



Crime, Character, and the Evolution of the Penal Message

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Abstract

Scholars depict punishment as a moral dialogue between the community and the offender, which addresses both the offender's crime and character. However, how the penal message evolves vis a vis that crime and character as it passes through the different stages of the criminal process has remained under-theorized. This article, building on communicative theory, explores the interrelation between crime and character along the penal process, from sentencing, through prison, to parole release. We argue that in the penal dialogue the relationship between crime and character evolves in a dynamic way through three phases: *separateness* (sentencing), *fusion* (prison), and *re-distinction* (parole) of crime and character. The proposed analysis develops the communicative meaning of the penal process, provides a normative account of the work of punishment administration authorities, and explores applications of our proposed normative analysis for the administration of the punishment.

Keywords Communicative theory · Crime · Character · Sentencing · Prison · Parole

1 Introduction

Throughout history, there has been a gradual shift from punishing offenders for their flawed character to the censuring of their crime. While the “crime” is formally defined by the criminal law, the term “character” has multiple meanings, but is usually defined as “the locus of our responsibility as agents.”¹ It includes, for example,

¹ Duff (1993: 366). In contrast, narrower conceptions of “character” view character-related actions as emerging from the individual's reason and rationality, rather than from other sources (see Duff 1993; Lacey 2011).

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the individual's disposition and traits that led them to commit a wrongdoing, all of which embody their "settled values, concerns, and attitudes."²

Pre-modern religious criminal law theorists, living during the medieval era, focused on the offender's (or "sinner's") moral character.³ They considered the offense (or "sin") to be a direct reflection of the whole of the offender's flawed character traits, including their attitudes, concerns, and values.⁴ In response to these pre-modern theories, during the enlightenment era, classical criminal law theorists, such as Beccaria, sought to promote values such as the rule of law, fairness, equality, and rationality.⁵ Such latter theorists shifted the focus from the character to the crime, a direction that continued with the rise of modern retributive theories during the second half of the twentieth century.⁶ However, the shift from character to crime stands at a tension point. Liberal criminal law principles require that the offender is treated as an active subject, a moral agent, and not as a passive object: This treatment is necessary in order to give normative significance to the offender's character and to recognize their post-crime character development.⁷

The communicative theory of punishment offers a normative attempt to reconcile this tension by viewing penal communication as addressing both the offender's crime and their character.⁸ This article, building on key elements of the communicative theory, develops and extends this normative view and argues that the penal dialogue evolves along the crime–character axis of the penal process. The article will apply its proposed normative analysis to the different phases of the penal process and demonstrate how the relationship between crime and character should be shaped along the penal process from sentencing, through prison, to parole release.

The article is structured as follows. Section 1 sets the ground for the analysis and explores how retributive theories are inherently restricted in their ability to be crime, rather than character, oriented. Section 2 suggests a normative framework for any penal dialogue; accordingly, three different messages must be considered relevant to convey the full penal message to the offenders. This full message will, in turn, implicate and reflect the evolution of the penal dialogue. Section 3 analyzes the relationship between crime and character at sentencing, suggesting that in a liberal sentencing regime, the court mainly focuses on censuring the crime as detached from the offender's character. Section 4 argues that the prison system is engaged with different messages, but mainly communicates the fusion of the offender's character with their crime. This fusion, the article suggests, is reflected through prison symbolism and practices. Section 5 argues that during parole an offender can, and should, reveal the distinctiveness of their character from their crime, reflect on the crime from a

² Duff (1993); see Lacey (2011), Whitman (2003), Kleinfeld (2016).

³ Whitman (2003, 2008).

⁴ Lacey (2011), Whitman (2003, 2008), Kleinfeld (2016); see Duff (1993).

⁵ Beccaria ([1764] (2009), s. 74), for example, writes: "the degree of sin depends on the malignity of the heart, which is impenetrable to finite beings. How then can the degree of sin serve as a standard to determine the degree of crimes?"

⁶ Lacey (2011), von Hirsch (2017), Whitman (2003, 2008).

⁷ von Hirsch (2017), Moore (2010); c.f., Maslen (2015), Roberts (2019).

⁸ Duff (2001, 2022).

more externalized perspective, and show their moral improvement. This reconceptualizes parole as a normative mechanism for the last stage of the penal dialogue rather than as technical sentence-reduction. Finally, Sect. 6 answers the main objections to the suggested analysis. The article concludes and summarizes our argument and extrapolates its implications for penal theory and practice.

2 Setting the Ground

Retributive theorists have played a dominant role over the past few decades in theorizing about punishment and in determining penal policy. Modern retributivists have often argued that the offenders are morally deserving of a proportionate punishment for their crime.⁹ However, there are two caveats involved in applying modern retributive crime-focused theory to the workings of penal theory and policy. One caveat involves the solidly retrospective view of the retributive theorists. Retributivists are focused on delivering proportionate censure toward the crime. Such retributivists have traditionally been past-looking and offense-focused and have purposefully overlooked (or given, at best, little weight to) factors that occur before (e.g., criminal history) or after (e.g. remorse) the crime for the calibration of the deserved punishment.¹⁰ Such approach treats the offender largely as a passive object and stands in tension with other liberal principles that require seeing the offenders as *active* and *autonomous* moral agents. Recognizing this issue, some retributivists have not only focused on the crime but, at least to some extent, viewed the penal message as ideally engaging with the offender's character. For example, von Hirsch, one of the prominent retributivist theorists, noted that "one visits censure or reproof on people, not acts."¹¹ He also suggested that while the offender's response to the censuring message should not change the level of deserved censure, "some kind of moral response" is expected on the offender's part, such as "an expression of concern, an acknowledgement of wrongdoing, or an effort at better self-restraint."¹² However, whether such response should affect the punishment and how such response fits into the complex world of punishment administration and post-sentencing developments remain irrelevant for and continue to be largely ignored by retributive theorists.¹³

The second caveat is the application of the crime-centric retributive theory to the real life of punishment administration. Scholars who have recognized this limitation have emphasized the costs both to theory and practice of the epistemic gap between retributive theory and law and the realities of legal punishment.¹⁴ They have questioned the retributive theorists' tendency to treat sentencing and punishment

⁹ Walen (2023).

¹⁰ Moore (2010), Singer (1979), von Hirsch (2017); c.f., du Bois-Pedain (2019), Roberts (2019), Roberts and Maslen (2015), Gray (2010).

¹¹ von Hirsch (1985): 82.

¹² von Hirsch (1993: 10–69).

¹³ von Hirsch (2017), Singer (1979), Moore (2010); c.f. Kerr (2019).

¹⁴ Apt (2016), Hanan (2020), Kolber (2009, 2021), Lippke (2007), Manikis and Matheson (2023), Kerr (2019).

administration as distinct subjects, each with its own body of theoretical underpinnings, policy debates, and law, despite the intimate moral interaction and mutual influences of sentencing and punishment.¹⁵ This gap is even more evident considering the everyday realities of the criminal justice system. The criminal justice system, openly and less openly, deals with the offender's character. This extends from the time of trial (e.g., character evidence laws, pre-trial detention risk assessment),¹⁶ through sentencing (e.g., recidivist premium, character-based mitigation),¹⁷ to the world of punishment administration that focuses heavily on the offender's character (prison rehabilitation and parole release mechanisms, e.g., showing "insight" toward crime or making amends).¹⁸ Therefore, without a full account of the evolvement of crime and character along the penal continuum, retributive theory remains incomplete both in providing a rational-future purpose for the punishment, and in explaining punishment administration work, meaning, specifically, the work of prison and parole mechanisms.¹⁹

Recent developments in retributive theory reflect the imperative to consider the penal process broadly, including the moral character of the offender and the future-looking purposes of punishment. There has been a growing willingness by retributive scholars to expand their view beyond the narrow time of the crime to the complex workings of the criminal justice system. This expanded view has included a reckoning of the pains and harms of imprisonment for offenders and their families²⁰ and post-sentencing expiation (e.g., remorse, apology during parole).²¹ This entails a shift from a focus on the crime to a broader retributive view that also encompasses individual character-related aspects.²²

One key development of retributive theories is their focus on their communicative elements. The communicative theory, developed by several scholars but most famously by Duff, seeks to understand legal punishment as a form of secular penance which aims at repentance, reform, and reconciliation, and suggests that these aims are to be pursued by a communicative process of censure involving the imposition of hard treatment.²³ From the communicative theory's perspective, while the punishment is based on the crime's severity, it has communicative elements that focus on the individual offender and the offender's future.²⁴

¹⁵ Lacey (2011), Lippke (2007), Stuntz (2001), Kerr (2019).

¹⁶ Lacey (2011).

¹⁷ Maslen (2015), Roberts (2019).

¹⁸ Dagan and Roberts (2019).

¹⁹ Duff (2001, 2022), Lee (2017).

²⁰ Lippke (2007), Manikis and Matheson (2023), Kolber (2021).

²¹ Dagan and Roberts (2019).

²² Maslen (2015), Kerr (2019).

²³ Duff (2001), Maslen (2015), Roberts and Maslen (2015), Dagan and Roberts (2019), Manikis and Matheson (2023); see Dancig-Rosenberg and Dagan (2019). Scholars debate whether the communicative theory: reflects retributive values in a broad sense (Roberts and Maslen 2015; Maslen 2015); is a "species of retributivism" (Duff 2001: 21); or is "a 'third way' between retributivism and consequentialism" (Zaibert 2002).

²⁴ Duff (2001, 2022).

Communicative theorists usually see the penal dialogue as focused not only on delivering a censuring message toward past criminal conduct, but are also interested, at least to some degree, in offenders' *responses* to the censuring message and in their penal experience as moral agents.²⁵ However, current communicative literature is limited in two important aspects that derive from the caveats described above regarding the retributive theory. First, with few exceptions, they treat penal communication as *sentencing*-oriented, largely ignoring the meaning of punishment administration for the making of the penal dialogue.²⁶ Second, and relatedly, as crime-oriented and sentencing-focused, they often neglect the complex management of crime and character within the punishment administration phase. Therefore, current communicative theorists insufficiently connect the justifications for punishment and the work of punishment administration authorities and fail to give sufficient focus to the shift from crime to character along the penal process.

This article seeks to fill this gap by exploring how the penal dialogue evolves along the crime–character axis of the penal process. As the article will argue, the penal dialogue is evolving and dynamic, depending on the point at which the interlocutors in this dialogue stand. The penal dialogue, the article argues, consists of three different messages that balance between censuring the crime and character. Accordingly, the different institutional phases along the criminal continuum communicate differently the relations between the offenders' crime and their character. This, the article argues, suggests distinct normative and policy implications regarding the nature of the penal dialogue and messages delivered at sentencing, prison, and parole. Parole, particularly, is a phase that is largely ignored – or rejected openly – by legal philosophers and penal theorists based on their narrow focus on censuring the crime at the time of commission.²⁷ In order to explore the meaning of this proposed normative argument, the analysis will use criminological literature regarding the subjective experience of punishment and its moral meaning for offenders.²⁸

3 The Penal Process as a Communicative Enterprise

Communicative theorists understand the criminal process as a communicative process between the community and offenders and possibly other actors (e.g., crime victims).²⁹ Penal communication focuses on delivering a censuring message that is proportionate to the severity of the crime and not to the offender's overall moral

²⁵ Maslen (2015), Dagan and Roberts (2019); see Lippke (2013: 4).

²⁶ For exceptions see, for example, Bülow and Dagan (2021), Dagan and Roberts (2019), Lippke (2007, 2013), Cochrane (2017).

²⁷ Ryberg (2015), von Hirsch and Hanrahan (1979), von Hirsch (2017), Singer (1979). For a review and more optimistic theory of parole grounded in the development of the offenders' agency see Bell (2021).

²⁸ Although the proposed normative theory regarding the three parts of the penal dialogue is also relevant to prison alternatives such as probation or fine sentences, the article focuses on a penal continuum that includes incarceration, which raises the most complex normative challenges (see Duff 2001). However, the authors intend to expand the research to include prison alternatives.

²⁹ von Hirsch (1993), Duff (2001).

character (e.g., as reflected through criminal history or post-crime reparations).³⁰ For von Hirsch, the censuring message is a past-oriented, crime-focused, and purely normative enterprise.³¹ The penal suffering (“hard treatment”) imposed, at least in theory, is only supplementary to the normative penal censure conveyed via the criminal sentencing.³² Duff, however, understands the penal message as both past and future-oriented, as it goes “beyond proportionality” and aims to morally persuade offenders as moral, rational, and autonomous agents and allow them to “write their side of the communicative dialogue.”³³ For Duff, during sentencing, as a public ritual, the community delivers a message to the offenders that they respect them as “fellow citizens of a liberal polity.”³⁴ The penal communication, ideally, should bring the offenders to repent their wrongdoing, recognize their need to avoid such wrongdoing in the future through moral reform, and provide them with space to express their apology for their wrongs.³⁵

The penal dialogue, according to Duff, is expanded through the trial itself. At trial, the offenders confront their civil responsibility for their actions. Likewise at trial, they must explain their actions to the community. They must face the climax of the sentencing process in its censuring phase when they are found liable for their wrongdoing as a public wrong.³⁶ Duff, however, does not elaborate on the specific content of the penal message across the multiple parts and experiences of the penal dialogue, namely the communicative meaning of prison and parole authorities.³⁷ This under-development of the communicative theory is all the more conspicuous considering the tension between the crime-focused censuring message of sentencing and the complex process of internalization, moral reform, and penance that Duff envisions during punishment administration.³⁸

The article will depict the penal dialogue as a dynamic process that includes three main parts that negotiate the relations between crime and character.³⁹ It will be argued that communicative dialogue should address both the crime and character but should also distinguish between the two, so that the offenders’ character will not be deterministically associated with the crime.

To clarify the distinction between censuring the crime, on the one hand, and censuring the offender’s moral character, on the other hand, and how the penal message develops around this axis, let us present an example. Danny, a 10-year-old boy, went shopping with his parents at a nearby supermarket. While his parents were browsing

³⁰ Having said that, it is important to note that “no modern version of desert theory completely excludes instrumental consideration in sentencing,” at least as an additional prudential reason to avoid crime (Bottoms 1995: 22; von Hirsch 2017; see Duff 2001).

³¹ von Hirsch (1993).

³² von Hirsch (1993: 77), Moore (2010).

³³ Duff (2001: 110–141).

³⁴ *Ibid.*

³⁵ Duff (2001).

³⁶ Duff (2001, 2007a, 2007b).

³⁷ Duff (2001).

³⁸ See Duff (2001, 2013).

³⁹ Maslen (2015), Dagan and Roberts (2019).

the shelves, Danny independently approached the candy section and quickly put his favorite lollipop in his pocket without telling his parents and without paying for it. Upon arriving home, Danny's parents immediately realized that Danny had stolen the lollipop. Danny's parents wanted to convey to him the message that taking something that does not belong to you without permission is morally unacceptable. They explained to Danny that taking someone else's property without permission shows disrespect for their belongings. Danny himself, they further explained to him, would not want others to take his belongings without permission. To demonstrate the seriousness of their message they also deprived Danny of his favorite lollipop for two weeks. At this stage, Danny's parents did not focus on the implications of Danny's act on his character, but solely focused on the severity of his act. Danny understood and replied to his parents that he knows that stealing is wrong, but he really wanted the lollipop and knew his parents would refuse to buy it for him, and felt compelled to take it without their permission. In response to this justification, Danny's parents conveyed to him an additional message: that we all need to control our desires and act according to what we deem right and fair; we should not act solely based on our desires. Accordingly, even if Danny knew that his parents would refuse to buy him candy, that does not justify stealing. To further clarify this message, Danny's parents explained to him that this is exactly why they were preventing him from eating his favorite lollipop for two weeks: to convey to him that rational and moral humans, as opposed to animals, should morally reflect upon the wrongness of their acts. In response, Danny started to cry, explaining that according to his parents' message he was being treated like an animal who does not control himself and therefore requires external restraint through punishment. Danny's parents reassured him that just because he made a mistake once does not make him someone lacking moral judgment; however, he must understand why he acted the way he did. They explained him that if he did not fully understand why he acted (the cause), he would do it again (effect); therefore, it was important that he fulfill the punishment imposed on him. They made it clear that now he should recognize the seriousness of the act and its cause and would be able to control his actions in the future. From now on, every time he feels the urge to do something wrong, he should remember the candy example, pause, and consider whether it is appropriate to do so, and only then act.

Essentially, Danny's parents conveyed three messages to him: *first*, a condemnation of the wrongdoing, the act of theft; *second*, the connection between Danny's wrongdoing and his moral character, indicating a lack of self-control and the need for moral improvement; and *third*, that a one-time wrongdoing does not stain Danny's character. The integration of these three messages is crucial in order to convey the complete moral communication. If Danny's parents had only explained to him the seriousness of his act without referring to his character (e.g., his motivation) they could not relate to the cause of his act and help to develop his ability to control his desires in the future. If Danny's parents had deprived him of his favorite lollipop for the rest of his childhood, while reaffirming his immorality, this would probably signal to him that his character is flawed, possibly beyond repair in this regard. Only the integration between the different messages communicates to Danny that his wrongdoing is serious, that he is responsible for it, and he can overcome his desires as his wrongdoing does not define his character.

It appears that the messages conveyed to the offenders during the penal process consist of three similar communicative dimensions: (a) a censuring message toward the crime, which is the focus of the sentencing process; (b) a censuring message toward the offenders who failed to act upon the community's moral values, which is delivered through the imprisonment period; and (c) a message regarding the offenders' capacity to regain trust and to act according to their own moral judgments as fellow citizens, re-distinguishing their crime from character, as conveyed through parole. As the article will argue, any penal dialogue should engage with these three messages along the penal process. The proposed normative analysis can offer tools for understanding and shaping the penal process.

4 The (Trial and) Sentencing Phase: Crime as Separate from Character

In pre-modern times, as noted, punishment was perceived as a means of purifying society from the offenders' inner "evilness" and "sinfulness."⁴⁰ The "sinfulness" was directed through their crime against the community and/or the omnipotent judging divine power. Accordingly, the act of crime was not the central focus of the penal process. Rather, it served as an indicator of spiritual and societal deviant inclinations and threats that needed to be eliminated, purified, and punished to clean the community from the impure presence of sin. Therefore, the central components of proving guilt focused on the offender's character through various types of character-related evidence – not necessarily connected to the crime. Thus, proof of guilt focused on extracting the sinner's remorseful confession that, first, showed their repentance and, second, redeemed their "soul."⁴¹

In contrast, liberal penal theories, originating in the Enlightenment-Kantian-driven era, focus the criminal trial solely on proving rationally and objectively beyond reasonable doubt that the offender intentionally committed the criminal act (with no defenses). These liberal criminal law theories give little, if any, regard to the offender's character (e.g., moral mores, habits, beliefs) that are beyond the narrow inquiry of the crime.⁴² Exceptions aside, modern criminal law doctrines focus narrowly on the criminal act and the "intentionality" (various forms of *mens rea*) accompanying it as the key markers of an offender's criminal responsibility. Thus, the modern criminal law assessment usually narrowly focuses on the moments of crime (or shortly before, e.g., pre-meditation) while largely ignoring events that happened before or after the crime that indicate the offender's character.⁴³ Modern penal systems dedicate serious efforts – not always successfully – to eliminating from the criminal trial biases and injustices that may arise from the offender's personal characteristics or from any affiliation with marginalized groups that may imply distinct

⁴⁰ Lacey (2011), Whitman (2003, 2008), Kleinfeld (2016).

⁴¹ Whitman (2008).

⁴² Lacey (2011), Feinberg (1984, 1985).

⁴³ von Hirsch (2017), Lacey (2011), Roberts (2019).

character traits. The criminal trial is focused on objective fact-finding, and it seeks from the offender neither inner reflection, “secular penance,” nor character reform (that can have a place during sentencing). In fact, the opposite is true. The focus of the trial is on evidentiary and procedural aspects and upon the fundamental question of whether an offense has or has not been proven beyond a reasonable doubt. Such process is normatively and emotionally disconnected from the meaning of the offense to the offender’s overall character.

Duff emphasizes the importance of the criminal trial as a central part of the penal system, in which the accused takes an active part rather than being merely the object of the proceedings. Duff, however, distinguishes between the trial phase, which focuses on *responsibility* and where the offenders are required to explain and justify their acts as a member of the civil society, and the sentencing phase that focuses on *liability*, where the convicted offender is the addressee of messages of blameworthiness for the wrongdoing. However, in both stages the focus is on the crime rather than on character.

The value of the trial is in defining the offender’s act as a public wrong, thus echoing the protected values of society; it is separate from dealings with the offender’s character⁴⁴ (unless the character directly relates to the offender’s *mens rea* when committing the crime). The criminal trial is “an examination, by a court sitting in public... in order to decide whether the defendant did the act charged and, if so, was at fault for doing it.”⁴⁵ The offenders (defendants at the time) are entitled to a presumption of innocence and are regarded as full moral agents during the trial, entitled to fight for their factual innocence. For example, during the trial, the offenders wear civilian clothing, which strongly symbolizes that prior to formal conviction they are free citizens and that the process does not “stain” their character.⁴⁶

The distinction between crime and character remains, while less strongly, also at the sentencing phase. Traditionally, retributivists view the sentencing message as focused mainly on censuring the crime rather than the character.⁴⁷ At sentencing, after the offender has been found legally liable, censuring them is justified.⁴⁸ While individual moral character-related factors are part of sentencing both for aggravating (e.g., prior convictions) and mitigating (e.g., remorse, apology, making amends) the sentence, for retributivists these considerations, if allowed at all, are not the main focus of sentencing. Rather, for retributivists, the focus remains on delivering a proportionate censure commensurate to the severity of crime. The messages conveyed throughout the criminal sentencing address the crime and have a defined social and normative purpose that provides a rational justification for the penal “hard treatment.” While the censure reflects an “expression of the apology that she owes to those whom she wronged... and to the wider community whose values she flouted”

⁴⁴ Duff et al. (2007a).

⁴⁵ Ashworth and Zedner (2008: 22).

⁴⁶ Estelle v. Williams (1976: 504), Mukai (1971).

⁴⁷ Williams (1955: 130), Lacey (2011).

⁴⁸ Duff (2007a, 2007b).

that hard treatment “provides a structure which can focus her attention on her crime and its implications.”⁴⁹

5 Imprisonment: Fusing Crime and Character

As discussed, the separation between crime and character is a fundamental principle that shapes the retributive vision of trial and sentencing. The retributive vision for prison, however, as we will explore in this section, shifts the focus from the crime to the character, and even fuses crime and character.⁵⁰

As we saw, the criminal trial and sentencing focus on the criminal act solely. However, when a custodial sentence is imposed, this changes the normative status of the punished individual, transforming them from a free citizen into a prisoner, thereby shifting the focus of the criminal process onto the prisoner’s character. By what means do prisons communicate to offenders (now prisoners)?⁵¹ This communication is achieved through three interrelated communicative messages that focus on their character as moral agents and are directed toward their internalizing the moral wrongdoing and moral reform.

The first communicative element brought into play by imprisonment is that of the changed context of the prisoners’ relationship with society. Human identity and mental capacities are shaped by the spatial–temporal and relational contexts in which we exist.⁵² Prison inherently disconnects prisoners from the civic community.⁵³ Thus, prison communicates the prisoners’ inability to be free moral agents who can manage their lives according to their own autonomous judgments as free citizens, and, so, exercises control over their illegal desires.⁵⁴ These messages are heavily focused on the offenders’ character.

Prison communication is primarily conveyed through the deprivation of liberty. The deprivation of liberty signifies the societal mistrust in the prisoners’ ability to exercise their actions in a legal way.⁵⁵ The restrictions on the prisoners’ positive and negative liberties are expressed through a wide array of limitations over human activities, such as family and professional life, leisure, or community-related practices.⁵⁶ Many dimensions of human activity, which allow citizens to develop their

⁴⁹ See and compare Duff (2003: 300).

⁵⁰ To be clear – we do not argue here that prison should include harsh violent practices common to many Western prisons (e.g., lengthy solitary confinement, humiliation, and degrading prison conditions) that aim to break offenders and fail to treat them as rational and autonomous agents capable of moral deliberation (see Lippke 2007, 2013). Instead, we aim to elucidate how the communicative aspects of prison inform and influence the prisoners’ character.

⁵¹ See Lippke (2007); for a pessimistic account of the possibility of moral communication in prison see Cochrane (2017). For empirical engagement with the communicative meaning of prison see Dagan and Zimran (2023), Ivins (2023); c.f. Schinkel (2014).

⁵² Goffman (1959), Crewe et al. (2014).

⁵³ Crewe (2011).

⁵⁴ Duff (2001, 2013); see also Ballas (2022).

⁵⁵ Duff (2001).

⁵⁶ Lacey and Pickard (2013).

agency, are abruptly halted upon entering prison. Imprisonment reduces the offenders' multiple identities to a single unidimensional "master status" of "prisoner"⁵⁷ and focuses them on their criminal identity. Contrary to the multiplicity of identities that characterize life outside prison, imprisonment freezes the prisoners to the isolated moment of crime.⁵⁸ That moment is stretched over the extended period of imprisonment. The confinement directs the offenders to return, time and again, to the moment of the crime, rather than moving forward and developing their other identities.⁵⁹

The first element focuses on the communicative meaning of separation from community, while the second element emphasizes the communicative meaning of the symbolism of prison regime. Prison consists of strong symbolism (wires, walls, uniforms, military order, disciplinary punishments) that serves as a continuous reminder that prisoners broke the moral boundaries of the community and are excluded from civic life: "The message of imprisonment is that the offender has not just damaged or threatened, but has broken, the normative bonds of the community."⁶⁰ Imprisoned offenders also stand in the (forced) presence of other prisoners, that reflect them as in "a hall of mirrors," their culpable image intensively and constantly before them.⁶¹ These communicative qualities, inherent to imprisonment, strongly symbolize their "spoiled" character and serve to maintain a connection from the offenders' character to their crimes. In so doing, the prison directs the prisoners' attention to their fault, so their internal censure will mirror the formal penal censure.⁶²

The third communicative element brought into play by imprisonment projects the labeling of the prisoners into the future. Prison rehabilitation often aims to connect character and crime. Such rehabilitation often focuses in direct and indirect ways on crime internalization and taking responsibility, analyzing the motivations that led to the crime, and developing self-control.⁶³ Such rehabilitation takes place in the isolating, suspicious, and stigmatizing sphere of prison, which relies heavily on the prisoner's past, and again connects their crime to their character.⁶⁴

All these features message to offenders a causal normative link between their character and their crime. Just as Danny's parents were not satisfied with conveying a message about why stealing is wrong, but also conveyed as part of the imposed punishment a message about his responsibility and need for self-control, prison communication does not allow prisoners to detach themselves from, neutralize,

⁵⁷ Goffman (1971), Crewe and Ievins (2020).

⁵⁸ Empirical studies consistently show that imprisonment suspends or puts on hold the prisoners' pre-existing societal roles and opportunities. See Liebling et al. (2011).

⁵⁹ Jewkes (2012), Dagan and Zimran (2023).

⁶⁰ Duff (2001: 150).

⁶¹ Ievins and Crewe (2015).

⁶² Crewe and Ievins (2020).

⁶³ Crewe (2011). The question of internalization of blame and its meaning for rehabilitation is complex because through internalization, the individuals may take responsibility for their crime, but they also may show a *lack* of social awareness of the full meaning of their actions and fail to associate their crime with their identity. Thus, for example, prisoners deemed to be in denial by a parole board were found to be *less* likely to reoffend than those who took responsibility for their crimes (Maruna and Mann 2006).

⁶⁴ Ievins and Crewe (2015).

minimize, or repress their crimes. Rather, it constantly encourages them to locate the cause of their imprisonment in their *own* character, something that they should address through internalization, moral reform, and penance.⁶⁵ While prison largely fuses crime and character, in order to complete the penal communication, an additional stage is required in which the prisoners acknowledge their role as moral agents and recognize that despite committing the offense, their moral character is *separate* from their crime. To achieve this a meaningful parole communication is necessary.

6 Parole: Re-distinguishing Moral Character from Crime

Parole, a common practice in all European⁶⁶ and several U.S. systems,⁶⁷ is under the constant attack of retributivists, viewed as unjust and unfair, and as undermining the censuring message of sentencing.⁶⁸ However, as we will argue, the parole process has an important normative function with regard to crime and character that goes beyond its instrumental-administrative importance (e.g., reducing overcrowding, risk-reduction).

Parole reflects a gradual reclaiming of released offenders' (now parolees') multiple identities, through work, family, and other societal roles, that render punishment inclusionary rather than exclusionary and render the parolees distinct from their crime.⁶⁹ As we saw, during imprisonment, the prison messages to an offender that their character fuses with their crime. The prison system's normative presumption is that unless they understand that their own moral character is the reason for the crime, the offender will be unable to identify, understand, and address the motives and reasons that led them to commit the wrongdoing.

However, a complete collapse of the distinction between moral character and the crime also poses a significant risk and curtails the potential for moral reform and the development of autonomous agency. If an offender cannot distinguish between their overall character and the part of their character that led to the crime, the offender will perceive themselves as a permanent offender and perceive the crime as a deterministic result of their flawed character. Moral reform requires that an offender is able to distinguish between their overall moral character and the part of their moral character that led to the crime. This distinction is essential to restore in the offender the awareness that despite their moral guilt being the exclusive reason for the crime, they are still an autonomous moral agent, capable of controlling their actions and desisting from committing crimes in the future.

⁶⁵ Duff (2001).

⁶⁶ van Zyl Smit and Corda (2019).

⁶⁷ Rhine et al. (2017).

⁶⁸ von Hirsch (2017), von Hirsch and Hanrahan (1979), von Hirsch (2017), Bell (2021), Forsberg and Douglas (2022), Ryberg (2015). Indeed, parole has been eliminated or minimized from many Western systems since the 1970s for retributive reasons; see van Zyl Smit and Corda (2019).

⁶⁹ Duff (2001: 149).

6.1 Parole: Breaking the Causal-Moral Chain of Crime/Character

In order to sever the causal chain of the crime, it is necessary to restore in offenders a sense of control over their acts and to disconnect the automatic and uncontrolled reactions that may lead to the commission of a crime. The moral reform of offenders should communicate to them that even if the circumstances that led to the crime recur, it is within their autonomous choice to break this sequence and prevent the reoccurrence of the crime. In other words, they are a moral agent and not just a reactive entity that responds deterministically and uncontrollably to objective circumstances. Being a moral agent implies the ability not only to weigh and understand the moral implications of one's actions, but to be an active causal factor that controls one's reactions and actions.

To explain why this message should be part of the penal communication, let us return to the example with which we began. Danny's parents endeavored to convey to him the message that although he acted immorally by taking the candy without permission, there is no reason to conclude that he cannot be a moral agent. On the contrary, his parents did not disregard the severity of the act, but rather linked that act to the message: the event of taking the candy will remind him how to behave in the future. In the future, when faced with a moral conflict between fulfilling his desires and his need to obey the command of conscience, he should choose the latter.

Similarly, during the parole phase, the state reminds the offender that despite committing a crime and serving a custodial sentence, the crime is not a constitutive part of their character. They retain the ability to choose to avoid committing crimes. The parole phase teaches the offender to take responsibility and recognize that they were a cause of the crime. However, in addition to recognizing their responsibility for the crime, to break the causal chain that led to their crime there is a second step: the offender must restore their autonomous moral character as separate from their crime. They are required to identify their character-related reasons that led them to commit the crime and acknowledge that they have the capacity to control them based on moral and rational autonomous considerations.

The parole phase precisely allows for such distinct moral functions. Parole is neither acquittal nor a sentence reduction but merely a "variation on imprisonment of convicted criminals."⁷⁰ Thus, parolees are often regarded as yet within the custody of the penal system and are subject to the regime of sentencing logic, even as they are no longer physically incarcerated.⁷¹ However, contrary to the imprisonment stage, the parole phase re-creates a distinction between the offenders' moral character and their crimes. During this period, a re-distinction begins between the two. The offenders – now returning citizens – should act as active moral agents who can control their actions and manage their lives according to ethical and moral considerations, not just as passive recipients of the moral censure. For this very reason, it is important that the parole process does not become a simple "re-sentencing," by which the original censuring message of sentencing is repeated and in which the

⁷⁰ *Morrissey v. Brewer*, 408 U.S. 471 (1972): 478.

⁷¹ Rhine et al. (2017).

crime narrative is repeated and reinforced.⁷² Instead, the process should stress to the parole applicants their ability to engage morally with their crime and the reasons that led to its commission and recognize their ability to exercise moral self-control.⁷³

The implications of our normative analysis extends to the nature of parole supervision and the conditions imposed by the parole board, in case of release. Those conditions should not undermine a parolee's ability to distinguish between their crime and character. For example, one common parole release condition prevalent in several systems is electronic monitoring during the parole release period. Such parole condition, however, "may lead to stigmatization of the individual wearing it."⁷⁴ The parolee may feel punished, shamed, and excluded even after their release.⁷⁵ Conditions of this nature affect the parolee's identity, both how they see themselves and how society sees them. Such conditions convey the message that, even after their release, their crime is an inherent part of their character; thus, they still should remain in a prison-like restricted status.⁷⁶

During the parole period, offenders regain their multiplicity of identities – returning to their family and friends, professional spheres, hobbies, and personal areas of interest, all while still serving their sentence. During the parole period, the offenders are still under supervision, are obliged to be accountable for their conduct, must earn societal trust, and face the omnipresent threat of returning to prison.⁷⁷ In addition, however, as Bell noted, parole can provide the offenders an opportunity "to exercise and develop their agency... as analogous to a professional license or college degree; something that a person can be said to earn, and which offers some empowerment upon return to the community."⁷⁸ Thus, the duality of the parole period is that the offenders simultaneously continue to serve their sentence and reintegrate. This reintegration into their social circles, and into their other identities, conveys to them a powerful normative message – the crime, no matter how serious, does not indicate the complete corruption of their moral character and their capacity to act as moral agents. In every human being, even in one who has committed serious offenses, there is an inherent capacity to act as a rational, moral agent who controls their illegal desires.

The type of character/crime separation at sentencing is dissimilar to that of parole. The character/crime separation at sentencing reflects the normative distinction that allows the proportionate and equal sentencing toward the crime, and it does not disconnect the offender from their crime. In contrast, the character/crime separation at parole sends the communicative message that the offender's character is distinct from their past crime and this distinction allows them to control their decisions and choices.

⁷² Herbert (2022).

⁷³ Bell (2021), Forsberg and Douglas (2022).

⁷⁴ Bülow (2014: 511).

⁷⁵ Ibid.

⁷⁶ Fitzalan-Howard (2020).

⁷⁷ Duff (2013).

⁷⁸ Bell (2021: 25).

6.2 Parole: Impacting Dimensions of Imprisonment and Citizenship

According to this proposed analysis, parole is not an additional or external part of imprisonment.⁷⁹ Instead, it serves a primary normative penal function. We can even say that imprisonment *sets the ground* for the message of parole to the offender: you have committed a crime, this crime derives from your character, but you have the opportunity to be again an agent capable of rational and moral choices and societal trust. The very possibility of parole – as distinguished from actually receiving it – delivers such a message. Thus, as a key mechanism in allowing the crime/character distinction to be reinstated, parole holds an important part of the overall communicative message of the penal system.

Moreover, we propose that parole can lead to an altered general perspective on imprisonment itself. In a system of parole, liberty deprivation does more than seek to remove offenders from society. It also encourages the potential parolee to identify the moral reasons for committing their offense rather than to neutralize or deny them. The stage of imprisonment, where an identity is formed between the moral personality of the prisoner and the offense, is only a *preparation* for the *primary* penal message delivered to the prisoner during the parole period. Thus, imprisonment is only a necessary step in the full penal communication, conveyed by parole, that the offender's moral character is separate from their crime.

The harmonic integration of these messages, this article suggests, also serves to soften the strict boundaries between the penal sphere and the civic community, and echoes these key messages both to offenders and to the civic community at large. The physical boundaries that prison constructs between prison and civic community reflect a material and symbolic dichotomic distinction between the normative free citizen and non-normative excluded and controlled prisoner. Parole, in contrast, blurs this distinction: the paroled prisoner is blended with the civic community. Parole messages the diffusion of the boundaries between prison and community and between the non-normative and the normative spheres.

Parole communicates to the members of the community that the penal message does not deterministically label offenders; and offenders too, under certain conditions and rehabilitative progress, can regain societal trust as moral agents that are distinct from their crimes. As the article suggests, parole “tells” the civic community that prison is not an isolated institution – a permanent exclusion of “others” with different character flaws – detached completely from the rest of the civic community. Parole, instead, conveys that prison is an *integral* part of the civic community. Through the parole, the civic community reminds itself that the strong boundaries between prison and community are not hermetic. Parole signals that even prisoners hold a distinct moral character despite their crimes. It likewise signals that the mirror image is also true: members of the civic community, despite being viewed by themselves and the state as moral agents, lack inner moral boundaries and restraints and have the potential to commit imprisonable crimes. This message undermines the dichotomic distinction between “normative” and “non-normative” citizens based

⁷⁹ Rhine et al. (2017).

on their character traits.⁸⁰ Thus, parole holds an important civic value to the community: crime is not identical with character; prison does not hold an eternal moral labeling; released prisoners should have the opportunity to regain community trust as fellow citizens; and prison and the civic community are not isolated phenomena.

7 Responding to Main Objections

The suggested analysis may face several objections that stand against the backdrop of communicative theory. In this section, we will address five main objections to the proposed analysis.

First, one can argue that the analysis of the proposed penal theory presumes that penal institutions function properly. In other words, the theory can be criticized on the grounds of confusing what “is” with what “ought to be.”⁸¹ Specifically, such critique would suggest that the practice of fusing crime and character during the imprisonment phase is undesired and is an illegitimate result of imprisonment rather than a normative element of liberal incarceration. A proper penal theory, it follows, should strive to preserve the distinction between crime and character also within the prison regime.

In response, we clarify that the suggested analysis offers a normative argument, focusing on how communicative theory should organize the relations between crime and character when developing an analysis of the communicative dialogue along the penal process. We use the communicative theory premise that recognizes, also, the important character-related meaning of the penal communication. The aim is to offer normative accounts of the current main penal phases that explain the normative intuitions underlying these institutional phases. Specifically, our proposed analysis does not support full fusion of crime and character through a stigmatizing message that views imprisonment as a permanent exclusion of community. Instead, we address the role of character–crime relations within the communicative theorists’ general view of on-going penal dialogue. We seek to explain why the function of prison – stressing the connection between crime and character – reflects a perception of the offenders as moral agents that could internalize the severity of their crimes and the reasons for committing them. As we argue, the imprisonment phase should be viewed as more a preparation for the parole phase, in which the state communicates to the parolees that they are moral agents able to reintegrate in community as fellow citizens, despite their crimes.

Second, it may be argued that the focus of the punishment on the offenders’ moral character rather than on crimes may stand in tension with the traditional liberal retributive values. Retributivists, as noted, resist criminal law’s attempt to engage

⁸⁰ This argument echoes Foucault’s (2012) criticism of the social dividing function of the disciplinary power of the prison.

⁸¹ see Duff (2001).

with the offenders' character. Retributivists perceive such engagement as one that undermines offenders' autonomy and is disrespectful, coercive, and intrusive.⁸²

In response, we stress that the proposed analysis suggests a complex perspective over the penal process consisting of censuring messages directed both toward the crimes and toward the offenders' moral character. The offenders' character does not stand *alone* as the subject of the punishment. To the contrary, the process is directed toward the crimes at trial and sentencing and, while in prison, the penal message aims to rationally persuade the offenders to recognize their crimes and to internalize their responsibility for the crimes and the moral reasons that led them to commit them. To some extent, addressing the offenders' moral character is important also for liberal penal theory as it messages that offenders are moral agents acting upon rational and moral considerations that reflect their character. A penal dialogue that is completely detached from the character disconnects moral character and action, and fails to accurately represent the offenders as moral agents.⁸³

Prison, as we argue, connects forcefully the crime to the offender's character. The prison, we stress, does not create this connection, but only reflects it forcefully to the offender, making it difficult for the offender to ignore this normative connection. The offender can barely deny, neutralize, and minimize the crime or distance themselves from it morally. Above all, it is important to note that moral character does not mean a specific moral content but rather a "thin" concept of rational and autonomous agency subject to moral decision-making in relation to the commission of the crime.

Third, one may argue that taking character-based messages seriously might lead analytically to a conclusion that prison time could become indeterminate. Prisoners could be released before or after their proportionate sentence if they show penal responsiveness or defiance, respectively. In response, we emphasize that we do not argue here for full subjectification of the penal process.⁸⁴ Our analysis stays in the boundaries of the communicative-retributive theories that require a close connection between crime and punishment. The *reason* for punishment remains the seriousness of crime that, in turn, determines the sentence, but the *justification* for the pains of imprisonment emerge from communicative values. While the penal process consists of three messages, the nature of the dialogue can be changed according to the prisoner's personal circumstances. The parole decision, in this regard, is not binary. It varies in terms of parole conditions, type of release (to the community or half-way house), and the possibilities within the particular jurisdiction. The very existence of parole delivers the message of a character/crime distinction, while the parole decision just communicates this message to the individual prisoner.

Fourth, one may raise the challenge of whether the proposed analysis is significantly different from the traditional penal welfarism and its rehabilitation-based parole model.⁸⁵ In response, we stress that our proposed analysis provides

⁸² Hampton (1984), Duff (2001), von Hirsch (2017).

⁸³ Smith (2014).

⁸⁴ Kolber (2021).

⁸⁵ Rhine et al. (2017).

a normative justification for the parole release process and integrates it as part of communicative theory, without relying on crime-control considerations of rehabilitation or risk-reduction to justify parole. Even more, the proposed analysis suggests normative boundaries for rehabilitation. As the moral reform must be connected to crime and to the offenders' moral character, coercing the offenders to satisfy instrumental values is forbidden and unjustified. This also explains why the parole board should be a judicial or quasi-judicial, rather than a purely administrative, authority – as is common in many parole systems.⁸⁶ A judicial forum is required for the weighty delivery of a normative message that goes beyond simple assessment of risk to public safety.

Finally, the feasibility of the proposed model raises challenges considering the punitive realities of many modern prison regimes. As criminological research on labeling suggests, prison “speaks more effectively about the shamefulness of the wrongdoer than about the wrongfulness of the act.”⁸⁷ Through imprisonment, incarcerated individuals, especially for serious crimes, are subjected to “a form of shaming which is both stigmatizing and difficult to discharge.”⁸⁸ Indeed, the greater the number of people incarcerated, the larger the stigmatized underclass becomes – an underclass excluded from legitimate opportunities of reintegration (e.g., housing, work) and that inevitably internalizes its stigmatization.⁸⁹ These empirical realities challenge the possibility of separating the character–crime fusion created during imprisonment. The answer to this should be at the level of prison and parole policy. There should be a mutual diffusion between the civil arena and the prison sphere that begins during the prison period. This mutual diffusion between community and prison should signal to the incarcerated individuals that their core character is not fully associated with their crime and they consist of other civic-oriented identities. Wearing regular clothing during imprisonment, generous visitation and furlough policies, and work-release within the community are prison instruments that increase the possibility that these individuals' crimes could be separated from their character when released.⁹⁰ From the perspective of the civic community, it is imperative that the prison not be regarded as an estranged enclave detached completely from the societal fabric. This can be achieved, in part, by positioning the prison conceptually and physically as a central space that is accessible for visits by community members (e.g., locating the prison as a visible institution community; allowing effective public scrutiny). That placement is paramount in ensuring the prison's integration within the broader social order and not as a normative “state of exception.” Locating the prison as part of the socio-civil order can prevent the fusion of the

⁸⁶ van Zyl Smit and Appleton (2019).

⁸⁷ Ievins (2023: 21).

⁸⁸ Ibid.

⁸⁹ Maruna (2012).

⁹⁰ Maruna (2012), Smiley and Middlemass (2016). This holds implications also for the prison practices themselves. For example, empirical research suggests that in several cases, prisoners viewed the physical interaction in a prison setting as cementing the offender's identity; and this holds implications for the prisoners' willingness to have visits from their loved ones by whom they did not want to be seen in the institution as an inmate (Pleggenkuhle et al. 2018: 742).

stigma onto incarcerated people's character in a deterministic and unchangeable way and will allow them to re-separate their moral character from their crime through the parole phase.⁹¹

8 Conclusion

The article argues that the relation between crime and character evolves along the three-phase penal dialogue. It illustrates how this normative argument, rooted in the communicative theory, could be applied to penal institutions from sentencing, through incarceration, to parole release. In response to the religious theories of pre-modern criminal law that focused on the individual's character, liberal criminal law theories shift the focus of criminal law from the offender's character to the crime. However, ignoring the character raises difficulties: it disconnects retributive theories from future-related developments and, thus, distances retributive theory from the realities of penal administration and the need to recognize the offenders' character-related developments after the time of sentencing. Communicative theorists, addressing both past and future, crime, and character, offer normative resources to bridge this tension. Such communicative theorists see penal communication as based primarily on crime severity, aiming to bring the offender to moral reform, repentance, and reconciliation, and view the offender as an active, rational, moral agent capable of moral deliberation and response to the penal message. However, so far, communicative theorists have not provided a full account explaining how character and crime form and interact during the real life of the punishment administration and release from prison.

This paper develops the communicative theory's reach by explaining how the penal message evolves and changes with the penal process in a way that reflects the relations between crime and character. By designing the criminal process according to the dynamics of penal communication, the penal system delivers messages regarding the crimes' severity, the offenders' moral responsibility, and their ability to become again moral agents that are fellow citizens. The normative focus on the offender's crime and character does and should change, we posit, in congruence with the changes in the penal communication via the penal process. Such analysis clarifies the full meaning of the communicative theory for the relationship between crime and character and between communicative theory and penal institutions. It enlightens the normative meaning of the parole phase and its intimate connection to the prison system in liberal criminal theory.

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⁹¹ See Bülow and Dagan (2021).

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