

THE DILEMMA OF EXPRESSIVE PUNISHMENT

BY WILLIAM DEFORD*

"In short, the infliction of punishment by law gives definite expression and a solemn ratification and justification to the hatred which is excited by the commission of the offence. . . ." — J. F. Stephen¹

"The medium is the message." —Marshall McLuhan²

INTRODUCTION: THE DILEMMA

In January 1990, Utah State Senator Paul T. Fordham presented a bill designed to address Utah's problem with criminal street gangs. Speaking to the legislators, he said, "I think we need to send a message to these organized people that there isn't a place for them in Utah."³ The medium that Senator Fordham chose for this message was a sentence enhancement that increased the minimum sentence for crimes committed "in concert with two or more persons."⁴ It is common for legislators to say that the intent of a sentence enhancement or other punishment scheme is to "send a message."⁵ This Comment is about the notion that

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1. 2 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 81 (London, MacMillan 1883).

2. MARSHALL McLuhan, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 7 (1964).

3. M. Scott Smith, Note, *Utah's Gang Enhancement Statute: Did the Legislature Create a Sentencing Factor as It Intended or Did It Unwittingly Create an Element of the Offense?*, 2000 UTAH L. REV. 671, 672 n.4 (2000) (quoting *Group Criminal Activity Penalties: Senate Floor Debate on S.B. 52*, 48th Utah Legis. Gen. Sess. (Jan 23, 1990) (Tape #20, Day #16, Side A, counter #2810)).

4. UTAH CODE ANN. § 76-3-203.1(1)(a) (2003).

5. A quick search of the Congressional Record for the last few years yielded the following statements about sentence enhancements. In each case, all italics are mine unless otherwise noted. 145 CONG. REC. 29,344 (1999) (statement of Sen. Abraham) ("We have to *send a constant message* to our children that drugs are illegal, drugs are dangerous, drugs may cost your life, and the penalties for drug dealing are severe.") (quoting Pres. Clinton); *id.* ("At this crucial time, we may be making real progress in winning the war on drugs and violent crime in part because we have *sent the message* that crack gang membership is no way to live and that society will come down very hard on those spreading this pernicious drug."); 144 CONG. REC. 14,320 (1998) (statement of Sen. Hatch) ("It is of the utmost importance that our children be

one of the purposes of punishment is to send messages or express social meanings.

This Comment suggests that the expressive dimension of punishment presents a dilemma: On one hand, punishment must be expressive to be satisfying and democratically acceptable because citizens demand punishments that adequately express public feelings about crime and criminals. But on the other hand, the messages of punishment are too complex, ambiguous, incoherent, and unpredictable to carry the intended messages clearly and unequivocally to criminals and to the public. Because so many punishment regimes are justified by the messages they purportedly send, the way we punish is bound up in our understanding of what punishment means and how it expresses that meaning.

Part I is a brief introduction to expressive theories of law, and specifically to the notion that criminal punishments express social meanings or send messages. I will focus on the work of Dan M. Kahan, who has elucidated a theory of expressive punishment that is both persuasive and troubling.⁶ It is persuasive because it is consistent and supported by empirical data and good reasons. It is troubling because it leads to the dilemma that is the subject of this Comment. Part II shows how the messages of punishment are not as simple as Kahan's theory suggests and how the complexity of social meanings leads to intractable ambiguities in the messages that punishment sends.

Before taking on expressive theories of punishment, it is useful to explain the kinds of criminal sentencing procedures discussed in this Comment. I write this Comment at a time when sentencing guidelines are the dominant paradigm for assigning criminal punishments. After

protected from predatory pedophiles who roam the streets and the Internet looking for innocent children to victimize. These offenders need to be *sent a message* that the punishment for their actions will be serve [sic] and predictable."); 144 CONG. REC. 9,873 (1998) (statement of Sen. Campbell) ("The 'Counterfeiting Sentencing Enhancement Act of 1998' will *send a clear message* to criminals who are even thinking about counterfeiting."); 143 CONG. REC. 25,256 (1997) (statement of Rep. McCollum) ("By passing this legislation, the U.S. Congress *sends a clear message* to criminals who would desecrate or destroy property at a national cemetery that the United States will not tolerate such disrespect of its veterans."); 140 CONG. REC. 602 (1994) (statement of Sen. Kyl) ("Instead of *sending a message* of retreat, our Nation needs to reinvigorate our war against drugs."); 139 CONG. REC. 27,025 (1993) (statement of Rep. Buyer) ("We must enhance the Federal death penalty to show criminals their actions will not be tolerated. Murderers have to realize that there are harsh consequences for such actions. We must *send that message*, that criminals and murderers will pay for their actions."); 138 CONG. REC. 31,188 (1992) (statement by Rep. Mineta) ("By passing the Hate Crimes Sentencing Enhancement Act, the House can *send a clear message* that they will no longer be tolerated and they will no longer be ignored.").

6. My discussion of Kahan's work on expressive punishment comes chiefly from the following article: Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996).

Blakely v. Washington,⁷ and its progeny *United States v. Booker*,⁸ this paradigm is likely to change significantly, or at least to evolve. Some of what I have to say about punishment is influenced by determinate sentencing regimes like the federal sentencing guidelines and the various guidelines promulgated in the states.⁹ As of this writing, though, it is still unclear exactly how the recent Supreme Court cases will be applied to determinate sentencing regimes, but at the very least it appears that juries will become more involved in the sentencing process.¹⁰

In addition to comprehensive sentencing guidelines, I also reference several specific sentence enhancements that legislatures have created. Sentence enhancements are aggravating factors that usually operate by raising the minimum sentence of a crime.¹¹ By 1991, over 100 mandatory minimum sentencing factors existed in federal law.¹²

I. WHY PUNISHMENT MUST BE EXPRESSIVE

This Part summarizes expressive theories of punishment generally in section A and Dan M. Kahan's theory of expressive punishment in section B. The objective of this section is to show—by way of Kahan's scholarship—that expressive theories are convincing not as moral justifications of punishment, but as political justifications. In other words, punishments must try to express public feelings about punishment because the public demands it. Any punishment regime that ignores the expressive dimension of punishment risks leaving public anger about crime unsated, which threatens the democratic legitimacy and political salience of the regime.

A. *Expressive Theories of Punishment*

In 1929, A.C. Ewing wrote that rehabilitating criminals requires that we inflict suffering on them because the criminal

7. 124 S. Ct. 2531 (2004) (striking down Washington's sentencing guidelines inasmuch as they require a sentencing judge to pronounce sentences in excess of statutory maximums upon findings of aggravating factors not found by a jury).

8. 125 S. Ct. 738 (2005) (holding that the jury trial requirements of the Sixth Amendment apply to the Federal Sentencing Guidelines and that the Guidelines, therefore, may not be mandatory, but merely advisory).

9. See, e.g., *infra* Part II.B.

10. See *Booker*, 125 S. Ct. at 756.

11. Michael Tonry, *Mandatory Minimum Penalties and the U.S. Sentencing Commission's "Mandatory Guidelines,"* 4 FED. SENTENCING REP. 129, 129 (1991).

12. *Id.*

must realize the badness of what he has been doing, and since his previous actions make it very doubtful whether he will do so of his own accord, this badness must be "brought home to him" and the consciousness of it stamped on his mind by suffering. The infliction of pain is society's way of impressing on him that he has done wrong.¹³

Punishments, then, should educate criminals and express the proper moral standing of criminal acts.¹⁴ It is significant that expressive theories use the word *express* and not *communicate*; the latter suggests a meeting of the minds, a communion between speaker and hearer. The word *express*, however, suggests a kind of force, descending from the Latin *ex premere*, meaning to press out, like pressing oil from an olive.¹⁵ Look again at the Ewing passage above. In describing punishment, he uses the words "stamped" and "impressing," both of which connote the same kind of downward force that *expression* in its original meaning possessed. If punishment is a kind of language, it is a language that depends on a vocabulary of force.

Even before A.C. Ewing wrote the article quoted above about how punishment should express moral condemnation, a handful of philosophers and legal theorists had suggested that punishments were or should be expressive. J.F. Stephen, quoted in the epigraph to this Comment, argued that the criminal law should affirmatively seek to express the public's moral indignation aroused by crime.¹⁶ This moral indignation should not be discouraged but instead is perfectly legitimate and indeed should be ratified by the punishments we inflict. "[T]he whole criminal law is based on the principle that it is morally right to hate criminals."¹⁷ When the law inflicts a punishment, according to Stephen, it allows expression of hatred for and vindictiveness toward the criminal that would be inappropriate in other fora. The criminal law channels the public's revenge so that "the criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite."¹⁸ Similar to Stephen's version of expressive punishment, Henry M. Hart—quoting

13. A.C. EWING, THE MORALITY OF PUNISHMENT 84 (1929), *quoted in* Igor Primoratz, *Punishment as Language*, in PUNISHMENT 58 (Antony Duff ed., 1993).

14. For a more contemporary version of this argument, see Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFFAIRS 208-38 (1984), *reprinted in* PUNISHMENT, *supra* note 13, at 143-73.

15. See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 438 (9th ed. 1991).

16. See STEPHEN, *supra* note 1, at 81-82.

17. Primoratz, *supra* note 13, at 56 (summarizing J.F. Stephen's "normative expressionism").

18. JAMES F. STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAWS OF ENGLAND 99 (London, MacMillan 1863), *quoted in* Primoratz, *supra* note 13, at 57.

George K. Gardner—wrote that while physical hardships can come from many sources like wars and market downturns, “[i]t is the expression of the community’s hatred, fear, or contempt for the convict which alone characterizes physical hardship as punishment.”¹⁹ Without some expressive element, then, punishment would be identical to any other physical hardship.

Nearly twenty years later, Joel Feinberg’s essay, *The Expressive Function of Punishment*,²⁰ revived the idea of excessive punishments.²¹ His essay examined the difference between criminal punishments and mere penalties like “parking tickets, offside penalties, sackings, flunkings, and disqualifications.”²² The difference between punishments and penalties is that punishments express condemnation, whereas penalties do not. Punishment, Feinberg argues,

is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority himself or of those “in whose name” the punishment is inflicted. Punishment, in short, has a *symbolic significance* largely missing from other kinds of penalties.²³

Feinberg seeks to show how punishments express meanings and what those meanings may be. Punishment may consist simply of an authoritative reprobation, condemning the crime and the criminal with a statement from a sentencing judge, for example, without any accompanying hard treatment. A punishment may also include hard treatment, which itself expresses social meanings. And what does punishment express? What are these social meanings? As Feinberg writes, “[i]t is much easier to show that punishment has a symbolic significance than to state exactly what it is that punishment expresses.”²⁴ Feinberg continues:

At its best, in civilized and democratic countries, punishment surely expresses the community’s strong *disapproval* of what the criminal

19. Henry M. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958) (quoting George K. Gardner, *Bailey v. Richardson and the Constitution of the United States*, 33 B.U. L. REV. 176, 193 (1953)).

20. JOEL FEINBERG, *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 95–118 (1970).

21. Matthew D. Alder, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1369 (2000) (noting that “Feinberg’s article touched off a still-flourishing debate within criminal law scholarship”).

22. FEINBERG, *supra* note 20, at 96.

23. *Id.* at 98.

24. *Id.* at 100.

did. Indeed, it can be said that punishment expresses the *judgment* (as distinct from any emotion) of the community that what the criminal did was wrong. I think it is fair to say of our community, however, that punishment generally expresses more than judgments of disapproval; it is also a symbolic way of getting back at the criminal, of expressing a kind of vindictive resentment.²⁵

Punishment does more than express disapproval and resentment, however. It has several other symbolic functions such as the following:²⁶ (1) Authoritative disavowal, as when a country punishes its soldier for inappropriate acts committed against another country—the country punishes the soldier to disavow that act, to show that it was the act of a single person and does not represent the country;²⁷ (2) symbolic nonacquiescence, as when a criminal is punished to announce that the public will not acquiesce in the crime by “standing idly by,” as the saying goes;²⁸ (3) vindication of the law, when a punishment is issued to reaffirm a law or principle that had been in doubt or previously had gone unenforced;²⁹ (4) absolution of others, as when a man is punished for statutory rape to absolve a young woman of moral guilt.³⁰

In recent years, expressive theories of law have abounded, championed by Cass Sunstein,³¹ Richard McAdams,³² Robert Nozick,³³ and Lawrence Lessig,³⁴ to name a few. Each theorist describes a subtly different way that the law influences behavior by what it says. This Part examines one theory of expressive law, formulated by Dan M. Kahan. I have chosen Kahan’s treatment of expressive law because it is a particularly cogent argument about punishment—which is the subject of this Comment—instead of the expressive function of law generally.

25. *Id.*

26. These four symbolic functions of punishment and the examples given are drawn from FEINBERG, *supra* note 20, at 101–05.

27. *Id.* at 101–02.

28. *Id.* at 102–04.

29. *Id.* at 104.

30. *Id.* at 105.

31. See, e.g., Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

32. See, e.g., Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649 (2000).

33. See, e.g., ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 370–74 (1981).

34. See, e.g., Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661 (1998); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995).

B. Kahan and the Language of Punishment

Kahan's article, *What Do Alternative Sanctions Mean?*, explains why "[i]mprisonment is the punishment of choice in American jurisdictions,"³⁵ although "theorists of widely divergent orientations—from economics-minded conservatives to reform-minded civil libertarians—are united in their support for alternative sanctions."³⁶ This disconnect between theory and practice, Kahan argues, exists because alternative sanctions, like community service or fines, lack the power to express condemnation in the same way that imprisonment can.³⁷ Alternative sanctions too often express the wrong things. Fines, for example, express that "you may do what you have done, but you must pay for the privilege."³⁸ Community service is ambiguous in what it expresses because it involves activities worthy of praise and admiration.³⁹ Alternative sanctions are politically unacceptable because they represent a "mismatch between the suffering that a sanction imposes and the meaning that [the sanction] has for society."⁴⁰

Punishment, writes Kahan, "is usefully conceived of as a language."⁴¹ By saying that punishment is "usefully conceived of" as language, he suggests not that punishment is language in a literal sense, but that the language metaphor is helpful to understanding whether and how punishments express social meanings. Both punishment and language have social meanings, and that is where the metaphor ends in Kahan's version of expressivism. He does not engage in any explicit discussion of the elements of linguistic communication (if such elements could be found and enumerated) and how punishment meets those elements and communicates in the same way that language communicates meanings. Instead, like Stephen and Ewing, he seems to argue that punishments do not communicate, they express. And they express meanings in the etymological sense of the word: they "press out" meanings by force. It is the force itself—the hard treatment, the imprisonment—that speaks. Kahan is right that the language metaphor is helpful. Indeed it is hard to talk about expression without using language terms like *speak*, *say*, etc. I accept the language metaphor, but I think the nexus between expression

35. Kahan, *supra* note 6, at 591.

36. *Id.* at 592.

37. *Id.*

38. *Id.* at 593.

39. *Id.*

40. *Id.*

41. *Id.* at 594.

and language may be more direct and important than is recognized in Kahan's treatment.⁴²

Kahan's principal argument is a political one: Only punishments that express condemnation are politically viable because the public is unsatisfied with punishments that fail to express moral condemnation "dramatically and unequivocally."⁴³ Fines, for example, are too equivocal to be politically acceptable because they create the appearance that criminals are buying their way out.⁴⁴ Kahan cites opinion surveys in which a majority of respondents said that fines would never be appropriate for certain serious crimes, that only imprisonment was appropriate.⁴⁵ So the political argument suggests that there may be very good reasons for alternative sanctions, but no one will accept them because people want to mete out punishments that adequately express their rage. Kahan's solution? "The rediscovery of shame."⁴⁶ Shaming punishments have the benefits of other alternative sanctions—especially that they are less costly than imprisonment⁴⁷—but also, argues Kahan, shaming punishments "express appropriate moral condemnation,"⁴⁸ and thus are more politically acceptable than other alternative sanctions. The article does not say specifically how shaming punishments express condemnation, only that they do. To be fair to Kahan, however, the ability of shaming to express condemnation may be self-evident. Take the case of the woman who was ordered to wear a sign that read, "I am a convicted child molester."⁴⁹ If this punishment was able to make the criminal feel ashamed, that shame resulted from some expression of condemnation implicit in the punishment. The criminal felt shame because she stood condemned by the community, in front of the community.

Perhaps, though, there are other ways to explain shame independent of condemnation. The punishment of wearing the child molester sign could result from a painful loss of privacy and autonomy without any regard for the community's condemnation. The criminal might be dismayed by having to wear a sign that reveals what she understands to be her intensely private and complicated family dynamics. For the criminal,

42. For more about the linguistic quality of expressive punishment, see *infra* text accompanying notes 54 and 55.

43. Kahan, *supra* note 6, at 592.

44. *Id.* at 622.

45. *Id.* at 623.

46. *Id.* at 630.

47. *Id.* at 635 ("The proponents of alternative sanctions shouldn't be entirely surprised by the growing popularity of shaming penalties. Much of their appeal is simply that they are cheaper than imprisonment.").

48. *Id.*

49. *Id.* at 632.

it may be analogous to being ordered by the government to stand naked on the courthouse steps. The shame derives not from condemnation but from embarrassment, debasement, or a loss of autonomy and privacy, irrespective of what the community thinks.

Even if criminals are not ashamed by shaming punishments, the message is nevertheless out there, and the public's anger is assuaged. Kahan writes,

[t]he public's realization that not all offenders view such punishments as disgraceful, however, does not diminish the resonance of either shaming penalties or imprisonment as symbols of the community's moral disapproval. If anything, the perception that the offender is not shamed by what is commonly understood to be *shameful* would reinforce onlookers' conclusion that he is depraved and worthy of condemnation.⁵⁰

Inasmuch as Kahan's argument is a political one, it seems to be the public's understanding of punishments that matters, not that of the criminal. In the passage quoted immediately above, Kahan focuses on the reactions of "onlookers," regardless of the criminal's capacity for feeling shame. Even if the criminal is totally shameless, and is delighted to see himself announced as a "John" on public access television,⁵¹ the punishment is a good one because the public watches the program and feels vindicated. The assumption that underlies Kahan's argument seems to be that a proper punishment is defined democratically—whatever the public will accept.⁵² While this may be problematic to some moral philosophers, the public's acceptance of a punishment regime is one criterion for a proper punishment that policymakers cannot afford to ignore. In this sense, Kahan's argument is compelling, supported as it is with empirical and historical evidence of what is politically viable and what is not.⁵³ And the way in which the criminal law responds to the public's demands for justice is a source of legitimacy on which our practices of punishment are and must be based.⁵⁴ Political viability is a way to measure the public's demands.

The basic claims of expressivism are hard to refute. Everything can be understood as symbolic; therefore punishment, too, can be seen as

50. *Id.* at 636.

51. *Id.* at 631–32 (citing newspaper articles about television broadcasts reporting the names of individuals convicted of soliciting prostitutes).

52. Kahan does not say whether his version of expressivism would support constitutional limits on punishments that the public would accept but that are cruel and unusual.

53. See Kahan, *supra* note 6, at 605–30.

54. See *supra* text accompanying notes 16–19.

symbolic. Inasmuch as law is a complex of social practices, the law is socially meaningful, and these social meanings are expressed in law's practices. The extent to which the law's social meanings can be coherent, predictable, unambiguous, and useful in ordering social interactions is the subject of Part II, in which I argue that the messages that punishment sends are too complex to be coherent, predictable, unambiguous, and useful in ordering social interactions.

II. WHY PUNISHMENT IS NOT EXPRESSIVE

So far I have summarized and critiqued some of the scholarship on expressive punishment, arguing that to be politically acceptable, punishments must send a proper message. Kahan in particular has argued persuasively that punishments lack salience when they send the wrong message, and that policymakers must be attuned to the messages that punishments send to the public. In this Part, I will try to complicate things a bit, showing that even though punishments must be expressive, they are not expressive in an unambiguous way. This is because the messages that punishments send are multifarious, complex, even contradictory, and do not possess the elements of ordinary language that help us to interpret messages. Policymakers have little control over the kinds of messages received by punishment's various audiences (the public, offenders, would-be offenders, victims). Kahan argued that what matters is that the messages are sent, not how they are received.⁵⁵ This seems to suggest that the messages of punishment are nothing more than empty political rhetoric, which may be partially true. Indeed, when the emphasis is on political acceptability, as it is in Kahan's article, the messages of punishment are in danger of becoming akin to trite stump speeches and grand campaign promises. In a democracy, any public endeavor can devolve into empty political rhetoric, but it need not be so. Especially if policymakers justify punishment regimes on the messages they supposedly send (like when Senator Fordham said that Utah should pass the sentence enhancement to send a message that gang members do not belong in Utah), we should be sure that the punishment can in fact send that message clearly, and that it will be received by its various audiences. Indeed, if the purpose of punishment is to express ourselves, it should be important that those expressions can be interpreted by their intended audiences. Otherwise, expressive punishment is no more productive than punching a pillow in anger. Punishment may send messages, but those messages are futile if they cannot be received and properly interpreted.

55. See *supra* text accompanying notes 43–48.

This Part, therefore, examines the messages sent *and* received by punishment to try to understand whether expressive punishments can, in fact, send messages that would be meaningful to their various audiences.

The messages that criminal punishments send are complex to the point of incoherence in three ways. First, the audiences of these messages are undefined and confused. Second, the speakers of the messages are complex, institutional speakers, obscuring the intents of the messages. And when the intent behind a message is confused, the message itself is confused. Third, the messages themselves are ambiguous, inconsistent, and sometimes contradictory.

In writing about the complexity of the messages that punishments send, I wish to avoid invoking the kind of universal complexity that inheres in any act or utterance, or for that matter, in anything. This would prove nothing. By universal complexity, I mean the complexity that Whitman invokes when he wrote that "All truths wait in all things."⁵⁶ Or the ambiguity and complexity of any simple utterance, as explained by William Empson:

In a sufficiently extended sense any prose statement could be called ambiguous. . . . Thus, "The brown cat sat on the red mat" may be split up into a series: "This is a statement about a cat. The cat the statement is about is brown," and so forth. Each such simple statement may be translated into a complicated statement which employs other terms; thus you are now faced with the task of explaining what a "cat" is; and each such complexity may again be analysed into a simple series; thus each of the things that go to make up a "cat" will stand in some spatial relation to the "mat." "Explanation," by choice of terms, may be carried in any direction the explainer wishes; thus to translate and analyse the notion of "sat" might involve a course of anatomy; the notion of "on" a theory of gravitation.⁵⁷

The complexity in the statement, "The brown cat sat on the red mat," is not the kind of complexity I refer to when I say that punishment's messages are complex. Assuming that "The brown cat sat on the red mat" was uttered in a face-to-face conversation between two people, the context would help to clarify any ambiguities and avoid the need to pull in anatomy and theories of gravitation to understand the words "sat" and "on." The words themselves are simple, have generally accepted meanings within a linguistic community, and any ambiguities may be resolved by the context of the utterance. The relevant context that could

56. Walt Whitman, *Song of Myself*, ln. 648, in *LEAVES OF GRASS* (N.Y. Univ. Press 1965) (1855).

57. WILLIAM EMPSON, *SEVEN TYPES OF AMBIGUITY* 1 (Peregrine Books 1961).

mediate any ambiguities includes the hearer's understanding of the speaker's intentions and the surrounding conversation that gave rise to the utterance.

Igor Primoratz wrote that inasmuch as punishment expresses important social messages, "punishment is a kind of language."⁵⁸ As discussed earlier, punishment-as-language is an imperfect analogy, but it is a metaphor that is hard to avoid when talking about the ability of punishment to express social meanings.⁵⁹ Even if it is an imperfect analogy, punishment has some elements in common with language. Like a sentence, punishment seems to have a subject (judge, police, warden, guard, probation officer, etc.), a verb (imprison, coerce, fine, etc.), and an object (the criminal). What I intend to show in this Part, however, is that the subject, the verb, and the object of punishment are considerably less simple and defined as this. A sentence is incomprehensible if its subject and object are undefined, anonymous, or too complicated to decipher, and its verb is ambiguous. Likewise, punishment sends ambiguous—even incomprehensible—messages because the subjects, verbs, and objects are each too obscure, ill-defined, and multiple to express any single, unambiguous meaning. To be sure, punishments are loaded with social meanings. They are far from meaningless. In fact, the complexity and multiplicity of their messages suggests that punishments may be *too* meaningful in too many directions to be coherent, predictable, and useful.

In section A, I discuss the problem of audience, namely that punishments simultaneously express too many different meanings to too many different audiences to be useful and coherent. Section B concerns the problem of speakers, which is that the messages of punishment are difficult to interpret because it is often unclear whose message it is. Inasmuch as the message is sent by anonymous or complex, institutional speakers, it becomes difficult to discern the intent of the message. And without understanding the intent, hearers cannot easily understand the message's meaning. Section C explores the content of the message and the problems of ambiguity and inconsistency. The messages of punishment allow for alternative reactions in two ways. First, as a society we have no operative and shared understanding of what a prison sentence means, no definition fixed by common usage and understanding. Second, punishments are applied inconsistently, giving rise to a dissonance

58. Primoratz, *supra* note 13, at 55; see also Kahan, *supra* note 6, at 594 (discussing ways in which commentators have conceived of punishment as a kind of language).

59. See *supra* text accompanying notes 16–19.

between the intended message and less felicitous messages of violence and race-, gender-, and class-based hierarchies.

A. The Problem of Audience: To Whom Does Punishment Speak?

If you do not know your audience, you cannot know how to reach them. Take this example of how an understanding of one's audience impacts how one tries to speak to them:

Traffic laws . . . present an interesting example of "general deterrence" as opposed to "special deterrence," in that anyone is a potential offender. This distinction is relevant because the audience of each type of deterrence is very different: General deterrence targets the entire community, while special deterrence targets a small sociological class that is statistically most likely to perpetrate certain crimes. *This significant difference in audiences can dramatically affect the nature of the communication needed to transmit the message to the targets.*⁶⁰

In this section I show how the messages that punishment sends are not directed at any specific audience but instead attempt simultaneously to express different meanings to different audiences, resulting in a loss of coherence.

I would like to return to the example with which I started the article: Utah's sentence enhancement for gang-related crimes. When Senator Fordham said, "I think we need to send a message to these organized people that there isn't a place for them in Utah,"⁶¹ he seems to announce who the intended audience is for the message they are sending. "These organized people," he said.⁶² The punishment is intended to send a message to gang members. This presents several possibilities. First, the message could be intended for the recipients of the punishment, that is, the gang members who have been convicted of gang-related crimes and who will therefore serve the additional prison time required by the new law. Second, "these organized people" could be anyone who commits gang-related crimes, whether they have been caught and convicted or not. Third, the audience for the message could be all gang members. The message, then, would be designed to keep them from committing crimes. After all, Senator Fordham directs his message to "these organized people," which could mean any gang member. Fourth, the message

60. Drury Stevenson, *To Whom Is the Law Addressed?*, 21 YALE L. & POL'Y REV. 105, 105 n.2 (2003) (emphasis added and internal citation omitted).

61. See *supra* note 3 and accompanying text.

62. *Id.*

could be directed to the public in general, to express the notion that their fears and their hostilities regarding gang activity are being vindicated. Further, the message could be to the public, telling them not to join gangs. But notice the structure of the legal formulation:⁶³ the statute provides that crimes committed in concert with two or more persons merit a greater penalty than if the crime was committed alone.⁶⁴ The law itself does not tell anyone not to join a gang or commit crimes in concert with others. It merely describes conditions under which the judge is constrained to hand down an enhanced punishment. The addressee of the statute is not any of those listed above, but instead the statute is addressed to judges and prosecutors. They are the ones who are expected to read the punishment legislation and act on it. As Drury Stevenson argues,

most of the sanctions in our codebooks are to be meted out to citizen violators; but being the recipient of the punishment is not the same as being the addressee of the injunction to mete out the punishment. If a military officer commands his men to shoot at the enemy, his men are the addressees, not the enemy, even though it is the enemy who is shot.⁶⁵

Although not the addressees, gang members may “overhear” a message sent from legislatures to judges and prosecutors, either by seeing a report of the new law in the newspaper or on television, by experiencing the punishment that the statute prescribes, or by observing a friend receive the punishment. But the legislature has no control over the message by the time the gang member receives it, or should receive it. The legislature is no longer sending any message, and the recipients of the message (judges and prosecutors), or those who “overhear” the message (the press, for example), now may not deliver the message to others in the way that the legislature intends. For example, the newspaper may criticize the new legislation for unfairly targeting low-income minors, undercutting the moral condemnation that members of the legislature seemed to intend. Or the judge could hand down the enhanced sentence with no accompanying explanation that the punishment was enhanced because the crime was gang-related. Again, no message of moral condemnation of gang activity is expressed to anyone but the judge and prosecutor.

63. See Stevenson, *supra* note 60, at 129 (discussing the structure of murder statutes; the statutes never say not to kill, they merely describe behavior that will be considered murder).

64. See UTAH CODE ANN. § 76-3-203.1(1)(a) (2003); see also Smith, *supra* note 3, at 671–73.

65. Stevenson, *supra* note 60, at 130.

Even if it is true that legislatively-created sentence enhancements are directed at institutional actors and not at the public or at criminals, what about the punishments themselves, the hard treatment as experienced by the criminal? Doesn't the hard treatment that a criminal must endure have a clearly defined audience? Not necessarily. In one sense, the punishment that a judge hands down speaks not to the offender, but only to the guards, prison wardens, probation officers, etc. who will have to act on the order. This, of course, ignores the social meanings that a term of imprisonment, for example, may have. It is the social meanings that expressivist theories focus on.⁶⁶ And the social messages of punishment indeed may be addressed in part to the offender. In addition, however, the messages of punishment may be addressed to the public, sending general messages of deterrence and norm reinforcement. They also may be addressed more specifically to the class of likely future offenders. A punishment may attempt to send a message of vindication to the victim of the crime. The audiences of punishment's messages are as complex as the messages,⁶⁷ and as the complexity mounts, so does the message's ambiguity. Utterances are clearest when they are focused on a single addressee or class of addressees.⁶⁸ The more they try to say different things to different people, the more the messages are confused. Drury Stevenson has argued that interpreting the same legal rule to send different messages to different people involves "an element of irony or deception."⁶⁹ I disagree with this notion. Instead, it seems that it is ordinary, accepted practice to try to convey multiple meanings with a single utterance, but it puts one at serious risk of what sociolinguists call a communicative "misfire," meaning that the messages are confused, or received as inappropriate or incoherent.⁷⁰

B. The Problem of Speaker: Whose Message Is It?

To understand an utterance, one has to understand something about the speaker of the utterance. According to pragmatic theories of language and meaning, "it is not so much what the sentences literally mean that matters when we talk as how they reveal the intentions and strategies

66. See *supra* Part I.

67. For a discussion of the complexity of the messages themselves, see *infra* Part II.C.

68. See Stevenson, *supra* note 60, at 135 ("linguistic rules . . . seem to weigh against the idea of multiple simultaneous addressees").

69. *Id.*

70. The term "misfire," used to describe a kind of linguistic infelicity, was coined by J. L. Austin in *HOW TO DO THINGS WITH WORDS* 16 (1962). Here, I use the word in its more general sense and not as a term of art within Austin's taxonomy of performative infelicities.

of the speakers themselves.”⁷¹ Understanding the meaning of an utterance requires some knowledge about the speaker so that the hearer can use that information about the speaker to draw inferences about the intentions and strategies of the speaker. These inferences are combined or contrasted with the literal meaning to arrive at an interpretation of the utterance.⁷² If criminal punishments contain social messages, the messages are less comprehensible than ordinary verbal communication because it is unclear who the speaker is. Thus the audience is unable to draw inferences about the speaker’s intent and come up with an interpretation.

This is especially true under determinate sentencing regimes in which the judge does not select the punishment but instead follows guidelines handed down from sentencing commissions. Under sentencing guidelines or mandatory sentence enhancements, there is no one who is actually making the sentencing decision. The sentence seems to come from nowhere. The judge has little or no discretion. The legislature often passes the buck to sentencing commissions to create guidelines. The commission is made up of officials that are neither elected officials nor public figures. The commission does not pronounce the sentence; that job belongs to the judge, who must in most cases follow the prosecutor’s discretion. And yet the prosecutor is not the origin of the sentence, either. The prosecutor is merely following the law as written by others. Ultimately, then, if there is any message sent by a criminal sentence, it is a message without a speaker, or more accurately with a speaker so complex that it is difficult to discern who is speaking.

Drury Stephenson wrote the following about such complicated, institutional speakers:

Legislatures and courts . . . seem to persist in the idea that a rule or ruling in itself will “send a message” to would-be offenders. The academic literature also reveals an ideological adherence to this idea. Rules and rulings do send a message to other state actors, whether administrative agency officials, lower courts, or enforcement officers (and perhaps lawyers). They do not send a message to the citizenry

71. PETER GRUNDY, *DOING PRAGMATICS* 3 (2d ed. 2000).

72. *See id.* at 64 (“We actually know much less of the meaning of our language than we think we do, precisely because what any token of our language means is much less determined than we tend to think it is. We let the context do the work for us so that, looked at alongside the contextual knowledge we take into account in determining what is meant by what is said, words and sentences make a relatively less important contribution to our understanding than we tend to think they do.”).

directly.⁷³

In the context of criminal sentencing, then, messages are being sent from legislatures to judges and prosecutors and sentencing commissions; messages transmit from commissions to judges, from prosecutors to judges. But any messages sent by a sentence enhancement rarely reach the public outside the courthouse.

Heidi Hurd has argued by means of speech-act analysis that legislative acts (like sentence enhancements) could not serve as communicative signals.⁷⁴ "[T]here can be no communication unless there is a speaker performing a speech act with an utterance . . ."⁷⁵ To say, though, that the message of a sentence enhancement has a complicated "speaker" that includes a host of administrative, judicial, and legislative officials is not the same as showing that there is no speaker at all. The speaker is merely difficult or impossible to identify. As Hurd writes, there must be a speaker for communication to exist, and this is because of intention.⁷⁶ In order to decipher a communicative signal, one must consider the intention of the speaker because of the pragmatics of communication.⁷⁷ In other words, the semantics and syntax of a sentence can say one thing, but an audience understands the sentence to mean something else because of its understanding of the speaker's intent. Intention is complex when the speaker is a loosely connected group of public officials, making it unlikely that the public would discern a clear message from it. The debate about whether legislative intent is a meaningful concept need not be explored here. Suffice it to say that if legislative intent is a meaningful concept at all, it is complex, making discernable and unambiguous expression unlikely.

C. The Problems of Ambiguity and Inconsistency: What Does Punishment Say?

William Empson, writing mostly about poetry, defined ambiguity as "any verbal nuance, however slight, which gives room for alternative reactions to the same piece of language."⁷⁸ This section is about "alternative reactions" and the nuances that give rise to them. The ambiguities of the messages of punishment come from two sources: first, the structural

73. Stevenson, *supra* note 60, at 162–63.

74. See Heidi M. Hurd, *Sovereignty in Silence*, 99 YALE L.J. 945 (1990).

75. *Id.* at 969.

76. *Id.*

77. *Id.* at 968.

78. EMPSON, *supra* note 57, at 1.

limitations of punishment as a kind of language, and second, the inconsistencies in the way that punishment is applied.

The first—structural source of ambiguity—does not have its own section in this Comment because I think I can sum it up briefly. Unlike spoken or written languages which derive their meaning from shared understandings about what words and grammatical structures mean, there is no operative and shared understanding of what a prison sentence means. There is no dictionary to define it for us, no grammar to chart the relations between terms. In the language of Ruth Chang, a meaningful choice of criminal punishment coupled with a communicative message is impossible because there is not “positive value relation” between the two.⁷⁹ Without a positive value relation between a punishment and its intended message, meanings abound, but they are not fixed by shared social practice or by common usage and understanding. We are left, then, with many alternative reactions according to personal interpretations of what the punishment means.

The second source of ambiguity—inconsistencies in the way that punishment is applied—is the subject of the next two subsections. First, I discuss the inconsistency between the punishment and its intended message, namely that punishments use violence and force to send messages about peace and the autonomy of others. Second, I discuss inconsistencies between punishments for the same offense and how racial, economic, and gender disparities in punishments send a message of inequality that few of us would endorse. These inconsistencies at once give rise to ambiguities and are examples of alternative reactions to punishment, and they show how unpredictable, incoherent, and undesirable the messages of punishment can be.

1. Inconsistency Between the Punishment and the Message

Punishment and the messages it seeks to send are often inconsistent because the means of punishment (force, violence, imprisonment, exacting fines, etc.) are similar to the actions the message seeks to condemn. Hannah Arendt wrote that “peace is the continuation of war by other means.”⁸⁰ This means that when peace is enforced by coercion and threats of violence as it so often (always?) is, then peace is maintained by the same violence as war. If the criminal law seeks to avoid chaos and

79. Ruth Chang, *Comparison and the Justification of Choice*, 146 U. PA. L. REV. 1569 (1998); see also Matthew Adler, *Law and Incommensurability: Introduction*, 146 U. PA. L. REV. 1169, 1171–72 (1998).

80. HANNAH ARENDT, ON VIOLENCE 8–9 (1970) (rephrasing Clausewitz’s dictum that war is “the continuation of politics by other means”).

impose order through force and the threat of violence, then the same paradox holds true. It would seem that you cannot properly condemn murder by killing the murderer, condemn stealing by taking the thief's money, or condemn kidnapping by taking the kidnapper by force and holding him against his will. Of course, not all punishments so directly mirror the crime; these examples are crafted to show the hypocrisy inherent in condemning violent crime by means of violent, forceful acts against the criminal. Punishments as mirror images of the crimes may have tremendous retributive value,⁸¹ but they lose the power to condemn those actions when the state undertakes them in response. Think of the confused message that a child receives when she is spanked for hitting her brother. Whether or not the spanking is legitimate, the *message* is confusing because the moral status of hitting another person is problematized when the authority figure (here, the parent) simultaneously hits and condemns hitting. Whatever the moral differences between inflicting suffering as legal punishment and inflicting suffering as crime, to the convict, crime and punishment may look similar enough to send the opposite message than society intends to send. The similarities between crime and punishment send this message: that we as a society believe that it is appropriate, even necessary, to take people's lives, property, and autonomy by force, to make others suffer, to deprive them of their families, their privacy, and their human agency. These are cast as justified human actions. These are some of the messages of imprisonment, and they confuse, even contradict, any message that hopes to reinforce social norms against doing violence or infringing on the autonomy of others.

2. Inconsistencies Between Punishments

In this section I argue that disparities between punishments for the same crime further confuse the messages of punishment, and rather than

81. For Immanuel Kant,

a punishment that closely mirrored the crime itself (i.e., the death penalty for murder) was required in order to actually respect the criminal and his own moral choice to commit the crime. By committing the crime, the criminal declares by his actions that he has chosen a moral universe in which such an act is permitted. Logically, the act must be permitted to others, not merely to him. When society exacts the same toll against the criminal that he has already taken against another, it is merely respecting his choice to create his own moral regime and to live with its consequences.

Donald L. Beschle, *The Juvenile Justice Counterrevolution: Responding to Cognitive Dissonance in the Law's View of the Decision-Making Capacity of Minors*, 48 EMORY L.J. 65, 84-85 (1999) (internal citations omitted) (explaining Kant's retributive justification for punishment, found in IMMANUEL KANT, *THE PHILOSOPHY OF LAW* 196 (W. Hastie trans., 1887)).

expressing generally-applicable moral principles, disparate punishments are in danger of sending messages of wealthy white supremacy.

In 1984, Congress passed the Sentencing Guidelines and Policy Statements of the Sentencing Reform Act ("SRA"). The SRA was designed to "eliminate sentencing disparities and state[s] explicitly that race, gender, ethnicity, and income should not affect the sentence length."⁸² Before the sentencing guidelines, there was some disagreement in the scholarship on whether significant sentence disparity existed.⁸³ Since the promulgation of sentencing guidelines, there has been increased scholarly scrutiny of racial, gender, and social class disparities in criminal sentencing.⁸⁴ In a study promulgated by the U.S. Sentencing Commission, it was found that mandatory minimums actually worked against the most important goal of determinate sentencing. The Commission found that sentence enhancements actually promoted sentence disparity instead of alleviating it.⁸⁵ This is because sentence enhancements do not eliminate discretion in sentencing; they merely shift the discretion from the judge to the prosecutor.⁸⁶ If the prosecutor decides to pursue an enhancing factor and proves her case, the mandatory nature of the sentencing scheme means that the judge is bound to apply the enhancement. But the prosecutor often will not pursue the enhancement, or will only use it as a bargaining chip in plea bargaining.⁸⁷ More damning, the study also found that sentence disparity under mandatory enhancement schemes was correlated with the race of the defendant.⁸⁸ Sentences of white defendants were more likely to fall below mandatory minimums than those of black or Hispanic defendants,⁸⁹ leading Michael Tonry to conclude:

82. David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 285-86 (2001).

83. *Id.* at 286.

84. See, e.g., Kathleen Daly, *Criminal Law and Justice System Practices as Racist, White, and Racialized*, 51 WASH. & LEE L. REV. 431 (1994); Shawn D. Bushway & Anne Morrison Piehl, *Judging Judicial Discretion: Legal Factors and Racial Discrimination in Sentencing*, 35 LAW & SOC'Y REV. 733 (2001); David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998).

85. Michael Tonry, *Mandatory Minimum Penalties and the U.S. Sentencing Commission's "Mandatory Guidelines"*, 4 FED. SENTENCING REP. 129, 130 (1991).

86. *Id.* at 132.

87. One example of downward departures cited by the study is in federal drug cases, in which prosecutors failed to file charges for the gun enhancement in forty-five percent of cases where the enhancement would apply. "[T]here were clear indications that prosecutors used the mandatory provisions tactically to induce guilty pleas." *Id.* at 130.

88. *Id.*

89. *Id.*

Were elected public officials more interested in rational policymaking than in political posturing, the U.S. Sentencing Commission report, "Mandatory Minimum Penalties in the Federal Criminal Justice System," would lead the Bush Administration to withdraw all mandatory sentencing proposals and the Congress to repeal mandatories now in effect.⁹⁰

Other commentators have likewise found racial disparities. For example, Shawn D. Bushway and Anne Morrison Piehl, in a study of punishments under Maryland's sentencing guidelines, found that African Americans had twenty percent longer sentences than whites.⁹¹ "We find more judicial discretion and greater racial disparity than is generally found in the literature." Similarly, David B. Mustard found that "blacks, males, and offenders with low levels of education and income receive substantially longer sentences" than whites, females, and educated offenders.⁹²

If the studies are correct and if these punishments are meant to send a message, it is, among other things, a troubling message of racial, gender, and economic inequality. If punishment expresses condemnation, it says that African Americans and Latinos are more worthy of condemnation than whites even when their behavior is the same. If punishment offers an education in morals, as Jean Hampton argues,⁹³ it teaches a morality of racial, social, economic, and gender hierarchies. Of course, some punishments send the opposite message, as when Martha Stewart was convicted and one of the jurors said that the verdict "sends a message to bigwigs in corporations. . . . They have to abide by the law. No one is above the law."⁹⁴ My point here is not that punishments are always unequal and unjust. It is simply that because of the complexity of the messages that punishments send, in the aggregate, punishments send messages that most of us would not endorse. The complexity of punishment's social messages means that the messages are less predictable and coherent than we would like.

CONCLUSION

My objective in this Comment has been to propose that expressive punishments present us with a dilemma: On the one hand, punishments

90. *Id.* at 129.

91. Bushway & Piehl, *supra* note 84, at 733.

92. Mustard, *supra* note 82, at 285.

93. See Hampton, *supra* note 14, at 143-73.

94. Alex Berenson, *Guilty Verdicts Give Executives a New Focus: Risk of Prison*, N.Y. TIMES, Mar. 8, 2004, at C1.

must be expressive to have the support of the electorate; people want the law to express their outrage at criminals. On the other hand, lawmakers cannot fix the messages sent by punishment regimes because the messages are too complex and ambiguous. A punishment regime will inevitably express some felicitous meanings (condemning of lawlessness, for example) and some embarrassing and painful messages (messages of racial inequality, to name one). It is not enough for a Congressman simply to announce what the punishment regime will symbolize—what the simple moral of the story will be—like Senator Fordham tried to do with his sentence enhancement for gang crimes. The messages of punishment are spoken by complex, institutional speakers and addressed to a multifarious and undefined audience. It is no wonder, then, that the messages themselves are just as complex and even contradictory. Punishments not only condemn violence, but also they authorize it.⁹⁵ They not only promote equality and the rule of law, but also they uphold racial, economic, and gender hierarchies. Punishments educate and degrade, and are personal and universal in their application. They send messages, but the messages are indecipherable.

95. *See infra* Part II.C.1.