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## SHAME, GUILT, AND PUNISHMENT

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**ABSTRACT.** The emotions of shame and guilt have recently appeared in debates concerning legal punishment, in particular in the context of so called shaming and guilting penalties. The bulk of the discussion, however, has focussed on the justification of such penalties. The focus of this article is broader than that. My aim is to offer an analysis of the concept of legal punishment that sheds light on the possible connections between punishing practices such as shaming and guilting penalties, on the one hand, and emotions such as guilt, shame, and perhaps humiliation, on the other. I contend that this analysis enhances our understanding of the various theories of punishment that populate this part of criminal law theory and thereby sharpens the critical tools needed to assess them. My general conclusion is that, in different ways, all of the theories we encounter in this area can benefit from paying renewed attention to the nature of the connection between the state's act of punishing and its expected or perceived emotional effect on the individual.

### I. INTRODUCTION

Consider the following list of penalties to which convicted men and women in the USA have recently been sentenced (see Garvey 1998, pp. 734–737; Kahan 1996, pp. 631–634)

- A woman convicted of drug possession is ordered to stand on a street corner wearing a sign saying, “I got caught possessing cocaine. Ordered by Judge Whitfield.”
- An offender convicted of DWI is ordered to paste a bumper sticker on his car that reads, “CONVICTED: DWI.”
- Men convicted of soliciting prostitutes in Kansas City, Missouri, have their faces and names displayed on the local community access channel in a program popularly known as “John TV.”
- Men in San Francisco, California, are required to attend the

“School for Johns,” where former prostitutes lecture them about life on the streets.

- A New York City landlord is sentenced to house arrest in one of his own slums.
- A juvenile convicted of throwing a brick, which blinded the victim in one eye, is ordered to wear an eye patch. He is permitted to take it off only when he sleeps.

The infliction by state officials of penalties such as these as an alternative to imprisonment has been the object of sustained interest inside and outside the academia in particular in the USA. In fact, it seems that the academic debate was to a good extent a reaction to the legal practice, and in particular to a number of creative sentences such as the ones listed above. One question that has occupied some of the commentators (Massaro 1997; Garvey 1998; Markel 2001) is whether different emotions could be expected to result from different penalties and whether that should be a cause of concern. Garvey (1998) and Markel (2001), for example, argue that while the first three penalties above are likely to elicit shame, the last three are likely to elicit guilt. They also argue that while there may be good justificatory grounds to attempt to instil guilt in the offender, there are no such grounds in the case of shame. In light of this, it is important in their view to restrict the term “shaming penalties” to those undesirable penalties connected to the intended infliction of shame, and “guilting penalties” for those desirable ones connected to guilt. As we shall see later, however, a concern for the elicited emotion is not on the agenda of all the scholars writing in this field. As a result, it is common to find the expression “shaming penalties” to refer to all of the creative sentences that could belong to the list above. In order to avoid confusion, in what follows I will use “shaming penalties” in inverted commas only when referring to penalties alternative to incarceration with no specification concerning the particular emotion such penalties are expected or aimed to elicit.

This article aims to shed light on the relation between shame and guilt, on the one hand, and legal punishment, on the other. The topic of “shaming penalties” should provide a fertile

ground on which to examine this relation. My focus, however, is broader than that for two reasons. Firstly, there is important work on this topic outside the field of “shaming penalties”. Secondly, as mentioned above, even within that field, some scholars are largely unconcerned with the emotional effects of their preferred penalties on their offenders. One question that will occupy us here is precisely whether the state can afford to be unconcerned with the believed emotional impact on the individual of certain forms of punishment. At any rate, the current diversity of stances with regard to the role that shame, guilt and other emotions ought to play in a theory of punishment, calls for further consideration of the very topic of their relation to the concept of punishment. In what follows, I will lay out a map of the intelligible relations between such emotions, on the one hand, and the concept of punishment, on the other. I hope this conceptual work to result in an improved critical grasp of the diverse accounts that populate this area of criminal law theory. I begin in Section II with a brief presentation of the emotions of shame and guilt and the cognate but often neglected emotion of humiliation. In Section III, I introduce the notion of punishment and sketch an account of its metaphysics that maps out the possible relations in which it can stand to shame and guilt and, possibly, other emotions. In Sections IV and V, I use this framework to evaluate some accounts of “shaming penalties”, guilt penalties, and guilt as a form of punishment. Our conclusions will be specific to each one of the theory types we will be discussing. To anticipate a general conclusion, however, it seems that, in different ways, all of these theories can benefit from paying renewed attention to the nature of the connection between the state’s act of punishing and its emotional effect on the individuals.

## II. SHAME, GUILT, AND HUMILIATION

For the purposes of the following discussion we do not need to present the philosophy and psychology of shame and guilt in much detail.<sup>1</sup> In this section, it should be enough to state our

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<sup>1</sup> See Rodogno (2008, Section 3) for a recent critical review of this subject.

preferred characterization of these emotions, make a few central remarks about it, and note some of the differences between shame, guilt, and humiliation, which will turn out to be particularly useful for our critical evaluation of “shaming penalties”.

I propose the following characterizations of shame and guilt:<sup>2</sup>

In shame, the subject appraises his or her self as globally negative, degraded, or worthless. In guilt, the subject appraises negatively his or her behavior as transgressing a norm to which he or she adheres.

Shame and guilt are both emotions of negative self-evaluation. This characterization is axed on the difference in their respective focus of evaluation. In shame, one evaluates negatively the self as whole (“I am a bad (greedy, inconsiderate, etc.) person”, “*I did that horrible thing*”) while in guilt the focus is one’s specific behavior (“I *did* that horrible *thing*”).<sup>3</sup> For example, having cheated at his term exam, Sam may feel guilt for what he *did* but may alternatively or additionally feel shame if the focus of his evaluation is on what that action reveals about *himself*.

In conjunction with this characterization, we should also note the following points. Firstly, I characterized shame and guilt as involving appraisals. What these exactly are is a matter of debate. Most generally, they are believed to be a form of evaluation or cognition (Lazarus 2001, esp. 50–54; Leventhal and Scherer 1987; Roberts 2003) that does not always take place at the conscious level and does not necessarily involve judgment and assent.<sup>4</sup> Secondly, emotions should not be understood to consist merely in appraisals: they also involve a distinctive phenomenology. In particular, we should note that shame and

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<sup>2</sup> See Teroni and Deonna (2008) for a more elaborate version and discussion of this characterization.

<sup>3</sup> Lewis (1971, p. 30) is at the origin of this distinction.

<sup>4</sup> Roberts (2003) would talk of “construals” rather than “appraisals” but the former share the same possibly unarticulated and unconscious nature of the former.

guilt share part of this phenomenology insofar as their negative hedonic tone is concerned. These are unpleasant emotions. Yet the quality of the pain they involve is distinct and characterized by the cognitive element – the type of evaluation – of each emotion. Thirdly, emotions such as shame and guilt involve preparedness to act in certain ways. Shame is generally associated with hiding, escaping, and striking back, while guilt with confessing, apologizing, and repairing. Fourthly, in the most interesting senses of this distinction, shame is not essentially public and guilt essentially private.<sup>5</sup> In particular private occurrences of shame are as frequent as private occurrences of guilt. There is no evidence that an audience, real or imagined, is a necessary feature of our shame experiences.<sup>6</sup>

This brings us to our final remark, which connects the topics of shame and humiliation. Until very recently there was scant empirical work on the emotion of humiliation as distinguished from shame, with exceptions in the field of clinical work. Elison and Harter (2007) and Smith et al. (2008) have, however, begun to set the record straight. The results reported in the latter study are particularly relevant here, for they are based on a number of experiments that reproduce quite closely – in the imagination of the subjects – the conditions of “shaming penalties”. In particular, it is worth our while mentioning the following results. Though humiliation and shame both involve a negative evaluation of the self, they differ from each other in a number of ways. (a) Though both emotions are hedonically negative, humiliation is perceived to be the more painful emotion and extremely painful in absolute terms (as opposed to shame which is moderately painful). (b) Humiliation has a stronger association to public exposure and is more sensitive to it than shame; in particular, public exposure to a group rather than a single

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<sup>5</sup> See Deonna and Teroni (2008) for an illuminating discussion of this point.

<sup>6</sup> Note however that Smith et al. (2002) present strong evidence that shame is more strongly related than guilt to public exposure. More precisely, the intensity of shame experiences but not guilt experiences increases with increased public exposure.

individual tends to increase the intensity of humiliation but not shame. (b) In its reactions, humiliation is more other directed than shame: feeling humiliated typically involves anger, antagonistic, even vengeful attitude toward others while shame is accompanied by self directed anger associated with a belief that the self is to blame for the experience. (c) The intensity of humiliation but not shame tends to increase with the perception of inappropriate and undeserved treatment such as a severe reprimand, perpetrated by another person, mostly so when combined to group public exposure. (d) Humiliation, but not shame, tends to increase and is especially intense when the humiliated person believes that the publicity has been deliberately enacted by the agent of humiliation (above all if in conjunction with group public exposure and severe reprimand). (e) Even if the humiliated person imagined by the experimental subjects was described as having committed a wrongdoing, the subjects tended to expect that, as a result of being humiliated, the person would feel unfairly treated, angry (at the agent of the humiliation), and vengeful. This pattern appears remarkably different from the reactions associated with shame. Consistent with much recent thinking on shame, when the person was expected to feel shame they were also expected to feel that they deserved their shame. These findings, then, suggest that public condemnation with a severe reprimand, especially when intentionally created and in a broader public context, will tend to instil experiences of humiliation with its hostile reactions. It will also sometimes reduce guilt and shame as well as intentions to apologize. These results will be very important for our discussion of “shaming penalties” in Section IV. First, however, we should say more about the concept of punishment, to understand how, if at all, emotions such as shame, guilt, or humiliation connect with it.

### III. SHAME, GUILT, AND THEORIES OF PUNISHMENT

In this section, I begin by introducing some familiar requirements theories of punishment must, according to many, address. I then build on these requirements in order to sketch an analysis of the concept of punishment focussed on the

possible connections between acts of punishing and their intended effects. This analysis will allow us to see the possible place shame and guilt can occupy within theories of punishment. First, however, four familiar points about punishment.

1. Punishment involves as one of its necessary features the intention by an official institution and its agents to inflict on the offender some burden, deprivation, harm, or hard treatment. More generally, in what follows I will be saying that legal punishment must necessarily involve the intentional infliction of a disvalue.<sup>7</sup>
2. Punishment under the law must express social condemnation (Feinberg 1965; Primoratz 1989). The idea here is that a theory of punishment must be able to account for the distinction between punishment and nonpunitive sanctions. While torts typically involve harms to others, crimes typically involve such harms *plus* a special kind of wrongdoing on behalf of the offender.<sup>8</sup> While nonpunitive sanctions must address only harms and typically do so through material reparation, criminal punishment must address harms *plus* wrongdoing.<sup>9</sup> Punishment, or the reparation

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<sup>7</sup> There is an issue concerning whether all disvalues must involve subjective feelings. Elsewhere (Rodogno 2009), I defend the claim that experientiality is not a necessary feature of human well-being, and hence of individuals' prudential value and disvalue: an individual's well-being can be affected positively or negatively in the absence of any positive or negative experience in the individual. Yet, when it comes to punishment, there may be reasons to want to inflict experiential disvalues.

<sup>8</sup> "Typically" because it is not clear that, as opposed to *mala in se*, *mala prohibita* always involve harm to others.

<sup>9</sup> Yet, we should note the following two points. Firstly, whilst some kinds of criminal liability do not seem to depend on actual harm (inchoate liability), they do depend on the creation of a risk of harm (and some (e.g. Finkelstein 2003) would count risk itself as a harm). Secondly, whilst some kinds of criminal liability do not seem to depend on (culpable) wrongdoing (e.g. strict and vicarious liability), they are for that very reason controversial (see e.g. Simester 2005).



of crime, then, has a symbolic as well as a material aspect. The symbolic aspect consists in social condemnation.<sup>10, 11</sup>

3. It is important to understand the nature of the relation between these two elements of the definition of punishment. At the definitional level, hard treatment and expression of condemnation are

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<sup>10</sup> I should mention two issues in conjunction with the expressive character of punishment. Some say that punishment ought to communicate rather than simply express condemnation, where communication, as opposed to expression, implies that efforts be made to ensure that the listener hear the message. Among scholars defending this view are Duff (2001) and Markel (2001). The second connected issue concerns whether the expressive dimension is analytically independent from the justificatory dimension of punishment. Feinberg (1965) claims that it is while Nozick (1981, p. 370) takes it to be a form of retributivism and so do Hampton (1992) and Markel (2001). Moore (1997) thinks it is also an aspect of justification but the justification is utilitarianism rather than retributivism.

<sup>11</sup> Why social condemnation? The answer goes at the heart of theories of criminalisation and spells out the “special kind of wrong” of the criminal act as opposed to the tort. The wrongful aspect of criminal acts is itself expressive though what it expresses is a matter of debate. The offender’s wrongful act is often thought to express the idea that he has greater worth than the rest of the individuals in the community, that he counts himself free to pursue his own interests without regard to, and indeed at the expense of, the others’. “It is a message of contempt, insult, dishonour, disrespect, and so forth...” (Garvey 2003, pp. 280–281; see also Murphy and Hampton 1988, p. 25). By condemning the crime, punishment sends a message back to the wrongdoer denying his superiority and a message to the community that such wrongs will not be tolerated. For want of space, I cannot discuss here many important issues concerning this particular aspect of punishment. Note that there may be differences for example as to what exactly is the meaning of criminal acts. Duff (2001) argues that not all crimes carry the demeaning message spelled out above. Garvey (2003) agrees and argues that that type of message captures one paradigmatic type of criminal act (which he calls “wicked wrongs”) but not another (“vicious wrongs”). Finally we should note that these are differences among those who think that an essential trait of punishment is indeed to convey social condemnation. This very idea, however, has been disputed (Hart 1963, pp. 60–69; Skillen 1980; Davis 1996, pp. 169–181), though I believe some of those disputing it (e.g. Skillen 1980) tend to confuse the definitional issue (the notion of punishment necessarily involves social condemnation) with the justificatory issue (punishment is justified when it expresses appropriate social condemnation).

clearly distinguishable. Yet, in reality, the two must go together (Feinberg 1965, p. 402; Skillen 1980, pp. 515–519; Primoratz 1989, pp. 187–188): as Feinberg claims, the hard treatment itself expresses condemnation. Importantly, not all types of action can express appropriate censure. As Skillen (1980) argues – and this is our third point –, there must be the right connection to the attitude of punitive hostility and this, I gather, is in place only for certain rather harsh treatments. As he puts it (1980, p. 517), appropriate censure embodies punitive hostility rather than simply symbolizing it as a matter of convention. To understand this distinction, think about the different relation of, respectively, crying and wearing black to grieving. There is a sense in which one is the ‘natural’ *embodiment* of the emotion while the other is a conventional or contextual *symbol* of it. Imposing loss of property, of liberty, of parts of one’s body, along with shunning and ostracism, seem to censure while embodying punitive hostility. An official but relatively private reprobation, however, though expressing social condemnation and possibly involving some amount of distress, can hardly be thought to embody punitive hostility.

4. Theories of punishment, then, must account for state actions that are aimed at inflicting certain types of disvalue on wrongdoers while at the same time expressing social censure. The fact that the state is authorized to inflict disvalues on individuals calls for a justification, and this is the fourth point concerning theories of punishment I would like us to retain. Theories of punishment will have to come up with acceptable stories as to why the state is morally permitted (or has a duty) to inflict such disvalues on wrongdoers. The types of justification available are of different and contrasting kinds: retributivist, consequentialist, hybrid, or communicative. For our purposes, it is enough to note the necessity of at least a valid type of justification for legal punishment.

The four points so far discussed are standard fare for any theory of punishment, even though, as the footnoted discussions document, there are disagreements about them. Something that has not been as widely discussed is what these points taken together can tell us about the role of emotions such as

shame and guilt in legal punishment. Before embarking on this discussion, however, an important clarification concerning the very boundaries of the concept of punishment is necessary. We can put the question at hand here as follows: is “punish” an *activity* verb, i.e., the bodily movement of the punisher intended to inflict a disvalue in the punished individual; or is an *accomplishment* verb, i.e., the action that consists of the bodily movement of the punisher and the result in the punished individual?<sup>12</sup> Using the noun “punishment” (rather than the verb “punish”), we may similarly ask whether punishment is exclusively what the state *does* or whether it is a concept that necessarily refers to the results of the state’s action in the offender. To illustrate, suppose the state decides to incarcerate a criminal as a form of punishment. Incarcerating the criminal is something the state *does*. When talking about punishment, some will focus exclusively on this activity: punishment is punishing. Others, however, will certainly agree that punishment involves an activity of the state while stressing that it is also something the criminal suffers. One can actively punish, just as much as one can passively suffer punishment. This may indicate that “punish” is an accomplishment rather than a simple activity. Which of these views is correct?

Answering this question is relevant here, for, according to which one of them is correct, the emotions of shame and guilt may stand only in certain intelligible relations to punishment and not others. If the activity view were correct, for example, shame and guilt can never be part of the punishment as they are *not* something the state *does*. On this view, shame and guilt can be goals or ends of punishment – end-states the hard treatment constituting punishment might be intended to cause – but they cannot constitute the hard-treatment itself. Similarly, on the activity view, suffering one’s loss of freedom is not the punishment: only incarceration, i.e., the intentional infliction of a disvalue, is. One argument speaks in favour of this view. Consider the fact that some individuals may actually thrive (or

<sup>12</sup> We may also ask whether alternatively it was an *achievement*, i.e., the result only, considered in its normative context. I would think, however, that few are prepared to take this option seriously and that the contention is really between “punish” as an activity as opposed to an accomplishment.

maybe not suffer particular pains) as a result of their incarceration. Even in these circumstances, however, we are able to recognize their incarcerating by the state as an act of punishment. This suggests that the occurrence of the actual intended disvalue is not necessary to individuate any token punishment as such, which leaves us with the punishing activity as the main, if not, only element in the metaphysics of punishment.

The activity view, however, seems to run against the following commonsensical intuition, which rather favors the accomplishment view. Consider our incarceration example once again and imagine that, as most individuals, our incarcerated criminal is actually suffering in many ways as a result of incarceration. If you now ask him which is his punishment, the incarcerating, or the disvalues he suffers, I believe you should be quite prepared to hear him point to the latter at least as much as the former. If you are inclined to accept the inmate's answer as idiomatic, you may be inclined to think that the boundaries of the concept of punishment extend beyond the mere activity of the punisher to include the intended results or effects of this activity. What we called above the "end-state" or "goal" of punishment, is not something other than punishment but itself constitutive of it. On this view, if shame and guilt are the intended disvalue for the offender they are as much part of his punishment as the activity of the state that aims to inflict them.<sup>13</sup>

In what follows, I argue that the accomplishment view is the only plausible view because nothing can even begin to count as a state punishing without reference at some level to the effect or result of that act in the offender, and only the accomplishment view can account for this. I will then show how this view tackles the one argument in favour of the activity view, to wit, that we can individuate a token punishing as such even when it fails to create the disvalue it was intended to inflict. Having straightened

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<sup>13</sup> Importantly, however, though the accomplishment view accommodates the possibility that shame and guilt are constitutive of punishment, it does not yet impose on those who defend shaming or guilt penalties the view that shame and guilt are the intended inflicted disvalue. As we shall see, it is theoretically possible to defend such penalties while thinking that experiencing shame and/or guilt is never a disvalue.

this issue, we will be able to map out the places emotions can occupy within a theory of punishment.

A key to understanding my argument is the distinction between type and token acts. Let me expose the structure of the argument first, and then illustrate it with an example.

- (a) The intention to inflict a disvalue is a necessary element of the concept of punishment.
- (b) Any type of action that qualifies as punishment must be believed generally to be connected to some disvalue (that, as *per* (a), the state aims to inflict).
- (c) Any token act of punishment that fails to generate a disvalue counts as a token punishment only insofar as at the type level, as *per* (b), that act is believed to be generally associated to some disvalue.

To illustrate, consider the claim (i) that incarcerating is a type of action that, under the appropriate circumstances, qualifies as punishment. The truth of (i) must entail, as *per* (a), that incarcerating is intended to inflict a disvalue. But what grants that belief? It must be, as *per* (b) a widespread belief to the effect that incarceration is generally connected to a disvalue and, in fact, in our society there is a widespread belief that generally, life in prison is bad for a person or worse than life outside. If that belief came to be progressively eroded, there would be a point at which incarceration would cease to count as a punishment.<sup>14</sup> The believed generality, as opposed to universality, of the association between a certain action type and a disvalue is worth noting, and we shall soon return to it. First, however, let us consider (c). Note that when considering whether a token state action is a punishment we are, of course, in the process of individuating a token action (*S*'s incarcerating of *y* at *t*) that belongs to a certain type (the incarceration type) as belonging to another type, the punishment type. If (b) is correct, the identification of any token state action as a punishment turns out to depend on a believed general connection

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<sup>14</sup> Note how the claim that a state is "punishing" its criminals by inviting them to take a fully paid trip to the best Caribbean Sea resort hotel is simply unintelligible.

between that type of action (incarceration) and a disvalue: without that believed connection, no token state action can begin to count as a punishment. This shows that the notion of punishment hinges on the specific nature of the effects it is believed to elicit. This also explains away the force of the one argument in favour of the activity view. Reference to the effects intended by the state action is already embedded in anything we count as punishment and that, even when a token punishment fails to elicit the intended disvalue. In order for us to identify these cases as punishment, there must be a believed connection between action type and disvalue; however, this connection is and is believed to be only a general rather than a universal one and hence it may in certain cases fail. By allowing “punishment” to cover the effects of the state action on the punished individuals, the accomplishment view qualifies as a plausible view of punishment, while, for failing to do so, the activity view is disqualified.

How does this elucidation of the notion of punishment shed light on its connection to shame and guilt? We now see that shame and guilt can stand in the following relations to punishment:

*Constitutive View:* Shame and/or guilt are the constitutive aim or intended disvalue of certain types of punishment.

*Non-Constitutive View:* Shame and/or guilt are not the constitutive aim or intended disvalue of certain types of punishments though they are still related to them in some way.

To say that shame and/or guilt are the constitutive aims of punishment is not to say that they are what the state does but rather that they are the disvalue the state aims to inflict which, as we saw, must be part of the notion of punishment. This account must satisfy three important requirements: (a) there must be a sense in which shame and/or guilt are disvalues; (b) there must be some type of action that is generally connected to the elicitation of shame and/or guilt; and (c) these types of actions must embody punitive hostility and social censure.

Before introducing the Non-Constitutive View, we shall bestow some initial plausibility to the Constitutive View by

addressing the first requirement: can shame and guilt be disvalues? The answer here is a clear “yes”. As we have seen, one common trait of these emotions is their negative hedonic tone: experiencing either one of these emotions is generally painful. To the extent to which experiencing pain is a disvalue, if the state causes any of these emotions to arise in someone, it thereby inflicts a disvalue.<sup>15</sup> This is not the whole story yet. On the Constitutive View, the punisher may be interested in shame and/or guilt as punishments, in two rather different ways, essentially and non-essentially. If the punisher is seeking shame and guilt essentially, it is seeking the particular brand of psychic pain that they respectively produce.<sup>16</sup> As we have seen, what distinguishes shame, guilt, and other painful emotions from each other are the particular cognitions that characterize each one of them. The punisher, then, may define the disvalue it aims to inflict as essentially involving the specific pains of shame and/or guilt, rather than simply unspecified psychic pain. We cannot exclude, however, that the punisher is out to inflict unspecified psychic pain, and that shame and guilt figure in a list of elicitors of pain along with other emotional experiences such as humiliation, disgust, etc. In these circumstances, we could still say that shame and guilt are the disvalue the punisher

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<sup>15</sup> Some may want to deny that inflicting the pains of guilt while painful and burdensome amounts to a harm because it supposed to benefit the wrongdoer. I suppose the idea here is that inflicting pain on someone is not a harm insofar as it leads to this person’s greater good or well-being. We could consider the pain I receive when I go to the dentist in this way. It is not harm because it is inflicted with an eye to my greater good. Let us accept this point for the sake of argument. I think that only a full-blown *justification* of punishment can show that punishment does not involve harming the offender in this sense. At the definitional level, we cannot bring substantial justificatory views to bear. I think that at this level it is all right to regroup harms, pains, burdens, etc. as things that are at least *pro tanto* bad for the agent.

<sup>16</sup> I am assuming that there are hedonic qualities within the positive and within the negative range. Hence pleasures do not vary *only* along intensity and duration axes. They may also be qualitatively different as in, the pleasure of drinking a hot chocolate is a (qualitatively) different kind of pleasure than that of reading a good novel.

aims to inflict though the specific pains of shame and/or guilt would be inessential to the definition of the intended disvalue.

Let us now turn to the Non-Constitutive View. At bottom, this view differs from the Constitutive View in failing to consider shame and/or guilt as the disvalues the state aims to inflict. Yet, for us to regard this view as relevant at all here, shame and/or guilt must figure somewhere in a “non-constitutive” theory of punishment. The only place I suggest they can appear is at the level of justification: shame and/or guilt are not what the state should inflict on offenders as part of their punishment but are desirable outcomes of some form of punishment or other, insofar as they play a specific justificatory role. Of course, someone endorsing the Constitutive View may also argue that shame and/or guilt can have an important justificatory role. After all, something can be at the same time a disvalue and a justification. Hence, as stated above, what distinguishes the two views is, at bottom, their respective stance on shame and/or guilt as part of punishment.

Just as the Constitutive View, the Non-Constitutive View has to fulfil some requirements. One seems particularly important here. On this view, the state aims to inflict something bad other than shame and/or guilt. The connection between the punishing, on the one hand, and shame and/or guilt, on the other, is hence severed. What we need, then, is a coherent account of the connection between certain types of punishment, on the one hand, and the elicitation of shame and/or guilt on the other not as the intended disvalue but as the desirable upshot. Is there, for example, a clear link between incarceration, on the one hand, and shame and/or guilt, on the other? If there is, this view can begin to tell us a story as to how incarceration is (at least partly) justified via shame and/or guilt (provided there is also a cogent account of the justificatory power of shame and/or guilt). If the penalties under consideration are shaming and guiltling penalties, it may be easier to show a connection between the punishing and the emotions of shame and/or guilt than in the case of, say, incarceration. As we shall see, however, it may be difficult to show that some of these “penalties” amount on their own to full-fledged punishments.



To sum up, firstly, I argued that, on the correct analysis, the concept of punishment embeds a reference to the specific kind of disvalue it aims to elicit in the offender. Secondly, I showed that this analysis allows us to map three conceptual positions in which shame and/or guilt can stand in relation to punishment: (a) constitutive and essential; (b) constitutive and inessential; and (c) non-constitutive and justificatory. In what follows, I shall apply this framework to those theories one may expect to bring together shame and/or guilt, on the one hand, and punishment, on the other. The aim is to enhance our theoretical grasp and critical assessment of this part of criminal law theory. In the next section, I focus on that part of the literature on “shaming penalties” that seems unconcerned with the emotional effects of their preferred penalties. In the section after that, I examine some of the literature keen on making connections between guilt and punishment.

#### IV. “SHAMING PENALTIES”

The views at hand in this section are typically unconcerned with shame, guilt and, in fact, any other emotion that punishment may elicit. Their lack of concern, however, does not mean that such views do not in fact involve connections to emotions. In principle, these views may occupy any of the positions outlined above and, in fact, any place outside it. The point of the map drawn in the last section, is precisely to guide our intellectual journey across this field by asking some cardinal questions. The questions will be the following: do defenders of “shaming penalties” think of shame or any other emotion as part of the punishment, i.e. as the intended disvalue? If so, are they interested in the specific brand of pain of any emotion in particular? If not a part of the punishment, do shame, guilt, or any other emotion stand in a purely justificatory relation to punishment?

The best place to begin answering these questions is Kahan’s (1996, pp. 631–634) categorisation of shaming sanctions. There are, according to him four types of shaming sanctions:

1. *Stigmatising publicity*: sanctions attempting to magnify the humiliation inherent in conviction by communicating the offender's status to a wider audience.<sup>17</sup>
2. *Literal stigmatisation*: sanctions involving the stamping of an offender with a mark or a symbol that invites ridicule. The stigma is sometimes attached to the offender property.<sup>18</sup>
3. *Self-Debasement*: penalties involving ceremonies or rituals that publicly disgrace the offender. These are the closest contemporary versions of the stocks. Offenders are typically asked to stand in a public space (a courthouse or a street corner) wearing a sign or making a speech.<sup>19</sup>
4. *Contrition*: sanctions of this kind come in two forms. The first requires offenders to publicise their own convictions, describing their crimes in first-person terms and apologising for them. The sincerity of the offenders' remorse seems largely irrelevant.<sup>20</sup> Another form of contrition is the apology ritual, which requires sincerity.<sup>21,22</sup>

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<sup>17</sup> See for example the "John TV." penalty mentioned in the Introduction.

<sup>18</sup> See for example the "bumper sticker" penalty mentioned in the Introduction or various sentences for petty thieves, DUI convicts, or child molesters who were ordered to wear t-shirts, bright-coloured bracelets, or signs announcing their crimes.

<sup>19</sup> See for example, the "cocaine" penalty mentioned in the Introduction but also sentences ordering those who urinate in public to clean the city's streets and those ordering landlords whose building was condemned as a slum, to post a four-foot square sign on the building that lists his name together with his phone number.

<sup>20</sup> For example, a company is ordered to publish apologies for dumping carcinogenic chemicals.

<sup>21</sup> For example, in Maryland, juvenile offenders must apologise on their hands and knees and are released from confinement only if they persuade their victims that their remorse is sincere.

<sup>22</sup> Commenting on Kahan's classes of shaming penalties, Massaro (1997, p. 691, note 235) criticised the class of self-debasement penalties as blurry, claiming that all the penalties described by Kahan "presumably share this self-abasement characteristic." Yet, I doubt that Kahan intended these classes to be mutually exclusive. In fact he describes the first form of contrition penalties as a combination of "stigmatizing publicity with an element of self-debasement", that is, a mixture of the first and third classes of shaming sanctions (Kahan 1996, p. 634).

What penalties from these categories have in common is (1) that they rely to a good extent on an aspect of publicity and a large audience. Their exposing, ceremonial aspect is not accidental. (2) They are all intended to debase the offender by reprimanding him publicly. These traits are what properly qualify these penalties as *shaming*. Shaming, in fact, can be characterised as the act of a shamer which is intended to debase someone before an audience.<sup>23</sup>

Interestingly, though Kahan takes shaming to be central to these penalties, the emotion of shame is not mentioned here as the intended disvalue, nor is any other particular emotion. Kahan (1996, pp. 636–637) is quite explicit on this point:

Shaming penalties might even more accurately be described as *degradation* penalties. All of them satisfy what Harold Garfinkel identifies as the “conditions of successful status degradation ceremonies”: they are imposed by an agent invested with the moral authority of the community; they denounce the wrongdoer and his conduct as contrary to shared moral norms; and they ritualistically separate the wrongdoer from those who subscribe to

<sup>23</sup> This, I think, is what shaming consists in at its essence. There are, however, richer characterisations of shaming such as the one offered here by Kahan and Posner (1999, pp. 368–369): “Shaming is the process by which citizens publicly and self-consciously draw attention to the bad dispositions or actions of an offender, as a way of punishing him for having those dispositions or engaging in those actions. Several elements of this definition should be emphasized. First, shaming is a matter of revealing information about a person’s dispositions or actions. Second, the revelation of information includes an expression of the speaker’s moral revulsion about these actions or dispositions. Third, the revelation of information must be done in a way that is known to the target of the shaming; when we secretly gossip about someone, we are not shaming him. Fourth, people who witness the shaming must believe that the target’s actions or dispositions are wrong.” Let’s call this legal shaming. Now, to the idea of public and purposeful degradation of a person, legal shaming adds: (1) that shaming reveals facts about the person’s dispositions and actions; (2) that the shamer expresses his or her revulsion concerning such dispositions and actions; and (3) that the audience must believe these actions and dispositions to be wrong. Now, these additions may very well be necessary for legal shaming understood as a form of legal sanction but it does not have to be true of some more basic forms of shaming. Think about a child publicly ridiculing another child before his peers for something like his small size or the clothes he is wearing. None of the three extra features Kahan mentions are at play and yet we would be in the presence of shaming, albeit of a rather basic form.

such norms. It is not a condition of a successful degradation ceremony that it induce any particular belief or emotion on the part of the offender. We might expect the ceremony to cause shame—particularly if the offender identifies with the community that is denouncing him. But to lower the offender's social status within that community, it is enough that the affliction convey disapproval in terms that its members understand.

Shame may be induced by shaming or degradation penalties but its presence is not necessary for successful ceremonies. In fact, it is not even necessary that any particular emotion arise for the degradation ceremony to be successful. It is sufficient that members of the community understand that disapproval is being conveyed to the offender.<sup>24</sup> Kahan and Posner (1999, p. 370) argue further that loss of reputation is the targeted disvalue, that is, the punitive element aimed at by shaming, mostly so when shaming is used against white-collar offenders, a class of offenders particularly liable to stigma:

Shaming destroys one's reputation, but this injures the victim not because reputation is intrinsically valuable but because now people will not trust him, thus preventing him from obtaining future gains either through honest cooperation with others or through exploitation of others under the guise of honest cooperation. ... Because shaming harms a person's reputation, and reputation is a valuable asset, shaming presents itself as a possible punishment that could be used by the government to deter crime.

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<sup>24</sup> Kahan (1996, pp. 636–637) offers more direct evidence that the felt emotion of shame is *not* what shaming penalties aim at. He does so while defending his theory against the charge that shaming penalties cannot respect a requirement of proportionality, as some individuals may be emotionally much more sensitive than others to shaming. Kahan replies that this approach to proportionality asks too much. One should not assess the proportionality of shaming penalties by looking at their emotional effect at the individual level. After all, other criminal sanctions such as imprisonment exact a difficult-to-predict psychological and emotional toll that varies from one offender to the next. But these differential effects are not ordinarily thought to render imprisonment problematic on proportionality grounds. We should rather understand proportionality in terms of the social meaning of the sanction, by its ability to express, and the degree to which it expresses moral condemnation. “Feeling shame is one thing. Being shamed is another. Shame's defenders insist proportionality analysis should focus on meaning and not feelings” (Garvey 1998, p. 750).

The authors understand loss of reputation as a valuable asset though one that is relevant only for its instrumental value: damage to it leads to losses in whatever things one may gain from cooperating with others (e.g. economic exchange). Shaming, then, functions as a punishment by inflicting the deprivation of reputation and whatever material damage this may cause.

We now have all the answers we need to position at least one prominent account of “shaming penalties” on our map. Neither shame nor any other emotion is the intended disvalue on this account: the deprivation of reputation is. The Constitutive View, in either its essential or inessential guise, is thus excluded. This would seem to force Kahan and Posner in the camp of the Non-Constitutive View. Yet, clearly, they would not see themselves as belonging to that camp either. On their account, neither shame nor any other emotion is explicitly called on to justify shaming penalties. This leaves us with only one logical option: “shaming penalties”, at least as Kahan and Posner conceive of them, are not a form of punishment connected to the emotions of shame and guilt in any systematic way. Hence, this view will not appear in our map.

This, I believe, is the view as their authors would conceive it.<sup>25</sup> Whether it is a coherent or correct view, however, is what we should consider next. In light of our analysis of punishment, we should in particular be interested in the claim that it is not a condition of a successful degradation ceremony that it induce any particular emotion in the offender. Two remarks are in order here. First, the fact that a token penalty may qualify as successfully degrading in the absence of any specific emotion in the targeted individual, does not show that at the type level there is no connection between that type of degradation ceremony and some specific emotion. If this is agreed, we can ask the second question: is there really no connection between degradation ceremonies and some specific negative emotion that qualify such ceremonies as penalties? Kahan’s remark to the effect that we may expect

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<sup>25</sup> It may be noteworthy to mention that Kahan (2006) has since recanted his defence of shaming penalties. See Markel (2007) for a reply to Kahan’s recantation.

ceremonies to cause shame suggests that there is at least one emotion and that the emotion in question is shame. To confirm this suggestion, in light of our previous analysis, we should ask whether degradation ceremonies can successfully be understood as forms of punishment in the absence of a widespread belief that they are generally connected to shame.

Though I do not think the emotion in question is shame, I would speculate that degradation ceremonies *cannot* be understood as forms of punishment in the absence of one emotion in particular, namely, humiliation. We can hardly begin to think of ceremonial degradation as a penalty in the absence of a widespread belief that it generally causes humiliation and, as argued above, this may be true even when token ceremonies fail to elicit humiliation. We can support this claim by jointly considering the central features of degradation ceremonies, on the one hand, and the psychology of shame and humiliation, on the other. As Kahan would agree, ceremonies involve the intentional debasement of the offender through reprimand before a large audience. Similarly, as we saw in Section II, humiliation but not shame is sensitive precisely to large audiences, to severe reprimand, and to perception of intentional public debasement. The structure of degrading ceremonies is an almost perfect fit to that of felt humiliation. To reinforce this claim, we may also consider the alleged role of humiliation from the justificatory point of view. On Kahan's and Posner's theory, deterrence justifies shaming penalties. Admitting that this is so, one may find it hard to believe that what will (directly or indirectly) deter potential offenders is the mere preoccupation with future losses in cooperation unaccompanied by the extremely painful emotional prospect of an orchestrated public humiliation.

To say this much, of course, is not to exclude that deprivation of reputation and its consequences can also be the intended disvalue of degradation ceremonies. It is rather to say that any story that fails to mention humiliation lacks an essential ingredient. Now, if humiliation is an essential ingredient of shaming penalties as understood here, one of the main criticisms against Kahan's and Posner's view, i.e., its illiberal nature (Massaro 1997; Nussbaum 2004), acquires its full force. When

experiencing humiliation a subject will experience his or her self as degraded or debased. By including intentional felt humiliation as part of the punishment and making a public spectacle of it, the state could be perceived as expressing the view that the offender deserves to experience himself as a lesser being because he is a lesser being. In many of its guises, however, liberalism purports to be anchored in the ideal of equality or equal value. The message the state would communicate by punishing in this way would risk flouting this ideal. This objection combined with the negative empirical associations of humiliation (outward directed anger and vengeful attitude) discussed in Section II must give any liberal reason to hesitate before defending shaming penalties.

The position espoused by Kahan and Posner is not the only possible position available to defenders of shaming penalties. Considering the problem of bad Samaritans, for example, Etzioni proposed that their names

... be posted on a Web site and in advertisements (paid for by the offenders) in key newspapers. Such postings would remove any remaining ambiguities about what society expects from people who can help others when there is no serious risk to their well-being. And those with a weak conscience or a faltering civic sense would be nudged to do the right thing fearing that their names would be added to the list of bad Samaritans, that their friends and families would chide them, that their neighbors would snicker. (Etzioni 1999, p. 44)

Our initial question is once again: is shame, guilt or any other emotion in particular the intended disvalue? In the passage above, Etzioni refers to shaming rather than shame and mentions how shaming is supposed to work prospectively, that is, by instilling *fear* of unwanted consequences in the potential offender. Etzioni does not single out any particular emotion as that which we would not like to have inflicted. Perhaps fear of hostile social reactions is a sign of prospective shame. Yet, if one is a *bad* Samaritan to start with, shaming will be unlikely to instil shame as much as mere fear of hostile reactions. Those for whom shame is more likely to arise in this way have already somehow internalised the attitudes or share the standards and values of the shamers (see Williams 1994, pp. 78–84). A little later Etzioni writes that:

True or pure shaming involves only *symbolic* acts that communicate censure, ranging from relatively gentle expressions such as according a student a C+ or sending a disruptive kid to stand in a corner, to more severe measures such as facing the victim of one's assault in close quarters and then apologizing to them in front of the community. Shaming differs sharply from many other forms of punishment—public flogging, for instance—in that the latter inflicts bodily harm rather than being limited to psychic discomfort. (Etzioni 1999, p. 45)

Here it seems that shaming aims at inflicting “psychic discomfort”. We may take this to be the beginning of a Constitutive View: some psychic discomfort is the intended disvalue and hence part of the punishment.<sup>26</sup> Nevertheless, we should ask whether the psychic pain sought after is of a specific brand, the pain of shame or the pain of guilt, or whether any emotion involving psychic pain will suffice. The following is as close as we get to an answer:

Most people are very reluctant—ashamed—to drive around with a glow-in-the-dark DUI sticker on their car or to take out an ad apologizing for their offences. An accountant who had been sentenced to stand in his neighbourhood with a sign that said “I embezzled funds” seemed deeply distraught when interviewed, musing that he might have been better off if he had instead accepted a jail sentence. A woman convicted of welfare fraud in Eau Claire, preferred to be jailed than to wear a sign admitting “I stole food from poor people”. This sort of intense response hardly reflects indifference. (Etzioni 1999, pp. 47–48)

Indeed, it does not. The question, however, is whether non-indifference implies shame or whether being “deeply distraught” is really all that counts. Though Etzioni mentions being ashamed as that which most people would feel, nothing suggests that the punishment sought after here should consist in the emotion of shame with its specific cognitions and associations.

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<sup>26</sup> Strictly speaking, nothing in the quote commented here directly commits Etzioni to the Constitutive View. On the basis of what I reported in the text, he could still claim that none of the emotions he refers to are the intended disvalue of shaming. Yet, the fact that he compares the psychic pain of shaming to the physical pain of flogging, combined with the fact that we would normally conceive of the physical pain as the intended disvalue of flogging, leads us to favour the Constitutive View interpretation.



Shame, in other words, would be appropriate insofar as it is a hedonically negative emotion. But so many other emotions could fit this bill. In particular given Etzioni's emphasis on shaming and the publicity this involves, we may expect, in line with the empirical research mentioned above, that humiliation would arise. Finally, in light of Etzioni's emphasis on the prospective use of these emotions (the fear of what would happen if one acted as a bad Samaritan), it seems that the role of shame in this sort of punishment is at most an inessential one.<sup>27</sup>

To say this much, however, is to admit that neither the pains of shame nor those of guilt are essential to "shaming penalties". This conclusion is reinforced when we recollect the position that Kahan and Posner defend and even the one that I argued they should want to defend, which essentially involved humiliation rather than shame or guilt. To those who had implicitly assumed that shame or guilt were strictly connected to the "shaming penalties" this will be a surprise. Others, however, will not be surprised by this conclusion. Criminal law theorists, they would argue, are much more interested in the actual punishing rather than what the punishment is intended to elicit because they are concerned more for the role of the state in punishing citizens and the values expressed and communicated therein, and less with the subjective experience of punishment a given defendant may feel. In other words, even though punishment includes both the punishing and its intended result, the focus has to be on the former as it is through its activity that the state expresses and communicates its values. Shaming and its meaning is what is important here, not shame or whatever other negative feeling it may elicit.

As argued in Section III, however, punishing involves a conceptual connection with the disvalues it aims to inflict. We simply cannot focus on any act of punishing without at the same time bringing in the disvalues that qualify it as such. This comes out most clearly precisely when we consider the expressive and communicative meaning of a punishing act. In

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<sup>27</sup> The other known defender of shaming penalties, Book (1996) also defends a position which sees shame as at best an inessential part of the punishment.

general any judgment of the form “F-ing is an un/acceptable form of punishment because it expresses and communicates value  $x$  rather than value  $y$ ” must involve some assessment of the type of disvalue generally associated with F-ing. If, for example, we judge that F-ing is unacceptable, our judgement must involve a negative assessment of the contribution towards particular expressive and communicative aims that inflicting such a disvalue makes. Now, as argued above, the disvalue may be a feeling or emotion. Meaning, then, is connected to feeling or emotion. To illustrate: suppose that one of the requirements of any form of punishment is that it does not express or communicate the lesser dignity of the offender. Suppose also that certain degradation ceremonies are believed generally to elicit the painful feeling that one is a lesser human being. What if not precisely this fact would be necessary for the general perception that by inflicting such penalties the state communicates the lesser dignity of the offender?

#### V. GUILT AND PUNISHMENT

Those authors more explicitly interested in the connection between “shaming penalties” and the emotions typically conclude that not all sanctions listed in the Introduction deserve that label as some of them typically elicit or are intended to elicit guilt (Garvey 1998; Markel 2001), which, they rightly maintain, is a rather distinct emotion from shame. This remark betrays the idea that shaming is particularly linked to the emotions of shame, something which, as argued above, is not substantiated neither by what emotions are in fact most likely to be elicited (most probably humiliation) nor by the alleged intentions of those defending these penalties.<sup>28</sup> Garvey (1998, p. 767) and Markel (2001, p. 2229) defend penalties intended to elicit guilt rather than shame as constituting the right kind of punishment on their preferred justificatory theory of punishment.

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<sup>28</sup> Markel (2001, p. 2162, note 22), however, does admit to be conflating the acts of shaming and humiliating someone.

The following are some examples of the kind of penalties they have in mind (Garvey 1998, pp. 775–794; Markel 2001, p. 2229):<sup>29</sup>

- Men in San Francisco, California, are required to attend the “School for Johns,” where former prostitutes lecture them about life on the streets.
- A New York City landlord is sentenced to house arrest in one of his own slums.
- A juvenile convicted of throwing a brick, which blinded the victim in one eye, is ordered to wear an eye patch. He is permitted to take it off only when he sleeps.
- A man who rammed his car into another car being driven by an interracial couple is required to watch “Mississippi Burning.”
- A rapist or pederast is punished not only with a period of incarceration, but also with exposure to documentaries depicting

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<sup>29</sup> They distinguish guilt from shame on the basis of three criteria (Garvey 1998, p. 766; Markel 2001, pp. 2178–2179): (1) the private/public criterion, and in particular the idea of an audience; (2) the self/behavior criterion; and (3) the action tendencies respectively associated with shame and with guilt, e.g., hiding and striking back for the former as opposed to focussing on the wrong, making amends and righting the wrong for the latter. We saw that neither shame nor guilt are essentially private emotions: they are both social in important senses. Shame, however, is sensitive to variations in public exposure in a way in which guilt is not. In that respect, if the aim is to elicit shame and not guilt, it would be best to avoid any unnecessary public exposure. With that aim in mind, it may also be correct to focus the offender’s attention on his deed rather than on his self. Yet, there is reason to believe that shame and guilt are not event-neutral (Olthof et al. 2004) and that even the penalties preferred by Garvey and Markel may elicit shame along with guilt. Being lectured by former prostitutes about life on the streets may plausibly have as a result that the offender focuses on the act as well as those aspects of his self that led to the wrongful deed. Wearing an eye patch all the time and hence, one should think, also in public places, may seem to involve a certain measure of public exposure even though there is no direct attempt to debase the offender. What is more there is much evidence to the effect that shame and guilt are highly correlated both at the dispositional as well as the situational level (Tangney and Dearing 2002; Fisher and Exline 2006; Harris 2003): guilt-prone subjects are also shame-prone and vice versa, and occurrences of guilt are likely to be accompanied by occurrences of shame and vice versa.

how victims of rape or child molestation have been traumatised by such actions.

On Garvey's understanding, (1998, p. 765) at least some punishments are justified insofar they aim at moral reform: ideally, "the offender comes through punishment to recognize and understand the nature of his offense, to experience guilt for what he has done, and finally, to repent his wrongdoing and to seek to make amends." On Markel's *Confrontational Conception of Retribution* (2001, p. 2229) guilt-inducing punishments "are structured to induce a kind of contrition", i.e., repentance, deep sorrow, remorse over a past wrongdoing, or a sense of guilt and the desire for atonement. Clearly, these authors agree that guilt and its cognate emotions should play a justificatory role in a theory of punishment. However, proponents of both the Constitutive and Non-Constitutive views could agree with that. What we should ask, then, is whether on Garvey's and Markel's accounts the pains of guilt are understood to be the intended inflicted disvalue or not.

For Garvey (1998) and Markel (2001), the idea is that guilt-inducing punishments "set in motion the moral sequence of perception of wrongdoing, guilt, and repentance." (Garvey 1998, p. 784) or that they are "contrition inducing" (Markel 2001, p. 2231). Both authors produce detailed descriptions (Garvey 1998, pp. 775–794; Markel 2001, pp. 2229–2232) of how various specific punishments (largely though abstractly inspired by *Lex Talionis*) can induce guilt or start the "moral sequence". As both authors agree, (Garvey 1998, p. 739; Markel 2001, p. 2230) the idea is that punishment reflects back on the offender what he has done to his victim. Hence, the juvenile who blinded his victim in one eye is ordered to wear an eye patch at all times except when he goes to bed. Similarly, those convicted of soliciting prostitutes receive a lecture by a former prostitute about the horrors of life in the streets. Or again, the case of the slumlord who is made to live in his own slum.

From the relevant passages, I evince that Garvey and Markel would want to endorse the Non-Constitutive View. That is because they systematically separate (1) the actual punishment (2) as being justified by what it hopefully sets in motion, i.e.,

guilt and penance. In fact, in the relevant passages, one finds no mention of guilt as itself a disvalue or part of the punishment.<sup>30</sup> Finally, both authors believe that there are always retributive grounds to inflict hard treatment on the offender whether or not moral education/guilt is what justifies such infliction and even when the offender is already repentant.<sup>31</sup> These authors, then, are not essentially interested in the pains of guilt and yet the guilt penalties they propose nonetheless aim at eliciting guilt for its justificatory power: the fact that some hard treatments involve a moral education/contrition-developing component may communicate the state's commitment to re-integrating the offender in the moral community.

On this version of the Non-Constitutive View, guilt penalties aim to inflict guilt but not as a disvalue. If guilt penalties are penalties, however, they must also involve the intention to inflict a disvalue. At this point, then, we should ask what that is. In light of the concrete examples of guilt penalties listed above, we could postulate that the intended disvalue is to be determined on a case-by-case basis. It can be the disvalue that one incurs as one is lectured by a former prostitute or that of having to wear an eye-patch all day long. Surely, such experiences may be annoying or fastidious. To that extent, we may consider them disvalues independently of the pains of guilt. What is less clear is whether we are inclined to think such action types as embodying punitive hostility. If we do not think of them as on a par with loss of liberty, loss of property, ostracism and humiliation, we should cease to label

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<sup>30</sup> Markel (in correspondence, 5 September 2008) confirmed that he was not trying to state that guilt is a form of punishment.

<sup>31</sup> See Garvey (1998, p. 770). Markel (2001) stresses that the *ex ante* function of retribution is to maintain a social commitment to an order of equal liberty over time. In the case of the quickly repentant offender, we coerce him to do or experience something he is averse to doing or experiencing (fines, incarceration) not because we want only guilt feelings to arise but because this coercion is part of how we communicate our censure and our commitment to equal liberty, by diminishing the plausibility of superiority that attaches to someone claiming license and then stating, whether sincerely or not, "I am sorry".

them “punishments” or “penalties”.<sup>32</sup> This, of course, is still compatible with admitting that they indeed constitute the most appropriate response to certain types of offences.

Garvey and Markel do not offer the only type of account connecting guilt and punishment. Guilt is also central to another recent and influential justificatory account of punishment outside the context of guilt penalties. According to Duff (2001), punishment is justified insofar as it communicates appropriate censure for a past crime. The aim of such communication is to dissuade citizens from committing crime and to bring those who have committed a crime to focus on, recognise, and secularly repent their wrongdoing. Repentance involves feelings of guilt though, contrary to these, it is a process that must necessarily go deep with the repentant individual, for it occupies his attention, his thoughts, and his emotions, for some considerable time. (Duff 2001, p. 108) Repentance is said to be an aim internal to punishment as communication and to involve two other aims, namely self-reform, and reconciliation. These three aims are hoped to be achieved and even if they are not, punishment may still be justified insofar as the criminal deserves it and insofar as one is still trying to achieve such aims. These are forward-looking aims but not ones assessed in consequentialist terms because what counts toward the justification of punishment is not how far these aims are realised but that there is an attempt towards their realisation. After all, communication takes two sides and cannot be successful if the interlocutor refuses to hear.

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<sup>32</sup> Alternatively, one should argue that such alternative forms of punishment do not involve the same concept of legal punishment as more “traditional” ones. Of course, we can imagine guilt penalties that actually involve action types from this more “traditional” class. Forcing a landlord to live in his own slum as a form of house arrest, for example, may involve a certain loss of liberty. To the extent to which we are inclined to see house arrest as a form of punishment, we will be inclined to see this guilt penalty as a form of punishment. These cases, however, add grist to my mill. They show that guilt penalties count as punishment only insofar as they are act types that embody punitive hostility. What is more, as mentioned in Section III, there is reason to suspect that the closer to “traditional” punishments guilt penalties are, the harder it will be to show their connection to guilt, and hence the harder for them to justify the “guilt” part of their label.

Punishment as a communicative practice, however, is also backward looking for it is justified only as an appropriate response to criminal wrongdoing.

Would Duff espouse a Constitutive View of guilt and punishment? In places, Duff (2001, pp. 118–119, 197) does hint to the existence of a hard treatment independent of the pains of guilt and penance and geared to the eliciting of the latter. These passages do suggest that Duff's would be ready to join the ranks of the Non-Constitutive View, along with Garvey and Markel. Yet, he also writes that: "In aiming to induce repentance, punishment thus aims to bring offenders to suffer what they deserve to suffer—the pains of repentance and remorse." The pains associated with guilt constitute the hard treatment inflicted upon the offender and hence the punishment as well as the avowed justification. Here we seem to have a clear-cut version of a Constitutive View of guilt as punishment, in its essential version. If that is so, however, Duff should deny that punishment is justified for those offenders who are already sincerely repentant for their crime and hence already suffering the pains of remorse and penance that they deserve to suffer. Yet Duff (2001, p. 119) refuses to do so, his argument being that punishment also serves the aim of reconciliation which is achieved through "the penal hard treatment that constitutes a forceful and public apology."<sup>33</sup> From this, we should evince that Duff thinks (a) that even if the pains of guilt constitute punishment, they do not sufficiently do so; and (b) there is some disvalue that it is necessary to inflict and that is not the pains of guilt.

Duff may insist that on his account the pains of guilt are essential to the punishment. In a passage in which he argues

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<sup>33</sup> This thought is confirmed once again when Duff (2001, p. 108) explicitly asks why a state should punish, e.g., inflict hard treatment, in order to bring about penitence. Isn't a conviction issued by a court enough for the purpose of focussing the offender on the wrong he committed? Once again, Duff thinks that it is not but what is relevant for us is the idea that a conviction may indeed be enough to generate full-blown repentance (and not only fleeting feelings of guilt) at least in some cases and in those cases, if the pains of penance constituted the punishment, we would not need to punish the offender further.

that even imprisonment may at times be a necessary form of punishment (2001, pp. 148–152), he argues that it should *serve* as a penance and in fact must be seen “as a species of penance”. Seeing it this way is possible

if its meaning is that the offender has, by his crime, made the maintenance of normal community with him impossible but that community can be restored if he undergoes this penance. His imprisonment then gives material form to this implication of his crime—it seeks to bring him to recognize that his crime has rendered the maintenance of normal community impossible. But it also constitutes the penitential burden through which he can, if he does repent, express his repentant and apologetic understanding of crime, or by which, even if he does not repent, he is restored to normal community as if he had repented.

Why would incarceration restore the offender to the community even in the absence of repentance? The answer, I imagine, must be that it does because there is a widespread belief in the community that incarceration is generally connected to disvalues that in fact embody punitive hostility and censure and that are independent of the pains of guilt and penance. If not, why impose it or, in fact, why impose any hard treatment over and above the pains of guilt and remorse?

The ambiguity that imbues this particular part of Duff’s account is, I think, indicative of another concern that this version of the Constitutive View shares with Garvey’s and Markel’s Non-Constitutive View. The worry is that just as the guilt penalties discussed above, the pains of guilt and penance cannot appropriately constitute punishment because they do not instantiate the right connection to our attitudes of punitive hostility hence the tendency of Duff to fall back on more widely recognized forms of hard treatment. This worry is more serious when applied to Duff’s account to the extent to which this account strives to reframe all punishments as species of guilt and penance. If, as Duff suggests, we really are to conceive of incarceration and other forms of punishment as aiming to inflict the pains of guilt and repentance, the scope of criticism described in this paragraph will extend to Duff’s theory of punishment as a whole and not only, as in the case of Garvey and Markel, to guilt “penalties”.



Duff may retort that guilt and penitence are proposed as part of an ideal theory of punishment, and not a theory that could be directly applicable to present societies (Duff 2001, pp. xv–xvi and Chap. 5). In our non-ideal conditions, the argument would go, the censure punishment expresses embodies punitive hostility and hard treatment. That, however, does not have to be so. In more ideal conditions, the link with punitive hostility may be severed: punishment would simply function to communicate censure to rational individuals. As much as I sympathise with this idea, I think it faces a considerable challenge: what would the expression of censure or social condemnation amount to in the absence of a link to punitive hostility? In its absence, there is simply no reason to think that communicating censure has any intelligible link to hard treatment or the intended infliction of a disvalue. What is more, if like the authors discussed in this section, we emphasize as part of our ideal theory that censure is to be communicated to *rational* individuals what, in the absence of punitive hostility, would lend intelligibility to the claim that communication of censure should be harsh? Rational nature here seems to call for remonstrating, reasoning, persuading, and entreating the offender, not for resorting to coercion and force. But then communication of censure would become detached from hard treatment or disvalue, which is the essence of punishment. The communication would not take place *through* punishment, for the latter necessarily talks to the individuals' sense of pain.

Depending on what one builds into 'rational', a repost would go, possibly, more fully rational beings would not need hard treatment penalties. Yet, for reasons of public communication, there would still be a place for symbolic punishments, which are painful only in virtue of their meaning. What is more, there is no reason why one should define punishment in terms of hard treatment or the intended infliction of a disvalue – as I did in Section III – if that excludes purely symbolic punishments. Certainly, punishment is intended to pain or burden the person punished: but there is – for communicative theorists – a crucial difference between purely symbolic punishments that pain only in virtue of their meaning and how the offender understands it;

and ‘hard treatment’ punishments that are also burdensome independently of whatever meaning they have.<sup>34</sup>

Accepting this point entails either abandoning the idea that punishment essentially involves hard treatment or understanding hard treatment in a way that includes purely symbolic punishments that pain only in virtue of their meaning. I am quite sure that in certain contexts purely symbolic behaviour can constitute hard treatment. Think for example of a mother’s remark to her son that she was seriously disappointed by his behaviour. For some children such a remark may be enough of a punishment: they may be shuttered while censure for their behaviour was effectively communicated.<sup>35</sup> Yet, even if we think the mother’s remark as a punishment, I do not think we can understand her behaviour in light of punitive hostility. The question we should ask, then, is whether the concept of legal punishment is also intelligible without any reference to punitive hostility. It seems to me hardly possible for retributivists to do so, even for those who defend communicative retributivism. I suppose, however, that some may want to answer positively, at least when the answer comes in the context of an ideal theory of punishment. To them I can simply reiterate my initial point. The pain elicited by purely symbolic punishment is still pain; rational creatures should not be “reasoned” through their sense of pain.

## VI. CONCLUSION

From a conceptual point of view, there are a number of ways in which one can connect punishment, on the one hand, and the emotions of shame and guilt, on the other. To get one’s bearings in this field, one should begin with the following cardinal question: are shame and/or guilt the intended disvalue of the punishing act or are they not? If they are, we may further ask whether the specific pains that characterize each of these emotions is sought as an essential part of the punishment or

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<sup>34</sup> I thank Antony Duff for pointing this objection out to me.

<sup>35</sup> In fact, several empirical studies attest that it is precisely within so-called communal relations such as the one standing between parents and children, and romantic partners that guilt is most likely to arise (Baumeister et al. 1994).

not. If shame and/or guilt are not constitutive of punishment, then, any connection between them and a certain act of punishment must be realized purely at the level of justification. These questions have revealed themselves to be very useful not only in affording a systematic grasp of the various theories in this field, but also in delivering a key to their evaluation. At the most general level, the conclusion to be drawn is that all of these theories could benefit from considering more explicitly and in detail the relation they establish between punishment and the intended disvalue.

At a more particular level, I found that though Kahan and Posner did consider that relation, their substantive conclusion was at best incomplete. There is a stronger relation between meaning and feeling or emotion than these authors are prepared to admit. Felt humiliation, I argued, is an essential intended disvalue of degradation ceremonies. Any defender of this type of penalties must be aware that inflicting humiliation involves the state in the communication of a kind of message it should not want to express, at least from a liberal point of view. Those who make a connection between guilt and punishment were found to occupy rather different locations on our map. Defenders of guilt penalties seem to endorse a Non-Constitutive View, while Duff's communicative account of punishment seems to be a version of the Constitutive View. Though the details of our critical assessments of these two positions differ, the criticism is at bottom the same: it is doubtful that the "punishments" these accounts defend do effectively amount to punishments. If they do, it is to the extent that they take the form of more "traditional" and less "alternative" punishments. Finally, we should note that the analysis of punishment offered here, with its emphasis on the role that the intended disvalues have in partially determining the status and acceptability of acts of punishment, is a tool in principle applicable to the evaluation of any candidate form of punishment.

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