harm, in the future.

Incapacitation can be achieved through a variety of means, such as house arrest or in a more limited way through the use of curfews or tagging. Incapacitation could also be achieved through more extreme methods, such as inflicting serious physical harm to the offender which means that they physically could not commit more crime or through capital punishment. I do not intend to look at these forms of incapacitation individually in this chapter. It is more usual in the majority, although not all Western democracies, to associate incapacitation with the use of imprisonment, and it is this method of incapacitation that I will focus on in this chapter. This is primarily because imprisonment is the most prevalent form of incapacitation and generally regarded by policy makers and governments as the most effective form of incapacitation (which is not the death penalty).

There has been, as we have seen in chapter 4, a tendency for successive governments to rely on imprisonment as a form of punishment. There has consequently been an increase in the prison population in both the UK and the US in recent decades. Zimmering and Hawkins, in their book *Incapacitation*, highlight that this is most likely to be because incapacitation offers “[t]he capacity to control rather than influence [and this] is the most important reason for the great and persistent popularity of incapacitation as a penal method.” (Zimmering & Hawkins, 1995 p158) By incapacitating the offender there is no need for governments to rely on other methods of reform or rehabilitation in order to have

an impact on the immediate behaviour of those who would commit crimes. By incapacitating the offender it is possible to be sure that the particular individual will not be committing crimes which could harm the general public. It is this reasoning that has made incapacitation through imprisonment and increasingly through methods such as tagging, a popular method of crime control.

There are broadly considered to be two types of incapacitation. General incapacitation which is an approach that looks at the aggregate benefit of crime prevention by removing large numbers of offenders from the community in order to create an overall impact on the numbers of crimes committed; and special incapacitation which is an approach that seeks in various ways, to identify those offenders who have either committed a disproportionately large number of crimes or who are considered as dangerous and incapacitate this smaller number of offenders in an effort to have a disproportionate impact on the crime rate. Incapacitation theory in the modern era has broadly focused on special incapacitation. The approach has a number of difficulties, which I will come on to examine in detail but briefly the problems with special incapacitation start with the issue of defining who it is that should be incapacitated. It is very difficult to predict which offenders will be dangerous in the future and will go on to commit more offences and if that group of offenders is identified how would a justification be constructed which enables them to be sentenced in a different way to other offenders who have committed the same offences but are not considered dangerous? I will consider these problems for incapacitation in the analysis below, first I will consider the evidence for the use of incapacitation through looking at the research that has been undertaken to build a case for the use of incapacitation.

Research in the area of incapacitation has tended to focus on a small number of studies, the most renowned being the work undertaken by the Rand Corporation led by Peter Greenwood, published in 1982. (Greenwood, 1982) It was Greenwood who first coined the phrase selective incapacitation, because he calculated that if incapacitation was targeted at those offenders who commit the most crimes and who pose the highest risk of future criminality, then the impact on the overall crime rate from incapacitation methods such as imprisonment, would be the greatest. The study focused its research in California, USA, with comparisons with some other states in America including Texas and Michigan, through the 1970s and 80s. The study relied on survey research from criminals who were already in prison, asking them to self-report on the number of crimes that they commit regardless of whether they had been arrested or charged with those offences. The study concentrated on a limited group of crimes. (Zimring & Hawkins, 1995)

Setting aside for the moment principled problems with the use of incapacitation, there are obviously a number of issues with the methodology of this research. The trustworthiness and accuracy of the information gained from those who were involved in the study could understandably be called into question. It could be assumed that those offenders who were already in prison would tend to under-report the number of offences that they were previously involved with in order to avoid being incriminated for additional offences. It could just as easily however be the case that they may over report criminal involvement as a boastful effort, or equally likely they could just fail to accurately recall all the criminal activity that they have undertaken. As many of the self-reported offences are not subject to criminal justice processes, such as arrest or crime reports which can be

quantified, it is therefore hard to verify much of the information reported through the study.

In addition there is a tendency to over predict the rate of re-offending that will occur when offenders are released back into the community. This is partly because of the type of offenders that are targeting through selective incapacitation. There are various ways to define 'dangerous offender', and I will show below that the RAND study developed seven factors that indicate the likelihood of re-offending and dangerousness. Whichever definition is used, even with quite broad and wide ranging definitions the actual number of dangerous offences that are committed is relatively small, in comparison to offending more generally. In studies such as that undertaken by RAND this makes it difficult to produce a data set that is big enough to accurately predict the possible offences that could have taken place if the offenders in the study were not in prison. The small numbers of subjects involved in the data set also makes it hard to construct a list of factors that these offenders have in common in a way that is predictive about their offending behaviour. (Von Hirsch & Ashworth, 2000 p93-94; Wilson, 2000 p117) In essence, focusing solely on those offenders who are in prison already does not provide a representative sample for the research. It is not reliable to make assumptions about the activities of those offenders outside of the prison system based on the self-reporting of offenders who are *in* the system. Despite these issues the RAND study did conclude that a large number of crimes would be prevented by incapacitating those offenders who commit the most crimes. These results have been called into question by a number of subsequent studies and analysis including work by Zimmering and Hawkins and von Hirsch. (Von Hirsch, 1987; Zimering & Hawkins, 1995)

The RAND Corporation research is not the only study to look at the possible benefits of incapacitating offenders in order to reduce crime. Other research has attempted to use official records of criminal recidivism in order to avoid the problems associated with the inaccuracy of research relying in self-reporting. A study in the US used the data from the Federal Bureau of Investigation (FBI) to look at how many crimes would have been prevented if offenders had been given the maximum possible sentence for their current crime. (Zimring & Hawkins, 1995) The problem with this approach are also obvious; unless the individuals in question are then arrested and/or charged with offences following their release then they would not show up in official statistics. So in the absence of accurate information from the individuals directly outlining the number of offences they have been involved with then statistics themselves would only give a partial picture of offending behaviour. It would seem unlikely that the individuals involved would be prepared to give an accurate reflection of their offending behaviour due to the fear of prosecution.

Zimring and Hawkins also undertook research on the efficacy of incapacitation, which is outlined in their book on the subject; *Incapacitation*. In their view, both research methodologies outlined above do not adequately capture the information that is needed to show whether incapacitation does actually reduce crime. Their preferred methodology would be one which compares crime rates across two different communities at the same time whilst one uses incapacitative methods and the other does not, or to look at the same community and its crime rates at different times when incapacitation is used and when it is not a policy for crime prevention. As with many policy interventions, however, it is difficult to demonstrate a causal relationship between changes made and any quantifiable or measureable impact. As Zimring and Hawkins point out there are many factors which

could have an impact on crime rates that are likely to have nothing to do with the number of people incapacitated or the type of people that are incapacitated. As I have demonstrated in Chapter 4, there is little evidence to suggest that the increase in prison populations in the US and UK are causally related to the broadly decreasing crime rates, other socio-economic factors are probably involved and it is very unlikely that one factor alone (including incapacitation) is responsible for the changes. In response to this problem Zimmering and Hawkins favour the use of multiple assessments and repeat trials as a way of establishing whether there is any causal relationship between policy changes and impact.

Like the RAND Corporation study published the decade before, Zimmering and Hawkins's research looked at the impact of imprisonment on crime rates in California, US but during a slightly later period in the 1980s and 90s. The results of their work showed that there was a reduction in burglary and larceny (theft from the person) during the period of the study, and that there was a negligible change on robbery, homicide, assault and auto theft. (Zimmering & Hawkins, 1995 p101) Their work concluded however that the reason behind this change in crime rates was not likely to be caused by incapacitation. It was not possible to conclude that the decrease in crime rates was due to the dramatic increase in the use of prison or jail, due to the difference in arrest rates between adult and young offenders. During the period of the study, the policy was to increase the number of adults imprisoned for burglary but this was not the case for young offenders. If the change in crime rates was caused by incapacitation you would expect to see the number of adults arrested decrease. In fact it increased by 19% with young offender arrests decreasing despite their lower imprisonment rates. Zimmering and Hawkins conceded that it was not clear why this pattern emerged. (Zimmering & Hawkins, 1995 p125) As with the other two studies

highlighted here, it seems difficult to prove that incapacitation does lead to a reduction in crime rates.

8.3 The Problem with Incapacitation

Despite the best efforts of researchers, a small sample of which are outlined above, it seems that there is little evidence for the efficacy of incapacitation as a method of crime reduction. There are a number of reasons why the incapacitative approach does not work when the aim and the justification is to make an impact on the general crime rate. As I have stated above if the justification for using incapacitation as a means of determining a sentence that is longer than the normal sentence would be for that offence, then it is important to show that the method does actually reduce crime. It has been shown above that it does seem to be difficult to show that incapacitation leads to a demonstrable reduction in crime and the basic reason for this is that crime does not operate in a constant, linear and predictable fashion. By and large offenders do not approach crime in the same way that a factory owner would approach production of merchandise. By this I mean that those committing crime do not set targets for the number of crimes that they aim to commit over a given period and then set about doing this, allowing for an easy measurement of the numbers and types of crime that would have been committed if they had not been in prison. What is known is that individual offenders very rarely specialise in one type of crime, making assumptions about the type of crimes that could be reduced by incapacitation very difficult. (Wilson, 2000 p117) It is also the case that individuals often do not have long criminal careers. (Von Hirsch, 2000 p121) It is more usual that offenders commit more crimes when they are younger and as they get older the numbers of crime committed reduces. This means that it is futile to estimate the numbers of crimes that could be prevented if certain offenders are

incapacitated for a defined period of time. It could very easily be the case that the offender would not go on to commit crimes at the same sort of rate that they had in previous years, if at all.

The problems for the justification of incapacitation do not end there however, as there are many types of crimes which will just be committed by someone else if an individual offender is incapacitated. This is particularly the case with organised criminal activities such as drugs, organised prostitution and other crimes committed by criminal gangs. (This type of crime could sit outside of the assumptions that I made above in relation to individual offending, it may be possible to predict the crime rates and patterns of criminal gangs which can be organised and operated with a defined business model). (Wilson, 2000) As soon as one offender is taken off the streets and put into prison, the criminal gang is able to replace them with someone else, thus having no impact on the overall crime rate despite the fact that a particular offender has been imprisoned and will no longer be able to commit any offences. Again this makes assumptions about reductions in crime due to the effect of individual incapacitation problematic.

Finally it has also been shown that young offenders in particular tend to commit crime in groups, meaning that if one of this group is taken off the streets there is no guarantee that the rest of the group will desist from offending. (Zimring & Hawkins, 1995 p92) This is not the case of course with all types of crimes and it is difficult to stretch this view to crimes such as sexual offences, and some violent offences that sit outside of organised criminal activity. This analysis does lead, however, to the conclusion that there is no reason to believe that incapacitation will lead to an overall reduction in crime and it is very difficult to make the assumption that crime will be reduced by the removal of

individual offenders from the community. Even if this assumption is made it is very difficult to make an accurate prediction about the level of the reduction in crime that could be achieved by incapacitating an offender. Without this it is difficult to justify the introduction of incapacitation as a method of crime reduction.

The difficulties of making presumptions about the overall reduction in crime rates that could be achieved through incapacitation are further compounded by a more pressing problem for incapacitation if it is justified as a means of crime reduction: that of the possibility of false positives. Linked closely to the problems highlighted above about the erratic way that many offenders commit crime, it is very likely that many offenders that are imprisoned in order to ensure that they never commit any offence in the future, would never actually go on to commit an offence. It could be said that in these instances offenders are being punished for crimes that they have not committed and would never commit. A proportion of the offenders identified as those that need to be incapacitated (and therefore receive a sentence that is longer than would normally be expected for their offence) would never go on to commit more offences if they are released. These offenders may meet all the criteria needed to be identified as requiring incapacitation but would not have gone on to commit future offences. The likelihood that predictions of dangerousness would lead to an unacceptably high proportion of false positives was demonstrated by the Floud Report in 1981 in the UK. The report found that this was particularly the case when using the kind of factors that the RAND study conclude are a good predictors of future offending behaviour, which are shown below. Having a high number of false positives in this way should be too high a price to pay for a liberal, just society that respects the rights and autonomy of its citizens.

The problem of false positives is connected closely to the issues associated with the unreliability of predicting future offending behaviour. If the methodology used to predict the likelihood of future dangerous offending behaviour is not accurate then it is likely that offenders who are not dangerous, and would never go on to commit any future offences, are sent to prison for longer than they deserve. The RAND Corporation study aimed to provide a rationale for the use of incapacitation as a means of preventing crime and based on their research, tried to give an estimate of the number of crimes that could be prevented by the incapacitation. The report also attempts to provide a framework for predicting which offenders could be considered likely to go on to commit more offences and that could be defined as dangerous.

The authors of the report concluded that there were seven factors that should be present if a prediction of dangerousness was to be made, and therefore the offender should be the subject of an extended prison sentence, thus incapacitating them. As was seen in the previous chapter's analysis of the use of evidence of the character of offenders, rather than an assessment of the culpability of the offender, these factors could be seen as evidence of a so called bad character. The seven factors presented by the RAND report do not state that the offender is more deserving of punishment because they are in some way more culpable for the offence they have committed, or that they have caused more harm. The justification for harsher sentences for offenders who have these factors is because their research showed that these factors are common to those who commit high numbers of crimes. Therefore if an offender has these factors they are more likely to go on to commit future crime leading to the conclusion that incapacitation of offenders with these factors will prevent crime.

Peter Greenwood concluded in the RAND study that there were a small number of offenders who were committing a large number of offences and by removing these offenders from the community crime would reduce. Through study of these offenders the RAND study concluded that they possessed seven common features. These factors are summarised below.

- 1) The offender was convicted as a juvenile
- 2) The offender had used drugs as a juvenile
- 3) Has used drugs in the previous two years
- 4) Has been employed less than 50% in the last two years
- 5) Has served time in a juvenile facility
- 6) Has been in prison more than 50% of the last 2 years
- 7) Has previously convicted of the same offence as the present one (Greenwood, 1982 p18)

If an offender's history contains these factors then, according to the RAND study, they should be considered for an incapacitative sentence. I will come on to look at the obvious issues with this approach shortly, and there is also a discussion to have about the difference between a dangerous offender and a repeat offender, however I will first look at the arguments which aim to defend the use of assessments, like the one from the RAND study to justify the extended imprisonment of offenders based on predications of the potential for future offending.

One argument in support of this kind of approach goes that it will never be possible with absolute certainty to predict whether or not an individual will go on to commit future offences. This is just not possible. What we could say, however, is that there needs to be

some assessment of whether we think a person is at risk of re-offending (particularly in the case of serious and violent offences). To make sure that these individuals are prevented from re-offending we are going to incapacitate them, thus taking away the uncertainty as to whether rehabilitation or persuasion is the best method for achieving this aim. Therefore we could say that if we need to have some way of making such an assessment then developing a list of factors, like the RAND study or some other methodology that seems to be reasonably accurate, is good enough and this is best outcome we can hope for. (Wilson, 2000 p117) Andrew von Hirsch calls this The Sunlight Argument. What this argument says is that predictions of dangerousness are going to be made anyway and that if this is the case then using sophisticated modelling and analysis is better than being reliant on a subjective, human-error prone assessment of who could go on to commit future offences or be considered dangerous from professionals working in the criminal justice system. (Von Hirsch, 1987 p130) Predictions of whether individuals are likely to go on to commit offences or pose a risk to the public are already in the criminal justice system of the UK. Examples of this are the system of bail and the role of parole boards, so the argument goes that it is better that these decisions are based on evidence in a standardised way rather than a subjective decision by individual professionals in the criminal justice system.

Andrew von Hirsch does not think that this reason is acceptable to justify the use of predictive assessments of future criminal behaviour. (Von Hirsch, 1987 p130-131) The point for von Hirsch and Duff, is that it is impossible to meet the requirements of even a negative interpretation of proportionality if sentencing is based on factors other than the offence for which that offender has currently been found guilty. In order for a sentence to convey the appropriate censure then an assessment of the harm caused by the offence and the

culpability of the offender is required. Offenders who are judged to be suitable for incapacitation would be sentenced on the basis of their possession of factors which sit outside of the harm caused by their offending behaviour and their culpability for that crime. They will also be subject to a harsher sentence (which results in their incapacitation) than those offenders who have committed the same or a similar crime but do not possess factors such as those outlined in the RAND study. This would result in differences between the sentences of different offenders for the same crime. As Andrew von Hirsch puts it “[w]hat chiefly counts is what was done, not who did it.” (Von Hirsch, 1987 p81) By relying on information about the past behaviour of the victim, some of which he or she may or may not have control over, the type and severity of sentence becomes reliant on who committed the crime rather than what the crime was, what harm was caused and how culpable the offender was. To accept that this is a good enough approach means that offenders will be punished more than they deserve. As Tonry states

If....one believes that the offender’s blameworthiness or culpability determines how much punishment he should suffer, to increase in that punishment for incapacitation reasons is, by definition, unjust. (Tonry, 2000 p130)

8.4 A Way Out for Incapacitation?

Given that I have shown that incapacitation as a means of crime reduction does not seem to be a suitable justification for its use and certainly not for the communicative theory of punishment, are there any other avenues for incapacitation? Duff thinks that there could be and it is through a form of incapacitation that he suggests a way to tackle the problem of the sentencing of dangerous offenders. I will outline Duff’s argument shortly, but there have also been other attempts to achieve this aim. One such attempt seeks to appeal to the

competing rights between the rights of an offender not to be held in prison for longer than is deserved versus the public's right to protection. Bottoms and Brownsword state the libertarian view that the rights of an individual can only be limited if those rights are overridden by some other more pressing right. Against this backdrop they contest that it is the right of an offender to be released at the end of the sentence that they deserved. And it is also the right of the member of the community not be attacked or assaulted and to be unfettered to pursue their idea of a good life. How then can these competing rights be balanced to ensure that the more pressing right is given precedence? They suggest that the rights of the offender should be seen as less important than the rights of the public only in the circumstance in which the offender poses a "vivid danger" to the public. The test of vividness, they propose is dependent on how serious the crime(s) the offender has been convicted of; the temporality of the offending, so when were the offences and how often were they; and the degree of certainty that the offender will in fact reoffend. (Bottoms & Brownsword, 2000 p160)

There is something to be said about the rights of the community and the rights of the offender, and this is an issue that Duff references throughout *Punishment, Community and Communication*. However, I would argue that this conception of the competing rights of the offender and the public does not get us very far past the criticisms of incapacitation analysed above. It is not clear that you would not have to rely on some of the evidence of bad character, such as drug taking or previous convictions, to provide any certainty as to whether the offender will go on to commit a future offence and be a "vivid danger". I would go further to suggest that this kind of method creates the additional problem that it seems to be creating an 'us and them' mentality in punishment, something which Duff is clear that

he would not want to see in liberal society. (Duff, 2001 p77) Deciding whose right is the most important in this setting seems to create opposition between the law abiding *us*, against the law breaking *them* to see who has the most important right; this does not fit within the conception of a just and liberal society that treats all members of the community as autonomous agents capable of rationality. This approach also does not get us away from the problem of having disproportionate sentencing; it merely attempts to justify that disproportionate sentence.

A further attempt at bringing together desert based theories of punishment and the use of incapacitation comes from Norval Morris and his endeavours take us closer to the thinking of Duff. Morris reconceptualises the view of what it means to be dangerous in order to alter the needs of the justification of incapacitation, with the specific aim of sidestepping the criticism that incapacitation has to make an accurate prediction of future offending in order to prevent crime and also to overcome the problem for retributivists that longer sentences for dangerous offenders could be said to be punished for crimes that they have not yet committed. What Morris says is that when an offender is labelled dangerous but does not go on to commit another crime, or would never have committed another crime, it does not mean that they are not dangerous. He uses the analogy of an unexploded bomb. If an unexploded World War II bomb is discovered and there are painstaking efforts by bomb disposal squads to remove it, with people evacuated from their homes to avoid any injuries or death. It is reasonable to label that bomb dangerous. It is subsequently discovered by the bomb disposal squad, when they get the bomb back to their secure laboratory that the bomb was in fact irreparably broken and there was no way that it would ever have gone off and could never have done harm. According to Morris this does not

change the status of that bomb at the time of discovery as dangerous. (Morris, 2000 p108)

So the same could be said of dangerous offenders, at the time of their arrest and conviction for a specific offence they are dangerous, this does not mean that you are making an assumption about what they will or will not do in the future (whether they will explode or not), what you are doing is saying something about their state right now and at that moment they should be considered to be dangerous and so should be treated as if they are dangerous.

Morris goes on to defend three proposals in relation to the use of incapacitation within a theory of punishment. Firstly he supports a desert based approach to punishment, by stating that punishments should not be longer than deserved. Secondly, however, he is comfortable with predictions of dangerousness being used as part of a determination of a sentence, as conceived of above, as long as the sentence is no more than is deserved. Thirdly, that there should be evidence that the dangerous criminal is indeed likely to go on to commit further offences in comparison to an offender who has committed the same kind of crime and a similar sort of criminal record. Morris concludes that if these three proposals are followed then it would be possible to develop a range of available sentences within desert limits but that could be used to extend sentences if it was considered that a particular dangerous offender that could be considered for incapacitation. Having a range of sentences that are all within a band width of punishments that could be considered proportionate is not dissimilar to how Duff conceives of sentencing being assessed as I showed in the chapters on harm and culpability. Morris states that,

[t]he upper and lower limit of “deserved” punishment set the range in which utilitarian values including the values of mercy and human understanding, may properly fix the punishment to be imposed. (Morris, 2000 p110)

In this way the dangerous offender could be given a longer sentence than an offender who is not considered dangerous, whilst still meeting the requirements of proportionality and not being accused of punishing offenders for a crime that they have not yet committed.

Although Morris does manage to move the discussion along there are two issues with framing the discussion on incapacitation in way that he does. Firstly, the sentences which would meet Morris’s requirements may not be of sufficient length for them to be considered as having incapacitative value for the most dangerous of offenders. The sentences would still be determinate and not outside of a sentence that would be deserved. Certainly within the range of sentences that Duff suggests would be deserved, even for serious crimes, are not as lengthy as current sentences and would not include a whole life sentence. What would happen to those offenders who continued to be considered as dangerous? When they had reached the end of their sentence, even if it was at the upper limit of the range suggested by Morris, then they would surely have to be released back into the community.

Secondly I think there is a problem with the analogy of the dangerous offender as an unexploded bomb, which is also an analogy which Duff uses as I will show shortly. A bomb, unexploded or otherwise is an inanimate object and so cannot have its rights infringed, as an inanimate object does not have rights in the way that a person does. People, offenders or otherwise are not inanimate objects, they are autonomous persons capable of rational decision making and so it is possible to infringe their right to receive an appropriate and

proportionate sentence, if they receive a punishment that they do not deserve. Is that an acceptable risk? As Duff says,

Disproportionately severe punishments are unjust, and so unjustified: for they communicate harsher censure than is justified. (Duff, 2004 p146)

8.5 Duff and Incapacitation

I have shown that incapacitation, when it is justified as a method of crime reduction, has a number of serious problems. I have then argued that a desert based theory could be compatible with incapacitation; Morris's idea gives us a starting point to use incapacitation alongside a more retributive theory, but that it does not seem to be sufficient for the purposes of determining a clear sentencing position for dangerous offenders. What then does Duff say about sentencing dangerous offenders?

Dangerous offenders are, according to Duff, fully responsible for their crimes and are persistent in their serious and violent offending. (Duff, 2001 p170) The persistent offender is more than merely a repeat offender; these two groups of offenders can sometimes be seen as interchangeable, particularly when applying targeted policies for incapacitation. The persistent offender displays a pattern of offending that is more than merely repeat offending, defined as committing a number of crimes over a period of time. Persistent dangerous offending is a pattern of serious violent criminal behaviour that constitutes a relentless attack on the community and on the shared values of the community. (Duff, 2001) The crimes must be of a serious and violent nature and the offender has to have been shown to be unresponsive to previous attempts to communicate censure and convey blameworthiness. Duff states however, that the dangerous offenders are not "victims of

pathological impulses, or unfortunate circumstance which drive them to crime.” (Duff, 2004 p141) They are deemed to be fully responsible for their crimes and this makes them culpable in the most serious sense, in the sense that I explored in the previous chapter. They have caused the highest level of harm and are culpable at the highest level. These dangerous offenders according to Duff pose a danger to the community at large and previous communication with them (as punishment) has to date failed to result in a change to their behaviour.

What Duff reluctantly suggests is that in these situations a prolonged prison sentence could be used to incapacitate such dangerous offenders. These offenders could be subject to what Duff calls special selective detention. (Duff, 2004 p141-165) Duff states that such a system would be special because it would consist of a prison term that is longer than would normally be seen for their current offence and it is selective because it focuses only on those serious, violent and persistent dangerous offenders. For Duff this is a very small group of offenders and does not include those offenders who have only committed one very serious offence. The offenders committing crimes that would be considered serious and violent would of course, under Duff’s theory of punishment, already be receiving a relatively long prison sentence, but would be given the opportunity to repent, reconcile and rehabilitate. Special selective detention would be reserved for those offenders who have repeatedly and relentlessly demonstrated a pattern of serious violent offending which has persisted despite attempts to engage the offender in the process of secular penance.

Duff argues that a limited use of special selective detention is required because it is difficult to conceive of a state system that wilfully and knowingly places victims and potential victims in danger by releasing dangerous criminals into the community. Duff does

not support the justifications for incapacitation as a means to reduce crime, for all of the objections that I have shown above, and crucially because to imprison offenders with the aim of preventing future crimes then the state would be treating the offenders as a means to an end, not as an end in themselves, an argument that I put forward at the very beginning of this thesis. Duff also rejects the idea that this is about a balance of rights between the offender and the citizen as a potential victim of crime. This is because the refusal of the state to incapacitate the offender does not infringe upon the rights of the potential victims of crime; it is the attack by the offender that infringes the right of the victim. (Duff, 2004)

So how does Duff begin to justify the use, even the limited use of special selective detention? He outlines his thinking in a paper on dangerousness and citizenship in the publication, *Fundamentals of Sentencing Theory* and later in *Punishment, Communication and Community*. He begins by exploring the idea that there are indeed other circumstances in which members of a community are effectively incapacitated in order to prevent harm, for example those who are deemed to be mentally ill or those who have a communicable disease and are therefore quarantined. In these situations a calculation is made that the individual will, or will potentially, cause harm to others and they are removed from contact with the community at large in order to prevent serious harm coming to other members of the community, not necessarily to prevent harm to themselves a requirement of the harm principle as demonstrated in Chapter 6. In these circumstances release of the incapacitated person is dependent on evidence that they no longer pose a threat to others in the community. In the case of quarantine and detention under the Mental Health Act, there is by and large no punitive connotation in the detention. There is no sense that the detention

conveys blameworthiness for the situation that the individuals find themselves in. (Duff, 2004) In addition to these non-punitive forms of incapacitation there are of course examples of detention in order to prevent harm already in use in the criminal justice system in the UK. For an individual charged with a crime but before conviction, bail is refused if it is thought that there is a risk that the person charged will abscond, or the individual charged with the crime might interfere with the process of justice or if it is thought that they are likely to go on to commit further crime. Those who are not granted bail are effectively incapacitated until they proceed through the court process. Parole is a further example of where risk posed by an offender is assessed and release of that person conditional on this judgement.

These are examples of where detention is used to prevent harm and Duff uses this kind of argument to justify the use of a strictly limited form of selective special detention and to build a case that contests that incapacitation conceived of in this way would not do an injustice to those detained. Central to this argument is the definition of what makes a person criminally dangerous, as I outlined in Chapter 4. According to Duff dangerous offenders have committed serious, violent crimes that constitute a persistent and sustained attack on the community. This is based on the idea that in normal circumstances there is a right for a citizen to be presumed as harmless. (Walker, 2000 p104) The thinking goes that each member of the community is presumed to be harmless, even if they have committed an offence, and have served their punishment and have been accepted back into the community. For the purposes of the normal day to day running of the community all the members that make up that community are presumed not to pose a threat to other members of the community, and so are treated as such by the state and each other.

Is there a point, however, when this presumption of harmlessness is revoked? For Duff an offender is dangerous because of their persistent serious criminal behaviour against members of the community and against the values of the community at large and this behaviour brings about the situation that such a person should no longer be considered as harmless. It can usually be said that victims and the community carry the cost of crimes, through the harm caused in the ways outlined in Chapter 6, both monetary, physically and mentally and to a certain extent this state of affairs needs to be accepted by the community, if we want to live in a community that is just (because the actions that the state would have to take to completely eradicate crime would be so draconian as to be unjust and to make living in a community unbearable). If a member of the community however continues to partake in offending behaviour in a way that is considered to be persistent, serious and violent, then according to Duff they lose the right to be presumed harmless they are then presumed harmful. They could then be imprisoned for a longer period in a large part according to Duff because this is shifting the cost of crime on to the offender and away from the victim and citizens. (Duff, 2004 p152)

To support this line of thinking Duff also uses the unexploded bomb analogy as described by Morris, and says that a label of dangerousness is not about a prediction of what might happen in the future, thus avoiding the criticism of the false positive argument. This is because dangerousness for Duff is not purely about a prediction of the actions that might occur in the future, it is a statement about the present condition of the offender as dangerous. Therefore there would be no false positives because, like the unexploded bomb, whether in fact an offender turns out to be capable of future harm or not, they are still

dangerous in the present. Duff conceives dangerousness as a dispositional property of the offender. He states that,

Dangerousness is a dispositional property which involves being in some present condition, or having existing characteristics, which *would* produce the relevant effect if certain (roughly) specifiable circumstances obtained. (Duff, 2004 p153)

If such circumstances never prevail then this does not mean that the offender does not possess the dispositional property of dangerousness. In the same way that a glass has a dispositional property of fragility, unless it is dropped on the floor then this property does not materialise as a state that the glass is in at present. In the same way dangerousness is a property that an offender possesses even if they are never put in the circumstance that means that the dangerous behaviour manifests. Even if there are no future situations in which dangerousness occurs and therefore dangerous offences are not committed then it does not mean that the offender does not have the dispositional property of dangerousness.

In order to provide more clarity on what this means Duff makes a distinction between a danger of something happening and *dangerousness*. Referring back to some of the factors produced in studies such as the research by the RAND Corporation, these factors are used as indicators of future dangerousness, this is misleading, what they are is an indicator that there is a *danger* that a person could commit additional crimes. What it does not mean is that a specified individual offender which has these factors is actually dangerous. This is because of the causal connection between dangerousness and displaying criminal behaviour, as described by Duff. Being a person who has committed a crime and also happens to have had a past in which one or all of the seven factors identified in the

RAND study or some of the other features common to large groups or the majority of offenders, such as being male, or black, or having poor literacy and numeracy, does not lead to criminal behaviour. One or more of those kinds of common features may be true of an offender however it does not mean that everyone with those features will be a dangerous criminal or that possession of these features causes criminally dangerous behaviour. What these kind of features could show is that there is a danger than those offenders in possession of these features may display criminally dangerous behaviours. Duff states that,

Criminal dangerousness is constituted by the possession of character traits (dispositions, attitudes, patterns of motivations) which will manifest themselves in serious criminal conduct in the kind of situation in which their possessor is likely to find himself. (Duff, 2004 p154)

For Duff the connection between these character traits and the action (the criminal behaviour) is a logical connection not a contingent connection. An individual who is a dangerous criminal and has the dispositional property of dangerousness could not behave in any other way if placed in the circumstances that mean that this behaviour is likely (for example a serious sex offender could not commit a sexual offence against women, if they never come into contact with women, however when they do then then they could act in a way that is dangerous). The evidence of possession of this character trait is the relentless serious violent criminal behaviour.

In order to exemplify his thinking Duff argues that there are other instances where members are excluded from communities legitimately (incapacitation is effectively excluding a citizen from the community). This includes the expulsion of academics from universities or of doctors being struck off and unable to practice. (Duff, 2004) A standard

punishment and sentence (for an offender) is similar to a temporary suspension from membership of communities such as academia or from a profession such as medicine. A punishment of this type communicates with the individual that an act has been committed which runs counter to the values and expectations of that community and this means the community feels that it is necessary to exclude them for a time. This would be analogous to imprisonment for offenders and so the removal of the offender from the community on a temporary basis which communicates the seriousness of the wrong that they have done to the offender. This suspension from the community should be temporary and then once the suspension has been completed the person should be welcomed back into the community as a full member, but Duff states that this is not always the case. There are instances in which the wrong that has been committed is so serious that an exclusion from the community is warranted. Selective special detention could be viewed as not merely a temporary removal from the community; it could be presumptively permanent although not irreversible. (Duff, 2004 p159)

If we look again at the analogous communities, such as universities, then in these instances permanent exclusion could of course be possible if a member has committed an act which means continued membership of that community is untenable. Repeated plagiarism in a university or gross misconduct if you are a doctor could result in expulsion from these professions meaning that the individual is no longer able to work at the University or practice medicine, or a similar profession. There are however several problems with these analogies. There is the obvious issue that if an individual is excluded from one of these types of communities then they are still perfectly at liberty to go off and do something else, to find a different profession or pursue other interests, and they continue to be free to

come and go as they please and engage in other community activities, see family etc. This is not the case if an offender is permanently, even presumptively permanently excluded from the community. The only life they would be at liberty to pursue would be within prison, or a similar facility.

In addition, the rules of engagement for membership of other communities such as universities and professional bodies are different to that of citizenship and membership of a community that is defined through nationhood. By and large membership of these other types of communities is optional. People also have a choice as to whether to join that university or professional body and part of that choice would be predicated on an assessment of the expected behaviour or code of conduct of that community. On joining that type of closely defined community the individual would be very clear about what was acceptable or unacceptable behaviour before joining. Membership of the community of a state looks different. The law makes it clear what is acceptable behaviour within that society but even if we accept the idea of tacit consent, it is often the case that members of society have little choice about being in that particular society and have little influence over the rules that govern the values of the community in which they find themselves, even if that society is based on democratic principles. It could be said that a member of the community has not agreed to follow the rules of society, in the way that someone joining a university or becoming a doctor has agreed to abide by the standards expected of them within that specific community.

It should be highlighted that the kind of exclusion from society that Duff argues would be justified for those subject to selective special detention would allow offenders some interaction with their community. He is not prepared to say that they would have no

connection with the community at all. In *Punishment, Communication and Community* he states that prisoners subject to this type of detention would be able to vote and would still have access to their families. He is reluctant to say that society has totally excluded them and that they have no role to play in the community. This however, also makes selective special detention less like the exclusions from other discrete communities to which he appeals as analogous, thus weakening his argument further. It would be an unusual state of affairs if an academic that was excluded from a university for plagiarism was still allowed to play a part in university community by communicating with colleagues or having a say in how the university department was managed.

8.6 Problems with Selective Special Detention

Aside from some of the issues highlighted above with Duff's selective special detention, there are two issues which pose a fundamental problem for Duff and why I will propose that selective special detention is not a good enough option for Duff on dangerous offenders. I will in the next chapter give two alternative approaches which I argue could offer a different option for Duff to deal with dangerous offenders.

Firstly where does this approach leave the principle of proportionality? Duff states that the persistent pattern of behaviour demonstrates contempt for the value of the community and it is as a direct result of these actions the offender renders himself or herself unfit for full restoration back into the community in the way that would be expected after serving a normal prison sentence for a serious offence. The right to be restored in this way has been given up by the dangerous offender. As we have seen the presumption of harmlessness becomes a presumption of harmfulness.

Though he (Duff) grants that individuals normally have the right to be presumed harmless, even after they have been convicted and punished for previous serious offences, he argues that such a right is rebuttable. (Lippke, 2008 p391)

This shift from harmlessness to harmfulness makes it right to give the dangerous offender an entirely different kind of punishment, thus, seemingly by-passing the principle of proportionality. Duff does however indicate that in the case of dangerous offenders then selective special detention is a deserved response, although not necessarily just to the current offence but to the totality of his criminality.

Even with Duff's conception of proportionality in its negative sense providing a range of "good enough" options for sentences to ensure the appropriate communication to the offender, it is hard to see that any option within that range would be to presumptively permanently exclude a member of the community. For Duff the dangerous offender is deemed dangerous as a dispositional property because of the persistent pattern of serious, violent crime but it does not follow that the sentence of the offender is also determined by reference to their past crimes. There needs to be a more robust connection made between the previous offences and the sentence, and I am not sure that Duff achieves this beyond saying that this can be used as evidence of the dispositional property of dangerousness which then renders the offender having a presumption of harmfulness. It is this presumption that means that the offender is deserving of presumptively permanent exclusion from society. It could be asked however, if this kind of information about the past of the offender is admissible for those who are deemed to be dangerous, why shouldn't it also be taken into account when looking at low level offender with a long history of offending?

Secondly and the more pressing issue for Duff, highlighted by Lippke, is that in constructing his argument for the presumptive permanent detention of dangerous offenders, Duff has to frame the definition of the dangerous offender in such a way that it could be concluded that dangerous offenders do not have the required kind of moral control over their behaviour which would enable them to understand and reflect on the censure that is being communicated to them. This is a problem for Duff because without this capability to understand, there is no justification for punishment as communication for these offenders, hence it could be said that they do not deserve punishment at all.

Duff holds that dangerous offenders *are* morally responsible in the kind of way that makes them culpable for their offences. Think back to the requirements for culpability outlined in the previous chapter and what is needed to be morally responsible for criminal actions. To be fully culpable, offenders need to be undertaking their actions voluntarily and are able to make moral decision about those actions. For Duff's theory, argues Lippke, punishment as communication works only if it presupposes that offenders refrain from offending because of moral considerations they have about the impact of their actions. (Lippke, 2008 p396) If this was not the case then the moral censure and blameworthiness associated with that censure does not make sense. Censure for a criminal act is an appeal to the moral sense of offenders that should induce them to the process of repentance and reconciliation which Duff suggests will then lead them to refrain from future offending behaviour. It is reasonable to conclude that those being punished need to be capable of undertaking moral reflection and consideration of their actions and the impact of their actions on others. They need to understand the harm caused and their culpability for that harm. If Duff is correct and dangerous offenders have dangerousness as a dispositional

property and could therefore *only* act in a certain dangerous way if they find themselves in certain circumstances then it could be that they do not have the right kind of moral control over their actions. They could not have acted any differently in those circumstances. If this is the case then this would call into question whether they should be subject to punishment and so subject to selective special incapacitation because they are not fully culpable for their actions and so not fully blameworthy or capable of changing their future behaviour. They are not able to engage in a moral discourse about their behaviour.

Lippke calls into question whether the kind of offenders that Duff is talking about could ever be reformed. (Lippke, 2008) These kinds of offenders are sex offenders, terrorists etc, who display the kind of relentless attack on society that Duff talks about. Punishment as Duff envisages it, even with presumptively permanent detention, would not involve totally giving up on the offender, there would always be the possibility of repentance, reconciliation and reform, but Lippke does not believe that some of these offenders are capable of such reform and if they are not then is their offending behaviour a result of their personality? This could be possible if we think of their behaviour as a dispositional property. If this is the case then these offenders are not being detained permanently only because they have committed an offence, they are being detained because of their personalities, which they could not change even if they wanted to. (Lippke, 2008)

A possible response for Duff could be to say that dangerous offenders do not lack the necessary moral control to address their offending behaviour, they just fail to use that control at the point of their offending behaviour. It could be that the failure to exercise that moral control is the reason that they deserve to be incapacitated in the way that Duff outlines. As Lippke suggests it could be that dangerous offenders are “chronically under-

motivated by moral considerations” whilst repeat offenders are merely “episodically under-motivated by moral considerations.” (Lippke, 2008 p348) The line that Lippke takes however, is to think that many of these very dangerous offenders that Duff is referring to have never been motivated by these kinds of moral considerations in the first place, so could not have stopped themselves from being non-motivated in this way.

8.7 Conclusion

It should be stressed that in *Punishment, Communication and Community* Duff makes it plain that selective special incapacitation should only be used in a very restricted way in exceptional circumstances and that even within this limit he is not entirely comfortable with this conclusion. What he appears to be saying in the defence of selective special detention is that citizenship is conditional, which is uncomfortable within his communitarian conception of society. The opposite view however is that citizenship is unconditional, which exposes potential victims, other members of the society, to unacceptable danger from people who act in a persistent violent manner.

What is difficult to see is how Duff could justify incapacitation through selective special detention if his conception of dangerous offenders makes it appear that they are beyond the reach of punishment as a moral communication. In the next chapter I will argue that there are two possible alternative approaches which Duff could consider to deal with the punishment of dangerous offenders within a communicative theory of punishment.

Chapter 9

A solution for the sentencing of dangerous offenders

In this final chapter I am going to propose two possible ways out of the problem of the punishment of dangerous offenders for Duff within a communicative theory of punishment. These two possible solutions are variations of the argument from the previous chapter on incapacitation for dangerous offenders and draw on the arguments put forward on the defining role of the harm caused by criminal actions and the culpability of the offender when sentencing. I am going to ultimately argue that one of these solutions provides an optimum answer to the problem of dangerous offenders within a communicative theory of punishment.

The first argument states that because dangerous offenders should have gone through the process of repentance, reform and reconciliation previously which has not prompted them to change their behaviour, then they are deserving of enhanced punishment. The justification for this enhanced punishment is because they are more culpable than offenders who have not displayed this persistent pattern of serious violent offending and so, they should attract a longer sentence.¹¹ The second argument states that these types of dangerous offenders do not have the requisite kind of moral control, as Lippke argues in the previous chapter, and so do not deserve punishment in the way that Duff conceives of it. They do however, pose a real threat to the well-being and safety of the

¹¹ It is the case that the overwhelming majority of dangerous offenders will have been convicted of a serious and violent crime prior to them being defined as dangerous. The notable exception to this would be serial killers, or serial violent offenders who have not been convicted previously but it comes to light that they have committed a series of serious violent offences. It seems entirely appropriate to sentence these offenders for each of the crimes they have committed which would be concurrently served.

public at large and so should be incapacitated in a non-punitive sense. This non-punitive incapacitation is only justified if previous punishment is deemed to have failed.

The first argument is coherent when certain conditions prevail in the community and I will begin the chapter by setting out those conditions, which are consistent with Duff's view of the liberal-communitarian society. (Duff, 2001) These conditions could be achieved in the UK and other liberal democracies with a shift in the way in which our society currently functions. The second argument could also function in the same societal conditions, but such changes are not necessary for the second argument to succeed as a means of sentencing dangerous offenders. I will conclude that it is this second solution, which provides Duff with the most effective and compatible solution to dangerous offenders.

9.1 What kind of society would need to exist for the first argument?

The criminal justice system in the UK today is populated with a disproportionate number of people who are politically, socially and economically deprived and as such disadvantaged both as victims and offenders (Green, 2013). The prison population in England and Wales has risen by 90% between 1990 and 2015, resulting in over 85,000 people currently in prison. (Office for National Statistics, 2017) In addition to the absolute numbers of prisoners increasing, there has also been a two-fold increase in the prison population as a proportion of the general population. The characteristics of this prison population indicate that many of them are from sections of society that are significantly marginalised and deprived.

Identifying common characteristics of the prison population could be a first step to improving equity within our society rather than using these characteristics to label certain groups as likely reoffenders, as I argued in the previous chapter.

So what does the prison population in the UK look like? The vast majority of people are men. Of the approximately 85,000 prisoners in England and Wales fewer than 4,000 are women. Just over 5% of the overall prison population are under the age of 20 and a quarter of the prison population is non-white. Approximately 90% of the general population is white, making the number of non-white people in prison disproportionate. (Allen, 2016)

According to the Prison Reform Trust over 60% of men in prison are suffering from a personality disorder. In addition, a review undertaken by Lord Lamming in 2016 found that a disproportionately high number of children and young people that have been through the care system are cautioned or convicted of an offence. (Lamming, 2016) The same review highlighted that the vast majority of children and young people in the care system were there because of abuse or neglect within the home and so are very likely to have had adverse childhood experiences which can impact on current and future behaviour. There is also some indication, although few robust data collections are available, that the prison population has a low education base and low levels of literacy and numeracy. I argue that these kinds of statistics show that our society should seek to address these issues in the wider non-prison community as a means of reducing crime; not try to reduce crime by increasing the prison population who represent the most vulnerable people in our community.

I have argued in previous chapters (Chapter 1) that the punishment of offenders should not be justified as a means of preventing crime, primarily because this treats the offender as a means to an end, rather than an end in themselves. This fails to recognise them as autonomous and rational agents. I do, however, want to argue that the state *should* seek to implement other non-punitive policies which aim to reduce crime by addressing the

inequalities that exist in the community. The statistics highlighted above indicate that the prison population is made up of people, overwhelmingly men, who are some of the most disadvantaged and at risk in our population. I am not going to argue here that there is a causal connection either way between the characteristics that are evident in the prison population and offending behaviour, I argued against that in the previous chapter on predicting offending behaviour. Being a non-white male who has been in the care system who has poor literacy and mental health problems, does not mean that you *will* be an offender. Nor am I going to argue that being in the criminal justice system causes some of these problems, such as mental health problems or drug addiction, although it could be a contributory factor. What I am going to argue is that our society should arrange itself in a way that gives the whole population the opportunity, motivation and incentive not to commit crime because everyone feels part of the society and shares in the common values, wealth and good that makes a collection of individuals in a defined geographic space a community.

As I have argued earlier in this thesis there is a concern that retributive theories of punishment do not allow for variations in sentencing due to the circumstances of the offender including deprivation, so called just deserts in an unjust society. (Hudson, 2000) It is difficult for retributive theories, because of the principle of proportionality, to take these circumstances into account when setting a punishment according to the harm caused and culpability of the offender, as argued in Chapter 7. There is little room for considerations of the offender's background if sentencing focuses on the harm caused by the crime and the culpability of the offender for that specific crime. It could be argued that the offender from an economically, socially and politically deprived background should not be considered as

blameworthy, and so as culpable, because those circumstances mean that they could, in some sense, never have acted any differently. (Duff & Green, 2013) Duff, however, argues that by allowing such deprivation, the moral position of the state to be able to hold the offender to account is called into question because of the circumstances in which the offender lives; a situation that has not been addressed by the state. (Duff, 2001) By not allowing certain members of society to live free from poverty and deprivation the state has failed in its duty to the offender, so cannot hold that offender morally to account for the wrong that they have done. Through addressing the issues in society that lead to some citizens being deprived in this way, the state could then hold the appropriate moral position to morally judge offenders.

Duff consistently argues through *Punishment, Communication and Community* that all members of society are autonomous and capable of rational decision making, and this is why punishment should seek to communicate with them about the wrong that they have done which is a public wrong. (Duff, 2001) For the wrong to be conceived of as a public wrong then surely it is the case that the offender should understand that it is a wrong (through the penitent process). In order to achieve this then the offender and all members of society need to understand the shared values of society and the community in which they live. If all members of society are to share those values they need to have the sense that the goods or capital (political, economic and social) of society could be shared and are not out of their reach. If there are members of society who do not feel that they are sharing in the advantages of the community then they will feel isolated and may not feel that they share common societal values. If those same members of society are denied access to the means to achieving their own good then they will not feel that they have an equal stake in the

community. Having a shared sense of values, with the space to live lives in their own way, is important for a shared sense of community. (Duff, 2001)

The classic veil of ignorance illustration from Rawls in *A Theory of Justice* provides an argument for equality in society that is consistent with Duff's communicative theory of punishment. A rational person is placed in the position of knowing nothing about themselves; nothing of their gender, their position in life, race, whether they were able to work or where they live. Behind this veil of ignorance, they have the chance to express a view about the kind of society they would like to live in. Placed in this position would a rational person choose to live in a society where there were proportions of the population without access to health care, adequate housing or education, and did not have a share in the material wealth of that society? Without knowing what *your* position is in that society, surely the rational person would choose a society where wealth and justice is distributed evenly through the community. (Rawls, 1971) The argument for a more distributive sense of justice has been developed by Amartya Sen, in *The Idea of Justice*, who argues for a more equal society where all members of the community are supported by the state to fulfil their potential and to pursue their own conception of the good in a way that ensures a fairer distribution of social as well as material capital. (Sen, 2009)

Providing all groups of the community with access to decent housing, the chance of a good education, access to health care including mental health care, drug and alcohol abuse programmes, parenting programmes and the means to feed and clothe their families would go some way to creating a society where all feel part of a whole. This needs to go alongside allowing people to have a meaningful say in the political processes of the community, to feel like their voice has been heard.

This needs to be augmented with a criminal justice system that is inclusive and understandable. (Duff, 1991) The criminal justice system has its own lexicon which can be impenetrable to those on the outside. For Duff the communicative process begins with the criminal justice system talking in a language that the offender can engage with and understand, without this an exclusionary and adversarial system prevails. (Duff, 2001) This is not to say that a full system of restorative justice need be imposed, in the way conceived of by Nils Christie, although many of the principles of restorative justice are compatible with the communicative theory of punishment. (Christie, 1977) There is no suggestion that the system should be wholly handed over to the community but it is essential that members of the community are able to engage with the criminal justice process. (Duff, 2001)

This may seem like a conception of a utopian community which has no chance of being realised in our society. There are, however, many government policies at local and national level in the UK that seek to address many of the problems associated with the impact of limited access to goods and services. Examples include schemes such as the Communities First Programme in Wales and the Sure Start programme for parenting support for deprived communities in England. These have had limited success probably partly because of a lack of resources but also because they are trying to tackle one aspect of a complex interdependent web of problems where it is often difficult to attribute causality and even harder to demonstrate the impact of interventions. Recently however the idea of giving citizens a Universal Basic Income has once again gained some traction with trials underway in countries and communities as diverse as Canada, California, Finland and Scotland. Although these trials are all configured slightly differently and have different philosophical underpinning as well as practical aims, they share a core set of principles;

namely that all members of the community will receive an income, regardless of job status, age, gender, ethnicity. What this could do is provide a solution to the problem of the intractable poverty that is a factor in many of the instances of material and social inequality cited above. Giving a standard and dependable income to everyone in the community removes the need for means testing for benefits and other complexities in the welfare system and more importantly it gives autonomy to citizens over how they direct their resources and creates, at least the possibility, of a level playing field.

If something like the UBI was introduced, alongside a rejuvenation of the criminal justice and wider political systems to allow for meaningful engagement by all citizens, then it could be supposed that a more just society could be developed. What this would do for potential offenders is to provide them every opportunity not to offend. If all members of the community share not only a set of values, but a common lexicon about those values and are able to articulate them, in addition to having a share in the material wealth of the country then it could be supposed that there would be a greater incentive to abide by the rules of that society.

9.2 The First Solution

So let us assume that this kind of society is the one that we are living in right now. Although not perfect, all members of the community are given access to services and an income which they know is consistent and safe and they feel that their voice is heard in political debate should they wish to engage. It could be supposed that in this kind of society the crime rate may be lower than ours is in the UK (although the UK *does* have a historically low crime rate currently). The criminal justice system issues lower punishment tariffs for offenders and many of the sentences that offenders do receive are community sentences

and come with the offer of education programmes and support for any mental health problems or addictions.

Of course some serious crimes are still committed in this society and offenders are sentenced according to the rating of harm and culpability explored in the chapters on harm and culpability. Offenders are punished in a system that supports repentance, reconciliation and reform, consistent with Duff's theory of punishment. There remain offenders who, despite having gone through this process still persist in committing numerous serious, violent crimes; dangerous offenders as defined by Duff. In keeping with Duff's theory these offenders have been presumed harmful rather than harmless and it is deemed that these offenders deserve longer punishments. They are fully culpable and responsible for their offending behaviour, and as such they should have reasonably known that their behaviour is not consistent with the penitent process. I argue that by not engaging with this process of repentance such offenders are deserving of a higher tariff of sentence. This higher value tariff is justifiable because they are *deserving* of a longer sentence than would normally be considered for their current offence. The longer sentence does not make reference to any potential future crime that the offender may or may not commit. The longer sentence, which would be a prison sentence (i.e. one that removes the offender from the community) would be deserved as a punishment because previous attempts to encourage the process of repentance, reconciliation and reform have failed which rightly results in their being viewed by the criminal justice system as being more culpable for the crime they have committed.

There are two aspects to support this argument which differentiates it from the defence of incapacitation proposed by Duff. The first is that the previous censure experienced by the offender *should* have produced awareness that the action they have

committed is wrong in the eyes of the community. Remember that we are working within a society that communicates with the offenders throughout the criminal justice system in a way that they understand and that is intended for them to understand. That society has a model of distribution of wealth and there is ample opportunity for all members of the community to have a say in how the society is organised through participation in the political process. These offenders have committed a relentless attack on society through repeated, persistent serious violent offences; they are dangerous offenders. These offenders are deemed to be responsible for their actions and capable of moral consideration. Therefore the previous attempts at censure for offences that they have already committed should have made it clear to the offender that their behaviour is not acceptable. The offenders continue to commit serious violent offences even though it has been made clear to the offender that their behaviour is wrong and deserving of censure. It is this persistent serious offending, despite previous attempts at penance through communicative punishment and being given every opportunity not to offend, that means that the dangerous offender is more culpable for their present offence and so deserving of harsher punishment.

If we go back to arguments in Chapter 7 on culpability of offenders and recall how Moore described what is required to be culpable of an offence. (Moore, 2013) He states that the person must be a moral agent, and capable of rational autonomous thought and action to be culpable. This is certainly the case for the dangerous offenders that Duff has described, they are responsible and they are moral agents, without this, as we saw in the previous chapter then communication with them through punishment would be questionable. They must also be deemed to have the appropriate mental capacity and they

cannot be a child. Again this is the case for Duff's dangerous offenders, there will clearly be offenders that do not have the appropriate mental capacity by virtue of having a diagnosed mental illness, but this is not the case for dangerous offenders who do have capacity for the appropriate moral control. The actions of the offender must be voluntary, that action must have caused an event or outcome which is prohibited by the law and there must be no other lawful or good reason for the offender to have carried out the offence. The moral agent is culpable if they are motivated by an intention to cause the prohibited event or outcome, or they should have reasonably believed or known that the event or outcome would be caused, and finally that the intention of the moral agent was formed in reasonable conditions which would have given the agent the opportunity not to perform the action. (Moore, 2013) It is these last two statements that I argue form the basis of why the dangerous offender is culpable in a different way to those offenders who have committed a first offence, or are merely repeat offenders. Dangerous offenders are in a position where it can be assumed that they reasonably know that their crimes cause serious harm and their intention was formed in conditions which give all citizens the opportunity not to perform such harm causing actions.

The community that I have outlined, where all members are treated equally, have a share in the wealth of the community and are given the opportunity to have a say in how their community works, creates the kind of society where citizens are given every opportunity *not* to offend. This is not to say that it would be the case that no offences are committed; human beings are fallible after all. What the polity does is constantly re-evaluate the position of the community in relation to shared values, and continue to work with its citizens to ensure that they are able to pursue their idea of the good in a way that

binds the community together under the banner of their shared values. Dangerous offenders have enhanced culpability for their actions that cause serious harm, because they have been given every chance not to offend and have been given every chance to understand that their actions cause serious harm to others within their community but still chose to cause harm.

This view of the enhanced culpability of the dangerous offender is further strengthened because not only does the offender intend to cause the harm, they have also previously been convicted of serious violent offences and so they should reasonably be expected to have a full understanding of the consequences of their actions, as required by the description of culpability from Moore. The previous attempts to communicate with the offender through the three step process of repent, reconcile, reform, means that it can be certain that the dangerous offender is fully aware of the harm that they are causing. They have caused such harm before and because they are rational agents are either choosing to ignore the harm caused by their actions or do not care about the harm that they are causing to other members of the community; this justifies the extended sentence, beyond what would normally be expected for an offender who has committed the same or a similar offence. The dangerous offender has been given every opportunity not to offend and they have been through the communicative process before and so should reasonably be expected to understand the harm that they have caused by *their* actions for which they are fully responsible. They are therefore, subject to enhanced culpability for their crimes and therefore a longer sentence.

This leads me to the second aspect of the argument for the extended sentences for dangerous offenders, as a sentence that they deserve. The idea of punishment as a form of

secular penance is a central pillar of Duff's communicative theory of punishment. It is this aspect of this theory that sets him apart from Andrew von Hirsch's communicative theory of punishment. (Von Hirsch, 1993) Indeed von Hirsch is critical of punishment as secular penance as he thinks that the state has no place in dictating what a person, offender or otherwise should feel or think. He likens the idea to that of religious penance in a monastery. In such a closed community then it could be that the abbot has the right to require such penitent actions from members of his community but this is not a role that the state should take with its citizens, the state has no business in the soul of the citizen. (Von Hirsch, 2003) Duff accepts this criticism in his response to von Hirsch and clearly states that the offender is still free to be deaf to the attempt at communication and should not and could not be forced to repent. (Duff, 2001) Duff states that punishment,

[M]ust seek to persuade (but not to coerce or manipulate) him to repent his crime and to accept his punishment as a penance for that crime, while leaving him free to remain unpersuaded and unrepentant. (Duff, 2001 p177)

Despite this reluctance to be more forceful in the pursuit of the penitent process, I think that Duff could push the conception of punishment as a form of secular penance further to accommodate the idea that the dangerous offender should be given a sentence that requires the offender to accept that they have committed a serious harm to the victim of their crime and to the values of the community. Duff is reticent on this extension of the idea of penance, because he fears that it will give rise to a fundamental objection to his theory of punishment in favour of other theories, such as von Hirsch's which could be seen as more consistent with liberal values of autonomy.

The requirement to demonstrate penance to an enhanced level could however, be reserved for dangerous offenders only. It would not have to consist of any action that could amount to coercion or bullying, thus ensuring that the state is not seen to be interfering in the soul of the citizen. The fully rational and responsible dangerous offender should be subject to enhanced penance because they have attacked the values of the community through the commission of serious, violent crimes that have caused serious harm and have already been through the process of penance without success. This enhanced penance would allow additional and sufficient time to repent, reconcile and reform because of the serious and persistent nature of the harm the dangerous offender has caused to others and the community.

This kind of sentence, which would consist of a prison sentence (set in conditions that are commensurate with the conditions in the broader society as conceived of at the beginning of this section), would be conditional on the process of repentance being undertaken earnestly and that this repentance is demonstrated by the offender. Duff states that the undertaking of punishment is a material embodiment of the apology that the offender is making to the community and to the victim. This enhanced form of penance would have to involve a commitment by the offender to engage in the process of repentance, reconciliation and reform and acceptance back into the community would be open to the offender, if it is determined that this enhanced penance had been undertaken. Enhanced culpability and enhanced penance would mean an extended sentence for the dangerous offender and a commitment to the victim, their family and the community that the dangerous offender would be effectively punished until such time as they have

committed in all honesty to the penitent process and so could be assumed to no longer be harmful to the community.

9. 3 Why is this different to special selective detention by Duff?

In this section I will argue that having extended sentences for enhanced penance is different to special selective detention. Unlike selective special detention, the idea of enhanced culpability for the offender is due to the previous attempts that have been made at communication and suggests that it is reasonable to assume that the offender should have full and complete knowledge of the consequential harm caused by their actions. This is not the same as stating that the offender is being punished for crimes that they have already been convicted of and punished for, such as so called ‘three strikes and you’re out’ extended sentences. Rather it is saying that there is no doubt that the offender understands the full impact of the serious harm that their actions cause because they have undergone the process of repentance, reconciliation and reform on a number of times previously. They are therefore more culpable for the current offence for which they have been convicted and so an extended sentence is a deserved response to that increased culpability.

My version of extended sentences for dangerous offenders gives an enhanced role to the process of repentance which clearly separates it from the idea of selective special detention. This is a problem for the compatibility of my argument with Duff’s theory as he does not think that the state should make an attempt to change the character of the offender. (Duff, 2001) It could be said that in giving this enhanced role to penance this does amount to requiring the offender to change their character, or certainly reflect very deeply on certain aspects of that character. Duff sees that this approach could undermine the strength of this theory, he is reluctant to say that the process of repentance is anything

more than offered to the dangerous offender, rather than firmly encouraged, as I have suggested.

But is there a real problem for Duff here? Surely a society that takes an interest in the welfare of its citizens, seeks to create shared values and rich relationships between members of the community and strives to ensure a fair distribution of social and material capital, would also want to strongly challenge the dangerous aspect of these offenders' characters. By strongly encouraging dangerous offenders to repent, reconcile and reform the state is creating the conditions that will enable them, as individuals to live peacefully with all members of the community; this surely is the business of a just and fair state. It is after all, the aim of secular penance to encourage reflective thought on the actions undertaken by *all* offenders and to hope that they desist from committing crimes in the future.

This level of penance would be reserved for the small cohort of dangerous offenders, and it would not be the case that every offender would be subject to enhanced penance. Repeat offenders who were not convicted of serious violent offences would not be subject to the same requirement or extended sentences. This is partly because the harm that they will have caused is less, as assessed by the living standard analysis; the crimes of the repeat car thief for example would not constitute a persistent attack on the values of society in the same way as an offender who committed numerous serious violent assaults. There is also something to be said here about the limits of the law; that the law does not concern itself with trifles. (Feinberg, 1926) The low level of harm caused by repeat offenders, rather than the kind of persistent dangerous offender described by Duff, would not justify such an extended sentence. (Morse, 1996) The serious violent offences of dangerous

offenders should be of special interest and seeking assurance that the process of repentance, reform and reconciliation has taken place and that the dangerous offender does offer an apology through their punishment to the victim(s) and to the community as a whole whose values they have violated. A reconciliation between Duff's theory and that of enhanced penance for dangerous offenders is possible because it is in effect an extension of his theory of penance rather than a move away from such principles and is no more of threat to his overall theory than the step away from proportionality that selective special detention requires.

It should also be noted that increased culpability, as I conceive it, is not the same as arguments put forward by authors such as Stephen Morse, who state that dangerous offenders could be given longer sentences and deserve such punishment because they are also guilty of the additional offence of reckless endangerment. (Morse, 1996) The argument goes: offenders should be aware that they have a propensity to commit violent crime, and should have a moral duty to ensure that they are not in the situation where they could commit such crimes. They are therefore deserving of punishment of the additional crime of failing to prevent themselves from committing offences. The sentence for reckless endangerment according to Morse would be short but would be deserved and in addition to the sentence for the crime for which they have been convicted. My argument by contrast, is not that an additional crime has been committed which enables the current sentence to be extended, but rather that the dangerous offender is *more* culpable than a non-dangerous offender for the crime that they are currently being charged with and so should be subject to enhanced penance and a longer sentence than would normally be seen for the specific offence.

9. 4 How could enhanced penance work?

Very briefly, how do I think that the offender could demonstrate enhanced penance? As Duff has stated the sentence which is deserved, and in this instance an enhanced sentence because of the increased culpability of the dangerous offender, is the public expression of the communication of censure with the offender. The sentence needs to be more than merely a symbolic gesture, hence the justification of punishments that are uncomfortable and/or harsh, this allows the offender to undertake the deep thinking that comes with an honest endeavour of penance. This could be achieved through community sentences or in the case of serious offending through prison.

For enhanced penance I would expect to see an increased level of engagement with the offender by the prison and their support staff, not aimed at forcibly changing the character of the offender, so not an effort to train the offender like an animal, but to offer support and enlightenment which could lead to reform. I would also expect to see an increased level of expectation by the state about that engagement. Unlike offenders that are not dangerous, it should not be left to the offender to accept the communication or not, the state should take an increased level of interest in the character and mind of the dangerous offender. The enhanced form of penance would involve mediation and a strong element of restorative justice to help the offender to understand very starkly the impact of their offending by being brought face to face with the consequences of their behaviour. Engagement with this in an open and honest way would be evidence that the dangerous offender was taking the process of repentance, reform and reconciliation seriously. Although I have not specifically commented on the length of the sentence or whether it should be determinate, there should be an expectation that release back into the

community would be dependent on compelling evidence of engagement in the process of penance. This would be a forceful expectation for enhanced penance.

9.5 Why the first solution does not work

This solution to the problem of dangerous offenders for the communicative theory does provide a partial answer to the issue of how the dangerous offender could be punished for an extended period to satisfy the victim, their family and friends and the wider community that justice has been done and the dangerous offender has been removed from society. The dangerous offender deserves this longer punishment for the crimes that they have committed and deserve to be subject to enhanced penance. The problem with this first solution to the problem of dangerous offenders is that it does not answer Lippke's objection; that the dangerous offender cannot be punished under the communicative theory because it is not possible to engage in moral discourse with them and having dangerousness as a dispositional property means that it could be the case that they could not have acted in any other way.

The dangerous offender has already been through the process of repentance, reconciliation and reformation to no avail. Even if the dangerous offender was subject to enhanced penance, why should it be the case that they will be any more influenced or reformed by doing more of the same? Repeated attempts at communication have not worked, which is why they are deemed to be more culpable and so subject to enhanced penance. Why should enhanced penance have any better outcome?

This first solution to the problem of dangerous offenders is neat, it does not require any major deviation from Duff's theory of punishment. It fits in with a liberal view of the

community and allows all citizens, including dangerous offenders to be treated as rational autonomous agents capable of making decisions and engaging in moral discourse. This problem with this solution however, is that it does not solve the entirety of the problem of dangerous offenders. It will result in dangerous offenders receiving a longer custodial sentence as a deserved response to their crime, but it still relies on the assumption that dangerous offenders are rational autonomous agents that can engage with the communication that punishment embodies and are capable of being influenced and reformed by that communication. There is however, nothing to suggest that the dangerous offender will be any more influenced to reform and accept their crimes as wrongs, by enhanced penance than by a standard sentence, there is a high chance that the communication will not be heard by the dangerous offender.

9. 6 The Second Solution

So if the first solution does not provide an answer to the whole problem of dangerous offenders within a communicative theory of punishment, is there another answer?

As with the first solution, the second option starts with the definition of dangerous offenders as outlined by Duff; that dangerous offenders are persistent, serious, violent offenders who demonstrate such severe offending behaviour that it constitutes an assault on the values of the community. (Duff, 2004) These offenders have committed a consistent, and frequent, pattern of serious violent crimes and will have been punished before for these offences. It is evident by their persistent violent offending behaviour that efforts at communication have fallen on deaf ears and they have continued to commit serious violent offences upon their release back into the community. As I showed in the previous chapter, Lippke argues that Duff's own definition of dangerous offenders raises the question that

these offenders do not possess the requisite moral control over their actions to justify punishment as communication. (Lippke, 2008) The evidence of persistent serious violent offending in spite of numerous attempts to communicate with dangerous offenders through punishment, suggests that these offenders are not and have never been sufficiently motivated by moral considerations to desist from such behaviour. It seems to be the case that within a communicative theory of punishment, dangerous offenders must be viewed as not possessing either the primary or secondary moral control necessary to engage with moral discourse about their behaviour and therefore, punishment as communication with these offenders cannot be justified. If this is the case then punishment as a form of moral communication with the offender cannot be justified as they are not capable of moral understanding, they are not the autonomous rational agents that Duff assumes are capable of taking responsibility for their actions.

Whether the offenders have the requisite moral control or understanding is not a problem for other theories of punishment, such as those which justify punishment because it reduces crime for example. As long as the offender is not clinically mentally ill, or a child, (Moore, 2013), then the offender can legitimately stand trial and be deemed answerable for the crime. The punishment that the offender receives under consequentialist theories is justified because it would prevent crime in the future, either from that particular offender or as a deterrent to others. Punishment for this purpose does not necessarily need to communicate on a moral level with the offender as a rational, autonomous and moral agent (although this might be preferable).

In response to this fundamental problem with the punishment of dangerous offenders within a communicative theory, I argue that the preferred, although more radical,

option for Duff is that we accept that dangerous offenders do not have the necessary moral control or capacity for moral discourse and so cannot be subject to punishment in the same way as other offenders. Dangerous offenders cannot be seen as rational autonomous agents. These offenders, if they are punished within a communicative theory of punishment, cannot be convicted for their crimes or be subject to sentencing that is justified as a form of communication.

If we suppose that these dangerous offenders have already been punished within a system which justifies punishment because of its communicative efficacy, then they would have already been engaged with communication that invites them to accept their blameworthiness for their offences. In order to be defined as dangerous offenders then they will have continued in their offending behaviour in such a way that shows a pattern of serious violent offences that amount to what could be considered as an assault on the community. It should then be accepted that they do not have the moral capacity to consider that their actions are wrong or that they are harmful to others, or that they do not have the appropriate moral capacity to care. These offenders are not reformed by the appeal to the shared moral values of the community. They do not understand or care about moral considerations and not because they do not understand the language of the communication but because they cannot understand that they should be held morally blameworthy.

Removing this group of offenders from the design of a sentencing theory within a communicative theory of punishment, clears the way to implement a mature model of sentencing based on the assessment of harm and culpability that I argued for in Chapters 6 and 7, without having the uneasiness surrounding the sentencing of dangerous offenders. Accepting that there are cases in which communicative punishment is not appropriate,

allows for the possibility of separating the justification of punishment for offenders from dealing with those who would challenge the values of society with their unlawful behaviour.

This separation makes it possible to have a deontological justification of the punishment of offenders that sees punishment as a deserved response to crime and have a consequentialist justification as a response to dangerous offending behaviour which states that this group needs to be removed from the community in order to protect the rest of society. Although Duff's theory of punishment is broadly deontological he also makes it clear that this does not exclude an element of forward thinking which is embodied in the reform element of penance. Other communicative theories of punishment, such as von Hirsch's, justify elements of the theory by appeal to both deontological and consequential arguments. Von Hirsch's communicative theory justifies the use of harsh treatment rather than merely symbolic punishment, because harsh treatment can act as a deterrence to prevent future offender. He characterises this as a prudential supplement to communication. Having a theory of punishment that is broadly retributive does not exclude the possibility that elements of an overall theory cannot be justified by other means. (Simester & von Hirsch, 2014 prt1)

9.7 Dangerous Citizens

If those who commit offences that constitute a pattern of serious violent offending from a punishment and sentencing theory then it could be possible to justify incapacitation of this group in a non-punitive sense, using a different method of justification. Incapacitation could be legitimised as a means of protecting the public from the harm that could be caused by the dangerous offender; thus appealing to a consequentialist justification for non-punitive incapacitation. Despite having committed unlawful actions, this group could not, and would

not, be called dangerous *offenders* because if they are incapacitated in a non-punitive sense then this would not be considered as a punishment, and so they could not be considered as offenders; they would be dangerous citizens.

I argue that the incapacitation of these dangerous citizens could be justified because the state has a legitimate role in protecting its citizens from serious harm. It could be seen as analogous to the incapacitation of those with mental health conditions who are sectioned or those who have a serious communicable disease who are quarantined. (Duff, 2001; Duff, 2004) Both these types of incapacitation rely on a defined process to reach the diagnosis of a condition of the agent, in other words the individual has a communicable disease or mental health condition. The diagnosis is based on evidence which is gathered and interpreted by a suitably qualified professional. This leads to a decision by health care professionals, within the framework of the law that the individual can be removed from the community against their will, if necessary, to prevent harm being caused to the public. (Mental Health Act 1983 and 2007) The condition that they have been diagnosed with is so serious that it is acknowledged that either their presence in the community will cause harm to others, in the case of those quarantined or that they do not have the capacity to live safely in the community freely, in the case of many of those sectioned under the mental act.

The key part of their incapacitation in these circumstances of quarantine and detention under the Mental Health Act, is that there is no blameworthiness attached to these citizens for their removal from society, there is no implication in their incapacitation is in any way the person's fault. In both of these examples steps are taken to treat the conditions for which they have been incapacitated. This treatment may or may not be

successful but release back into the community is dependent on such treatment being undertaken and assurances that the threat of harm no longer exists.

The incapacitation of dangerous citizens can be seen in the same way. A process, similar to that of the diagnosis and decision making for quarantine or sectioning, could be developed and followed. The offender becomes a dangerous citizen when there is sufficient evidence, gathered and analysed by suitably qualified professionals to suggest that previous attempts at communication (through punishment) have not worked and the individual continues to demonstrate serious, violent offending behaviour. At the point of conviction for a further serious violent crime (seen as part of a persistent trend of serious violent activity), an assessment could be made as to whether that offender has the moral capacity to engage with punishment as communication. The serious, violent, offending behaviour of the individual constitutes the first part of the evidence needed to reach a conclusion that the offender is a dangerous citizen. Further evidence is needed of previous unsuccessful attempts having been made to communicate with them through the process of punishment which seeks to enable repentance, reconciliation and reform. (Duff, 2001) Together these pieces of evidence demonstrate that the offender does not have the moral understanding and capacity to be held fully responsible for their offending behaviour and cannot engage with the communicative process. It cannot therefore, be presumed that the process of repentance, reconciliation and reformation will be successful.

In Duff's communicative theory, it is left open to the offender to accept the process of repentance. I argue, however, that dangerous citizens are not capable of repentance in their current condition. Their dangerous behaviour is of sufficient seriousness to demonstrate that they are not capable of moral consideration and so punishment as

communication which is left free to the offender to accept or not, does not apply to them.

Therefore, like the decision to prevent harm through quarantine or sectioning, the dangerous citizen should be incapacitated which is justified not as a punishment for what they have done but to prevent harm to the community. It needs to be stressed that the number of individuals who would display the type of persistent unlawful behaviour to be classed as dangerous citizens would be very small in the same way as those who Duff would view as dangerous offenders would be limited. (Duff, 2001)

9.8 Problems for non-punitive incapacitation

There are a number of problems with this solution to the problem of dangerous offenders for the communicative theory of punishment and I shall address them now. An obvious issue is the potential for the state to abuse the power to incapacitate. I acknowledge that this solution is heavily dependent on there being a very tight and limited definition of dangerous citizen, and on there being a fair and earnest process for gathering evidence to make the decision to incapacitate dangerous citizens. These processes would need to be defined in legislation that contained the appropriate checks and balances, and include oversight, accountability and transparency which had an element of independence from the government. There is a real danger however, that if the system does not work and does not prevent harm to victims, then there will be pressure on the state to use the system in an unjust way. As Andrew von Hirsch points out,

Every time such a system misses (i.e. fails to imprison) offenders who subsequently rob or assault, pressure will increase to make the definition of dangerousness more inclusive. (Von Hirsch, 1987 p126)

He made these comments in relation to a system of predictive detention of offenders but the risk could easily extend to the incapacitation of dangerous citizens.

The answer to this criticism of the non-punitive detention of dangerous citizens is that in reality all state power could be abused to further the political aims of whichever set of people are in charge and in areas across the policy spectrum not just criminal justice. (Morse, 1996) The key to this is to have a developed and functioning democracy which holds the state to account for such abuses and to have a legislative framework which sets out not only the process by which such decisions are made, but also embeds sufficient oversight, accountability and transparency. The decision to incapacitate a dangerous citizen in order to prevent harm to other members of the community, should be made by appropriately qualified professionals, in possession of all available evidence, adhering to a previously agreed system of decision making, which is then independently verified by a suitably qualified and substantive oversight body (such as the judiciary). The state operates within a democratic framework and it must be assumed it will, by and large, act in a way that is fair and just and within the letter and spirit of the law. If robust checks and balances are put in place and enshrined in legislation then the idea of the incapacitation of dangerous citizens in order to protect the community, is not necessarily undermined even if it is possible that the state could implement it in a way that is unjust.

A further problem for non-punitive approaches to incapacitation more generally and one that is highlighted by Lippke is that it could be contested that incapacitation in this form is effectively the same as punishment. (Lippke, 2008) In fact, it could be argued that it is worse because non-punitive incapacitation is indeterminate in a way that determinate prison sentences are not, which makes it unjust. There are two aspects to this problem, first

that non-punitive incapacitation is effectively the same as punishment, and secondly that non-punitive incapacitation breaches the rights of the citizen to act freely within the law unless they are being punished.

To take the first aspect of this criticism that non-punitive incapacitation is no different, if not worse than imprisonment as a punishment. (Lippke, 2008) I argue that non-punitive incapacitation of dangerous citizens is clearly *not* the same as punishment. First let's consider what makes non-punitive incapacitation similar to imprisonment for punishment. Non-punitive incapacitation removes the citizen from the community, into a secure facility; it is, more than likely, to be done against the will of the citizen; and it is done as a response to criminal behaviour (the evidence of very serious violent offending and previous failed attempts at communication). These are all common features of both punishment via imprisonment and non-punitive incapacitation. Imprisonment as punishment communicates a strong message of censure because of the deprivations that these common features impose on the offender which ultimately amount to a loss of liberty. Therefore non-punitive confinement will communicate the same message as imprisonment for punishment. It could therefore be argued that non-punitive incapacitation sends the same message because it performs the same actions as imprisonment.

There are however two reasons why the message that is being expressed by non-punitive incapacitation is profoundly different to the communication that imprisonment as punishment aims to portray. Firstly non-punitive incapacitation is not apportioning blame or censure on to the offender, there is no suggestion that the dangerous citizen could or should take full responsibility for their serious and violent behaviour. The dangerous citizen has shown that they do not have the moral capacity to do this. They cannot therefore be

censured publicly for the actions that they have committed. Secondly, non-punitive incapacitation as the aim of preventing harm and protecting other members of the community whereas punishment as communication has as its aim the purpose of explicitly expressing censure and engaging with the offender in the penitent process in a public forum.

Even with these differences at a level of principle there is no doubting that imprisonment for punishment and non-punitive incapacitation do *look* the same even if they do not *mean* the same. There are however already instances where the same outcome or activity can and does, have very different meanings. Consider the differences and similarities between taxes and fines. The two have the same process and outcome, i.e. the transfer of money from an individual (or a company) to the state. The money may even be used in a very similar way by those who are collecting it; to provide funding for services for the benefit of the public via the institutions of the state. The two money transfers are however, viewed by the community and the state in very different ways. There is no punitive connotation in paying taxes, indeed it is often seen the opposite way, that paying taxes is a good thing and part of one's civic duty. This is not the same with the payment of a fine. There is a blameworthy process to paying a fine in the same way as there is with any other punishment. (Duff, 2001) The fine is the expression of censure whereas the tax is not. The payment of the fine is a public acknowledgement of the wrong that has been done. The payment of one's taxes is an expression of a commitment to the shared values and wealth distribution of the community.

The incapacitation of dangerous citizens who pose a serious threat to the community and the use of prison as a punishment can be viewed in the same way. Imprisonment as

punishment expresses censure and aims to communicate with the offender (if the criminal justice system is organised in a way that supports a communicative theory of punishment). This is the public and material force behind the apology to the victim and the community from the offender and is a crucial part of the penitent process. The incapacitation of dangerous citizens is aimed at preventing harm and does not seek a public apology or recompense from the dangerous citizen because the justification of incapacitation is different to that of the justification of the punishment of offenders.

The second part of the issue for non-punitive incapacitation as outlined above is that the detention of citizens, unless they are being punished, is not just. Retributive theories, including Duff's, hold that citizens should be free to act according to their will, in an autonomous way, unless they are being punished for a defined crime. It is a significant step for the state to remove citizens from the community and take away their liberty, which is why it is so vital to have a general justification for punishment. There are however, as I have already shown, times in which it is legitimate for the state to take away an agent's liberty where there is a significant risk of harm to the community at large. Quarantine of citizens with a communicable disease is an example of this and I have gone into detail on this above. It would be difficult for a state to explain why they did not take steps to detain a citizen who showed all the symptoms of a serious communicable disease which posed an immediate threat to the community at large. And indeed our criminal justice system already engages in other ways in the detention of citizens who have not committed a crime through the system of bail.

Detention under the Mental Health Act is a further example of the state effectively incapacitating individuals who pose harm to themselves or others and it could be asked why

can't dangerous citizens be treated as having a mental illness and deemed unfit for trial and sectioned? Do they effectively lack competence in the same way that those who have diagnosable mental illness do? (Morse, 1996) I have argued that dangerous citizens are deemed to be incapable of moral consideration and so cannot be punished as a means of communication, and are therefore not held responsible for their crimes. It is not clear to me that this kind of offender could also be said to have a diagnosable mental health illness. Their behaviour and lack of ability or desire to engage morally with their criminal behaviour does, as Lippke suggests, imply that it is not possible to engage with them in a moral communicative process. (Lippke, 2008) It could also be said that their behaviour is part of their personality, in which case they are being incapacitated because of something over which they have no control. It does not follow, however, that this constitutes a diagnosable mental illness which could be treatable. The suggestion that their behaviour is directly linked to their inherent personality supports the argument that the dangerous citizen should not be deemed blameworthy for their actions in the same way as other citizens but not that they are mentally ill. Lippke points out that,

[T]he offer of treatment to terrorists or hardened criminals is likely to be met by them with contempt, for they are not obviously disturbed.... in the ways that the insane are. (Lippke, 2008 p412)

These dangerous citizens are not mentally ill, but they could have what could constitute a flaw in their personality which means that they can commit serious violent acts against other members of the community on a persistent basis without having any moral qualms. I am not talking here about the one off actions of a person in the heat of the moment. I am not even talking about the young person who commits a number of violent crimes over a

period of time whilst misguided. Dangerous citizens are those who commit serious, violent acts as a way of life, as Lippke and Duff describe the terrorist or the hardened criminal who acts with impunity with no consideration for the serious harm that they cause to others. These offenders are not persuaded to repent, reconcile and reform and are not persuaded by any moral considerations but this does not necessarily make them mentally ill.

This dangerous citizen may not be mentally ill, but they do appear to have a personality trait, the inability to show moral restraint in a serious violent manner, which makes it impossible for them to live in the community without causing serious harm to others. It does not however make sense then to treat the dangerous citizen as a person with a mental illness. It is more likely that they have a personality disorder which cannot be treated in the same way as a mental illness can be. That does not mean that they should not be incapacitated in a non-punitive way to prevent serious harm to other members of the community. As Morse might say they are bad rather than mad. (Morse, 1996)

9.9 Is the dangerous citizen compatible with Duff's theory of punishment as communication?

A clear issue for compatibility with Duff's theory is that a central pillar of punishment as communication is that the offender, alongside all citizens in the community, should be seen as autonomous agents, capable of rational decision making, and so responsible for their actions. The dangerous citizen is a citizen by definition but is not being treated as an autonomous rational agent. The opposite of this position is assumed, that they are not rational decision makers.

The dangerous citizen has shown from their behaviour that they are not rational decision making agents, which is one step further than presuming them harmful as Duff

assumes for the dangerous offender. It could be said that the rational choice would be for the dangerous citizen to stop the violent offending behaviour, even if that decision is made on the basis of a purely self-interested standpoint. The rational decision based on moral considerations would be that the communication through punishment (which the dangerous citizen would have gone through previously) would have brought the offender to see that their actions were morally wrong and unacceptable to the community and they would desist from future serious violent behaviour. The rational decision, even one devoid of moral consideration would be that in order to be part of the community, free to go about their business then they should desist from the serious violent behaviour because to do otherwise will result in them being in prison. The communicative process has shown them that the community views their actions as wrong even if they do not consider them to be so. Thus the rational decision based either on moral or non-moral considerations would be to stop the serious violent offending behaviour. There is something about the personality which makes the dangerous citizen unable to do this.

This is a position however, that many people find themselves in, as fallible human beings we are all capable of making decisions that do not seem to be rational. The difference with the dangerous citizen could be that the decisions which they are making have a profound impact on other members of society and cause those others serious physical and emotional harm on a repeated basis. These are not irrational decisions that the dangerous citizen has come upon in the spur of the moment. Given the persistent serious nature of the actions that have been undertaken by the dangerous citizen then it can be assumed that they are not capable of understanding the consequences of their decisions or they are capable of understanding them but are not minded to make decisions that do not

cause serious harm to other people. The conclusion being that they are not rational, autonomous agents capable of making decision that would minimise or stop entirely the harm that they cause.

The other inconsistency with Duff's communicative theory of punishment is that the non-punitive incapacitation of dangerous citizens could be seen as treating the individual as means to a separate end, the separate end being the prevention of harm to others. Their freedom is sacrificed for the protection of other members of the community. This may seem like a small price to pay, since the dangerous citizens that I am talking about have already caused a great deal of harm. This is however, a more serious inconsistency with Duff's theory. If I am saying that these offenders should be incapacitated rather than communicated with, or being subject to special selective incapacitation (which still assumes that the dangerous offender is a rational autonomous agent) because the evidence says are dangerous citizens, then their right to their freedom is being overridden by the rights of the community to be harm free, the ends and goals of these dangerous citizens are being disregarded.

When looking at the first solution I stated that it is the business of the state to prevent crime and the harm caused by crime, but not through the system of punishment. There are measures that could be taken to prevent crime and so harm, in the community that would be of benefit to the community at large. These included improved distribution of wealth and access to services such as education. The same could be said for the non-punitive incapacitation of dangerous citizens, although the removal of the liberty of the individual clearly makes this a much more serious undertaking by the state. The evidence that the dangerous citizen poses a serious and significant threat to the community, and that

they are not moved by moral considerations, could lead to the decision that in order to prevent harm the incapacitation of the dangerous is necessary and justified. In the very strict and limited circumstances in which the incapacitation of dangerous citizens would be justified the state would be acting in a way that ensures that serious harm is prevented. Look again at the analogy of the person in quarantine, there is a sense in which that individual is being treated as a means to an end, the end being the prevention of serious harm to the community. The justification for quarantine is that the person has a condition that would place others in contact with them in immediate and serious harm and there is no way that the person with the condition could prevent that from happening themselves. The dangerous citizen is the same. An assessment has been made based on the evidence of their previous behaviour and the lack of response to previous moral persuasion which means that their incapacitation in order to prevent serious and immediate harm is justified.

Removal of dangerous citizens from the community is justified because it will prevent a serious and immediate harm, in the same way that other actions by the state prevent harm. This is not inconsistent with an approach to punishment which is justified because of its communicative efficacy. The state's response to dangerous citizens and preventing harm is separate from the punishment of offenders. Not only is this response to the actions of these dangerous citizens consistent with the role of the state to keep all its citizens safe, it also consistent of the response of the state to offending behaviour and so not inconsistent with Duff's communicative theory of punishment. The criminal justice system is free to communicate with all offenders, who are rational, autonomous citizens capable of making decisions and coming to understand the wrong that they have committed and repent for that wrong.

9.10 What would happen to the dangerous citizen?

Before I come to the concluding remarks in this thesis I will describe what I think would happen to the dangerous citizen. To be consistent with Duff's theory it cannot be the case that dangerous citizens are incapacitated and given up on. As I hope has come across strongly, the numbers of dangerous citizens would be very small and because they are not being punished there is no reason why they should be held in a conventional prison. The aim of the incapacitation would be to prevent harm to the community at large not to punish so any level of hardship, beyond the deprivation of their liberty, would not be appropriate. It could be the case that the dangerous citizen is supervised in a secure place that is comfortable and with access to their families and other services. It would not be the aim to morally educate them but there could be access to education more broadly and support with understanding and implementing moral considerations.

The non-punitive incapacitation and any education that they may receive may help dangerous citizens come to understand and accept that their previous actions have not been consistent with the shared values of the community. Consistent with Duff's theory, the dangerous citizen would be free to engage with such programmes or not. The issue then arises of whether it would ever be possible for a dangerous citizen to be reintegrated into the community. In the same way that the mentally ill or those in quarantine can leave such incapacitative situations then I argue that the dangerous citizen should also be offered the possibility of returning to the community. This would be dependent on the meaningful engagement with any support programmes and on an assessment of their engagement by those who are supervising them, in exactly the same way as mentally ill patients are assessed and released. There would also have to be close and meaningful monitoring if the

dangerous citizen was allowed back into the community, to ensure not only that there was no longer a threat to the community but also that the dangerous citizen integrated successfully back into the community. In this way the door would always be left open for the dangerous citizen to become a full member of the community once more.

Conclusion

The purpose of this thesis was to present an argument in support of R A Duff's communicative theory of punishment and to acknowledge, and seek to solve, the problem of the sentencing of dangerous offenders. I have argued that the communicative theory of punishment seeks to justify punishment because it communicates with the offender and that communication apportions blame through punishment and that punishment itself (the sentence) is an embodiment of the communication. Punishment has to be proportionate to the seriousness of the crime for the communicative theory. If it is not then the punishment cannot communicate the appropriate blame; too harsh a punishment and the sentence communicates blame which is disproportionate to the seriousness of the crime. The appropriate severity of the punishment is determined by looking at the harm caused by the crime committed and the culpability of the offender who has committed the crime. This allows those imposing the sentence to assess the seriousness of the crime, which in turn will allow them to impose an appropriately serious punishment. This punishment allows the offender to understand the gravity of their wrong doing, and for Duff it allows the offender to repent reform and reconcile with the community through secular penance. Offenders within the communicative theory are citizens, and retain their status as a citizen and as such are treated as rational, autonomous agents, capable of decision making and capable of understanding the communication in which they are engaged within the criminal justice system.

This theory of punishment treats all citizens as ends in themselves, and as members of the community. I have argued however, that a problem arises when considering the

sentencing of so called dangerous offenders, and this problem is two-fold for Duff. Firstly, punishment as communication does not seem to satisfy the expectations of the community or victims, when sentencing dangerous offenders. Sentences within the communicative theory should only take into consideration the offence in question when determining the appropriate sentence, and should not take into account previous offences for which the offender has already been punished. The communicative nature of the sentences would result in less harsh and more meaningful sentences based on an assessment of harm and culpability, than are currently seen. For Duff the punishment should have a substantive fit with the crime committed. Would a community find this type of punishment appropriate for a dangerous offender and would the state be fulfilling its role in keeping the community safe? Secondly it seems that the conception of the dangerous offender as envisaged by Duff and supported in my thesis, as persistent, serious and violent offenders who seem unswayed by moral considerations, are unreceptive to the moral considerations of the communicative punishment and seemingly could not have acted any other way. This calls into question the legitimacy of punishment as communication for the dangerous offender.

Duff seeks to address this issue through the use of selective special incapacitation for dangerous offenders. This method acknowledges that the offender is responsible for their crimes, and so should be answerable for them but accepts that the limited reliance on imprisonment and shorter custodial sentences advocated by Duff's communicative theory does not meet the needs of the dangerous offender or the community in which they live. A presumption of harmlessness that this afforded to all members of the community is revoked in the case of the dangerous offender and is replaced by a presumption of harmfulness, because of their previous persistent serious violent behaviour. The offender is dangerous in

their present condition, their dangerousness is a dispositional property and it is this dangerousness that justifies the incapacitation of the dangerous offender, which may be presumptively permanent.

I argue however, that the problems with the use of selective special incapacitation are intractable for Duff. Dangerous offenders would be subject to the expectation that they are responsible for their crimes in the same way as all other offenders but would not be subject to the same sentencing policy as other offenders. Their sentencing would sit outside of the communication process and outside the principle of proportionality which would be applied to other offenders and other sentences. Proportionality requires that the sentence for a crime is dependent on the crime committed in that instance, not on who committed that offence. The sentence must reflect the seriousness of the crime in order to express the right amount of blameworthiness or censure; this is essential for the communicative theory of punishment. To have one set of offenders sitting outside of this system of sentencing because of their dangerousness means that in the case of dangerous offenders their sentence is dependent on *who* they are, rather than what they have done. This position is untenable for Duff.

My first solution suggests that the dangerous offender is more culpable than other non-dangerous offenders and so should be subject to extended sentences. The prison sentence received by dangerous offenders should be longer than other offenders because this is a deserved response to the increased culpability of the dangerous offender. This first solution is dependent on there being substantial changes in the way that society functions. I have argued that society should be arranged in such a way that the citizen has every reason *not* to commit offences. If there is an offender who continues to commit serious, violent

offences when they have been given every reason not to commit such offences then it is this element which means they are more culpable than other offenders who have not committed a series of violent crimes.

This first argument allows the communicative theory to continue to maintain the status of dangerous offenders as rational autonomous agents. They are responsible for their crimes in the most serious way, they are culpable indeed they are more culpable than other offenders, because of their status as rational citizens. Their sentence allows them to be subject to a longer sentence as a form of enhanced penance for their crimes. This solution however, does not solve the problem that dangerous offenders seem to be incapable of moral discourse and therefore moral communication with them cannot be justified.

The second possible solution for the communicative theory is potentially a greater step away from Duff's communicative theory of punishment, but presents a neater and simpler answer to the problem of dangerous offenders. If Lippke's argument is accepted, that dangerous offenders according to the definition presented by Duff could not be considered to be rational autonomous agents capable of moral discourse, then the opportunity arises for saying that dangerous offenders should not be punished at all but should instead be detained in a non-punitive sense. It should be accepted that they are not fully responsible for their actions, they are not culpable in the same way as other offenders and therefore cannot be punished as a means of communication; they cannot understand the moral discourse (or do not care) required for repentance, reconciliation and reform. It can then be argued that within strict limits, dangerous offenders, as dangerous citizens, can be incapacitated in a non-punitive sense, in order to protect the community from the risk of further harm, but that this incapacitation does not apportion blame on to dangerous

citizens because they could not have acted in any other way and communication of censure with them is futile.

I have argued in this thesis that the notion of dangerousness that I outline is distinct from that of Duff's. Whereas Duff argues that all offenders, including dangerous offenders are rational autonomous agents capable of moral discourse, I maintain that those who commit the most persistent, serious violent offences lack the requisite primary and secondary moral control which is necessary for engagement in the kind of moral discourse required to justify punishment as communication. Their actions are evidence that they lack, or have lacked, the necessary primary moral control. They are seemingly incapable of regulating their persistent violent behaviour. Further, they do not display an understanding that there are steps they could take to avoid violent offending behaviour and are unmotivated by attempts to offer them assistance to address this behaviour, thus demonstrating a lack of secondary moral control. It is this evidence which leads to the conclusion that such offenders are incapable of moral control and discourse. They should therefore be considered as dangerous citizens and subject to non-punitive incapacitation which can be justified in order to prevent harm to the community at large.

The dangerous citizen is clearly distinct from Duff's conception of the dangerous offender and it may be that some of those identified by Duff as dangerous offenders are not dangerous citizens. The dangerous citizen must have demonstrated that they lack moral control, as described above, through the commission of a series of violent acts and they also need to demonstrate that they have made no attempt to understand and modify their behaviour. If we think back to the list of the types of offender that Duff suggests could be dangerous offenders (the thug, the hard man etc) there are evidently subsets of offenders

within these groups. For example not all sex offenders commit the same kinds of crimes with same intentions and motivations. I envisage that dangerous citizens would only be those who commit habitual serious violent offences and have no prospect of responding to programmes aimed at addressing their behaviour (which would require secondary moral awareness and control). In order to develop my conception of the communicative theory of punishment further I could examine the idea that there are some offenders within Duff's definition of dangerous offenders that could be subject to enhanced penance but not be considered as dangerous citizens. This would expand my communicative theory of punishment further considering the idea that enhanced penance and dangerous citizens could be seen as part of an overall approach to punishment as communication.

The role of the state and the community is central to the justification of the communicative theory of punishment and the non-punitive detention of dangerous citizens. Within my theory the state has a duty to prevent harm to its citizens, including dangerous citizens and to create a sense of shared values across society. It should be remembered that dangerous citizens are not being punished therefore there is no reason to presume that their detention should entirely remove all of their rights as citizens. Their detention is justified because it prevents harm and therefore does not require any measure of deprivation beyond that which is necessary to meet this end. It could be that the dangerous citizen is permitted to participate in the community and it would be interesting to explore the possibility of voting rights for those in non-punitive detention and other form of political and societal engagement.

I have argued that my proposed solutions to the problem of dangerous offenders are distinct from that of Duff and as such I have developed an original approach to the

communicative theory of punishment. The first solution stretches Duff's idea of secular penance to allow for enhanced sentencing of dangerous offenders. This is different from Duff's solution to the sentencing of dangerous offenders, special selective detention, because enhanced penance, unlike special selection detention, adheres to the requirement of proportionate sentencing. Enhanced penance creates a way in which dangerous offenders can be seen as more culpable than non-dangerous offenders. In the second solution I introduce the idea of the dangerous citizen which separates the justification of punishment as communication for all offenders and the non-punitive detention of dangerous citizens because they cannot be viewed as blameworthy. Unlike Duff's idea of dangerousness, I maintain that dangerous citizens lack moral control and so cannot, and should not, be punished.

It could also be the case that the idea of the dangerous citizen could be applied to other communicative and retributive theories of punishment that incorporate proportionality in sentencing, including that of Andrew von Hirsch and Morris. The idea that there are some offenders for whom non-punitive incapacitation could be justified in a way that sits outside of the justification of punishment (because of the role that the state has to prevent harm) may provide additional tools for such theories to deal with the constraints of proportionality in sentencing.

My final conclusion for this thesis states that the second solution is the preferred solution to the problem of the punishment of dangerous offenders within a communicative theory. The first solution relies on a fundamental shift in how our current society currently functions, and on a greater emphasis being placed on the idea of penance. If enhanced penance is to be accepted, then it also has to be accepted that the state does have a greater

role to play in the moral lives of citizens. This answer does not provide a response to the fundamental problem of whether dangerous offenders are capable of the moral discourse that is a requirement of punishment as communication. The second solution relies of acceptance of the idea that there are some citizens who are not responsible for their dangerous actions, but are not suffering from severe mental health problems. It also requires accepting that some citizens will be incarcerated for an indeterminate time outside of the system of punishment.

However, these two solutions could be seen as a continuum of a system for dealing with serious violent behaviour and the development of this idea could be an area for future work. Communicative punishment would be the norm for most offenders, with dangerous offenders subject to enhanced penance and then finally those who commit persistent, serious and violent acts are deemed to be dangerous citizens and therefore subject to non-punitive incapacitation.

For the purposes of this thesis however, I argue that the first solution is more in keeping with Duff's communicative theory, it maintains the status of dangerous offenders as rational autonomous citizens of the community that require extended prison sentences, because it's a deserved response to their dangerousness. However it is the second solution that provides the answer to the problem of the sentencing of dangerous offenders. By separating the justification of punishment and the justification of incapacitation it is possible to maintain the status of offenders as rational, autonomous agents capable of understanding and engaging with the communicative process of punishment, whilst providing the protection that the community deserves from the harmful actions of dangerous citizens.

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