1. Introduction

In his classic essay ‘Prolegomenon to the Principles of Punishment,’ H.L.A. Hart emphasizes that a philosophical inquiry into legal punishment must address at least three separate questions: “what is the justifying aim of punishment?,” “who may be punished?,” and “how severely may we punish?” (Hart 2008, 3). To these questions, I hold that one should add the question of how may we punish. In other words, which modes of punishment are morally permissible for a legitimate state to exercise? Insofar as philosophers have discussed this question explicitly, the focus has largely been on capital punishment.¹ By contrast, a more common practice of punishment in most democratic states nowadays—namely imprisonment—has received far less attention.²

The overall ambition of this thesis is to add to the ethical analysis of imprisonment as a mode of punishment by addressing several important questions in the ethics of imprisonment. To this end, I address and discuss imprisonment from a set of different perspectives and theoretical starting points. The first is the impact of imprisonment on prisoners. Assuming that it can be legitimate for a state to incarcerate criminal offenders, what exactly are ethically defensible prison conditions? Do prisoners have the right to privacy? Second, imprisonment has consequences, not only for those who are incarcerated. A more complete analysis of imprisonment from an ethical perspective should also consider these indirect consequences, such as consequences for the children and families of prisoners. Do we have special moral obligations toward the families and children of prisoners? If so, how should prison conditions be designed to meet these obligations? Third, in many democratic states, all, or at least a subset of prisoners, are denied the right to vote. Can it be permissible for a legitimate democratic state to bar its prisoners from voting in democratic elections? Fourth, mental disorders, such as attention deficit hyperactivity disorder

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¹ For a good and accessible discussion on the ethics of capital punishment, see Kramer (2011).
² For similar observations, see Alasdair Cochrane (forthcoming) and Richard Lippke (2007).
(ADHD), are very common among prison inmates. What are the implications of this for discussions on the ethics of punishment? Is provision of medical treatment to offenders with ADHD even morally required by established theories of punishment? This thesis in applied moral philosophy, consisting of this introduction and four papers, addresses the abovementioned and related questions. The objective is to discuss and assess moral principles and arguments relevant for the above questions and to investigate and discuss their practical implications.

This introduction provides a general background to the papers. In section 2, I present a definition of legal punishment. In section 3, I introduce a few theories about the justification of punishment. My aim is not to provide an exhaustive list of all proposed justifications of legal punishment. Rather, the theories presented are prominent theories that are discussed explicitly in the accompanying papers. In section 4, I discuss a number of central questions in the ethics of imprisonment and their relation to the discussions in three of the papers in this thesis. The questions I focus on are the following: (i) “what sort of punishment is imprisonment?”, (ii) “what sorts of criminal offenses/offenders (if any) merit imprisonment as an appropriate criminal sanction?”, and (iii) “if imprisonment is a fitting criminal sanction for certain crimes, what sorts of prison conditions are morally justified?” In section 5, I briefly introduce a few claims and arguments made in the debate about criminal disenfranchisement. In addition, I introduce and discuss what I refer to as the argument from democratic self-determination, which is the focus of one of the papers included in the thesis. In section 6, I present my concluding remarks, and in the final section, I summarize the four papers.

A general conclusion of this thesis is that although imprisonment can be warranted as a form of punishment, it should be limited and considered only as a last resort. As I argue below (section 4.2), established theories of punishment imply that there

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3 To be fair, this introduction does not only provide a background. At some occasion it also strengthens and clarifies some of the assumptions and arguments made in the individual papers.
4 For critical introductions to philosophical theories of punishment, see Brooks (2012), Boonin (2008) and Golash (2005).
is a presumptive case against imprisonment. Imprisonment is also associated with indirect harm and therefore requires further justification in comparison to non-custodial sanctions (Bülow 2014a). Moreover, the practice of imprisonment calls for concern about and respect for both prisoners’ rights in terms of privacy and self-determination, and for awareness and mitigation of possible harm to third parties. It should involve a commitment to assist prisoners with regard to reform and successful reintegration into society, even though their other rights, such as the right to liberty, freedom, and to vote, may be suspended or taken away.

2. The notion of legal punishment

Any philosophical discussion on punishment must start from an idea of what punishment is. My concern here is not any sort of punishment but legal punishment. As an illustration, assume that Alex punishes her daughter Beate for not being home in time by grounding her for a week. Although this is an instance of punishment, it is not the sort of punishment discussed in this thesis. Rather, it is a type of private punishment—a decision made by a private individual (Brooks 2012). In contrast, assume that Alex is sentenced by a court to serve 24 months in prison for having physically abused Beate. This would be an instance of legal punishment.

Needless to say, there are similarities between these two types of punishment. There are differences as well. Legal punishment does not result from a decision made by a private individual but is an act authorized by the state in response to an action judged as criminal wrongdoing. This means legal punishment is always conferred for a particular crime (Brooks 2012). Criminal wrongdoing is not identical to moral wrongdoing. A moral wrongdoing may not be a criminal act and a criminal wrongdoing is not necessarily an instance of moral wrongdoing. Thus, we can character-

5 I am aware that some might disagree with this description of the connection between criminal law and morality. For instance, echoing the famous claim made by Thomas of Aquinas, *Lex iniusta non est lex*, proponents of natural law might hold that what rightfully counts as law is, at least to some extent, constrained by morality. Here, I do not attempt to discuss central questions for analytical jurisprudence nor do I assume that either legal positivism or natural theories of law are correct. Rather, I wish to stress that
ize legal punishment as a form of punishment exercised within a legal system and authorized by the state in response to criminal wrongdoings within the same legal system.\footnote{To say that the punishment is authorized by the state and, thus, not authorized by private individuals is not incompatible with the fact that it is indeed individuals (i.e. prison officers) who carry out the punishment. These individuals do not carry out the punishment by virtue of being private persons but by virtue of representing the state. A slightly different point can be made with regard to private prisons, which one can claim carry out the punishment on behalf of the state (for a discussion on whether punishment can be performed by private actors at all, or whether it must be carried out by the state, see Brennan, forthcoming).}

Further clarifications are needed to provide a satisfactory definition of legal punishment. First, punishment (legal or non-legal) is thought of as something that is \textit{unpleasant} or \textit{burdensome} for the individual being punished. It involves some form of treatment normally considered to be harsh or burdensome, or it involves deprivation of some good that is normally considered valuable. In the examples above, deprivation of one’s liberty and freedom of movement is an intended burden suffered by both Beate and Alex.

Moreover, the burden or deprivation associated with legal punishment is not merely accidental, but is \textit{intended} and is \textit{intentionally} imposed on the criminal offender by the state authority. Punishment, then, amounts to intentionally imposed burdens. This opens up the possibility that there are further harms or burdens associated with legal punishment, which are not necessarily intended, and therefore not part of the punishment. For instance, as a result of imprisonment, ex-prisoners often experience lack of job opportunities and housing (Carlsson and Petterson 2013; Petersilia 2003; Tonry 2011). Depending on the legal context, these consequences may either result from lack of help or support in terms of reintegration or from formal restrictions on ex-offenders. However, while these restrictions certainly are burdensome, they are not necessarily imposed as forms of punishment (Hoskins 2016).

Another example discussed in one of the papers included in this thesis is harm to third parties such as the families and children of prisoners. Although several researchers and scholars that address these collateral harms refer to them as ‘punish-
ment for innocent parties’ or ‘punishment beyond the offender,’ I insist that such descriptions are misleading. Despite the rhetorical power of these descriptions, I hold that neither of these harms are necessarily part of the punishment, but should be understood as foreseeable side effects thereof.

Finally, a plausible definition of legal punishment—as of any form of punishment—also involves an element of condemnation or reprobation (Boonin 2008; Feinberg 1965; Hoskins 2016; Zimmerman 2011). Punishment is not merely about imposing a burden or deprivation, but is a response to an act of criminal wrongdoing that expresses disapproval of that wrong. By punishing someone, one does not only inflict harm on that person, but one does so in a way that also expresses the censure or condemnation of that person’s behavior.

To sum up, in this thesis, legal punishment is understood as an intentional imposition of some form of treatment normally considered harsh or burdensome and/or the deprivation of some good normally considered to be valuable, authorized by the state as a condemnatory response to criminal wrongdoing. With this proposed definition in mind, I now turn to theories of punishment, which attempt to answer the questions of how and why punishment can be morally justifiable.

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7 See, e.g., Comfort (2007) and Manning (2011). In the most recent contribution to this discussion, Lippke (forthcoming) argues that so-called punishment drifts come perilously close to punishing the innocent and are incompatible with legal principles, such as the principle that only offenders should be held responsible for their crimes. Lippke argues that indirect harm should not be seen as incidental to legal punishment or as merely foreseen but not intended by state authorities. However, without anticipating the discussion in my paper on imprisonment and its indirect negative effects on third parties, I hold, contra Lippke, that the indirect harm to children and families of prisoners can be seen as merely foreseen side effects. My point is rather that a core normative question is whether they can be justified as such. However, despite this way of formulating the problem, I am unsure whether Lippke and I are in much disagreement. Both Lippke and I hold that the doctrine of double effect, which is often invoked in order to explain when harm that is a merely foreseen side-effect of promoting a further good can be permissible, does not show that it is justified to allow for indirect harm to families and children. This is because it is contestable whether the proportionality and necessity requirements inherent in this principle are fulfilled (see Bülow 2014a; Lippke forthcoming).

8 Not every proposed definition of legal punishment suggests that it involves an element of disapproval. For example, Hart does not include this aspect in his definition of punishment (2008, 4-5). Another example is given by Michael Cholbi, who holds that any loss, deprivation or suffering imposed on an offender by the state or a juridical authority as a direct legal consequence of criminal behavior is punishment (2002, 544).

9 For philosophical defenses of definitions of legal punishment similar to the one I have outlined in this section, see, e.g., Boonin (2008), Hoskins (2016), and Zimmerman (2011).
3. Theories of punishment

It is often assumed among moral philosophers that individuals have a *prima facie right* not to be intentionally harmed or subjected to burdensome treatment. Therefore, insofar as legal punishment involves the intentional imposition of something that is normally considered burdensome or unpleasant, or the intentional deprivation of some good, such as liberty, the need for a justification is asserted. This is frequently called *The Problem of Punishment.*

In recent years, there has been a huge increase of work on the philosophy of punishment.\(^{10}\) Herein, I introduce three families of theories. These are the standard form of *consequentialism*, *retributivism*, and *expressivism*. In relation to expressivist theories, two different approaches will be discussed: *the moral education theory* and *the communicative theory of punishment*. Although these are all prominent theories, my aim is not to provide an exhaustive list of all proposed justifications of legal punishment.\(^{11}\) Nor will I try to determine which theory is the most plausible one. Rather, the abovementioned theories are theories about the justification of punishment discussed explicitly in the papers included in this thesis.

Before I introduce the theories of punishment, I wish to make one remark. A common idea in the philosophy of punishment is that part of the moral justification of legal punishment must be that criminal offenders have forfeited at least some of their moral rights (e.g., Morris 1991; Wellman 2012). This view is referred to as the *right forfeiture theory of punishment* (Wellman 2012).\(^{12}\) Although I believe that it is an important discussion for philosophers working on punishment, I hold that it has

\(^{10}\) For an overview and discussion on some recent trends in the philosophy of punishment, see Hoskins (forthcoming).

\(^{11}\) There are several good introductions to the philosophy of punishment. For a recent critical but accessible book-length introduction to different theories of legal punishment, see Brooks (2012). Another critical examination of the various proposed justifications of legal punishment can be found in Boonin (2008). The entry on “Legal Punishment” in *Stanford Encyclopedia of Philosophy* by Antony Duff (2013) provides a good overview, as does Zachary Hoskins’ entry “The Moral Permissibility of Punishment” in *Internet Encyclopedia of Philosophy*.

\(^{12}\) For critical discussions on the idea of right forfeiture and punishment, see Boonin (2008) and Lippke (2001a; 2007).
less relevance for the purpose of this thesis compared to the abovementioned theories. The right forfeiture theory is probably best understood as a view about the moral permissibility of legal punishment. However, as such, the right forfeiture theory appears to be insufficiently equipped to provide a promising theoretical starting point for discussions on how criminal offenders ought to be treated. In other words, it is one thing to say that legal punishment can be morally permissible and a rather different thing to say what sorts of prison conditions are morally desirable. In my opinion, we would be in a better position to address the latter question if we also had an idea about the aim or purpose of punishment. All theories that I discuss below provide ideas about the aim of punishment. Moreover, even though proponents of the right forfeiture theory hold that the forfeiture of at least some moral rights is a necessary condition for a moral justification of legal punishment, at least a few of the proponents of this view equally argue that this is only a part of its justification. For example, Christopher W. Morris (1991) holds that the justification of punishment presupposes the loss of moral rights while also demanding further reasons that motivate this practice. Morris does not make a definitive claim about these further reasons, but he does mention that his view is compatible with retribution, moral education, and deterrence as possible overall aims of punishment (Morris 1991, 55). Therefore, assuming that Morris’ version of this theory is correct, we must include at least one of the theories that I present below.

13 This is also how Wellman (2012) presents this view. He holds that traditional theories of punishment, including those discussed in this thesis, only explain why we want to punish but cannot establish why it is morally permissible to punish (2012, 371). Without going to deep into this discussion, I believe that this claim is exaggerated. Fairness-based retributivism, for example, seems to provide both a reason for why we want to punish and why it is permissible to punish in the first place (see section 3.2).

14 I wish to emphasize that I do not hold that right forfeiture theorists are unable to say anything whatsoever about the types of prison conditions that are morally defensible. The obvious implication of the right forfeiture theory is that any prison condition that does not violate the rights that the offender has not forfeited is morally permissible. Perhaps it is possible to provide a full theory on imprisonment from this perspective. My point is only that theories specifying the aim of punishment appear more promising as theoretical starting points.

15 Another family of theories that I do not address in this thesis is the so-called ‘mixed theories of punishment.’ These theories characteristically attempt to combine elements of retributivism and consequentialism. As I have stated in the introduction, H.L.A Hart (2008) argues that a morally acceptable account of punishment must address a number of different questions, including (i) ‘what justifies the general practice of punishment?’, (ii) ‘who may we punish?’, and (iii) ‘how severely may we punish?’ Accord-
3.1. Consequentialist accounts

In a standard consequentialist view such as utilitarianism, legal punishment is not warranted for its own sake, but because it helps to bring about good effects, or because it decreases the amount of bad ones. As such, punishment is considered a necessary evil justified by reference to forward-looking considerations. This view is in its essence expressed and endorsed by the utilitarian philosopher Jeremy Bentham (1748–1832). He writes:

> But all punishment is mischief; all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil (Bentham 1996[1789], 158).

It is possible to discuss what exactly should count as good consequences. In the context of legal punishment, however, crime prevention is the immediate good for which punishment is held to be justified according to the consequentialist (Duff 2001). It should be observed, however, that within the standard consequentialist framework, crime prevention is not a final good, but it requires justification on its own. From a utilitarian perspective, this could be argued for in terms of reducing the suffering and harm caused by crimes. Where there is less crime, people will feel safer, which would also contribute to their overall well-being. But it is also arguable that punishment can provide personal satisfaction to those affected by crime, which in turn could contribute to their well-being (Duff 2001, 4). Despite these complications, I limit my focus here to crime prevention as the consequentialist rationale for legal punishment. I call this the standard consequentialist view because (as we shall...
see in the next section) at least one form of retributivism can be understood as a consequentialist ethical theory.

Typically, the consequentialist argues that legal punishment may lead to crime-prevention in at least three different ways. First, she may argue that legal punishment deters individuals from committing criminal offenses either through its execution or by the potential threat. The threat of punishment is held to provide individuals with a good reason to not break the law. This is referred to as general deterrence. An offender who has been punished may also be deterred from committing further offenses given the unpleasant experience of punishment. This is referred to as specific deterrence (Duff 2001, 4).

Second, legal punishment, and most notably imprisonment and capital punishment, is held to incapacitate the offender and render her unable to commit further crimes. The extent to which a punished offender is actually incapacitated varies across different forms of penal sanctions. As Antony Duff (2001) points out, most sanctions incapacitate offenders only partially and temporarily rather than completely and permanently. Imprisonment hinders prisoners from committing certain offenses, but it is still possible for them to commit crimes against fellow inmates or prison officers. Insofar as one is not imprisoned for life, any incapacitation is temporary.

Third, being subject to punishment may reform or rehabilitate the offender. By reform, I here mean that punishment could modify people’s dispositions in such a way that they will freely avoid or refrain from committing crimes in the future. Punishment could—at least in theory—induce respect for criminal law and induce recognition on offender's behalf that the crime committed was wrong. Rehabilitation, in contrast to reformation, does not necessary involve effecting changes in character but is about assisting the offender in becoming compliant with the law and functioning better in society (Duff 2001, 5). Different forms of legal sanction such as imprisonment or probation, could be accompanied by further measures aimed at helping, assisting, and/or improving convicted offenders’ skills and ca-
pacities. These measures may include work training, education, drug-treatment programs, and therapeutic programs.16

Those who favor the standard consequentialist view may disagree with one another about which of the abovementioned crime-preventive strategies is the most effective. Moreover, depending on the aim one endorses, there is room for conflict with regard to policy recommendations. For instance, an explicit focus on deterrence and incapacitation does not necessarily fit well with a focus on rehabilitation and reform. For example, Hart holds that if a system of legal punishment were to endorse reform as the general justifying aim, it would forgo the hope to influence those who have not yet committed any criminal offense. Given that this class is far greater than those who have committed crimes, he holds that reform ought to be subordinated to general deterrence as the primary aim of legal punishment (Hart 2008, 27). Consequently, deterrence theory and rehabilitation theory are therefore often treated as different theories of punishment (see, e.g., Brooks 2012, Duus-Otterström 2008).

From a consequentialist perspective, it is not only the good effects of punishment that matter for the moral assessment of legal punishment, but also the harm caused by punishment to the offender and to other people affected by it directly or indirectly. Some of these harms, such as the negative consequences of imprisonment for the families and children of prisoners, are not part of the punishment but may be considered regrettable side-effects thereof. As I discuss briefly in paper II, a consequentialist could argue that these side-effects are regrettable and perhaps even desirable insofar as they contribute to the overall deterrent effect of imprisonment. However, regardless of whether the consequentialist finds that certain side-effects are acceptable, the consequentialist will always hold that punishment should ideally

16 I am aware that rehabilitation does not comply with the definition of punishment that I outlined and described in section 2. In contrast to punishment, rehabilitation does not intend to harm the offender but to help the offender and make him or her better off. In a similar vein, Göran Duus-Otterström points out that it is questionable to view rehabilitation as a form of punishment (2008, 49). Yet, none of this suggests that rehabilitation is not perceived as a burden for the offender. Participation in a rehabilitation program might be very burdensome and unpleasant for offenders, even though no harm is intended. However, as I discuss in paper IV, a few rehabilitation programs may qualify as punishment according to the communicative theory of punishment (see section 4.3).
cause as little harm as possible with as large a crime-preventive effect as possible. Moreover, if the overall goal is crime prevention, it could be argued that punishment does not have to be the prime means towards this end. It appears that a proponent of consequentialism would encourage other crime-preventive strategies and not rest solely on the use of punishment.

There are common objections to the types of consequentialist approaches to punishment I have presented above. For example, if punishment is justified as means for achieving overall good consequences, this may imply that unduly harsh or disproportionate punishment of a guilty offender or even punishment of the innocent can sometimes be morally justified (Bennett 2008; Boonin 2008; Brooks 2012; Duff 2001; Golash 2005). Another common objection, most notably against those who favor deterrence as a crime-preventive measure, is that when punishing a guilty offender for the sake of overall good consequences, we are using the offender as a mere mean to achieve a further end, namely, crime prevention (Boonin 2008; Golash 2005). As Deirdre Golash puts it, “we have a moral duty to treat every individual with respect due to a person, rather than to use them as mere instruments to our own ends” (2005, 45). The problem, or so it seems, is that when we punish one individual in order to deter others, we use that person as a mere instrument to achieve a certain end for others, and are thus not treating that individual with the respect due to a person.

Although I agree that the consequentialist approach might lend support to disproportionate and unduly harsh punishment, I believe the objection that the offender is treated as a mere mean can be avoided. As Zachary Hoskins (2011) points out, adherents of deterrence as the justificatory aim of punishment can respond that it is not the actual infliction of punishment on an individual offender but the overall threat of punishment that has a deterrent effect. Similarly, Matthew Kramer (2011) stresses that if individual executions of punishment have a deterrent effect, it is because they are elements of an ongoing practice of punishment. In other words, it is the existence of an institution of punishment that has a deterrent effect, not the indi-
vidual infliction of punishment. After all, if a system of punishment aiming at gen-
eral deterrence was to be perfectly efficient, it would never inflict any harm on in-
dividuals for the sake of the overall good. However, if the existing institution of
punishment does have a deterrent effect, this also implies that everyone who lives in
a society with this institution is benefitting from it, including those who end up be-
ing punished by it. In this sense, criminal offenders are not treated merely as means
to the ends of others (Kramer 2011, 29-30). Moreover, because the proponents of
deterrence theory can emphasize that it is “the system of threats” that has a deter-
rent effect, and that individual inflictions of punishment therefore are warranted
when individuals fail to heed to those threats, the proponents of this view also have
a plausible response to the claim that deterrence theory inevitably endorses punish-
ment of the innocent.17

3.2. Retributivist accounts
Retributivism is probably the most well-known theory of punishment (Brooks
2012). Familiar phrases such as ‘an eye for an eye’ express the basic idea of retribu-
tivism: guilty offenders ought to get what they deserve, which is to suffer in propor-
tion to the harm they have inflicted on their victims.18 Retributivists see punishing a
guilty person as something that is just and/or something that is good in itself. How-
ever, an important feature of any form of retributive theory of punishment is that
only guilty persons ought to be punished, and only in proportion to the seriousness
of their crime. Crime seriousness, with in a retributivist framework, is often unde-
stood a function of both the degree of harm and the degree of culpability (see e.g.,
Lippke 2007, 23). Thus, the concepts of desert and proportionality are interlinked
within a retributive framework (Brook 2012). Another way to put this is to say that
the punishment must fit the crime.

17 A similar characterization of the deterrence theory has been presented by Brooks (2012, 38-40).
18 Note, however, that the principle of lex talionis (eye-for-an-eye) is suited not only to retributivist theo-
ries, but also to consequentialist frameworks as well.
Retributivism comes in different forms and can be defended on different grounds. Some philosophers have defended the idea of retribution as the justificatory aim of punishment by appealing to thought experiments held to show that punitive desert is intrinsically valuable. Punishing the guilty, it is argued, is *ceteris paribus* a more valuable state of affairs than not punishing the guilty and is therefore warranted even though it would not have any further positive effects (see e.g., Kershnar 2002; Moore 2010). As Michael S. Moore points out, this shows that retributivism, contrary to common understanding, is not necessarily a deontological theory but that at least one form of retributivism qualifies as a form of consequentialism (Moore 2010, 155-159). However, this consequentialist form of retributivism differ from the standard consequentialist accounts discussed above because punishment is not considered an evil deemed necessary for crime prevention, but as a good in itself.

There are well-recognized problems with this position. Even if we grant that the punishment of wrongdoers is intrinsically valuable, it is another question whether this single-handedly provides a sufficiently strong reason for creating, running, and maintaining an institution of legal punishment (Shafer-Landau 1996, 295). Legal punishment, especially imprisonment, is expensive, and resources are limited. The question, then, is why should we spend our scarce resources on punishing wrongdoers for its own sake rather than spending our resources on promoting the good of others, such as the wellbeing of the elderly or on the educational system? Moreover, it can be contested whether the state should be allowed to bring about this good. For instance, Victor Tadros argues that even if the suffering of wrongdoers is intrinsically good, citizens lack an enforceable duty to pursue all good ends, and forcing them to partake in the promotion of that good may in fact violate their moral rights. The state would then be coercing its citizens, using them as mere means to an end that the citizens permissibly and reasonably could reject (Tadros 2011, 80). Therefore, even though punitive desert is intrinsically valuable, it does not follow that it is morally permissible nor warranted to establish an institution of legal punishment.

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19 For an illuminating discussion on retributivism and the problem of limited resources, see Ryberg (2013).
Another form of retributivism derives the importance of retributive punishment from another value, namely, fairness. According to this view, society is partly understood as a cooperative venture. As such, society involves the distribution of burdens and benefits, where the burdens are understood as compliance with criminal law. While everyone benefits from a criminal law that protects them from certain forms of harm, each individual needs to adhere to the burdens of self-restraint and abstain from committing criminal offenses. When breaking the law, one is therefore gaining an unfair advantage over others (i.e., one accepts the benefits while ignoring the burdens). According to this view, punishment is seen as a way of restoring fairness and justice when someone has breached the initial fairness. It is the elimination of an unfair advantage that an offender has gained as a result of his/her crime (Boonin 2008, 120).20

One of the merits of this position, I believe, is that it demystifies the notion of retribution. The notion of fairness is very straightforward and is something that we often care about deeply. A common criticism of this view, however, is that it fails to explain adequately why certain actions merit punishment in the first place. What is wrong with physical abuse or rape, and thus the reason why these crimes merit punishment, is not that individuals that have committed these wrongs have taken an unfair advantage over others. Rather it is because they have wronged the victim of crime.21 Furthermore, this view seems to rest on the dubious assumption that crime amounts to a failure to restrain oneself and that compliance to criminal law is a burden. This picture, however, does not fit well with many crimes such as physical abuse, murder, or rape. On the contrary, for most people, it is not a burden at all to restrain from committing these sorts of offenses.22 Therefore, it is unclear whether

20 For a classic defense of this form of retributivism, see Morris (1968).
21 Antony Duff has even proposed that this line of criticism of fair-play retributivism is conclusive (2001, 22).
22 These paragraphs on fairness-based retributivism are important improvements to the description of this theory in section 3.1 of paper II. In that section, I attempted to defend the claim that we should resist a form of Hobbesian cynicism that if punishment is too lenient (for instance, if one were to disallow harm to third parties), punishment would cease to have a sufficient general deterrent effect (see Bülow 2014a, 781-782). When making this point, I drew a parallel to this objection to fair-play retributivism which emphasizes how serious crimes such as physical abuse, rape, and murder are wrongs that most of us do
those who commit such offenses have taken any real unfair advantage over law-abiding citizens (see e.g., Bennett 2008, 31).  

Regardless of type, retributivism is essentially a backward-looking theory. According to retributivists, the justification of legal punishment does not primarily lie in its future effects, regardless of whether these effects are the reformation of the offender or deterrence of other individuals from committing crimes. Rather, it is warranted because it is deserved. Punishment, then, is a matter of moral responsibility and justice. This relates to an assumption inherent in retributivistic theories, namely that individuals who are liable to be punished are moral agents. For instance, according to Richard Lippke, standard retributivist theories conceive legal punishment as a form of institutionalized moral blame. This view presupposes that offenders are autonomous agents capable of grasping and acting on moral reasons. It is only insofar as they are moral agents in this sense that they also are appropriate subjects for moral praise and blame (Lippke 2006, 274; 2007). Similarly, Andrew von Hirsch (1976) points out that the notion of just deserts, central to retributivist theories, entails that punishment is not only meant to restore justice or to make the offender suffer, but also a way of ascribing moral blame. This aspect of retributivist theories has important implications for imprisonment because it is arguable that retributivism not only requires that the punished individual is a moral agent, but also remains one while serving the sentence. Otherwise, the prison inmate will no longer be an appropriate subject for punishment. For instance, Lippke holds that according to retributivism, “legal punishment must be structured so that it is consistent with recognizing and treating offenders as rational and autonomous moral beings.” (Lippke 2007, 111). I discuss this in somewhat greater detail in paper I.

not contemplate and that most people therefore do not have to exercise any self-restraint in order to abstain breaking the law that prohibits these wrongs. Rather, I think it seems plausible that most people in decently fair societies do not commit such crimes simply because they believe them to be wrong. The claim made in paper II is further supported by the discussion in section 4.2 below, where I raise further skepticism about whether imprisonment is warranted for general deterrence.

23 For two recent discussions and responses to this objection see Duus-Otterström (2015) and Westen (2016).
The endorsement of retributivism is sometimes depicted as a mere expression of vengeful desires. However, retributivism and vengeance should not be conflated. Rather there are important differences between the two. One immediate difference is that vengeance, in contrast to retributivist punishment, is personal in nature. As Thom Brooks points out, vengeance “is an act of private justice without limits: I seek vengeance when I desire to injure another; I injure another to a degree I am satisfied with and not only to what he may deserve.” (2012, 17). In contrast, retributive punishment is an act of public justice and has limits. According to retributivism, punishment is justified only when it is deserved and only if proportionate to the wrongdoing. Here lies a further difference, because retribution is dependent on a past wrongdoing. This, however, is not necessary for vengeance or revenge. Revenge is not rational in the sense that the avenger must have been wronged. As Robert Nozick points out, revenge may be carried out by an avenger for a harm, injury, or slight, regardless of whether it amounts to wrongdoing or not (1981, 366-367).

3.3 Expressivist accounts

The third type of theory to be discussed is expressivistic theories of punishment. According to this view, legal punishment has a communicative or expressive function in virtue of which it is also justified. It should be acknowledged that some might find my division of expressivist theories of punishment as being distinct from retributivism and consequentialism as somewhat misleading. There are retributivists who find the justification of punishment as a deserved and appropriate response to crime in its expressive function. According to these theorists, punishment is warranted because it communicates the censure that offenders deserve for their wrongdoing (see, e.g., Duff 2001, 27-30) or because it is the appropriate way of expressing proportionate public condemnation (see e.g., Bennett 2008). Yet, I believe

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24 How one ought to express proportionate public condemnation can of course be debated. Note, however, that it must not be a matter of expressing how upset the public is with a particular wrong. In Bennett’s view, for instance, the appropriate way to express proportionate public condemnation is to put into symbols “how sorry we think the offender ought to be for what she has done.” (2008, 146).
there are good reasons to treat expressivistic theories separately. First, not all theo-
ries focusing on the expressive function of punishment are retributivistic. Second,
there appear to be important differences between standard forms of retributivism
and, for instance, the communicative theory advocated by Duff (see below). The
latter sees deserved punishment as being partly justified as an attempt to reform the
offender, whereas the former does not (Brooks 2012, 106).

In this thesis, two kinds of expressivist theories are discussed: the moral education
theory of punishment and the communicative theory of punishment. The latter is
discussed in greater detail in paper IV, where I take this theory as the theoretical
starting point for a discussion on the permissibility/requirement to provide pharma-
cological treatment to prisoners with ADHD.

The moral education theory combines elements of deterrence, retribution, and reha-
bilitiation, and sees punishment as a form of moral education (Hampton 1984, 208).
Adherents of this view hold that although punishment aims partly to deter, the mor-
al boundaries marked by legal punishment first and foremost aim to inform offend-
ers about the wrongfulness of their conduct. According to Jean Hampton, who is
famously associated with this view, punishment conveys a larger message to agents
who are able to reflect on the reasons underlying criminal law, namely that certain
acts are prohibited because they are morally wrong (1984, 212). Thus, punishment
is a way of teaching offenders (as well as the rest of society) that what they have
done is morally wrong. Yet, Hampton (1984) argues that punishment is not meant
as a way of conditioning offenders to do what society requires them to do. Punish-
ment aims to teach offenders what is morally right or wrong, not to force offenders
into being moral (Hampton 1984). In this sense, moral education theory is different
from consequentialism. For moral education theorists, it is first and foremost the
function of punishment as moral educator, i.e. its communicative function, which
provides its justification. In contrast, an adherent of the standard consequentialist

25 For instance, Glasgow (2015) views the expressive element in punishment as having irreducible nor-
mative force. In other words, it is something for which punishment is warranted without further refer-
ence to just desert or crime prevention.
view could be open to any means of conditioning offenders so long as it helps reduce and prevent crime.

As Duff (2001) points out, there are problems with the moral education theory because it sees *moral education of offenders* as a general aim of punishment. It is not obvious that all offenders need moral education. The fact that one acted wrongly does not entail that one did not understand that one’s act was morally wrong. The offender may very well recognize that what he or she did was morally wrong but committed the criminal act despite this, for instance, out of strong self-interest. If this is the case, the offender does not need moral education. Rather, the problem is that he or she does not care enough about the wrongdoing (Duff 2001, 91). Instead, Duff suggests that legal punishment should not be seen as a communicative enterprise aiming at moral education but rather as a communicative enterprise that “seeks to persuade the wrongdoers of the error of their ways and to repair the damage done by their crimes to their communal relationship.” This leads to Duff’s own theory called *the communicative theory of punishment*, one of the most well-discussed contemporary theories of criminal punishment. According to Duff, criminal offenses are *public wrongs*, that is, wrongs in which the public as a whole has a proper interest (2001, 60-61). This proper interest, Duff holds, involves an authoritative and communal condemnation of such wrongs and that these wrongs merit a public communal response. Criminal wrongdoings, understood as public wrongs, are not only wrongs to the victim but also to society as a whole. The victim is not wronged solely in virtue of being a freestanding individual but is wronged as a member of the community. Thus, crimes are always wrongs against the community according to Duff (2001, 63).

Following this view of crime, Duff holds that the justification for criminal punishment lies in its communicative purpose, where the justifying aim of punishment is to communicate to the offender the censure that he or she deserves for committing the crime (Duff, 2001, 30). Legal punishment, he argues, should be seen as a species of what he calls *secular penance*, where the punishment constitutes an attempt
at persuading the offender that what he or she has done was wrong (Duff, 2001, 30). In doing so, it focuses on fostering repentance. Through this repentance, the offender will start to reform and, hopefully, reconcile with those he or she has wronged. A truly successful penal communication occurs when each of these aims is fulfilled. According to this view, punishment should be both communicative and inclusionary (i.e. address the offender as a member of the community) (Duff 2001, 106ff). Moreover, the theory incorporates forward-looking as well as backward-looking components. It is retributivistic in the sense that punishment is justified as deserved censure. Unlike pure retributivistic accounts, however, it is forward-looking in its focus on reform and reconciliation, with the aim of reforming the offender and restoring the relationship between the offender and the community.

One common objection to Duff’s theory is as follows. If punishment is understood and warranted as a form of secular penance, then what about a criminal wrongdoer who refuses to listen carefully to the censure communicated to them through their punishment? What about a hard-headed criminal who leads his or her life by his or her own values and commitments?26 Duff is not ignorant of this possibility. Even though the attempt to bring about repentance and reform is the internal aim of communicative punishment, Duff does acknowledge that there are offenders who most likely will remain unpersuaded by the message of punishment (Duff, 2001, 121–24). There are, of course, various possible reasons as to why this might happen. For example, some offenders will not listen seriously to the message that their punishment is intended to communicate, while others will listen but remain unpersuaded. Others might fail to listen or remain unpersuaded because they do not care about the rightness or wrongness of their conduct. In reply, Duff stresses that we might be justified in an attempt that we know will fail (2001, 123). We are justified in such an attempt, partly because it is owed to the victim and to the members of the community who have a shared interest in the wrong that the offender has committed. In either case, the offender has, by virtue of being an autonomous moral agent, the

26 See Glasgow (2015) for an objection of this sort to the communicative theory of punishment.
right to not listen to the message of the punishment. One virtue of seeing communi-
cative punishment as an attempt to persuade the offender that he or she has done
wrong, according to Duff, is that the offender thereby is treated rightly as a moral
agent, that is, an agent who can reflect upon the values that underlie the prohibition
of certain types of wrongs (Duff 2001, 123). Of course, not everyone will find this
reply persuasive. For instance, Victor Tadros suggests that although the communi-
cative theory is very humanistic, it runs the risk of becoming too lenient and it
might therefore deemphasize the protective aim of criminal justice. According to
Tadros, we have a duty to protect others from harm, which also seems to motivate
the development and maintenance of criminal justice institutions in the first place.
According to the communicative theory of punishment, however, this duty is given
a secondary role (Tadros 2011, 89).

As I mentioned at the start of this section, the theories presented above are not ex-
hauative and this text does not serve as a complete survey of all theories within the
philosophy of punishment. Rather, the above theories are all prominent theories of
punishment and are the ones that are used or discussed in one or more of the papers
included in this thesis. In the next section, these theories are applied to improtant
questions in the ethics of imprisonment.

4. Punishment and imprisonment

Imprisonment or incarceration is the harshest form of punishment in many coun-
tries.27 Still, the use of imprisonment is often taken for granted and in discussions
on punishment it is almost as ‘punishment’ is treated as synonymous with ‘impris-
onment.’ It should be clarified, however, that although punishment can be morally
justified in principle (for instance, by reference to one of the theories mentioned

27 One might argue, rightly I believe, that capital punishment is a harsher form of punishment than im-
prisonment. This, however, is a matter of dispute among moral philosophers. Utilitarian moral philosop-
her J.S. Mill (1806-1873), for instance, famously favored capital punishment because he thought it was
more humane than lifelong prison sentences (Mill 1986 [1868]). Whether Mill is right is of course de-
pendent on the type of imprisonment one does consider and compare with the death penalty. For sure,
the prison conditions which Mill had in mind are probably very different from those in many current
prison systems.
above), this does not guarantee that incarceration is justified as well. Moreover, several ethical and philosophical issues should be addressed to determine the circumstances under which imprisonment can be justified, such as the indirect harm to the families and children of prisoners; whether prisoners should have the right to work, recreation, and privacy; or whether they should retain all of their political rights.

In what follows, I will address three questions that I find are crucial for a philosophical discussion on imprisonment. (i) What sort of punishment is incarceration? (ii) For which types of criminal offenses is imprisonment a fitting criminal sanction? (iii) If imprisonment is a fitting criminal sanction for certain crimes, which types of prison conditions are morally justified? I will discuss these issues in turn. In doing so, I will use the theories of punishment introduced in the previous section, while I also relate my discussions on these questions to the papers included in this thesis.

4.1 What is imprisonment?

Although punishment is essentially thought of as unpleasant or burdensome, it can be so in various ways. Sometimes, it involves deprivation of some good which a person otherwise has a right to, or it involves imposition of special burdens or even suffering. One example of punishment involving direct infliction or imposition of a burdensome or even painful experience is corporal punishment. Modern examples of punishment, however, often take the other form, where it is the deprivation of some good that is held to be burdensome. This includes imprisonment, which is often regarded as the intentional deprivation of liberty. The European Prison Rules (EPR), for instance, state that all persons deprived of their liberty shall be treated with respect to their human rights and that prisoners shall retain all rights that are not lawfully taken away by the decision sentencing them or remanding them to custody. If further restrictions are placed on a person deprived of his or her liberty, the restrictions should be the minimum necessary and proportional to the legitimate objective for which they are imposed (van Zyl Smit and Snacken 2009, 99).
Dirk van Zyl Smit and Sonja Snacken (2009) point out, the basic principles of EPR build on the idea that deprivation of liberty is a sufficient punishment in itself (2009, 99). According to this view, one is not sent to prison to be punished. Rather, being sent to prison is the punishment.²⁸

In depriving an inmate of his/her liberty and freedom, imprisonment largely diminishes the inmate’s possibility to lead an autonomous life (Lippke 2003; 2007). Yet, imprisonment is more than merely the intentional deprivation or restriction of liberty. After all, prison shares this element with other forms of punishment such as electronic monitoring. However, unlike electronic monitoring and home confinement, imprisonment involves the physical removal of an individual from the community into a prison, where the inmate is required to lead his or her life under the control and supervision of others. Thus, insofar as imprisonment involves intentional deprivation of freedom and liberty, it does so in a particular way. As such, imprisonment also sends a very harsh message to the offender, as well as to the rest of society, namely, that the offender has done something that has rendered himself/herself unfit to live among the rest of us (Duff 2001, 148-152; Lippke 2007, 1).²⁹ Moreover, many of the burdens associated with imprisonment spring from the fact that offenders are removed from the community. Loss of contact with family and loved ones is one example.

It has been observed that there are many burdens are associated with various aspects inherent to prison life, such as having to abide by strict rules and living under the control and supervision of others. Sociologist Erving Goffman, for instance, stresses that total institutions—where prison is a paradigmatic example—violate the social boundaries by which an individual holds objects of self-feeling, such as

²⁸ The importance of this principle is also emphasized by Kleinig (2005), who sees it as one of the basic moral principles governing ethics in corrections.

²⁹ Note that according to Duff (2001), the communicative message inherent to imprisonment is part of punishment (as deserved censure), but it also explains why it is an appropriate response to certain types of offenses (2001, 150-151). What I wish to stress here, however, is that the fact that imprisonment inevitably carries a message of this sort is part of what makes it a harsh punishment. After all, the fact that imprisonment carries a harsh message should be acknowledged by other penal theories, although they do not see the communicative feature as part of its justification.
his/her body, immediate actions, and thoughts and feelings clear of contact with and free from the gaze of others (Goffman 1991[1961]). It is, I believe, hard to deny that leading one’s life under such conditions is indeed burdensome. Similarly, sociologist Gresham M. Sykes points out that the deprivations associated with imprisonment, including the loss of liberty and autonomy, decreased security and the deprivation of goods and services,

[...] carry a more profound hurt as a set of threats or attacks which are directed against the very foundation of the prisoner’s being. The individual’s picture of himself as a person of value – as a morally acceptable, adult male who can present some claim to merit in his material achievements and his inner strength– begins to waver and grow dim (Sykes 2007[1958], 79)

The views expressed by Goffman and Sykes are echoed in contemporary research on prison life. For instance, criminologist Ben Crewe suggests that the objectifying processes in risk assessments and psychological assessments prevalent in contemporary prisons may undermine control over personal integrity and can be very destructive for inmates’ psychological well-being, especially in the case of long-term inmates (Crewe 2011, 515).

In the light of what I have said above, I believe it is important to recognize that as a punitive practice, imprisonment should be guided by the normative principle that being sent to prison is the punishment. The deprivation of liberty and freedom, together with its communicative message, makes imprisonment a harsh punishment. However, although the practice of imprisonment inevitably runs the risk of ‘violating the social boundaries protecting the self,’ it can be held that prison conditions that afford very little privacy, and thus make little room for inmates to be recog-

30 Goffman describes total institutions as having the central feature of ‘breaking down’ the barriers separating the basic social arrangements in modern society in which “the individual tends to sleep, play and work in different places, with different co-participants, under different authorities, and without an overall rational plan.” (1991, 17). In total institutions, all these spheres of life are conducted in the same limited space under the same authority. Daily routines are carried out collectively, and each member is treated alike. All phases are tightly scheduled and incorporated into the rational plan designed for the official aims of the institution.
nized as autonomous moral agents, are morally problematic. I discuss this and argue for it in paper I.

4.2. Who should go to prison?

It is a common view among penal philosophers that imprisonment should be exercised very carefully and that it is an appropriate response only to a limited set of criminal offenses (see, e.g., Duff 2001; Kleinig 2008; Lippke 2007). This is regardless of any justificatory aim(s) one ascribes to punishment. I support this view, and in what follows, I will discuss how each of the theories introduced previously (section 3) can support a precautionary attitude toward imprisonment.

A straightforward argument for a precautionary stance against imprisonment comes from retributivism. The retributivist holds that punishment should be proportional to the criminal wrongdoing and that it should fit the crime. Given that imprisonment is a very harsh form of punishment, it should therefore be reserved only for the more serious types of offenses. As I have indicated above, imprisonment largely diminishes the offender’s possibility to lead an autonomous life. It may therefore be argued that from a retributivist perspective, imprisonment is suitable only for crimes that have a similar effect on its victims. As Lippke puts it:

Incarceration might thus be regarded by retributivists as an especially suitable penal response to those serious offenses that defeat or diminish in significant ways the capabilities of victims to live decent lives of their own choosing. There seems little doubt that those incarcerated suffer severe losses to such capabilities. Imprisonment cramps and truncates the lives of offenders, at least for the duration of their sentences. As such it does something to serious offenders that is comparable, if not exactly equivalent, to what many of them have done to their victims (Lippke 2003, 33).

Following this line of reasoning, Lippke argues that imprisonment is an appropriate punishment for criminal offenders that have with a high degree of culpability inflicted or threatened to inflict severe physical and psychological harm. This, he argues, includes crimes such homicide, aggravated assault, rape, kidnapping, and ter-
rorism. Equally, the case for imprisonment is weaker for criminal wrongdoings where both culpability and potential harm inflicted is lower. These include many property crimes and drug-related crimes (Lippke 2007, 65).

One does not have to endorse retributivism to be restrictive about the use of imprisonment. Adherents of the standard consequentialist view could arguably support this conclusion as well. As I have pointed out above (section 3.1), the proponents of standard consequentialist accounts hold that punishment is always an evil and is justified only if it leads to overall good consequences, such as crime prevention. Given that imprisonment can be very exhaustive, we shall therefore expect the good effects of imprisonment, such as deterrence, incapacitation and reformation, to be stronger than those of other forms of punishment associated with fewer burdens, such as community service or electronic monitoring. If not, the consequentialist view speaks against imprisonment and in favor of the alternatives. Yet, it is not obvious that imprisonment is superior from the viewpoint of crime prevention. Although it ultimately is an empirical question, a common remark is that imposing harsher punishment—including long-term imprisonment—does not have a clear deterrent effect on most potential offenders. Even though it is natural to think that disincentives to crime will change people’s behavior, it is also reasonable to think that such disincentives lack an obvious deterrent effect in a range of cases. As Michael Tonry (2008) points out, most crimes discussed in debates on whether punishment helps deter criminals all, or whether penalty enhancement increases the deterrent effect, are not crimes that are carried out after careful risk–benefit calculations (2008, 281-2). This is true, for instance, of violent crimes. As Tonry puts it, most of these crimes

[…], are unambiguously wrongful, which means that many people will not commit them under any but exceptional circumstances. Many of these crimes are impulsive or committed under the influence of drugs, alcohol, peer influences, powerful emotions, or situational pressures. Many are committed by people who are deeply socialized into deviant values and lifestyles. These characteristics of many would-be offenders do not mean that it is a priori impossible to affect would-be
offenders’ criminal choices by means of legal threats. They do mean that doing so is far from being a matter merely of enacting harsher laws, imposing harsher penalties, or adopting more aggressive policing strategies (Tonry 2008, 282).

Note that these remarks, although they should not be taken as the final word on this matter, are important for the current discussion because these include the sorts of wrongs we usually think merit imprisonment. Moreover, even if the threat of being incarcerated were to deter potential offenders from committing these crimes, one should be careful in drawing the conclusion that this is so because harsher punishments always have a stronger deterrence effect. Deterrence theorists often emphasize that the deterrence effect depends on three components: severity, certainty, and celerity or swiftness (Paternoster 2010; Tonry 2011). It is commonly remarked in this context that although the threat of punishment has a deterrent effect, it is the certainty and celerity of punishment, rather than its severity, which matter the most (see Tonry 2011). This view was already expressed by Cesare Beccaria (1738-1794), who argued that the closer the punishment follows the crime, the more efficient it will be. Beccaria (1986[1764]) argued that this is because the crime and the punishment are then linked intimately in such a way that any seductive picture of the benefits associated with the crime should also immediately remind one of the burdens and displeasure associated with the punishment. Following this idea, other measures, such as increased police presence, can be preferred to penalty enhancement if one wishes to deter criminals.

What has been said so far should not lead to the conclusion that imprisonment is irrelevant from a consequentialist point of view. Instead of focusing on deterrence, one could argue that imprisonment has the most to be said for it when there is high risk of continued criminal activity and when imprisonment is needed to provide

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31 This point raised by Tonry is also relevant for an argument discussed in paper II (section 3.1), that is, if punishment were too lenient, people who are now deterred may start committing serious crimes. In reply to this argument, I stressed that it is reasonable that most people are law-abiding, not because they fear punishment, but because they believe that the actions prohibited by criminal law are, as Tonry puts it, “unambiguously wrongful” (Bülow 2014a, 781-782). Although I have made no reference Tonry in the paper, I think his point captures the essence of the argument I intended to make.

32 For a critical discussion of this claim, see Tonry (2011).
security and safety to society. In other words, incarceration can be warranted because of its incapacitative effect. I find it hard to disagree with this point. However, one should also be careful to not be too hasty in drawing conclusions to the effect that incarceration is needed to incapacitate a particular offender or that incapacitation inevitably leads to a reduction in crime levels. To the contrary, one might argue that although some offenders need to be incarcerated, one should remain careful when making claims about the high risk of continued criminal activity. As John Kleinig (2008) points out, judgments like these are very hard to assess. He writes:

> We should remember, however, that judgments of dangerousness are fraught with difficulty. Such judgments are better determined by repeated lawlessness than by some psychosocial assessment, though even in the former situation it is important not to overemphasize the need for incarceration. The analysis of crime patterns suggests that for many who engage in criminal activity, criminality represents a phase rather than a disposition. Even if, given the social potency that the fear of crime possesses, we might err on the side of caution, our tendency to overestimate the risk of re-offending should give us pause before we determine that incarceration would be justified (Kleinig 2008, 222).

Besides these concerns, one should be aware that although prison sentences have an incapacitative effect, it does not necessarily follow that they have a crime-reductive effect. As Golash (2005) points out, it is not always the case that those who are imprisoned would in fact commit further offenses if they were left free. Moreover, even though imprisonment takes one person off the streets, this person may very well be replaced by others who will commit the same crime. According to Golash (2005), this is true, for example, when it comes to drug- and gang-related criminality (Golash 2005, 29). These are crucial points because punishment—including imprisonment—in the consequentialist view is usually taken to be warranted first and foremost by its crime-preventive effects.33

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33 Some might wish to stress that the problems associated with incapacitation as a crime-preventive rationale will diminish as advances in genetics, neuroscience, and psychiatric epidemiology provide a basis
In addition to skepticism about its crime-preventive effects, it is sometimes stressed that imprisonment makes prisoners worse. For instance, Tonry (2011) points out that imprisonment, especially short-term sentences, are likely to be criminogenic and contribute to increasing crime rather than decreasing it. While short sentences rarely suffice in doing any good in terms of crime prevention, a short period of imprisonment can lead to loss of employment, housing, and contact with one’s family, all of which are conceived as problems that contribute to increasing rather than decreasing crime. Moreover, being an ex-prisoner is more stigmatizing than merely being a convict, which in turn also diminishes one’s life prospects (Tonry 2011, 140). Another common criticism of imprisonment is that it makes criminals better criminals. The idea is that prison serves as a “school for crime” and that imprisonment may turn a criminal into a criminal laborer (Brooks 2012, 43). Concerns have also been raised about the fact that because prison life often is repetitive and involves restricted routines, where the inmate is regulated by an extensive and rigidly enforced body of rules, it can cause psychological harm to inmates, such as loss of agency. Prison life may erode the skills prisoners need to cope with life in the outside world, which is different from prison life with its relatively rapid pace, lack of structure, and vast number of choices (Irwin and Owen 2005). Thus, rather than reforming or rehabilitating inmates, imprisonment has the tendency to do the very opposite. Another concern is whether the rigid structure of prison life may foster anger, frustration, and perhaps even a sense of injustice toward conventional society (Irwin and Owen 2005). It has been suggested that these effects are not only long-term effects that can persist post-conviction, but are also especially problematic because they undermine the kind of civil disposition that is desirable in civilized liberal democratic societies (Jacobs 2014).}

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34 Note that many of the negative effects described here are relevant not only for consequentialists who favor rehabilitation as the justifying aim of punishment, but also for deterrence theorists. As Paternoster (2010) points out, the many obstacles associated with having served a prison sentence may decrease the perceived utility of not offending (Paternoster 2010, 820).
Of course, whether it is true that prisons make prisoners worse in the ways described above depends on the type of prison conditions being discussed. After all, there are substantial differences between the so-called supermax prisons in the U.S., where inmates are held in solitary confinement with almost no opportunities to participate in rehabilitation programs, or to have meaningful contact with other human beings, and prison regimes, which actively engage with inmates in ways that can facilitate rehabilitation and reform, for instance, by providing working opportunities and rehabilitation programs. To this end, it is also crucial to provide prison inmates with decent levels of privacy and room for self-determination, as I argue in paper I, and to help them sustain meaningful relationships with loved ones, as I argue in paper II.

As for consequentialism, I believe that the moral education theory of punishment also implies caution toward the claim that imprisonment should be the prime means of punishment. As for other penal theories, the moral education theory does not by definition favor any particular form of punishment. However, as Shafer-Landau (1991) points out, incarceration in itself seems to be an insufficient means to attain the goal of moral education. Even under the best of conditions, prisons arguably only provide the setting in which moral education and moral reformation of offenders can occur (Shafer-Landau 1991, 200). Moreover, even if incarceration does morally educate, it can be questioned whether it is the most efficient or the best alternative to this end. Arguably, someone might learn that vandalism of communal property is wrong, not by being incarcerated for two months but rather by being forced to repair or restore the same property that one has destroyed. Moreover, to make the case for imprisonment from a moral education perspective even harder, one can consider the claim that prison inmates are often subject to some form of prisonization. This is “the process by which inmates take on, to a greater or lesser extent, the folkways, mores, customs, and general culture of the penitentiary”

35 For an illuminating introduction and a historical overview of so called supermax prisons, see Shalev (2009). For philosophical arguments against supermax and extensive solitary confinement, see Hoskins (2013) and Lippke (2004).
(Lippke 2007, 179). If inmates tend to become prisonized, this would probably hinder them from absorbing the moral message that their punishment is supposed to communicate. Of course, there are ways in which the tendencies of prisonization could be countered, for instance, by allowing prisoners to have good social contact and allowing visits from friends, families, and other people from outside the institution (Bülow 2014a; Lippke 2007, 179). Thus, moral education theorists, insofar as they endorse imprisonment as a criminal sanction at all, should be willing to discuss which prison conditions—if any—will be the most beneficial for moral reform.

Finally, I turn to the communicative theory of punishment. One implication of Duff’s version of this theory is that imprisonment should not be used as the prime means of punishment. Instead probation, community service, and other modes of punishment, which can be executed within society, should be preferred. By contrast, imprisonment interrupts the offender’s relations with the rest of society by removing him or her from the ordinary community. As I mentioned above, a salient feature of imprisonment, according to Duff, is that it communicates to the offender that he or she is not fit to live with the rest of us (see section 4.1). Duff holds that this makes prison an appropriate response only to the most serious forms of wrongdoing, which are the ones that not only damage or threaten the normative bonds of society but also have broken them, for instance, by directly flouting the community’s most central values. A person who commits such a wrong has “made it impossible for us to live with him in the ordinary community of fellow citizenship unless and until he has undergone this penitential punishment” (Duff, 2001, 150). Duff does not provide an explicit list of the types of wrongs he believes merit imprisonment in the above sense. He proposes that this “depends on the community’s understanding of what kinds of wrong make community impossible” (Duff 2001, 151).36 However, regardless of the types of wrongs that warrant imprisonment, imprisonment should

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36 This account of imprisonable offenses is of course very vague, and a critic might argue that it does not provide sufficient practical guidance. I believe, however, that Duff’s emphasis on offenses that are directly flouting core values indicates that the sort of criminal wrongdoing he has in mind are those which violate core liberal values, such as autonomy and freedom, and where the degree of culpability is high. This corresponds with the retributivist argument for prison.
not be a matter of mere exclusion, but should, as all forms of punishment according to Duff, also be a way of reconciling the offender with society (Duff 2001, 148-52). This has important implications for the types of prison conditions that can be justified because prison life may undermine rather than facilitate the aims of secular penance. This includes, but is not limited to, how prisoners should be given assistance and support during their sentence. I partly address this topic in paper IV, where I argue that the communicative theory of punishment requires the provision of medical treatment to offenders with ADHD. Whether imprisonment, even under the best circumstances, can work as a form of secular penance beyond a mere symbolic sense is also debatable.37

The discussion so far is not exhaustive. It only provides a starting point for further discussion. As a general and cautious conclusion, however, I like to point out that there is an overlapping consensus in favor of a moral presumptive case for restricting the use of imprisonment. It should be a more rare form of punishment, appropriate only for severe crimes, and it should be considered only as a last resort. I discuss and argue for this assertion at some length in papers included in this thesis. This leaves open the question about the type of punishment appropriate as an alternative to imprisonment. One suggestion, of course, is community-based sanction. However, it should be noted that community-based sanctions are not free from ethical problems merely because they are less severe than imprisonment. Rather, they merit their own ethical discussion and analysis. Even though they are less harsh than imprisonment, community-based sanctions, such as probation, community service and electronic monitoring, also carry the possibility of being too intrusive and possibly degrading (Bülow 2014c; von Hirsch 1990).38

37 For a recent critique of Duff’s justification of imprisonment, see Cochrane (forthcoming). See also Schinkel (2014) for an empirical investigation of the communicative theory of punishment with regard to long-term imprisonment. Brooks (2012) also raises doubts about whether prison is a reliable means for secular penance (2012, 117-118).
38 The so-called shame punishments, which can rightly be deemed degrading, constitute one example. For a discussion on these, see Nussbaum (2004).
4.3. Reformism and abolitionism

Can there be an ethics of imprisonment? Some philosophers have found this self-contradictory and repugnant. Derek R. Brookes, for instance, has claimed that “[T]o propose or construct a correctional ethics would be an oxymoron, rather like presenting oneself as a married bachelor or a violent pacifist; or, closer still, like constructing an ethic for slave-masters” (Brookes 2005, 40).\(^{39}\) One possible argument for this view is that the very act of incarcerating another human being is degrading and inhumane, and therefore the use of incarceration as punishment must be abolished (Kleinig 2005, 3). By contrast, others believe that although many instances of imprisonment and many current prison regimes are morally problematic, the punishment as such is not wrong in itself (see, e.g., Duff 2001; Kleinig 2005; 2008; Lippke 2007; Nussbaum 2004). For instance, Martha Nussbaum writes:

> There is no reason to think that the whole institution of imprisonment is incompatible with basic human dignity and respect. The very fact of limiting a person’s freedom for a period of time does not express the view that this person is not fully human (Nussbaum 2004, 249).

The tension illustrated by the divergent opinions of Brookes and Nussbaum can be further illuminated. As John Kleinig (2005) points out, it is important to distinguish two different questions in the ethics of imprisonment that are otherwise conflated easily. First, is there any moral place for imprisonment as punishment? Second, are existing practices of imprisonment morally acceptable? A person can give an affirmative answer to the first question and simultaneously provide various negative answers to the latter. Such a combination of answers would be provided by a reformist, while an abolitionist would answer Kleinig’s first question negatively (Kleinig 2005, 3).

From a philosophical perspective I believe that the case for abolitionism is much harder to defend than the case for reformism. The former presupposes that even the

\(^{39}\) Another way to reach the same conclusion would be to argue that not only imprisonment, but any form of legal punishment, is immoral. For defenses of this view, see Boonin (2008), Golash (2005), and Zimmerman (2011).
most humane forms of imprisonment are immoral. I side with those who believe that the use of imprisonment as a form of legal punishment is not wrong in itself, which is the reformist perspective. It ought to be observed, however, that this position is compatible with the claim that none of the current prison regimes in the world suffice from a moral point of view. As I see it, the reformist perspective is a normative project that tries to assess the types of prison conditions that are morally defensible and the ways in which prisons may be reformed. Yet, when I discuss imprisonment and the ways in which it ought to be reformed, my starting point is mainly how imprisonment is used in Europe and in the U.S. today. These are also the examples addressed (and thereby assessed) in the papers. It is possible, however, to argue that imprisonment, as used in these and in other countries, should neither be abolished nor reformed but should largely remain unchanged or perhaps be made harsher and more severe. However, I argue against this position. For instance, in paper I, I argue that prisons conditions that afford little to no privacy are morally problematic. I stress how according to a number of established theories of punishment—including retributivism, consequentialism, moral education theory of punishment, and communicative theory of punishment—imprisonment should be compatible with treating inmates as moral agents (i.e., as autonomous agents responsive to moral consideration in the sense that he or she can be moved by these considerations and may take them into account in practical deliberation). In turn, treating inmates as moral agents requires—or so I argue—that they are assured certain levels of privacy. In paper I, I discuss and defend three different arguments that establish a connection between moral agency and privacy: (i) decent levels of privacy are crucial in order to empower agents in formulating their own autonomous decisions and beliefs, (ii) respect for privacy is crucial for agents conception of themselves as autonomous and self-determining persons, and (iii) respect for privacy is crucial for the agents to perceive themselves as trustworthy, and a lack of pri-

40 I wish to stress, however, that I do not believe that the arguments in the papers are relevant only for the U.S and Europe. Insofar as my arguments are valid, they are also universal. That said, it is reasonable that, for instance, respect for inmates’ privacy addressed in paper I is not the most urgent or pressing issue in every prison system. Basic needs such as health, hygiene, and fundamental rights are more urgent in many prisons if we were to consider prison conditions worldwide.
vacy may result in deep distrust about the agents’ capability to act responsibly (i.e., to be persons who can be responsive to and motivated by moral considerations). Taken together, these arguments make a case for the importance of privacy in prison and explain how failure to provide inmates with decent levels of privacy may lead to the result that they are no longer treated and recognized as moral agents.

In the light of these concerns I defend the claim that invasion of privacy should be minimized to the greatest extent possible without compromising other important values and rights to security and safety. In general, inmates should be afforded individual cells and non-supervised visits. Although privacy and security is always in tension, I suggest that it is important to recognize that the conflict between the right to privacy and the need of security is not always a matter of all-or-nothing, or that it involves an inevitable trade-off in which privacy is only achievable at the expense of the decreased security. Certain measures that ensure privacy, such as ensuring inmates’ individual rooms, do not necessarily decrease security. Other measures, such as new technology which involves breath analysis test, can replace the standard procedure of drug-tests where the inmate has to urinate under the supervision of a prison officer, which is held to be a serious and potentially humiliating invasion of privacy. In this case, it is arguable that both privacy and security can be increased. Moreover, respect for inmates’ privacy should be part of the objective of creating and upholding a secure and safe environment in the long run. Among other things this means that procedures such as strip searches should only be used when necessary and preformed with respect due to a person. It should be observed, however, that many prison systems, such as the ones in the U.S. and the U.K., suffer from overcrowding, it is difficult or even impossible to afford decent levels of privacy to inmates. This does not imply, however, that respect for privacy can be dismissed. Rather it implies that drastic prison reforms should be encouraged in these contexts (Bülow 2014b).

Paper II also provides reasons to resist the position that prison conditions can either remain as they are or be made harsher. Here, I argue that the collateral harm of im-
prisonment to families and children of prisoners ought to be mitigated. Part of my argument for this conclusion is that two established positions in normative ethics, namely, consequentialism and deontology, cannot explain how allowing for indirect harm to the children and families of prisoners, as documented in criminological research, can be morally permissible. For the consequentialist, it is argued that although imprisonment acts as a deterrent and does incapacitate serious offenders, we should not be too optimistic about the crime-reductive effects of imprisonment (see section 4.2 above). Rather, I suggest that it is not clear that these effects outweigh the harm to families and children of prisoners or that mitigating the collateral harm to children and families of prisoners would jeopardize the crime-reductive effects of imprisonment. To the contrary, allowing for and facilitating meaningful contact with one’s family could help encourage and support inmates and act as an incentive for their reform and rehabilitation. However, in order to fulfil this role, concern for and mitigation of the harm to families and children of prisoners is crucial. Otherwise it is reasonable that this expectation merely adds to the burdens families and children of prisoners suffer (Bülow 2014a, 778; 780). Whereas the consequentialist has a hard time showing that the harm to families and children is outweighed by the supposed benefits of imprisonment, the deontologist cannot appeal to the doctrine of double effect because it is questionable whether the doctrine is applicable to the case at hand. In making this argument, I use the following formulation of the doctrine adopted from Jonathan Bennett (2001):

(i) The behavior is not bad in itself.
(ii) The agent’s intentions are good
(iii) The good does not flow from the bad and/or the agent does not intend the bad as a means to the good.

41 Among the indirect harms to prisoners children and family members reported by criminologists are decreased psychological well-being, financial costs, loss of income and economic opportunities, and intrusion in and control of their private life (see, e.g., Arditti et. al. 2003; Comfort 2007; Murray 2005). The ways in which the families of prisoners are affected by their imprisonment are of course different and vary across families and prison systems. Yet, one should bear in mind that these are real consequences and the question is whether one, from a moral perspective, can allow for them. This is not a minor problem, and it affects many people. For instance, in Sweden, it is estimated that 30,000 children have at least one parent in prison or on probation (Kriminalvården 2016).
(iv) The good is good enough compared to the bad, and there is no better route to the former.

Applied to the case at hand, I believe that although we may grant that conditions (i)–(iii) are satisfied, I have some doubt about whether condition (iv) is fulfilled. If the intended good effects are crime prevention and crime reduction, I think we can appeal to the arguments in the consequentialist analysis. However, if we consider other goods, such as the intrinsic value of retribution, we can also question whether this value is achievable only at the expense of causing foreseeable harm to the families and children of prisoners. For example, it is not clear that just desert requires imprisonment in all or even most cases. If so, then other types of sanctions would be appropriate. Also, even if imprisonment is required for the sake of just desert it is not obvious that this requires a prison system that does very little to help families and children of prisoners. Rather, retributivism seems equally compatible with a system that mitigates these harms as much as possible.

As a consequence of the ethical analysis summarized above, prison should be used only as a last resort. Where incarceration is deemed appropriate, I hold that the harm caused to third parties gives rise to special moral obligations. In paper II, I use the notion of residual obligations to defend, clarify, and categorize the special moral obligations that we owe to prisoners families and children. I propose that to mitigate some of the harm, prisons ought to be made more accessible and friendly for visits by family and children. Among other things, I argue that specific accommodations should be made for this purpose and, where manageable, a guest apartment should be provided to facilitate longer visits in a family- and child-friendly environment. Moreover, prison staff should be informed of and have knowledge about the needs and life situations of prisoners’ children in order to mitigate the potential harm associated with parental imprisonment (Bülow 2014a).  

42 For a discussion on the notion of residual obligations, see Hansson and Peterson (2001).
43 Many of the suggestions I defend are in line with several positive aspects of Scandinavian policies. For instance, in both Sweden and Denmark, some prison officers are responsible for anchoring a children’s
Another important question is the extent to which those serving prison sentences have the right to access (or perhaps even requested to undergo) mental health treatment or other forms of assistance. For example, it has been estimated that in several European countries, 25–45% of adult prison inmates suffer from attention deficit hyperactivity disorder (ADHD. In comparison, ADHD is estimated to affect 2–5% of adults in the general population. ADHD is also associated with coexisting psychiatric disorders, such as substance abuse disorder and antisocial personality disorder, which both increase the risk of delinquency. It has been reported that among prison inmates with ADHD, conduct disorder (CD), usually childhood-onset CD, is common, which in turn is believed to be the dominant risk factor in mediating subsequent development of antisocial behavior and delinquency, not ADHD alone (Ginsberg et al. 2012, 706).

Since ADHD is prevalent among prison inmates, it is reasonable to raise the question whether it would also have an effect on discussions pertaining to the ethics of punishment. In paper IV, I address this question from the perspective of the communicative theory of punishment. Given that pharmaceutical treatment, such as methylphenidate, can reduce the symptoms associated with ADHD, I propose that a prison system governed by this theory ought to recognize that provision of pharmaceutical treatment may be required not only for medical reasons. From the perspective of the communicative theory, provision of pharmaceutical treatment to offenders with ADHD should not necessarily be seen as an alternative to punishment, but rather as an aid to achieve the penal ends of secular penance. Especially in cases where prison sentences are combined with rehabilitation programs, which according to the communicative theory of punishment can qualify as a form communicative punishment. As I have described above, a common objection to the communicative theory of punishment is that at least offenders will remain unpersuaded by the message of punishment (see section 3.3). However, another possibility is that an of-

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44 This is a question that is gaining more and more attention from philosophers. For a discussion on some of the issues addressed in this discussion, see Ryberg (2015).
fender will become interrupted by the conditions associated with a particular mental disorder. An offender suffering from severe ADHD may be an agent who could listen to the message communicated by punishment and become persuaded by it but fail to consider the message seriously owing to various distractions such as lack of attentiveness. Moreover, ADHD may hinder inmates’ prospects of self-reform. As ADHD is associated with problems of attention, hyperactivity, or impulsive behavior, it could undermine inmates’ prospects of self-reformation, given that many rehabilitation programs in correctional care have high demands in terms of concentration, working memory, and self-regulation (Ginsberg, 2013, 406). These include therapeutic programs of the sort that communicative theorists argue qualify as communicative punishments (see Duff 2001, 102-104). Therefore, provision of medical treatment may be required in order to help these offenders engage in the communicative dialogue inherent in successful penal communication of the sort advocated by communicative theorists. Failure to provide medical treatment may therefore render this punishment merely symbolic and, perhaps, even unjust. One cautious conclusion, I propose, is that my discussion on this topic indicates that the distinction between rehabilitation, on the one hand, and punishment, on the other, is not as sharp as one might initially think, at least not on the view favored by communicative theorists.

Some might worry that if prison conditions are arranged in the way that I propose in the papers, imprisonment will cease to be or at least become less of a punishment. Punishment should, as I stated in the definition above, be burdensome or unpleasant, or involve some type of deprivation (section 2). But if the suggestions I propose in the papers render imprisonment too lenient, some might say that it equally ceases to be a punishment. I am skeptical about this point. It rests on a dichotomy concerning the relationship between prison conditions, on the one hand, and punishment, on the other: more humane forms of imprisonment are only achievable at the cost of meting out less severe punishment. This, however, is not apparent. If the aim of imprisonment is to deprive offenders of their freedom and liberty, none of the suggestions I make in the papers undermine this aim. For instance, guaranteeing inmates certain
levels of privacy or actively mitigating harm to their families and children by improving prison facilities certainly does not make prison a place where the inmates’ freedom, liberty, and possibility to lead an autonomous life is not largely diminished.

5. Felon disenfranchisement and prisoners’ right to vote

One question that has received a fair share of attention from legal philosophers is whether felon disenfranchisement can be permissible. This is a widespread practice commonly associated with the U.S. and the U.K. In certain U.S. states, such as Kentucky and Virginia, ex-prisoners are permanently prevented from voting.\(^{45}\) Most states, however, have more restricted forms of felon disenfranchisement, where prisoners and parolees (and sometimes offenders on probation) are not allowed to vote over the course of their sentence. Maine and Vermont, by contrast, are the only states that permit prisoners to vote during their sentence (Munn 2011, 224). In the U.K., all prisoners are denied the right to vote during their prison sentence. The same holds for New Zealand, where everyone sentenced to prison is denied the right to vote during their sentence. In addition to the above mentioned jurisdictions, in Australia, the voting rights of prisoners serving sufficiently lengthy prison terms are restricted (Munn 2011, 225). Another example is Germany, where disenfranchisement can be included as a part of the sentence for a limited set of crimes (Lippke 2007, 199; Munn 2011, 225).\(^{46}\)

Critics of this practice have argued that felon disenfranchisement always amounts to unfair punishment (e.g., Cholbi 2002), whereas others have argued that it is justifiable in principle, albeit only for a restricted set of offenders (e.g., Bennett 2016;

\(^{45}\) Observe, however, that since April 2016, Governor Terry McAuliffe decided that 200,000 ex-convicts in Virginia should be allowed to register to vote in the upcoming presidential election in late 2016 (Horowitz and Portnoy 2016). This point is not recognized in Paper III simply because these news came too late.

\(^{46}\) Other notable examples are Austria, Belgium, Greece, Iceland, Italy, and Luxembourg, all of which variously restrict prisoners from voting depending on the length of sentence and/or nature of offense. For a recent overview of criminal disenfranchisement in Europe, see Tripkovic (2016).
Lippke 2001b; 2007; Munn 2011). Others directly oppose felon disenfranchisement because it hinders offender reform, rehabilitation, and reintegration (e.g., Dhami 2005; Easton 2011). One common argument defending felon disenfranchisement appeals to the idea of a social contract.\(^47\) Lippke presents this argument as follows:

According to this social contract argument those who enter civil society authorize the state to make laws for the public good and, in addition, pledge their help in executing these laws. Violations of these laws are then held to deprive citizens of the right to further participation in their own governance (Lippke 2001b, 561).

Lippke holds that although this provides an initial starting point, the argument does not show why disenfranchisement is an appropriate response to crime. All it says is that offenders can be subjected to any legal sanction that the authorized state has decided to attach to the rules it makes on behalf of its citizens (Lippke 2001b, 561). Therefore, an additional argument for the inclusion of disenfranchisement in these possible sanctions is needed.

Even if one believes that the social contract argument is insufficient, I believe that it indicates how questions about the legitimacy of barring those who commit serious crimes from voting are largely connected to ideas about society and democracy. For instance, critics of felon disenfranchisement hold that it is undemocratic and/or inappropriately exclusionary (see, e.g., Beckman 2009; Dhami 2005). However, ideas about democracy are also present in arguments that defend felon disenfranchisement. For instance, Peter Ramsay (2013a) argues that allowing prisoners to vote might conflict with the ideal of democracy as self-rule. He writes:

I take democracy to mean a state in which all the citizens collectively rule themselves by determining the laws they will obey. I take representative democracy to mean that citizens do this through the election of political representatives. My argument will be that in a state that takes collective self-government seriously voters should not be in prison. The prisoners of such a

\(^47\) When this argument is discussed by philosophers it is often ascribed to traditional social contract theorists such as John Locke (Lippke 2001b, 561) or Jean-Jacques Rousseau (López-Guerra 2014, 210-211).
democracy are necessarily placed at the margins of democratic citizenship by reason of their lost liberty and the formal dependence on the executive that this entails. For that reason, such a democracy will use imprisonment sparingly, and it will regard the rights of those imprisoned as a matter of the highest importance. But, for the same reason, such a democracy will not allow prisoners to vote (Ramsay 2013a, 421f).

According to Ramsay, it is inappropriate to grant prisoners the right to vote because they are deprived of the civil rights and liberties that are fundamental for self-governance and personal autonomy. As I understand it, Ramsay’s position is that the enjoyment of civil liberties is intrinsic to the idea of democratic citizenship. Civil liberties are the minimum set of negative rights and liberties warranted to make citizens formally independent of the executive. This, as I understand it, means that someone who is not formally independent, for instance, in the sense that they can exercise their civil liberty without the interference of others, should not enjoy the right to vote. Prisoners lack formal independence in this sense because they are deprived the negative freedom of movement, association, and assembly. Their freedom to practice their profession, as well as their private life, is also heavily restricted and the place where political deliberation takes place is tightly controlled by the executive (2013a, 429). Therefore, granting prisoners the right to vote is incompatible with the idea that democratic citizenship entails formal independence from the executive, as ensured by civil rights (Ramsay 2013a). It is a matter of taking this democratic ideal seriously, which in turn, also provides an argument for more restricted use of imprisonment.

Rather than focusing on whether felon disenfranchisement is compatible or requested by a certain democratic theory or a certain political ideal, Andrew Altman (2005) argues that legitimate democratic collectives have the right to decide whether to disenfranchise felons and to, within certain limits, define their political identity. This argument (which I refer to as the argument from democratic self-determination) starts with the recognition of how the members of a legitimate democratic state have a broad collective right to decide the political arrangements and policies that
should govern their political lives and public matters (Altman 2005, 264). As a matter of fact, among legitimate democratic states, there exists a wide diversity of policies concerning electoral systems, political representation, and democratic systems. As Altman (2005) points out, some states have a system of proportional representation, whereas others use a district-based first-past-the-post system. Insofar as there is a collective right to democratic self-determination and, thus the right of citizens to within certain limits define the identity of their political community, it is not only reasonable to expect differences in political arrangements but such differences should also be respected. Altman argues that this is so, even if one electoral system is deemed superior to any other as a matter of political morality. If a democratic collective has no choice but to adopt the most optimal system from a moral perspective, there would be no apparent reason to suppose or claim that the democratic collective has the liberty to decide for themselves how they should be governed (i.e., they would lack the right to self-determination). In a broad range of cases, it is also reasonable to expect that the most “virtuous” system will remain undetermined and that substantial and reasonable disagreement will occur between different parties (Altman 2005, 264).

According to Altman (2005), the collective right to democratic self-determination includes the decision of whether one finds the disenfranchisement of serious criminal offenders to be important. This does not mean that the collective is allowed to disenfranchise anyone for whatever reason. The decision to disenfranchise must not be normatively ungrounded or arbitrary. However, unlike disenfranchisement on the basis of sex or race, Altman holds that the preference to live in a state that bars serious criminal wrongdoers from voting is not ungrounded or arbitrary. This is because the wrongs that serious criminal offenders are guilty of involve violation of important normative constraints. Then, the preference to disenfranchise serious criminal offenders is, according to Altman, connected to normative considerations
of political significance, whereas one’s sex, race, and sexual orientation are not.\textsuperscript{48} For this reason, Altman holds that it can be permissible for a legitimate democratic collective to disenfranchise serious criminal offenders because it can be an important part of how the collective defines its political identity (Altman 2005, 268-269). Note that this is different from arguments stating that offenders have shown themselves untrustworthy to decide in political matters or that they have displayed a disrespectful attitude toward the law. Rather, felon disenfranchisement can be a legitimate and important part of how the members of a democratic community have decided collectively to respond to certain offenses as a way of defining their political identity, even if doing so falls short of a specific democratic ideal (Altman 2005, 271).\textsuperscript{49}

In comparison to other arguments, Altman’s argument has received little attention in the philosophical literature on felon disenfranchisement. One exception, however, is Claudio López-Guerra (2014), who recently raised several objections to the argument. According to López-Guerra, the argument from democratic self-determination fails because it (i) fails to show why felon disenfranchisement can be permissible without saying that disenfranchisement on the basis of gender or race is not; (ii) fails to show that a democratic collective may have good reasons for disenfranchising felons beyond a mere desire to do so and simultaneously asserts that the interest of a democratic collective in defining its identity is stronger than the felon’s interest in voting; and (iii) rests on the dubious premise that the political identity a democratic collective might want to assert by disenfranchising felons cannot be asserted in ways other than disenfranchising felons.

\textsuperscript{48} Note that the argument is not that race or sexual orientation are not normative considerations nor that they lack any political significance. The more charitable interpretation of Altman’s claim, however, is that a decision to disenfranchise individuals on these bases would be normatively ungrounded in the sense that the basis lack connection to further considerations of political significance, whereas the the status of being a felon has such a connection in terms of the important normative constraints.

\textsuperscript{49} It should be noted that Altman merely asserts the existence of a collective right to democratic self-determination. He rests silent on whether this is a fundamental moral principle or whether it rests on more basic moral considerations such as utility (2005, 272). One immediate response to his argument, of course, is to deny that members of a legitimate democracy have this collective right in the first place.
In paper III, I discuss López-Guerra’s objections to Altman’s argument and how they can be avoided. Although Altman may disagree, I believe that the types of crimes that can be said to have political significance, and for which one may be disenfranchised, include those that involve violation of the normative constraints of the type that are fundamental to a democratic society and are needed to assure individuals’ security and the prospect of leading decent lives informed by autonomous choices. These most reasonably include the right to life, freedom, autonomy, and, to some extent, property. These rights are politically significant because it is reasonable to say that democratic systems build upon and are governed by these rights. Moreover, these rights are also safeguarded by the same system. Although I do not defend this claim explicitly in the papers, I believe it is plausible that the ideal of collective self-governance, which underlies democratic systems, entails that the members of a democratic community can make autonomous decisions and have the capacity for self-government. Similarly, Ramsay stresses that insofar “as a political regime takes collective self-government seriously, citizenship must presuppose the personhood of citizens, because personhood is the characteristic that lends individuals the capacity to partake in collective self-rule.” (2013b, 4). According to this view, criminal offenders who freely violate the normative constraints needed to assure individuals’ security and the prospect of leading decent lives informed by autonomous choices are not only acting wrongfully from a moral point of view, but also from a democratic perspective because they have equally violated the basic preconditions for democratic citizenship as well as core values of liberal democracy. In addition, crimes related directly to the democratic process, such as electoral fraud, are among the criminal wrongs for which it would be permissible for a democratic collective to adopt disenfranchisement policies. The decision to disenfranchise those convicted of such offenses must not be construed as a punishment but can be understood as a way in which a democratic collective expresses and affirms its view about the standards of citizenship it endorses. For example, it seems to be, at least prima facie, a plausible view for a democratic collective to hold that those considered full members in one’s democratic community and,
therefore, allowed to participate in shared democratic decision-making should equally restrain from violating the sort of normative constraints that protect the rights and values underlying and safeguarded by the same democratic system. Framed in this way, we can see how and why felon disenfranchisement, contra disenfranchisement on the basis of sex or race, is not arbitrary or ungrounded. We can also see why a democratic collective may have both a reason for, as well as a strong interest in disenfranchising serious offenders, namely as a way of affirming the core values of liberal democracy and to express a normative view about the normative standards and expectations associated with democratic citizenship. Arguably, this is a view which is hard to account for without a disenfranchisement policy. In other words, I believe that a proponent of the argument from democratic self-determination can respond to each of López-Guerra’s objections.

Although the argument from democratic self-determination suggests that it can be permissible to disenfranchise felons, it does not rule out the existence of reasons for resisting the adoption of such a policy. As I discuss in paper III, felon disenfranchisement may have negative implications for offender rehabilitation and reintegration. This, of course, should be taken seriously. Yet, even though one accepts that members of a democracy have the collective right to adopt disenfranchisement policies within certain limits, one does not suggest that this right is absolute. If the negative consequences of a disenfranchisement policy are extensive, this particular policy may be deemed morally impermissible. It is debatable, for instance, whether inherently unjust societies can allow for disenfranchisement because doing so may disproportionally disadvantage the already marginalized groups in such a society. Even in relatively fair societies, it can be debated whether disenfranchisement is

50 Although I do not acknowledge this in the paper, the view that I explicate here is probably more compatible and similar to a republican notion of citizenship emphasizing the importance of shared commitment to core values in a liberal democracy, rather than a liberal one. I am thankful to Lars Lindblom for drawing my attention to this point.

51 This does not mean that I fully endorse Altman’s view. Rather, my aim is primarily to show that his argument deserves to be taken seriously and that it should not be dismissed too easily. Also, it is important to note that a full defense of felon disenfranchisement requires further elaboration beyond showing how Altman’s argument can be improved in such a way that avoids the objections to it raised by López-Guerra.
problematic because it may hinder offender rehabilitation and reintegration. I think that one ought to consider these matters seriously. However, as I indicate in my discussion on this matter, allowing prisoners to vote is not the sole or perhaps not even the most important measure one can take to facilitate offender reintegration. Access to vocational training, education, decent job opportunities, mental health treatment, possibility of family visits, and maintenance of meaningful contact with loved ones are all measures that should be facilitated in prison and there are strong moral reasons for doing so.\textsuperscript{52} Yet, where these measures, as well as a commitment to assist prisoners post-release, are in place, members of legitimate democratic community have the collective right to choose whether serious criminal offenders should be barred from voting. This is so, as it can be a constitutive part of how a democratic community defines its basic tenets.

\section{Concluding remarks}

This thesis is not exhaustive and far more can be said about the ethics of imprisonment. One overall aim of this thesis is to show that philosophical discussions on punishment and criminal justice should acknowledge that questions about \textit{how} we punish merit serious attention on their own. Of course, such questions are not independent from standard questions in the philosophy of punishment, such as why we punish or how it can be permissible to punish. However, insofar as one focuses explicitly on imprisonment as a mode of punishment, I think there are a few concluding remarks which I wish to bring attention to here.

\textsuperscript{52} This is also emphasized by Mary Sigler, who stresses how other sorts of disqualifications that may follow a conviction, such as restrictions on housing and employment, have far greater effects on prisoners’ daily lives. In contrast, disenfranchisement does not impose the sort of material hardships that may undermine rehabilitation and reintegration, at least not to the same degree (Sigler 2014, 1740). Duff (2014) appears to recognize this point as well, as he acknowledges that the loss of the right to vote is probably not ranked high on the list of losses that prisoners endure due to a prison sentence. He believes that for many prisoners, the right to vote is “far outweighed by such other matters as the loss of liberty, of family, of employment, of privacy, and too often of physical and psychological safety” (2014, 4). Contra Sigler, Duff opposes criminal disenfranchisement and holds that it is reasonable only for a narrow set of offenses, while recognizing that “questions about the extent and conditionality of the right to vote are in the end questions about how a democratic polity should understand and define itself, which must be a matter for public deliberation by its own members.” (2014, 6). Note, however, that this is essentially the same point made by the argument from democratic self-determination.
First, standard theories of punishment have a lot to offer when it comes to assessing and evaluating modes of punishment. However, insofar as one focuses on narrow questions such as how it can be permissible to punish wrongdoers, one runs the risk of overlooking other important questions relevant for an ethical assessment of prison conditions and prison policy. One example is the negative side-effects or foreseeable harm to third parties associated with imprisonment. A more complete ethical assessment of prison conditions and prison management requires explicit discussion of these negative side-effects. To this end, we need to complement standard theories in the philosophy of punishment with a discussion about the circumstances under which it can be permissible to cause harm or bring about negative consequences as a side-effect, and whether these include the collateral harm of imprisonment endured by the families and children of prisoners. Moreover, I believe it is important to recognize that at least some of the harm and deprivations associated with the criminal justice system, such as harm to third parties or criminal disenfranchisement, must not necessarily be understood as punishment. Rather, if punishment is seen as a condemnatory, intentionally burdensome treatment authorized by the state in response to an alleged criminal offense, it is at least theoretically possible to see how these deprivations and harm do not necessarily qualify as punishment. In turn, this has important implications for how we should assess these deprivations and harm from a normative perspective.

Second, I wish to stress that the papers in this thesis, in one way or another, emphasize how ethical discussions on punishment and imprisonment should not be reduced too easily to questions about how harsh or how lenient punishment should be. Certainly, imprisonment is a harsh punishment that involves the intentional burden associated with the deprivation of liberty and freedom. It also carries a very strong message—that the individual being punished is not fit to live among others (see section 4.1 above). I believe that this can be an appropriate punishment for serious offenses. Yet, we cannot rest satisfied with this conclusion. We must also acknowledge that there are questions about prison management such as inmates’ right to privacy, prisoners’ access to mental health treatment, and the possi-
bility to maintain meaningful contact with loved ones, all of which merit serious attention. This thesis contributes to the discussion on these questions by addressing relevant normative arguments as well as how conclusions from these arguments can be implemented. These are important questions that should not be ignored, especially since discussions on these issues have important implications for prisoners’ lives, both within prison and post-release. To emphasize these questions is not a matter of having a bleeding heart. Rather, I wish to stress that although imprisonment is harsh, it can also be better or worse at facilitating reform and reintegration. This includes, in part, recognizing the side-effects and consequences of imprisonment for other parties than merely the prison inmates. I believe that an explicit focus on reform and reintegration, in addition to a focus on prison as a punishment in the above sense, is not mutually exclusive nor logically impossible. Instead, I wish to emphasize that in discussing and assessing the practice of how we punish, we should recognize equally that we can be better or worse at punishing. Failure to acknowledge these sorts of questions and take them seriously is likely to do more harm than good, both for the individuals being punished and for society as a whole.

Last, I wish to say something about the practical implications of the arguments in this thesis. As a thesis in applied philosophy, the overall concern is not primarily to engage directly with a particular prison policy. Instead, the focus is on principles and arguments relevant to the practice of imprisonment. That being said, many of the practical implications of the arguments in this thesis, although possibly controversial from an international perspective, are already being raised as important concerns within some prison systems such as the ones in Scandinavia. For instance, in Sweden, Denmark, and Norway, concern for children of incarcerated parents has attracted considerable attention (Scharff Smith 2015). The importance of recognizing how prisoners often suffer from ADHD is another problem that has recently gained attention in Sweden, although the topic of medical treatment is a contested issue (Kriminalvården 2014; Mederyd Hårdh 2015). This thesis contributes to these discussions by highlighting the ethical and philosophical questions relevant to this
context and shows how it is possible to formulate a moral rationale for these commitments and policies.

7. Summary of the papers

Paper I
As I have indicated above, imprisonment involves the deprivation of freedom and autonomy (section 4.1). To do so, imprisonment inevitably involves careful supervision and control, which in turn affect inmates’ prospects of privacy. In paper I (Treating Inmates as Moral Agents: An Argument for Privacy in Prison), I argue that although some privacy must be interfered with, prison inmates ought to enjoy as much privacy as possible insofar as this does not compromise other values such as safety and security. I argue in defense of the idea that the right to privacy is important because of its connection to moral agency. I discuss and defend three arguments in support of this claim: (i) privacy is crucial for empowering agents to formulate their own autonomous and authentic decisions and beliefs; (ii) respect for one’s privacy is crucial in order to conceive oneself as a self-determined agent; and (iii) respect for one’s privacy is crucial in order to conceive oneself as a trustworthy agent. It is argued that the importance of treating prison inmates as moral agents is inherent or can be motivated from different established philosophical theories about the justification of legal punishment—including retributivism, consequentialism, the moral education theory, and the communicative theory of punishment. Therefore, these theories should support inmates’ right to certain levels of privacy. Even so, any account that defends prison inmates’ right to privacy must deal with two possible problems. The first is the question of how much privacy should be allowed during imprisonment. The second is that the right to privacy may conflict with other rights, such as the rights of the public, prison staff, as well as the prison inmates themselves. This last point is particularly important since the right to security—with which the right to privacy is often held to be in conflict—must be specified and further elaborated, notably to those who are owed the right to security. The paper
also includes a discussion on how the aim of protecting privacy can be achieved. I suggest that respecting privacy can be a good way of actually promoting and creating a safer and more secure environment. It might be argued that if there is little gain in security but a much greater loss in inmates’ right to privacy, security should remain the foremost consideration. In response, I would say that this might be true in a particularly well-defined case. However, the issues that can arise from the control process, such as cell searches, strip searches, and drug tests, imply that these processes must be carried out in a way that respects inmates’ privacy and integrity. Performing the aforementioned procedures in a respectful manner may lead to the development of a more balanced and secure environment (Easton 2011, 74ff). Moreover, there is empirical evidence that indicates how individuals who are unable to control aspects of their own lives may suffer from a number of maladies. These maladies may include seemingly irrational behavior designed to provoke some sort of response and intolerable levels of frustration, which may lead to sudden uncontrollable outrage (Lippke 2007, 114). If this is correct, respecting the right to privacy should arguably be part of the objective of creating and upholding a secure environment, which would have a better effect in the long term.

**Paper II**

In addition to its immediate impact on prison inmates, imprisonment also affects third parties. In paper II (*The Harms Beyond Imprisonment: Do we have Special Moral Obligations towards the Families and Children of Prisoners*), I discuss prison conditions explicitly by addressing the rights of prisoners’ families and children. Different types of collateral harm affecting prisoners’ families and children, including decreased psychological well-being, financial costs, loss of economic opportunities, and intrusion in and control of their private life are indirect consequences of imprisonment. I discuss whether such collateral harm arising from imprisonment to prison inmates’ close family members and children give rise to special moral obligations towards them. In doing so, I first argue that it is hard to defend the position that allowing for the abovementioned harms can be morally per-
missible for the sake of the overall aims of incarceration. Two potential strategies are discussed: (i) a consequentialist account on which the benefits of imprisonment outweigh the harm to third parties and (ii) an appeal to the doctrine of double effect. The former strategy, it is argued, should be refuted because it is contestable whether the benefits of imprisonment sufficiently outweigh the harm or that mitigating the collateral harm to children and families of prisoners would jeopardizes the crime-reductive effects of imprisonment. To the contrary, allowing for and facilitating meaningful contact with one’s family could help encourage and support inmates, and act as an incentive for their reform and rehabilitation. The latter strategy, according to which the collateral harms can be permissible insofar as they are merely foreseen side-effects, is refuted by the claim that the doctrine of double effect is not applicable to this case. This is because even though most of the conditions of the doctrine are fulfilled, the proportionality and necessity condition, which states that that the good of imprisonment is not good enough compared to its negative side effects and there is no better route to the former, is not fulfilled. Consequently I argue that the aforementioned harm warrants the use of imprisonment only as a last resort. Where imprisonment is deemed necessary, it gives rise to special moral obligations toward the children and families of prisoners. Using the notion of residual obligation, these obligations are defended, categorized, and clarified (Hansson and Peterson 2001). Though not exhaustive, the obligations explicated in paper II include obligations of improvement, which imply—or so I argue—that prison facilities should be made more accessible and friendly for visits and that accommodations should be made for this purpose. It is also arguable that in some cases, where it is in the child’s best interest, female prisons should allow babies to stay with their mothers. In cases where manageable, prisons could be expected to provide guest apartments for families traveling long distances and enable longer visits in a family- and child-friendly environment. I also suggest that one potential obligation could be to reduce the financial costs and economic losses associated with the imprisonment of family members, especially by providing support for prison visits and helping inmates maintain contact with their loved ones. In addition, I suggest that economic
support and aid could be provided to prevent, for instance, moving, which can result in further dramatic changes for children, such as having to change schools.

**Paper III**

In paper III (*Felon Disenfranchisement and the Argument from Democratic Self-Determination*), I discuss the question of whether felon disenfranchisement can be morally permissible. In particular, I focus on one argument that has figured in the philosophical debate on felon disenfranchisement, referred to here as the argument from democratic self-determination. This argument, which was originally proposed by Altman (2005), states that as a matter of democratic self-determination, a legitimate democratic collective has the right to decide whether to disenfranchise felons as a way of defining its political identity. Yet, a legitimate democratic collective’s right to self-determination is limited and the choice to disenfranchise anyone must be connected to normative considerations of political significance (Altman 2005, 268). In this paper, I propose that *mala in se* crimes that violate fundamental rights such as the right to life, autonomy and, to a certain extent, property, qualify as having political significance, because these crimes equally violate rights and values that are fundamental for and central to liberal democracies. Other crimes that have political significance are crimes that relate directly to the democratic process, such as election fraud.

Although this argument is held to justify policies that are significantly broader in scope than many critics of existing disenfranchisement practices would allow for, it has received very little attention from philosophers and political theorists. One exception is López-Guerra (2014), who recently raised several objections to the argument. In this paper, I argue that the argument from democratic self-determination can avoid López-Guerra’s objections. In responding to these objections, I explicate how it can be permissible for members of a democratic collective to disenfranchise felons. I propose that this is the case if the disenfranchisement of felons is not intended as a punishment, but as a way of expressing the view about citizenship one endorses as part of a democratic collective. That is, the primary aim of felon disen-
franchisement is not to add an additional punishment besides imprisonment but to express the standard of citizenship one endorses as a political community. It is permissible to disenfranchise serious criminal wrongdoers because one finds that allowing them to vote is incompatible with one’s view of citizenship. Moreover, I discuss the implications of the argument in terms of offender reintegration. I conclude that although certain policies may be deemed problematic and even morally unjustified because they may seriously undermine offender reintegration felon disenfranchisement remains defensible in principle.

Paper IV
Attention deficit hyperactivity disorder (ADHD) is common among prison inmates. According to Ginsberg et al. (2012), the estimated share of adult prison inmates with ADHD in several European countries is 25–45%. In comparison, ADHD is estimated to affect 2–5% of adults in the general population. ADHD is also associated with coexisting psychiatric disorders among which substance-use disorder and antisocial personality disorder are common, and which both increases the risk of delinquency. Among prison inmates with ADHD, this condition it is often combined with conduct disorder (CD), which in turn is believed to be the dominating risk factor mediating the later development of antisocial behavior and delinquency (Ginsberg et al. 2012, 706).

Since ADHD is prevalent among prison inmates, it is reasonable to investigate the ways in which it would affect discussions in the ethics of punishment. My aim in this paper is not to suggest that medical interventions should replace or reduce the duration of incarceration. Rather than being an alternative to legal punishment or a form of offender rehabilitation, I suggest that at least some pharmacological intervention, such as providing methylphenidate to offenders with ADHD, should be encouraged for achieving certain penological ends. More specifically, I focus on the communicative theory of punishment and its implications for this area. Within the more prominent version of this theory, advocated famously by Antony Duff (2001),
criminal punishment is understood as a form of *secular penance*. I suggest that two of the central concerns within this theory, namely repentance and self-reform, may be interfered by the neurophysiological obstacles associated with severe ADHD and that as a remedy (and to successfully achieve the aims of communicative punishment), one should offer offenders diagnosed with ADHD the option to undergo pharmacological treatment. Failure to do so may render the punishment merely symbolic and, perhaps, even unjust. This position is defended against the objection that the secular penance made possible by methylphenidate is less authentic.
References


Tonry, Michael. (2011). Less Imprisonment is no doubt a good thing, more policing is not. *Criminology & Public Policy* 10(1): 137-152.


Svensk sammanfattning

Denna doktorsavhandling består av en övergripande introduktion ("kappa") och fyra uppsatser som på olika sätt behandlar filosofiska och etiska frågor rörande fängelsebystraffning. Till skillnad från andra moralfilosofiska frågor, såsom om huruvida dödstraff kan vara moraliskt rättfärdigat, har frågor om fängelsestraffets moraliska legitimitet och frågor om vad som utgör moraliskt godtagbara fängelseförhållanden fått betydligt mindre uppmärksamhet ifrån moralfilosofier och etiker. Syftet med denna avhandling är att bidra till den moralfilosofiska diskussionen om fängelser genom att belysa fängelsebystraffning utifrån ett antal olika perspektiv och teoretiska utgångspunkter.


Den tredje uppsatsen behandlar en, skandinaviskt sett, kontroversiell fråga om huruvida det kan vara tillåtet för demokratiska stater att vägra vissa brottslingar rätten att rösta i allmänna val. Medan exempelvis Sverige tillåter alla klienter att rösta finns ett flertal länder, såsom Storbritannien och Nya Zealand, där man inte

Den fjärde uppsatsen utgår från hur vetenskapliga studier påvisat en hög förekomst av funktionsnedsättningen ADHD hos kriminalvårdsklienter. Frågan som diskuteras är hur och om man bör ta hänsyn till detta, samt hur det påverkar filosofiska teorier om bestraffning. Mer specifikt undersöker jag hur den så kallade kommunikativa straffteorin bör förhålla sig till detta. Enligt den kommunikativa straffteorin
är straff moraliskt rättfärdigat i kraft av att det fungerar som samhällets sätt att ut-
trycka klander, vilket i sin tur avser att framkalla ånger (eng. repentance) och upp-
muntra den straffade till självreformerings. En av teorins implikationer är att vissa
behandlingsprogram som kanske inte primärt avser att vara bestraffande likväl kan
förstås och vara påbjudna som bestraffning. Sådana behandlingsprogram ställer
dock krav på koncentration, uthållighet och självreglering, vilket blir utmanande för
kriminalvårds klienter med ADHD. I artikeln argumenterar jag för att företrädare av
den kommunikativa straffteorin också bör vara varse om dessa problem, eftersom
den som lider av ADHD kan ha svårigheter att ta till sig av den kommunikativa
bestaffning som den kommunikativa straffteorin avser med behandlingsprogram-
men. Detta ger i sin tur upphov till särskilda moraliska skäl till varför kriminal-
vårds klienter som lider av ADHD också bör erbjudas medicinsk behandling och
varför behandling bör göras möjlig inom kriminalvården. I annat fall är det tvek-
samt om bestraffningen inte bara är verkningslös, utan också i viss mån orättfärdi-
gad. Teorin implicerar dock inte att klienterna kan tvingas till behandling.