Punishment, Penance and Respect for Autonomy

Robert Justin Lipkin
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Currently in fashion is a type of theory that justifies punishment on the ground that it restores the offender’s identity as a moral being. Generally, this type of theory, called “the moral good theory of punishment” or “the moral good theory” for short, insists upon a conceptual relationship between punishment, properly understood, and moral personality. R.A. Duff has formulated an interesting version of the moral good theory which justifies punishment as compulsory penance, a conception of punishment designed inter alia to respect the rationality and autonomy of the offender. According to Duff, this conception of moral personality places two constraints on a system of criminal justice and punishment. First, such a system must treat an offender as a rational, autonomous individual throughout the criminal process. Second, punishment must help the offender restore and realize his identity as a moral agent.

In this article I show that the penance theory of punishment suffers two fatal defects that are typical of most moral good theories. First, according to a plausible and traditional view of the nature of law, the penance theory goes too far in requiring the criminal process to incorporate elements of morality. Second, if morality should be incorporated into the criminal process it is not obvious that the penance theory takes this incorporation far enough. Taking autonomy and morality seriously in the criminal process may require resisting the conventional view that coercion is compatible with the autonomy of the offender. Consequently, if punishment requires coercion it may be incompatible with the proper respect for persons as rational, autonomous agents.
Since punishment involves depriving an offender of his life, liberty or property any theory of punishment must face the problem of justifying such coercive treatment. In short, the problem of justifying punishment centers around the fact that punishment involves conduct which, in other circumstances, is wrong. Hence, supporters of punishment must demonstrate what justifies such conduct when it functions as punishment.

A theory of punishment, in Duff’s view, should explain the meaning of punishment and demonstrate how punishment is justified (T14). In his view, there are three kinds of theories of punishment (T5). The first kind of theory justifies punishment in consequentialist terms by indicating how punishment contingently brings about some social good. The second kind of theory justifies punishment in consequentialist terms but places certain non-consequentialist constraints on what a theory of punishment can allow. The third kind of theory shows how punishment is conceptually tied to its justifying aims.

Duff opposes theories of the first kind because such theories regard the relationship between punishment and its justifying goals as contingent. As a result, such theories can generate the wrong substantive results concerning what kinds of punishment are permissible. Consider:

"The whole-hearted pursuit of such aims would surely sanction the imposition of manifestly unjust punishments: the punishment of innocent scapegoats; excessively harsh punishments for relatively trivial offenses; a refusal to accept excusing-conditions which should in justice be accepted. It is at best a contingent truth that just punishments are consequentially efficient; and it may sometimes be true that unjust punishments are more efficient (T2)."

Theories of the second kind avoid these unacceptable results by embracing non-consequentialist constraints, such as punishing only the guilty or fitting the punishment to the crime. Consequently, such theories avoid the intuitively implausible results that pure consequentialist theories can generate. Still, such hybrid theories get the right results for the wrong reasons. According to such
theories efficiency tells us that only the guilty should be punished or that punishment should fit the crime. On the contrary, Duff contends that such constraints are justified whether efficient or not. They are justified because they are intrinsically related to the moral conception of a person as a rational, autonomous being.

Theories of the third type justify punishment by connecting the central goals of punishment to essential features of morality or justice. The most familiar example of the third type of theory is retributivism. Justice requires that wrongdoers pay for their wrongful conduct. Punishment is the appropriate official vehicle through which the payment is made. Retributive theories conceive of justice as consisting of a moral order that evil can disturb. Criminal conduct is an evil that disturbs this order. Punishment annuls the evil caused by the crime. In this way there is a conceptual relation between justice and retributive punishment. It is this sort of non-contingent relationship between morality and punishment that Duff seeks.

Nevertheless, Duff opposes retributivism, but not because it is contingently related to morality. Rather, Duff’s basic reason for opposing retributivism is that it doesn’t pay sufficient attention to the wrongdoer’s rationality and autonomy; nor does it sufficiently explain how punishment in itself satisfactorily makes payment for the misdeed (T204, 205-28). The question then arises whether there is a theory of punishment which ties central features of punishment internally to the conception of a person as a rational, autonomous being. Duff’s answer is that “the penance theory of punishment” is such a theory. 5

The penance theory informs us that punishment is a communicative act directed at the offender as a rational, autonomous agent. Punishment aims to convince him that his conduct deserves moral blame, that he should repent and restore his damaged relations with the community. When punishment is directed at goals other then the moral reclamation of the offender, it is improper, because
it manipulates or uses the offender, thus failing to treat him as a rational, autonomous agent.

The penance theory of punishment regards punishment as continuous with the criminal trial. The trial itself is analogous to moral blame, aiming at the responsive understanding of the offender (T75). On Duff’s view, the trial is essentially a moral undertaking which seeks the assent and the participation of the defendant as a rational, autonomous agent (T233, 116). Generally, the criminal law seeks the allegiance of the citizen as a rational moral agent, by appealing to the relevant moral reasons which justify its demands; the trial seeks to engage the defendant in a rational dialogue about the justice of the charge which [the defendant] faces, and to persuade her—if the charge is proved against her—to accept and make her own the condemnation which her conviction expresses (T233).

According to the penance theory, penance is self-imposed suffering designed to facilitate the offender’s repentance. Penance may be understood as something an offender submits to voluntarily, constituting a form of self-imposed punishment, “through which he can express his repentance and restore himself to the community from which his [offense] separated him” (T251). Though emphasizing the offender’s voluntary role in accepting penance, the penance theory does not eschew coercion.

It is justifiable to coercively impose penance upon an offender just so long as the process does not mistreat or manipulate her (T251). Compulsory penance does not mistreat the offender if it “addresses her as a rational moral agent” (T253). Compulsory penance is permissible when it seeks to engage in moral dialogue with the offender (T253). In short, the Kantian⁶ imperative is met by treating the offender as a rational, autonomous moral end, not merely as a means to some independent goal. What justifies us in punishing the offender is that punishment, as a compulsory penance, helps the offender to repent and reform himself (T255).
Duff’s theory attempts to solve the problem of justifying punishment by demonstrating how punishment is internally related to a Kantian conception of moral personality. Admittedly, this theory is an engaging and humane attempt to characterize a morally appealing conception of punishment, one that avoids the deficiencies of consequentialist and retributivist theories of punishment. Its fatal defect, however, is that it simultaneously concedes too much and too little to morality. Let’s explore the reasons for this objection.

First, Duff’s conception of a criminal trial is descriptively inaccurate. The participants in a criminal trial, especially in common law countries, have no intention of engaging in a dialogue, moral or otherwise. The primary goal of a criminal trial, under an adversary system of criminal justice, is to determine whether the defendant is guilty. The law formulates precise rules governing this enterprise which from the participant’s perspective is an egoistic, competitive activity. The rationale for this model is that through this competitive, adversary process—truth—guilt or innocence—is discovered and justice served.

But certainly, Duff should not be faulted on the ground that his conception of a criminal trial does not rest upon the actual workings of criminal prosecutions. Instead, his concern is to describe an ideal: how should criminal trials be conceived and what justifies them? His answer is that trials are justified as attempts to communicate to the criminals the court’s moral condemnation of the criminal’s misconduct. More important, trials are attempts to engage criminals in the process of understanding and internalizing the judgment of the court.

The quick rejoinder is that this moral conception of a criminal trial is implausible even as an ideal. More specifically, the problem with Duff’s account of a criminal trial is that it distorts one very common and persuasive account of the relationship between law and morality, and the underlying rationality of criminal law. A traditional conception of law emphasizes the individualis-
tic or prudential basis of a legal system. Call this "the prudential conception of law." According to this view, prudential rationality informs the law, especially the criminal law, by supplying the motivational or justificatory force behind legal proscriptions.

In particular, one important goal of law is to provide a general motive for obedience. Such a motive should also prompt people to endorse and defend the law. Either morality or prudence is the better method for achieving this. For morality to do the trick it is necessary that each individual share with others the same or similar moral principles. From a Kantian viewpoint these principles should conform to universal law, requiring an individual to respect other people as rational, autonomous agents, or put in Kantian terms, as ends in themselves.

For any theory of practical reasons—including moral reasons—to ground the criminal law, it must provide sufficient motivational or justificatory force to prompt people to obey the law. The motivational basis of legal rules requires two elements. First, ordinary individuals must believe that in obeying the law there is something in it for them. Second, they must believe that others are inclined to obey the law on the condition that obeying the law is a general practice. Consequently, providing a general reason or motive for obedience is central to grounding the criminal law.

But then Duff's moral conception, and perhaps any conception of morality properly speaking, is inadequate as the basis of the criminal law because it is unlikely to provide a general motive for obeying the law. The simple reason for this is not everyone believes that there is inherent value in being bound by a duty to respect others. So, morality will not be able to gain the consent of the moral skeptic, nihilist or cynic. If, in principle, morality must ground the criminal law, then the criminal law is likely to be groundless. General consent and the motivational or justificatory force required to ground law cannot be achieved by appealing to moral reasons.

If, however, we turn to the law's prudential basis we are able to draw into the law's net every rational person, moral or not.
Whatever else a rational person must be, he must be prudent. Any rational person realizes that a system of law is in his rational self-interest. Only by living under law can a rational, prudent and autonomous person implement his plans and achieve his goals. From a motivational perspective, this is the strength of the prudential basis of the criminal law. The law tells its citizens: “Whatever your morality, whether you have one or not, whether it is a secular or religious morality, whether it is egoistic or altruistic, whether it is inconstant or ubiquitous, you always have prudential reasons for obeying the law. Hence, if you are rational, you will obey the law.”

This view does not deny that the law is informed by basic moral values. Of course, proscriptions against murder, theft, fraud and so forth are moral proscriptions. But their motivational or justificatory force in law does not depend upon morality. Indeed, the prudential view argues that whether a potential offender is swayed by moral arguments he will be persuaded by prudential arguments, if he is rational. The motivational or justificatory force associated with obeying the law is that it furthers the individual’s rational self-interest.

How one sees the justificatory force behind the criminal law determines whether one sees a trial as a moral activity or a prudential one. According to the prudential view there are two reasons for rejecting the conception of a trial as a moral activity. First, some adherents of the prudential view believe that morality, if real at all, has little influence over what we do. Second, even if morality is real and has some motivational influence over our conduct, prudence is the better basis of the criminal law because its motivational force is greater and more constant than the motivational force that morality supplies. The trial, therefore, is grounded in rational prudence and is not analogous to moral blame; nor is it designed to get the guilty defendant to accept the judgment of the court as his own regarding the moral propriety of his conduct.
Duff’s attempt to explain the meaning of the concept of punishment is similarly marred by his failure to recognize the prudential basis of our system of criminal justice and punishment. The penance theory of punishment regards penance as self-imposed suffering which facilitates repentance and is designed to reconcile the offender with others and himself (T247). On the prudential view, penance is neither a necessary nor a sufficient condition for explaining the meaning of “punishment.” It is not sufficient because penance alone is unlikely to serve as a deterrent against committing criminal conduct. Moreover, if the criminal law is to teach anything, its lesson is in the form of a prudential threat. Break the law and you will pay. In short, the criminal law instructs people in the cost of engaging in criminal behavior.

The reason penance is not necessary for explaining the meaning of “punishment,” on the prudential view, is that law seeks to give the offender what he deserves or to alter his conduct, not to help him achieve inner harmony or satisfaction. The general justificatory strategy of the criminal law is to appeal to some universal factor that has motivational efficacy in getting people to obey the law. If a person obeys the law for moral reasons that’s fine. But if he doesn’t feel the motivational force of moral reasons he is certain to feel the force of prudential reasons if he is rational. Consequently, penance is not a necessary feature of punishing criminal conduct.

On the prudential view, were the law to be interested in the moral development of actual and potential offenders, it would be overstepping its bounds, intruding upon the individual’s privacy, liberty and independence. The prudential view of law regards people as essentially individualistic, free and self-interested individuals valuing their privacy, liberty and independence. No doubt legal sanctions intrude upon these values. But some intrusion is tolerable because it brings about the benefits of enhanced privacy, liberty and independence. When the state is permitted to enforce conventional morality, these values are in-
Penance and Respect for Autonomy

12 When the law tries to do the job of morality it encroaches upon the offender’s privacy, liberty and independence in ways more terrible than other institutions. On the prudential view, the law is the worst choice to do the job of morality. Repentance may be an important dimension of an appropriate moral response to one’s misdeed; it is not, however, the state’s job to respond in this manner.

Duff attempts to answer the argument against state intrusive-ness by pointing out that the criminal trial attempts to engage and arouse, not to coerce; it seeks to reach “the inner citadels of his soul”: but we do not try to break down their gates: we rather try to persuade him to open those gates himself, and leave him free to keep them firmly closed” (T272). But how is this permissible? What if the offender autonomously decides he does not want to be aroused and engaged? What if he categorically rejects the state’s attempt to open the gates to his moral inner sanctum? What Duff fails to see is that coercion need not be explosive, violent or brutal in order to be pernicious. Therefore, on the prudential view, the penance theory, by incorporating elements of morality in the criminal process, requires punishment to do too much.

5

Duff offers an alternative and progressive conception of law, a conception maintaining that law is the embodiment of perennial moral convictions understood in a Kantian fashion. Hence, law must appeal to the individual’s rationality and autonomy. On this view, moral reasons supply the justificatory or motivational force for obeying the law. Such a view conceives of the trial as a moral dialogue between the state and the offender. The state’s goal is to get the offender to internalize the moral reasons against acting as he did. The general question here is whether this moral conception provides an adequate account of the meaning and justification of the criminal process.

Doubtlessly, some aspects of a trial incorporate moral elements. Moral responsibility, for example, is required for cul-
pability, punishment and so forth. On closer inspection, however, it is evident that a criminal trial is not like a moral dialogue. One reason for this is that genuine moral dialogue must in principle permit the offender to prevail, not merely because he did not commit the misdeed but because his accuser, not the offender, has the wrong moral principles or has interpreted the offender’s conduct wrongly. Hence, if Smith accuses his colleague Jones of ethical misconduct in having sexual relations with a student, it should be possible in a genuine moral dialogue or argument for Jones to convince Smith that he (Smith) is wrong for condemning Jones because Smith has the wrong moral principles. When dealing with the state, however, this is never appropriate. The law must prevail. There is no true exchange of moral arguments in court. Generally, moral evaluation of conduct involves such things as an interpretation of motive, character and perspective; these conspicuous features of moral dialogue are systematically excluded from a criminal trial or are admitted only for limited purposes.

If the moral dimension of the law is taken seriously, it is difficult to see how penance can be coerced in the name of the offender’s autonomy. Duff himself inveighs against coercive methods of punishment because he values autonomy not merely as instrumentally valuable but also as an essential feature of moral personality. How then can he be right in thinking that a person can be justifiably coerced to serve penance? On the penance theory, the ultimate goal of punishment is the autonomous recognition that one has acted wrongfully and that one must autonomously atone for one’s misconduct. It is mystifying that such a process can be initiated by coercion.

Duff contends that penance is internally related to punishment and guilt, but it is difficult to see how coerced penance is so related. Describing a person as compelled to engage in conduct which should paradigmatically and essentially involve his autonomous choice is psychologically paradoxical. If the value of moral restoration is that the offender realize autonomously that he acted wrongly, it is difficult to see how he can be compelled to repent. Simply stated, coercing repentance is inconsistent with the proper respect for persons that Duff rightly embraces.
This inconsistency clearly reveals itself when we inquire into what sorts of autonomy Duff’s theory protects. There are several different types of autonomy having practical significance. A person may autonomously perform an action. He also may autonomously choose a different morality than the majority’s. Finally, a person may autonomously choose to be evil. Duff’s conception doesn’t preserve any of these different kinds of autonomy. Instead, Duff seems to be characterizing autonomy as the autonomy to be moral whether one wants to be or not.

One might argue in support of this characterization that being moral is the best or most important kind of autonomy a person can achieve; hence, compelling the offender to autonomously choose to be moral by obeying the law or serving penance if he violates the law, is really doing something that is in the offender’s best interest. This argument is insufficient because, on this view, autonomy is not tied to the offender’s actual system of practical reasons; you can be acting on the basis of the offender’s autonomy without doing anything to satisfy any of his desires. This is a strange notion of autonomy. Whatever else autonomy is, it must be connected to something the individual wants. This view of punishment is not tied to the offender’s system of reasons or his autonomous decisions and hence does not concern his actual desires. And if it need not be so tied, then any kind of punishment—no matter how oppressive—can be justified as restoring the offender’s autonomy. What if the offender sincerely, and non-pathologically, believes he was right to commit his crime? How can he repent then? How do we respect a party’s autonomy when the other participant in the dialogue—the state—cannot admit, even in principle, that the offender’s morality is right? It is not obvious that we do. Further, any intelligent offender knowing that a Duffian system of criminal law favoring repentance will feign repentance in order to gain privileges in prison or early parole.

Duff inveighs against drug or psycho-surgical techniques in reforming the offender, because these methods do not address the offender as a responsible moral agent. But then it is unclear how coercion generally can do the trick. What if there were a drug or
a surgical technique that had the effect of compelling the offender to reflect seriously on his attitudes and relations with other people? Does compelling the offender to take this drug or undergo the surgical procedure address him as a responsible moral agent? If so, how? Suppose he must be physically forced to accept the treatment. Does his ultimate repentance justify this process? If so, then almost anything can count as treating the offender as a responsible moral agent. If not, Duff must explain how ordinary coercion, even "hard treatment," accords the offender the appropriate degree of respect. 20

Finally, Duff seems to place great weight on the fact that the penance theory of punishment does not coerce the understanding or will, though it probably can restrict the movement of the offender (imprisonment) and his opportunities for a range of activities such as going to the theatre, travelling abroad, and so forth. But again how is it possible to draw a workable line conceptually between coercing the will as opposed to merely restricting the offender's movement and opportunities? If penance can be coerced without violating the internal logic of the Kantian imperative, what does Duff's theory rule out? The simple fact is that the more punishment restricts movement and opportunities the more such treatment has implications for what one believes, how one reasons, what one hopes for and how one constructs plans for the future. In other words, punishment involving imprisonment and other forms of "hard treatment" cannot fail to have a coercive effect on the offender's understanding and will. Isn't that the point of imposing these penalties in the first place? If penance cannot be compelled except at the expense of treating the offender as a rational, autonomous moral agent, then punishment cannot be explained as compulsory penance or provide the sort of justification Duff seeks.

What can we learn from the failure of Duff's theory? The reason for the failure of the penance theory is that the theory is com-
mitted to the dogma that punishment must permit coercion. I refer to this commitment as the dogma of coercion because it is accepted almost universally and its adherents take it as an article of faith needing no further justification. Most theories of punishment accept this dogma. Indeed, most theories define punishment as involving coercion. If punishment is defined as involving coercion, then the traditional theories of punishment cannot be faulted for trying to provide a justification for the coercive elements of punishment.

Moreover, because traditional theories do not require punishment to benefit the offender by helping him regain his status as a rational, autonomous moral agent, their acceptance of the dogma of coercion does not discredit their justification of punishment. But in the case of the penance theory in particular and moral good theories in general, the challenge remains: how can coercion be enlisted on behalf of the offender’s autonomy? The problem for the penance theory is to explain how restoring the offender’s moral autonomy can occur through coercion.

I do not contend that restoring one’s autonomy through coercion is impossible. There may be kinds of autonomy and kinds of coercion that make this possible. But then the penance theory must identify them. What I want to emphasize is that the penance theory and moral good theories generally do not even recognize this as a problem. The penance theory assumes that autonomy can be restored through coercion without describing either the conception of autonomy involved or how coercion, as ordinarily understood, can help the offender restore his autonomous interactions with others. And such an assumption is tendentious. Without an answer to this challenge, it is difficult to see how a moral theory regarding autonomy as a salient value can justify coercion in punishment. The penance theory can be saved only by revealing how coercion can restore and respect autonomy or by reconstructing the theory’s conception of autonomy. An even more radical solution to save the penance theory is to abandon the dogma of coercion.
Notes


3. It should be pointed out that some theorists are skeptical about whether punishment can be justified. Marxists and other political radicals suggest that the need for punishment is tied to an oppressive social order. See W. Bonger, Criminality and Economic Conditions (Boston: 1916). More specifically, Godwin believed that "the period that shall put an end to the system of coercion and punishment, is intimately connected with the circumstances of property's being placed on an equitable basis." W. Godwin, Political Justice (Unwin Brothers, Ltd., 1949), p. 36. For a contemporary challenge to the justifiability of punishment see A. Skil­len, Ruling Illusions (1978), pp. 109-21.


5. "The penance theory of punishment" is my name for Duff's theory, not his.

6. The "Kantian" imperative refers to Duff's goal of finding the meaning and justification of punishment in the Kantian demand that we respect other people because they are rational, autonomous moral agents (T6). Note that Kant held a retributivist theory of punishment.

7. This is not to suggest that guilt is merely a descriptive concept. There is, of course, factual guilt—whether the defendant acted unlawfully—and legal guilt—whether the defendant is legally responsible for his conduct. Legal guilt refers to the empirical facts of what the defendant did, as well as a condemnation of the defendant. P. Arenella, "Rethinking the Func-


9. This prudential conception of the law is most closely associated with, though not limited to, Thomas Hobbes’ political philosophy.


11. Privacy may be understood in moral or prudential terms, or in some combination of these terms. For a very useful collection of articles on the meaning and importance of privacy in ethics and law see *Philosophical Dimensions of Privacy*, ed. F. Shoeman (Cambridge: 1984).

   Whatever else privacy is, it must include “the right to be let alone.” T. Cooley, *Cooley on Torts* 29 (1879). The right to be let alone entails freedom from public (governmental) intrusion as well as intrusion by other individuals. Moreover, the sort of privacy I have in mind includes the right to exercise autonomy in decisions affecting one’s personal life. K. Karst, “The Freedom of Intimate Associations,” *Yale Law Journal* (1980): 625-92.

12. Perhaps there is no better example of this abuse than the remark made by Bruce Fein of the American Heritage Foundation debating Professor Laurence Tribe over the propriety of the Supreme Court’s decision in *Bowers v. Hardwick* 106 S.Ct. 2841 (1986), upholding Georgia’s sodomy law. Mr. Fein stated that although such laws are largely unenforced, they are valuable because they teach a moral lesson. Mr. Fein believes that the government has a right to “establish norms of morality within society. Even if such laws like this go largely unenforced, they perform a tutelary function.” MacNeil/Lehrer Newshour, *Thirteen*, 10 Transcript No. 2807, July 1, 1986. On the prudential view, we are protected from the criminal law’s inflicting such lessons upon us.


14. In the case of civil disobedience, the law might be morally wrong, and subsequently changed. But in a particular trial the law’s representative cannot admit that it is wrong. Martin Luther King Jr. was morally correct in violating Jim Crow laws, but the state could not admit this at his trials. Moral arguments should preserve the possibility of either participant discovering and admitting that he is wrong.

15. Both Morris and Hampton believe that coerced repentance is compatible with autonomy. According to Morris, coercion is a necessary feature of
setting a limit on action. And setting such a limit is one of the chief pur-
poses of punishment.

16. Duff places great weight on what might be called "an argument from in-
ternal relations." Presumably, if $X$ and $Y$ are internally related, then $X$
follows from $Y$ or is more appropriate to $Y$ than $Z$ which is not in-
ternally related to $Y$. Thus, repentance is internally related to punishment
while deterrence is not. Unfortunately, whether penance is or is not in-
ternally related to punishment depends on one’s initial presuppositions
regarding the purposes behind the criminal law. Perhaps, penance is in-
ternally related to punishment while deterrence is not only when one sees
a Kantian sense of morality behind the purposes of the criminal law. But
on a prudential conception of criminal law, deterrence is internally re-
lated to punishment while repentance is not. Hence, Duff’s use of this
type of argument begs the question against adherents of the prudential
conception of law.

17. If we interpret Kant as maintaining that a person acts autonomously only
when he acts for the sake of a moral principle, then it is impossible for
the person to act autonomously when performing morally neutral or im-
oral actions. Indeed, for Kant acting non-morally or immorally reveals
an heteronomous will. In this case, something other than law as such
conditions the will. Is an offender then necessarily someone who acts
immorally or heteronomously? No. The law may be immoral or the of-
fender may in good faith believe that it is.

Hobbes, Mill and Hume and others endorse an alternative concep-
tion of autonomy, describing a person’s conduct as autonomous if it is
based on his beliefs and desires, or beliefs and desires subject to certain
rational constraints. Duff endorses the Kantian conception of autonomy.
He then needs to explain how someone can be coerced to act on moral
principles, especially when we keep in mind Kant’s distinction between
acting in accordance with principle and acting for the sake of principle.
The prudential conception of law endorses a belief-desire conception of
autonomy. On this view, a person is moral only if he wants to be moral.
But if he does not want to be moral, how can we justifiably cause him to
have this desire while simultaneously respecting him as a person?

18. Of course, one could argue that punishment need not be concerned with
what the offender actually desires just so long as it concerns what he
would desire under certain circumstances. But Duff rightly rejects argu-
ments purporting to show that by compelling an offender to act in a cer-
tain manner, you now respect his autonomy because under other cir-
cumstances he would consent to the treatment. That an offender would
consent in other circumstances doesn’t show that he now consents; there-
fore we do not respect his actual autonomy by appeals of this sort.

19. At worst, coercion is inconsistent with encouraging a person to
autonomously restore his relations with others. At best, coercion is mere-
ly contingently related to such encouragement. The relationship is con-
tendent because though coercion may be effective in a given case, it need
not be. Some people, given their psychological make-up, may respond
to coercion, others may not. Similarly, some people may respond to to-
ture. But torture is nonetheless unacceptable.

20. Of course, Duff might argue that coercion is consistent with autonomy
because it is the best method for getting the offender to recognize that he
acted wrongly. Is this argument based on empirical evidence? Is empiri-
cal evidence the right sort of justification of the claim that coercion is
compatible with a respect for autonomy?

McTaggart argued that punishment engenders disgrace. Disgrace
is the mechanism through which a person recognizes that he has acted
wrongfully and this recognition causes him to repent. J. E. McTaggart,
"Hegel’s Theory of Punishment," in Philosophical Perspectives on
Punishment, ed. G. Ezorsky (Albany: State University of New York
Press, 1977), p. 49. But McTaggart concedes that this process of punish-
ment, disgrace and repentance may not be efficacious in state ad-
ministered punishment (p. 52). Hence this process has little to do with
the criminal law.

More importantly, why is punishment necessary for disgrace? If an
offender is capable of feeling disgraced shouldn’t the public recognition
that he committed a crime be sufficient? Concretely, disgrace should
occur through the process of indictment, trial and sentencing, not neces-
sarily by incarceration. McTaggart’s view might be that incarceration is
necessary for an offender to appropriately reflect on his misconduct and
for disgrace to achieve its results. But why should this always be so? If
it is not always the case, should an offender be pardoned without incar-
ceration if he feels the appropriate disgrace prior to sentencing?

21. Certain conceptions of “autonomy” may be compatible with some types
of coercive treatment. For the penance theory to succeed, an analysis of
the different senses of “autonomy” and “coercion” is required. For moral
good theories in general to succeed, their proponents must provide a
method for identifying which senses of these terms are relevant to politi-
cal and legal theory.

22. Abandoning this dogma requires that penance theory take the offender’s
autonomy much more seriously than is presently thought possible. The
offender then must have a greater voice in the type and duration of his
punishment. Certainly, this does not mean that the offender unilaterally
select his own punishment. But it does entail that he have a meaningful
(equal?) say in determining his sentence. Compulsory arbitration may
serve as a model for this type of sentencing. The autonomy of two par-
ties—the state and the offender—is respected only when both agree on
a solution to their conflict.

Adopting this proposal means that the offender’s autonomy, though
far from absolute, must be honored in ways antithetical to our current
ethical and legal conceptual scheme. Without an adjustment in current
thinking about moral personality or coercion, it's difficult to see how the penance good theory presents a viable alternative to traditional theories of punishment.

Robert Justin Lipkin
Delaware Law School
Widener University