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Criminal Law, Crime and Punishment as Communication

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by Klaus Günther*

I. Punishment: From Welfare Instrumentalism to Moral Expressivism

When Andrew von Hirsch's conception of punishment as censure was published, quickly getting considerable attention, this was at the peak of a criminal law politics which considered punishment as an instrument for the realisation of political goals. The most important goal was, of course, prevention of crime. Preventive criminal law politics was part of the welfare state reform agenda of most of the wealthier countries in the Western World during the Cold War period.¹ It conceived of law as a form of political instrumentalism, wherein punishment was an integral part. Embedded in a broader policy of societal reform, which included measures designed to change economic inequality and to improve the situation of the poor by redistribution of wealth and public support, one of its primary goals was the rehabilitation of the offender and the prevention of offending. Punishment could only be justified as a means to an end, i.e., an end which was politically justified by the public good of increasing the welfare of society.²

The articulation of *punishment as censure* was intended and widely regarded as part of a general critique of political criminal law instrumentalism, in particular of simple-minded or purely symbolic measures of crime prevention. This critique is founded primarily on moral reasons and assumes a moral conception of criminal law. One of its central objections is that political instrumentalism disregards the status of the perpetrator as an (autonomous) moral person and treats him or her as a mere object of preventive intervention—as an object of rehabilitative treatment or police intervention, or as a tool for public security measures *via* punishment; and in general as a means for the realisation of political ends in criminal law legislation. —Although

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¹ D Garland and RA Duff, 'Preface: A. von Hirsch, Censure and Proportionality' in RA Duff and D Garland (eds), *A Reader on Punishment* (Oxford, Oxford University Press, 1994) 112.

² For an analysis of this long tradition of welfare and punishment, which began around 1900, see D Garland, *Punishment and Welfare* (Aldershot, Ashgate, 1985).

political criminal law instrumentalism had its merits, notably for abrogating old-fashioned and unjustifiable prohibitions in the realm of offences against public morality, it was at the same time very expansive. There seemed to be no limit to criminalising any behaviour that was regarded as somehow dangerous and socially dysfunctional; no reference to essential moral values, to a moral relationship between victim and offender, and to the offender as a moral agent. Why should, e.g., *insider trading* on the financial market be declared a crime (as it was done in Germany 1994), when it serves only a collective good like the efficiency of the stock market, and when there is no real victim in a moral relationship to an offender? As a consequence, a *political* conception and justification of criminal law is either rejected or modified into a conception of political *morality*. It is rejected to the extent that it is equated with an instrumentalist view of the political in general.

Doing justice instead of pursuing political goals with punishment implies that crime is primarily considered as a moral interaction between moral and autonomous persons: the *offender* as a responsible subject, and the *victim* as a moral subject whose autonomy and integrity is denied by the offender. And it involves a *third party*, society: not as a collective agent whose public welfare should be served by punishment but, again, as moral agents who get a moral message by the punishment of the offender, 'providing them with reason for desistance.'³ Furthermore, punishment has to be a *proportionate* reaction ('just desert') which expresses moral condemnation to the degree of 'the blameworthiness of the conduct', instead of a reaction which is chosen for instrumentalist reasons as a means to realise the political goal of prevention.⁴ Its expressive function is central, because it detaches punishment from any further political purpose which should be realised. As an expression, or manifestation, of moral condemnation of the offender as a responsible agent, at the same time addressed to the victim as a moral person who was wronged by the fault of the offender, and as an expression of moral indignation about and a moral disapproval of the crime by third parties or society, punishment can stand on its own feet and does not need any further political justification.

³ A von Hirsch, *Censure and Sanctions* (Oxford, Oxford University Press, 1993) 10.

⁴ *Ibid*, 15ff; A von Hirsch, *Doing Justice: The Choice of Punishments* (New York, Hill and Wang, 1976); T Hörnle, *Tatproportionale Strafzumessung* (Berlin, Duncker & Humblot, 1999).

II. The Communicative Turn

The shift from *political instrumentalism* to *moral expressivism* of punishment has of course to do with a general critique of welfare state political instrumentalism which was raised for many different reasons. Although welfare state politics was inaugurated for the benefit of society, for the realisation of social equality and justice, and directed by democratic legislation, there was a strong tendency to treat citizens more as an object of intervention than as subjects or participants. Consequently, experts played an important role on all levels from legislation to individual cases, and society in general was envisaged as an entity of regulation, steering, and control by the state and the political system. At the end of the Cold War period, the experience of self-empowerment of the civil society came more and more to be regarded as an important resource of social integration. Civil rights movements were one part of this experience of civil solidarity; the struggle of minorities of different kinds for recognition of their identity, and for equal concern and respect in a pluralistic society, another one.⁵ As a consequence, citizens discovered the empowering dimension of their rights, actively participating in the self-organisation of society on different levels and in different areas. Demanding reasons and justifications in a fair procedure with equal participation became an end in itself, thus transforming the top-down-structure of welfare state politics. Participation could be demanded and organised by increasing communication, among the members of civil society as well as between the state and the citizens. Indeed, social integration can only be realised through communication, wherein the citizen is regarded and treated as a moral person, taking responsibility for himself; this could be achieved by treating him as a communicative actor.

With regard to punishment, the *communicative turn* of modern societies was naturally ambivalent. On the one hand, it led to a re-discovery of the offender as a communicative agent, as a person who had *to respond to* and had to be treated as *responsible for* the crime he or she committed. The crime has to be *censured*, because this reaction is appropriate among equal members of a moral community who treat each other as responsible persons. PF Strawson had demonstrated that a *reactive* attitude, expressing resentment or indignation to another person because of a violation of a moral norm, differs from the objectifying attitude which we take from

⁵ J Alexander, *The Civil Sphere* (Oxford, Oxford University Press, 2006) part III.

the observer's point of view when the offender obviously lacks the capability of responsibility. On the other hand, the communicative turn also led to a re-discovery of the victim of crime as a moral person with his or her own needs and interests which should be recognised by the reaction to crime. If preventive justice ignored the moral personhood of the offender, it did the same with the victim, who was more or less neutralised and excluded from the public justification of preventive punishment. Recognising the offender as a communicative actor went hand in hand with recognition of the victim as a communicative actor in the penal justice system. According to David Garland, the public rehabilitation of the victim was one of the strongest motives for a critique of welfare state criminal law instrumentalism.⁶

Taking the communicative turn into account, treating offender and victim as moral persons implied treating them as communicative actors who are able and have an obligation to respond, who have a right to ask for justifications, and an obligation to give answers. Consequently, punishment had to change its identity. It turned from being a political measure, from being a means to an end, into a moral message, an expression of censure; which must be conveyed to the offender, to the victim, and to society.

As censure, punishment differs from other kinds of sanctions. It adds a further element to the visible element of hard treatment. As Joel Feinberg has pointed out, without this additional element, punishment would not differ from other kinds of sanctions or taxes.⁷ This additional element is communicative. With censure, punishment begins to speak, to say something. It gets a meaning which has to be articulated and can be expressed by a judgement. It does so not by uttering words and sentences, but by the performance of something, by hard treatment. The two constitutive elements of punishment always appear together, and they are always experienced at once, but they can be separated conceptually: 'It is the communicative element of censure which links punishment with the public.'⁸ Furthermore, the communicative element has a justification of its own, which also

⁶ D Garland, *The Culture of Control* (Oxford, Oxford University Press, 2001); also of the role played by criminology experts, whose expertise was rejected because of the different experience of the members of civil society.

⁷ J Feinberg, 'The Expressive Function of Punishment', reprinted in Antony Duff and David Garland, *A Reader on Punishment*, above n 1 at 73, 80.

⁸ T Hörnle and A von Hirsch, 'Positive Generalprävention und Tadel' (1995) 142 *Goltdammer's Archiv für Strafrecht* 261, 266.

differs from the justification of the hard treatment element: 'The rationale of censure is the conveyance of a message, whereas other communicatively mediated reasons have to be put forward for hard treatment.'⁹ As Antony Duff has pointed out, that message has to be conceived as a communicative sequence in which persons are *addressed* as rational agents.¹⁰ But what does it mean for punishment and censure to become communicative?

III. Punishment as Communication

Most studies of punishment as communication start with the communicative meaning of punishment. As mentioned above, punishment addresses the offender as a responsible agent; likewise the victim and the other members of the community. Punishment conveys a message to them too. But it is always part of any standard explanation of punishment that it is also, and perhaps primarily, a response to a *crime*. As an 'answer', it not only addresses the offender, the victim and the community, but it does so because of the crime committed by the offender. This is true independently of any goal or message which is attributed to hard treatment. Even preventive theories of punishment do not deny the fact that a crime was committed as a necessary condition for preventive punishment.

But how do communicative theories of punishment refer to the crime? Is it only the cause, the occasion, for conveying the message of censure to the offender and to other persons? It must be more. The concept of a censure which addresses the offender as a responsible agent, sensitive to reasons and capable of deliberation, being convinced by normative reasons that his behaviour was wrong, is also committed to the view that what the offender did has a communicative meaning too. To treat the offender and the community as rational and communicative agents who are responsible for their actions, who can respond to censure, leads necessarily to the conclusion that the crime itself, insofar as it was committed by a rational and communicative agent, has a communicative meaning too.¹¹ Just as punishment

⁹ Ibid, 267; von Hirsch, *Censure and Sanctions*, above n 3 at 9-10.

¹⁰ RA Duff, *Punishment, Communication, and Community* (Oxford, Oxford University Press, 2001) 79.

¹¹ For an interpretation of the 'crime as an icon', see I Puppe, 'Strafrecht als Kommunikation--Leistungen und Gefahren eines neuen Paradigmas in der Strafrechtsdogmatik' in E Samson et al (eds), *Festschrift für Gerald Grünwald zum siebzigsten Geburtstag* (Baden-Baden, Nomos, 1999) 469, 473ff.

addresses the offender and sends a message to her, to the community, and to the victim, the *crime* sends a message to the victim and to society too. Treating the offender as a rational agent and person recognises the crime as a communicative action to which the communicative act of censure (and/or punishment) is the *communicative answer*.

If the crime is communicative in itself, two kinds of reaction are possible. Of course, it would be possible to conceive of a communication about crime without any communicative relationship to the offender or her crime. Society could communicate about them like it communicates about other matters of the objective world. Crime and offender would be external to the communicative relationships among the citizens. They would communicate *about* the crime and the offender, but not *with* the offender as a responsible agent of her crime. There are indeed some cases in which a society does this, and crime is viewed with an objective or propositional attitude from an observer's point of view: for example, if a society or its authorised representative has to decide what to do with a dangerous offender who suffers from severe deficits and therefore has to be detained; or when the crime is considered' as an effect of a cause which can be empirically studied and remedied, say as a problem of social regulation, of means-end interventions designed to neutralise the cause. But these examples of a communication about the crime and the offender have no internal relationship to punishment. They lead only to interventions according to observations and scientific hypotheses about cause-effect-relations. If punishment is to have any communicative meaning, it must be conceived of as a part of a communicative relationship with the offender—that is, as a communicative response to an offender because of her crime.

IV. What does the Crime Say?

Therefore one should conceive of punishment-as-communication as part of a communicative sequence which already starts with the crime. As a communicative action, punishment says something, because of a crime, to somebody. As an answer, there has to be something prior to which it is a response. Crime and punishment stand in a communicative relationship. It is the meaning of the crime to which the meaning of punishment is related. One can think of crime and punishment as speech acts which refer to each other.

But what could be the meaning of the crime to which punishment is the answer? Obviously, it must be more than the meaning of the volitional action which is labelled a crime. One might draw an analogy with a simple version of a theory of meaning, according to which the meaning of a sentence is the intention of the speaker. Analogously, the meaning of a crime could be the purpose of the offender, for example the end which an actor wants to realise by moving his body in a certain way, the reason he would give when asked why he did it. But considered as an intentional action only, the movements of the body are neutral towards the question whether the action is a crime or not. If A intentionally kills B, A might pursue some end with the action (e.g., getting money), but it is not inherent in that description whether A's action is a crime. As a crime, an action contains an additional meaning; or at least, an additional meaning is attributed to it. As a crime, it is a violation of a norm of criminal law, a violation of legally protected interests or goods, a harm to others which is legally prohibited. Usually, this is not the meaning which was attributed to the action by the offender himself, except in rare cases where the offender aims at the violation of the law *intentione recta*, like civil disobedience (with the additional aim to defend the law in general and to protest against what she considers to be a violation of the law by the political system), or like offenders who act as terrorists. If so, the problem is that such an additional meaning cannot simply be attributed to the offender.¹² The typical crime of theft or killing is not done with the intention of committing *a crime*; rather, that status is attributed to the offender's action by the victim and by society.

One can find conceptions of a crime as communicative action among retributivist theories, including perhaps Kant and Hegel. Although neither of them elaborated on a *communicative* theory of punishment in the strict sense, they conceptualised crime and punishment as a sequence which is structured by a meaning beyond the intention of the offender. For both, the crime is self-negating because of its meaning: 'If you offend him, you offend yourself; if you rob somebody of something, you rob yourself, if you beat him, you beat yourself; if you kill him you kill yourself.'¹³ According to the law of retribution, 'What does it mean: "If you rob him of something, you rob yourself?" Who shall steal does make property of all insecure; he robs

¹² Puppe, *ibid*, 474.

¹³ I Kant, *Metaphysik der Sitten, Rechtslehre* in: I Kant, *Schriften zur Ethik und Religionsphilosophie*, K. Vorländer ed. (Darmstadt, Wissenschaftliche Buchgesellschaft, 1975), A 198 (454), trans. by author.

himself (according to the law of retribution) of security of property....'¹⁴ This sounds as if the law of retribution simply requires us to do to the offender the same as he did to the victim. But the story is more complicated than that. Kant's explanation gives the law of retribution a specific meaning. Retribution is not a simple *tit-for-tat*. It works by universalisation. If stealing makes property insecure, it means that, by his act of stealing, the offender denies the security of property; similarly, by one act of killing he makes life insecure. Making the individual victim's property insecure means, by universalisation, that property *of all* is insecure. And because the quantifier 'all' includes the offender as well as the victim and everybody else, the offender's property becomes insecure too. 'Insecure' means that the rights to property and to life lack sufficient protection; as they do in the state of nature, where each individual is responsible for his own security. It characterises not a normative, but a *factual* state of affairs. An act of theft or killing does not deny the right to property or life, but denies its security, its factual protection against violation. Punishment then performs the truth of the descriptive statement that property is insecure with regard to the offender. If the offender denies protection of rights, he will not be protected against any intrusion into his own rights. But why and how can Kant interpret the law of retribution in this way? Because criminal law is public law—it is publicly executed, and those who fail to punish a crime could be considered as participants in the 'public violation of justice'.¹⁵ And because the offender is a person. Punishment articulates the implicit public meaning of the offender's criminal act, which was itself communicative. Making life and property insecure could be interpreted as a regression toward the state of nature.

Hegel seems to be more precise on this point. For him, it is not that the crime is a normative statement which has to be falsified. Rather, the important argument is that punishment has to deny the crime because, otherwise, 'it would become valid.'¹⁶ By contrast with Kant, it is not the probable factual effect that property would become *insecure* if the violation of the law of property by theft or robbery were unpunished; that nobody would trust in the validity of property law anymore and therefore try to care for his or her own security. For Hegel, insecurity of property is only a side-effect of something different which happens when an act of theft is committed. Whereas for

¹⁴ Ibid, 199 (454).

¹⁵ Ibid, 199 (455).

¹⁶ GWF Hegel, *Grundlinien der Philosophie des Rechts*, E Moldenhauer and KM Michel eds, 6th edn (Frankfurt, Suhrkamp, 2000), § 99.

Kant, an individual crime of theft denies the validity of property law and, as a *factual* consequence, makes property insecure for all, Hegel emphasises the *normative* point that by an individual crime of theft a *new norm is asserted*. It is the norm which would become valid if theft were not punished. According to this norm, violation of property by theft is permitted.¹⁷ Of course, this new norm is essentially *defective*, but nevertheless, it is stated by the offender as a norm with a claim to validity.

But why and how can an individual offender, who is by no means an authorised legislator, make new law? Hegel does not say very much about this question. Of course one could presume that in the chapter on crime in his '*Philosophy of Right*' everybody is a legislator, because on this stage there is still no state or sovereign established, nobody who would be legitimately authorised to enact new law. It is like in the state of nature, where, according to Locke, everybody has a right to punish any violation of the natural law. But it seems that for Hegel it is not necessary that the offender could make new law, that he had the authority to enact a statute or to pronounce a rule according to which theft were permitted. It is already sufficient that the offender makes an assertion, performs a speech act, which claims to be recognised as valid—as any other assertion or imperative which claims to be true or morally right. As an assertion which raises a validity claim, it has to be taken seriously: it has to be regarded as a communicative act which is addressed to others with the claim to be based on reasons and the responsibility to commitments which are inferentially entailed in the statement. Hegel links the validity of the implicit statement inherent in the criminal act to its 'subjective imputation' to the will of the offender: 'that the crime is committed without any hesitation ... that it shall be *valid*'; the offender commits it 'as *something that is valid*'.¹⁸ " Because the offender commits a crime as an autonomous person acting wilfully, the act can become a statement about normative validity. This is made clear in § 100, where Hegel says that because the actor acts as a reasoning person, his action is in itself reasoning: it is 'something general', something by which 'a *law* is postulated, which he has recognised for himself.'¹⁹

¹⁷ K Seelmann, *Anerkennungsverlust und Selbstsubsumtion. Hegels Straftheorien* (Freiburg and Munich, Alber, 1995) 88.

¹⁸ Hegel, above n 16, § 96 (addition).

¹⁹ Hegel, above n 16, § 100.

The normative validity of this postulated law is, of course, a false one, because it contradicts itself or destroys itself. It can only be generalised as a reasonable normative statement, as a law which is valid for an indeterminate number of persons and cases, if a single exception is made for the offender. Theft shall be prohibited to everybody, except the offender; or, to put it the other way round, theft shall be permitted to the offender, but not to anybody else. Killing shall be permitted for the killer, but not for anybody else. As a normative statement with a single exception or privilege, the normative statement implicit in the crime it is also self-destructive for a second and more important reason. The defective norm denies the possibility of legality (justice) as such. As Günther Jakobs has pointed out, such a law would contradict Hegel's definition of legality ('Recht') in § 26: that being a person and respecting others as persons is the (sole) basis for anything as law.²⁰ Punishment, again, performs carries out the the self-destruction of the norm by hard treatment of the offender.

Jakobs has made the relationship between crime and punishment explicit as a communicative sequence: 'Human behaviour is not only an occurrence with external effects, but insofar as a human being surveys or is able to survey the effects of his behaviour, his behaviour also *means* something, like a spoken sentence means something.'²¹ Jakobs also makes clear that this communication is not asserted as such by the offender himself—that the meaning of his behaviour does not necessarily coincide with the meaning of an act as it is represented in the offender's mind, for example as his intention or consciousness of wrongfulness—but that it is attributed to him by society. As such, the meaning does not depend on the intention of the offender, but only presupposes that he is a responsible agent. What is imputed to him is that 'he considers his behaviour as an authoritative design of the world.' For example, a drunken driver 'makes by his behaviour expressive that in this specific situation other things are more important to him than dominantly taking seriously into account the life of others.' This is the opposite of the normative statement of the legal norm prohibiting drunken driving, an objection against the legal norm articulated by behaviour. Criminal behaviour entails a message which cannot be ignored.²² Punishment, in turn, is an objection against the violation of the norm whose validity is

²⁰ G Jakobs, *Staatliche Strafe: Bedeutung und Zweck* (Paderborn, Schöningh, 2004) 26 fn 135.

²¹ G Jakobs, *Strafrecht Allgemeiner Teil: die Grundlagen und die Zurechnungslehre*, 2nd edn (Berlin and New York, de Gruyter, 1993) 9.

²² T Hörnle, *Straftheorien* (Tübingen, Mohr Siebeck, 2011) 30, interpreting Jakobs' theory.

re-affirmed so that the citizens can continue to rely on that norm when planning their lives.

If one takes together Kant's, Hegel's and Jakobs' interpretation of the message which is conveyed by the crime, it turns out that the argument of self-destruction of the implicitly proposed norm, and the self-contradiction of the offender who wants to get the advantages of a law which she denies by her crime, works only because the legitimacy of a general normative order is already somehow presupposed. The offender, as well as the victim and society as a whole, inhabit a normative order which is already accepted and intelligible for everyone. But if that's right, the message of the crime can be denied without any real communication. Either punishment takes place *within* the offender because of her self-contradiction—it simply executes the internal communication of the offender with herself about the contradiction of the two norms she wants to propose at once—or it takes place within the society which re-affirms the validity of its normative order and re-integrates its members into it by punishing the offender. Here, society communicates with itself, and the offender is only confronted with the law.²³ *The law doesn't speak*. Yet, if one takes crime and punishment as communication seriously, one has to include the law in the communicative sequence and look more closely at its communicative role within this sequence.

V. What does the Criminal Law Say?

As the explanation of the communicative meaning of punishment by Kant, Hegel, and Jakobs has demonstrated, we have to start the communicative sequence not just with the crime, but already with the *criminal law* prohibiting a certain human conduct and defining it as a crime. But why and how, and to whom does the criminal law speak? And how is its message related to the message conveyed by punishment? According to Kant and Hegel, the law does not speak, because it is already and obviously present as the reasonable and general will. According to Jakobs, it does not speak because it is already there as the normative structure of a functionally differentiated society. By contrast, Antony Duff has made the important point that the

²³ A similar objection against 'norm-oriented' communicative theories of punishment is made by Tatjana Hörnle, *ibid*, 30ff.

communicative sequence begins with the criminal law:²⁴ 'In claiming authority over the citizens, it claims that there are good reasons, grounded in the community's values for them to eschew such wrongs.... It speaks to the citizens as members of the normative community.'²⁵ Duff's emphasis on reasons makes a difference here to the authors just mentioned, because reasons are usually addressed to persons who are able to understand reasons and to deliberate with and about them. Of course, criminal law is an authoritative normative reason and therefore it is exclusionary with regard to other reasons the addressee may have in mind, in particular reasons favouring the prohibited action.²⁶ But as a legitimate authority, criminal law claims justification with regard to the values and principles of the normative community. The members of a normative community can claim that the legal reasons are justified by the values of the community, and they have a right to contest it when there is no justification at all or a defective one. This is why the criminal law can *speak*; why it can speak *to them*, and not only about them. It takes its addressees seriously as deliberative persons who respond to reasons and who guide their intentions and their behaviour according to reasons.²⁷ Of course this becomes manifest only in a democratic procedure of legislation where each citizen has a right to participate. The citizens are regarded—and understand themselves—as co-legislators who participate in public deliberation about the justification of their criminal law. Therefore, they have a right to claim that a valid criminal law is justified by reasons—as long as nobody puts forward a new reason against it in the public procedure of legislation.

Tatjana Hörnle has objected to 'norm-oriented expressive theories of punishment' like the one proposed by Jakobs, on the ground that they treat the legal norm and its validity as an end in itself; representing the state or some generalised interest, detached from the individual interests of the citizens and, in particular, from the victim.²⁸ According to this interpretation, punishment which communicates the validity of the norm has a function merely of stabilising mutual expectations of behaviour, and

²⁴ Duff, *Punishment*, above n 10 at 80ff.

²⁵ Duff, *ibid*, 80.

²⁶ For the role and function of exclusionary reasons see J Raz, *The Authority of Law*, 2nd edn (Oxford, Oxford University Press, 2009) 3ff.

²⁷ K Günther, *Schuld und kommunikative Freiheit* (Frankfurt, Klostermann, 1995); K Günther, 'Welchen Personenbegriff braucht die Diskurstheorie des Rechts? Überlegungen zum internen Zusammenhang zwischen deliberativer Person, Staatsbürger und Rechtsperson' in H Brunkhorst and P Niesen (eds), *Das Recht der Republik* (Frankfurt, Suhrkamp, 1999) 83.

²⁸ Hörnle, *Straftheorien*, above n 22 at 30ff.

of enhancing the security of rights and goods *in general*. But this is not the crucial criticism. In a democracy, legal norms are the result of a legitimate process of deliberation and inclusion, where every citizen has a right and a chance to participate via the public sphere of civil society, via the right to freedom of expression and information, and via the right to vote for members of parliament (in a representative democracy). The legal norm is then a manifestation of political autonomy and represents a republican self-understanding. It is not a generalised will viewed from nowhere, detached from the real interests of individual citizens, but the result of a public deliberation about interests.

When such a justified criminal law is violated, this means that the offender rejects the reasons for the law. But instead of putting her reason against the law forward to the democratic procedure of legislation, she expresses her dissent by committing a crime. Furthermore, the offender denies to the victim her status as a co-legislator—who has to be convinced by reasons in a deliberative procedure, not by doing harm to her. Punishment can then be considered as a manifest rejection of the law-negating reasons of the offender, thereby reinforcing the reasons which justify criminal law in a fair and inclusive democratic procedure of legislation. As such, punishment addresses the offender as a reasonable, responsible person, as well as the victim and the other citizens. On this view, the communicative sequence is extended to criminal law, crime and punishment. Insofar as it is based on justifying reasons, one could even speak of a circle: punishment communicates with the offender, the victim, and society about the justifying reasons of legislation and the unjustified reasons of the offender.

VI. Why Hard Treatment?

If the communicative circle of criminal law, crime and punishment is complete, the obvious question arises why the other element of punishment, hard treatment, is necessary. If the communicative meaning of punishment can be made completely explicit by the communicative circle, why is it necessary to add more, to put the offender in jail or to take her money? What could hard treatment do what cannot be done by the explicit performance of the communicative action? As Duff asks:²⁹

²⁹ Duff, *Punishment*, above n 10 at 82; Puppe, above n 11 at 475.

But censure can be expressed by a formal conviction, or by a purely symbolic punishment that burdens the offender only insofar as it takes its message of censure seriously. Why then should we express it through the kinds of hard treatment punishment that our existing penal system impose—punishments that are burdensome or painful independently of their communicative content?

One can distinguish two different answers to this question. The first admits that the meaning of punishment can be made fully explicit and performed by communicative action, and that hard treatment is—at best—a different kind of reaction to the crime and the offender which is independent of the communicative meaning and pursues a different purpose, e.g. deterrence.³⁰ The second answer claims that the meaning of punishment cannot be made completely explicit without hard treatment, that the performance of the communicative action is incomplete without some extra-linguistic behaviour.

This second, constitutive line of thinking is found in writers such as Jakobs, for whom the communication of the norm's validity through punishment is in need of a 'cognitive safeguard of the norm's validity'.³¹ Similarly, Duff has suggested that the communication of censure has to be followed by a 'purposive communication' with the offender who takes a burden upon herself, by which she can make explicit that she understands the communicative message—like a procedure of mediation between victim and offender or different kinds of community services.³²

Hörnle also claims that the communication of censure is in need of a 'symbolic substantiation' by hard treatment, because otherwise there would be no quantifying scale to make differences which are proportionate to the degree of injustice.³³ But although the argument for scaling different degrees of unlawfulness and criminal responsibility is convincing, it is not obvious that hard treatment is a necessary medium of scaling; it remains an open question whether hard treatment is the only possible scale to express different degrees of unlawfulness and responsibility. One could imagine a scale, analogous to years of imprisonment or to different sums of money in order to translate the different degrees of unlawfulness and criminal responsibility: for example, 'A is convicted of theft with degree 3 (within a scale of 0.1 to 5).' If such a scale gets recognised and accepted within a community as the

³⁰ von Hirsch, *Censure and Sanctions*, above n 3 at 12ff.

³¹ G Jakobs, *Rechtswang und Personalität* (Paderborn, Schöningh, 2008), 33f.

³² Duff, *Punishment*, above n 3 at 82ff.

³³ T Hörnle, *Straftheorien*, above n 22 at 42.

measure for expressing different degrees of crime seriousness, we would not need to add further actions like imprisonment or fine for the same purpose.

But the most important problem is that communication and hard treatment—at least as they are practiced in most societies today, by imprisonment—are in a certain way mutually exclusive. It sounds awkward to emphasise the communicative meaning of punishment on the one hand and to do exactly the opposite by hard treatment on the other. Whereas communication is inclusive, respecting and treating the offender as a responsible person with a right to justification, hard treatment is always exclusionary. This is manifest in imprisonment. Imprisonment is by definition non-communicative social exclusion of the prisoner, placing the offender in a situation where nobody does communicate with him, and where nobody is allowed to communicate with him—except for residual communications with prison guards and restrained and supervised communication during a limited time with some relatives or by letter; or, again limited, communication with a lawyer. If one takes the communicative message of punishment with regard to the offender seriously, it leads into a paradox. The communicative message is that he or she deserves to be deprived of communication opportunities. Thus punishment is a communicative action of non-communication. It treats the offender as a communicative actor just as long as it is necessary to pass along the communicative message; after that, the communication ends, together with recognition of the prisoner as a communicative actor.

VII. Communication as an Action

It is quite surprising that most authors who emphasise the communicative meaning of punishment do not consider communication as a kind of action in itself, as something which can stand on its own feet as an action. Typically, either hard treatment is considered as a medium for the transfer of punishment's propositional content—the moral message of censure—or, if hard treatment and the moral message are separated, the pure expression of the message is considered to be something deficient, something which lacks an important element. On the latter view, without hard treatment the pure expression would come down to a simple utterance of words which were not taken seriously, not by the victim, not by society, and primarily not by the offender. This is even true for expressive theories like von Hirsch's, according to which hard treatment can be justified by deterrence, as an addition to the separately

justified censure. But is either view really true? What if expressing the moral message of censure were already a kind of action in itself, and as such, itself a *treatment* of the offender, and if it were already embedded in a communicative relationship among offender, victim and society which can be made explicit?

One possible interpretation of communication as an action is provided by speech act theory.³⁴ As John Searle has stated his central hypothesis, 'speaking a language is engaging in a rule-governed form of behaviour. To put it more briskly, talking is performing acts according to rules.'³⁵ This interpretation of communication as action does not deny that communicative action is often accompanied by extra-linguistic actions which get their meaning by an interpretive relationship with a speech act. Hörnle is right in stating that praise and recognition are often accompanied by a gift, like money, and that the same is true for hard treatment. But this relationship is contingent and conventional, and one can easily imagine other situations (or other cultures) where praising someone is not accompanied by a gift, where the act of praising someone is in itself enough. It depends, among other things, on the ways and manners of evaluating, viewing, experiencing and receiving an act of praise. It is also true that in law in particular, a speech act with legal significance is often related to a symbolic action. But one can also observe that in many cases a symbolic substantiation becomes more and more unnecessary. For example in contract law, Roman law and Common Law always required a symbolic action for a promise to constitute a contractual obligation. But since Grotius and Savigny, the promise itself was more and more recognised as the source of obligation, because of its performative character. So why not think of the history of punishment as a development where hard treatment becomes more and more unnecessary for the conveyance of the message?

In order to elaborate more on the distinctive communicative aspect of punishment, it may be helpful to take some insights from speech act theories.³⁶ According to these theories, communicative action can be analysed on three levels. The formal (*locutionary*) act is generally the act of uttering the sentence itself, and communicates

³⁴ J Austin, *How to do Things with Words* (Oxford, Clarendon Press, 1962); J Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge, Cambridge University Press, 1969).

³⁵ Austin, *ibid*, 5; Searle, *ibid*, 22.

³⁶ R Hamel, *Strafen als Sprechakt. Die Bedeutung der Strafe für das Opfer* (Berlin, Duncker & Humblot, 2009).

the surface propositional content of the utterance. This act should be distinguished from the *illocutionary act*, which refers to the *illocutionary force* of the locutionary act—its real, intended meaning—and from the act's *perlocutionary effect*, which refers to the actual effect of the act (whether or not intended).³⁷ What is most important for understanding the nature of the speech act as an action is the illocutionary act and its illocutionary force, since this identifies what a speaker intentionally *does* by uttering a sentence with propositional content: it is the purpose inherent in the act and which can be realised by performing the speech act. This is most obvious with explicit illocutionary acts that use performative verbs, like 'I promise [...]'. The illocutionary act fulfils those rules which are constitutive of the promise, so that the speaker intends her utterance to be a promise and the hearer understands it as a promise. As an action it changes the world—specifically, the social (and moral) world of speaker and hearer. By performing a promise the speaker commits herself in her social relationship to the hearer to do what she has promised. This constitutive effect of the illocutionary act of promising is independent of all those additional effects which can also be caused in the social world by the commitment. If the hearer—or third parties—understand the speaker's utterance correctly as a promise, this might generate certain additional effects like emotions of delight, trust, or a motive for other actions of the hearer. These effects—perlocutionary effects—may well be intended by the speaker too, but they are incidental and not inherent in the illocutionary force. A speaker can have various purposes for making a promise, but these (ulterior) purposes are not relevant to the question whether the locutionary act itself *is* (or is not) a promise qua illocutionary act.

In cases such as promising, the illocutionary force of speech acts may depend on the existence of extra-linguistic rules. The utterance of the word 'yes!' as an answer to the celebrant's question whether one would marry one's partner may count toward a valid marriage only when a system of rules about the legal institution of marriage already exists, and when it is intersubjectively recognised by the collective intention of the members of the group. A marriage is an *institutional* social fact which is constituted by rules; as an institution it consists of a 'system of constitutive rules'.³⁸ Institutional facts can be generated by *declarative speech acts*; with them a speaker

³⁷ For example, the locutionary act of saying, 'there's a man behind you with a gun' might have the illocutionary force of a warning not to move, and the perlocutionary effect of making the addressee turn around.

³⁸ Searle, *Speech Acts*, above n 33 at 51.

can declare that the fact *x counts as y*, within a certain context (which may be constituted by other institutional facts). *Y* is a new status and function of *x*, which consists in a collective attribution and recognition. The social relationship between *A* and *B* may count as a *marriage* when the required performative utterances are made by the celebrant and the partners in the celebrant's presence, according to a pre-existing system of (legal) rules. Following a previous suggestion made by Searle, Roman Hamel has suggested analysing the verdict in a criminal law trial as a declarative speech act and considering *this* to be the core communicative meaning of punishment. By its performance, the institutional reality is said by Hamel to be changed in two dimensions: issuing the verdict re-constitutes and re-affirms the validity of the norm which was violated by the offender, and it censures the individual criminal act, as legally adjudicated, from a general and public point of view.³⁹ In both dimensions, a new institutional reality is created.

But Hamel's picture is incomplete. By performing a speech act, an intersubjective relationship is established by the illocutionary force between speaker and hearer. This relationship goes beyond the particular normative relationship which is created constitutively by performing a speech act according to specific institutional rules. As Habermas has demonstrated, the illocutionary force of a speech act is related to mutual understanding of speaker and hearer when the illocutionary act is performed sincerely, without any hidden reservations.⁴⁰ Certainly, in the case of a (successful) act of promising, that promise is understood and accepted as creating a specific binding between speaker and hearer with regard to the propositional content of the promise. But what is most important to Habermas is that the illocutionary force always generates a wider binding effect, of a different and more general character, among speaker and hearer *because of its purpose that the speech act shall be understood and accepted*.

This general binding effect differs from the specific one of a speech act which is related to institutional facts, like a promise; and it is an essential feature of all kinds of illocutionary speech acts that are performed sincerely. The general binding effect can be revealed on occasion by a rejection or critique of the illocutionary act by the hearer. If there is disagreement, the speaker is obliged to give reasons to support

³⁹ Hamel, *Strafen als Sprechakt*, above n 35 at 128, 152-153.

⁴⁰ J Habermas, *Theorie des kommunikativen Handelns*, vol I (Frankfurt, Suhrkamp, 1981) 391, 395.

what he said and, on the other side, the hearer is obliged to give reasons for her dissent. In this way an acceptance or consensus can be established between speaker and hearer, emerging from a rational discourse between them. The discourse is itself a sequence of communicative interaction, and the consensus generates further binding effects for speaker and hearer because of its possible inferences and commitments.

One could therefore say that a speaker raises a *claim* by performing a speech act sincerely, a claim which is directed to its acceptance by reasons. The kinds of reasons which are given and demanded by the participants in a discourse depend, in turn, on the nature of any ensuing disagreement. Habermas distinguishes *three* different issues of disagreement: the *truth* of the propositional content, as well as of the implicit and presupposed assertions regarding contextual facts of the speech act; the *correctness* of the explicit or contextual normative content of the speech act; and the *sincerity* and authenticity of the speaker's performance of the speech act. Thus, what the speaker claims with her performance of the illocutionary act is that its assertive component is true, that its normative component is correct, and that its subjective component is sincere. These *validity claims* are challenged and confirmed through reasoning, by the speaker, the hearer and—because they are reason-dependent and to that extent general—by any third party. By raising such validity claims with the illocutionary component of her speech act, the speaker is obliged to justify its truth, correctness, and sincerity, should her claim be challenged by the hearer or anybody else.

If one takes this extended interpretation of the illocutionary meaning into account, it becomes obvious that, whether or not it happens to contain performative elements of the kind Hamel envisages, communicative action is always embedded in an intersubjective context which has a normative structure. The normative structure is made explicit in the case of contestation, when a validity claim is rejected and reasons are demanded by hearer and speaker. Reasons and justifications are always in the background when a speech act is performed sincerely. An important part of this normative structure is that speaker and hearer are obliged to treat each other as *persons* who have a *right* to disagree, to demand reasons; and an *obligation* to give reasons. This normative and social relationship is constituted by the illocutionary force of the speech act.

VIII. Again: Punishment as Communication

This interpretation allows for a new approach to the communicative meaning of punishment, one that does not depend so much on the classification of censure as a declarative. The important point is that censure as a speech act raises a validity claim which refers to a valid normative order whose legitimacy can be justified by reasons in a rational discourse. It refers to the normative order, the system of legal norms, to the victim, and to the offender.

From this point of view, it can be seen that the crime as well as the response to it must be understood in a communicative fashion. In a democratic and republican setting, where legal norms are legitimised in a public and inclusive process of deliberation and contestation, citizens are primarily regarded and regard themselves as *communicative actors*. Such a setting institutionalises the normative structure of the intersubjective relationship between speaker and hearer with regard to law and politics. Citizens are regarded, treated and understand themselves as rational beings who raise claims, who give and receive reasons, who interpret their actions as meaningful and self-authored, and who are able to take reasons into account when planning and performing an action. This is the reason why they can be considered as co-legislators, and it grounds the public meaning of crime. And this is the reason why Hegel could claim that, by committing a crime, the offender proposes a new norm. It rests on the concept of a responsible agent: ‘Democratic law needed to rest on beliefs in the civil qualities of actors; it is centred, in fact, on motives, on cultural assumptions about agency, understanding, and responsibility.’⁴¹

Furthermore, it is not the act of punishing itself which somehow introduces a new meaning or a message, one that could be made independently explicit, translated and pronounced. The criminal procedure is already a communicative process. And its end, *the verdict*, is an essentially communicative act.⁴² It fulfils the requirements of a communicatively integrated society: it is public and reasoned. Of course, the verdict is institutionally related to hard treatment—and hard treatment gets its meaning through an interpretation which refers to the verdict. But this relationship does not

⁴¹ Alexander, *The Civil Sphere*, above n 5 at 178.

⁴² S Schork, *Ausgesprochen schuldig—Dogmatische und metadogmatische Untersuchungen zum Schuldspruch* (Frankfurt, Peter Lang, 2005).

mean that both have to be necessarily considered and treated as a unity. They have to be treated separately.⁴³

With regard to the *offender*, the communicative message is twofold. As has been suggested by von Hirsch and others who propose a communicative interpretation of punishment, one part of the meaning conveyed to the offender is that what he did is *wrong*. But the pure statement of wrongfulness is not enough. The norm is not presented to the offender as something that he has to take for granted. Because the verdict is, as a speech act, performed in an intersubjective relationship with a normative structure based on reasons and justifications, the claim of the verdict that the crime is wrong can be justified by reasons. Furthermore, in a democratic society, one can interpret the violation of the norm itself as a normative statement, an expression of dissent against the valid norm.

But here is the crux. The offender's expression of dissent was not articulated through the public deliberative procedures of the public sphere of civil society, even though he had a right—in that forum—to propose an abrogation of the valid norm. As a statement of dissent, the offender's norm-violating act is legitimately rejected as wrong. He did not address the other citizen—the victim—as a communicative actor, as an equal participant in the public discourse, but denied his status. Consequently, the offender is not regarded as a co-legislator. He has to bear the burden of being forced into a legal procedure which treats him as a person, a responsible agent, but only with regard to his role as an addressee of the norm, not as its co-author.

⁴³ I consider this to be the mistake of R Hamel, *Strafen als Sprechakt*, above n 35, who always speaks of the verdict *and* punishment.