

## PROCEDURAL RIGHTS

During a lecture on moral rights, another member of the audience asked Joel Feinberg if he believed there were any absolute rights. Without hesitating, Feinberg suggested the right not to be punished without first being found guilty via a fair trial. We were all satisfied with this answer. After all, every procedural right seems important, and (as James Nickel puts it) “the centerpiece of due process rights is the right to a fair trial.”<sup>1</sup> Moreover, even if one condones targeted killing in exceptional circumstances (as when a police officer shoots a kidnapper in order to rescue imperiled hostages), this violence would be justified by the aim of helping the victims, not by the goal of punishing the kidnapper. And given how difficult it is to imagine a situation in which the interest in punishing a criminal would be so pressing that we could not spare the time or resources to conduct a fair trial, Feinberg’s proposal seems to stand up to scrutiny. Recently, however, I have begun to question this standard line of thought.<sup>2</sup> In fact, not only do I

---

<sup>1</sup> James W. Nickel, *Making Sense of Human Rights*, 2<sup>nd</sup> ed. (Malden, MA; Blackwell Publishing, 2007), p. 110.

<sup>2</sup> I do not mean to suggest that theorists necessarily think the right to a fair trial is *absolute*, but I certainly regard belief in moral procedural rights as the orthodox position. The prevalence of this view is on display in *Procedural Justice* (London: Ashgate Publishers, 2012), Larry May and Paul Morrow’s recent anthology of historical and contemporary writings on due process rights, in which none of the authors advances the view I defend here. As with most orthodox positions, the existence of procedural rights is more often presumed than defended, but prominent authors who have argued on behalf

now doubt that the moral right to a fair trial is absolute, I have come to believe that there is no such right at all. Thus, in this paper I defend the stark thesis that, absent special circumstances, there are no moral procedural rights.<sup>3</sup>

I divide this essay into four main sections. First I argue that there is no general moral right against double jeopardy. Next I explain why punishing a criminal without first establishing her guilt via a fair trial does not necessarily violate her rights. In the third section I respond to a number of possible objections. And finally, I consider the implications of my arguments for the human right to due process.

### **Double Jeopardy**

For two reasons, I begin by contesting the widespread presumption that we have a moral right against being prosecuted more than once for the same crime. First, given that it is generally accepted that there are many procedural rights, I must discuss more than the right to a fair and reliable trial if I want to defend the broader thesis that there are no pre-institutional procedural rights. Space considerations obviously do not allow me to

---

of this type of moral right (in addition to those featured in May and Morrow's anthology) include R.A. Duff, *Trials and Punishments* (Cambridge: Cambridge University Press, 1986); Ronald Dworkin, "Principle, Policy, Procedure" in *A Matter of Principle* (Boston: Harvard University Press, 1985); Larry May, *Global Justice and Due Process* (New York: Cambridge University Press, 2011); and Robert Nozick, *Anarchy, State & Utopia* (New York: Basic Books, 1974).

<sup>3</sup> More precisely, I should say that there are no general, moral, judicial, procedural rights. The various components of this more cumbersome description will be explained below.

analyze each potential procedural right separately, but if I can make parallel cases against two of the most widely-affirmed procedural rights, this will at least lend credence to my more general skepticism regarding procedural rights as a whole. Second, even though the right against double jeopardy is commonly regarded as a core right, I suspect that there is less resistance to its denial than there would be to contesting the moral right to a fair trial. So, if I can first show that we have good reason to question the right against double jeopardy, this may render readers less resistant to the more radical conclusions to follow.

Given my view that there is no general moral right to be tried no more than once for any given crime, how do I explain the intuitive appeal of the prohibition against double jeopardy? I believe that we have good instrumental reasons to design our legal systems so that prosecutors know they can try someone only once for any given crime. Otherwise, legal officials could continually harass citizens by repeatedly charging them for the same crime, or charging folks when there is very little evidence (since they could simply prosecute again later if the defendant is acquitted). In other words, in the absence of a strict prohibition against multiple jeopardy, there would be too much room for legal officials to abuse their powers, thereby undermining the citizens' capacities to lead good lives. And once legal institutions incorporate this prohibition, citizens have *legal* (though not necessarily moral) rights against double jeopardy.

But don't citizens also have a *moral* right against double jeopardy? Perhaps; but if so, it is not because this right is a pre-institutional moral right (like an innocent person's right not to be punished) which holds globally in the state of nature or any other institutional context. Rather, if contemporary citizens have a moral right against double jeopardy, I would think it is only because, *once the state has publicly announced that it*

*will not try anyone twice for the same crime*, it thereby incurs a duty of fidelity to keep its word.<sup>4</sup> What is more, while this duty is *regarding* the person who has already been tried once, it need not be especially *owed to* this person. Thus, it may be that the state's moral duty not to criminally prosecute Jane twice for a given crime is *regarding* Jane, but it is *owed to* all of the citizens equally (though Jane is of course likely to care the most that this duty is respected).

Moreover, even if we assume for now that one's guilt must be established via a fair and reliable procedure, it remains an open question whether we must avoid double jeopardy. This is because reliability is dual-faced, and only one of its faces recommends avoiding multiple jeopardy. More specifically, reliability cannot be understood solely in terms of avoiding the conviction of innocent defendants; otherwise, the most reliable procedure would just be to summarily acquit all defendants. Instead, a procedure is reliable to the extent that it maximizes the number of guilty people convicted and minimizes the number of innocent convicted. And while our concern to avoid wrongly convicting the innocent suggests that we should prohibit multiple jeopardy, our aim of convicting as many guilty criminals as possible counts in favor of it. What is more, reasonable people can disagree about how to weigh the competing concerns of convicting the guilty and exonerating the innocent. Should we prefer a system wherein twenty out of a hundred guilty defendants are acquitted while two out of a hundred innocent people

---

<sup>4</sup> By invoking the duty of fidelity, I do not mean to rely on a general duty to obey the law. More minimally, I suggest only that the occupants of special roles (like judges and prosecuting attorneys) often have specific duties to adhere to the institutional rules which constrain their publicly-defined positions.

are wrongly convicted, or an alternative system in which thirty out of a hundred guilty defendants are acquitted but only one out of every hundred innocent people is wrongly convicted? It's not clear.

Even if one ratio were incontrovertibly better than another, though, this would not settle the question of double jeopardy, because it is possible that we could increase the percentage of guilty people convicted *and* decrease the number of innocent people wrongly convicted by allowing double jeopardy but increasing the burden of proof that the prosecution must establish. In that case, no one could complain that a criminal legal system was made less reliable when it was amended to allow double jeopardy. Most importantly, it is interesting to ask, "Whose rights would be violated if a society moved from a system with a lower presumption required to establish guilt combined with a prohibition of multiple jeopardy to a system with a higher presumption of innocence and the possibility (in certain circumstances) for multiple jeopardy?" I submit that no one's rights would be violated. The basic point is that prohibiting double jeopardy may well make sense in certain (or even most) institutional contexts, but that does not mean that we are required as a matter of principle to avoid multiple jeopardy in all contexts. And if there are institutional arrangements that can be made more reliable by allowing double jeopardy, then it does not seem that anyone's rights would necessarily be violated by allowing double jeopardy in those contexts.

Before closing the section, it is worth comparing double jeopardy to the statute of limitations in the criminal law, because I would urge us to conceive of the two in similar terms. There are a variety of good reasons to limit the amount of time after a crime that one may be prosecuted. Suppose that, in view of these reasons, Nora's jurisdiction enacts

a statute of limitations which precludes the authorities from prosecuting crimes which were committed more than seven years earlier. In these circumstances, Nora presumably has a legal, and perhaps even a moral, right not to be prosecuted for an act that she committed more than seven years earlier. But one can acknowledge this without affirming the quite distinct claim that Nora has a pre-institutional moral right that no criminal legal system with jurisdiction over her be designed so as to prosecute crimes committed more than seven years earlier. If Nora's legal system had decided to place the statute of limitations at eight instead of seven years, for instance, it is hard to see how Nora's moral rights would have been violated.

People are unlikely to think there is anything magical about the particular duration of seven years, so I presume that this much is relatively uncontroversial. In my view, though, we should reason similarly about single jeopardy. Although one is obviously a salient number, and the difference between being prosecuted once and being prosecuted twice for the same crime is in many ways more significant than the difference between being prosecuted for a crime committed six years and 364 days earlier and being prosecuted for a crime committed seven years and one day earlier, I suggest that there is no more magic in the number one than there is in the duration of seven years. In my view, those who design and regulate a legal system do not necessarily violate their constituents' moral rights when they move from single to multiple jeopardy any more than they do when they increase the criminal statute of limitations from seven to eight years or reduce the legal speed limit from sixty-five to fifty-five miles an hour along a given stretch of highway. I appreciate that there may be compelling practical reasons to prohibit prosecuting defendants more than once for the same crime (just as there might be

good policy arguments in favor of higher speed limits or a shorter period of statute of limitations), but this is quite different than alleging that one's moral rights are necessarily violated if one is prosecuted more than once for the same crime.

### **Fair, Reliable and Public Procedures**

I am inclined to understand the right to a fair trial just as I have analyzed double jeopardy: I think we have ample reason to insist that the state not punish anyone until she has been found guilty by an appropriate procedure, *not because each individual retains her right against being punished until she has been proven guilty by a fair, reliable and public process*, but because we should take great care to minimize the number of people wrongly punished. In other words, we have instrumental, rather than intrinsic, reasons to design our judicial institutions in this way. If and when a criminal legal system is constructed along these lines, its constituents may well acquire a legal and moral right not to be punished before being found guilty, but this would merely be because those who operate the judicial system have a duty of fidelity to adhere to their publicly promulgated rules.

My position obviously flies in the face of the standard view that each of us has a pre-institutional right not to be punished until she has been duly convicted in a fair trial.<sup>5</sup>

---

<sup>5</sup> Many theorists (especially those working in the Kantian, Hobbesian and Hegelian traditions) incorporate the existence of procedural rights into their very definitions of punishment. In his canonical paper, "Two Models of Rules" (in Samuel Freeman (ed.), *John Rawls: Collected Papers* [Cambridge: Harvard University Press, 2001], p. 26), for instance, John Rawls specifies that "a person is said to suffer punishment whenever he is

To vindicate my unorthodox view, then, I will construct an imaginary case in which this putative right is egregiously disrespected, and then will argue that the person punished is not actually wronged.

Imagine that Sandra lives in a marvelous society appropriately called Justland. Justland is not entirely free of crime, but it enjoys an extremely low crime rate, and every single criminal in the history of Justland has been swiftly apprehended, duly convicted, and appropriately punished. Until recently, that is. Several months ago, someone stole a substantial sum of money from the state treasury. After an exhaustive investigation turned up no leads, the Prime Minister proposed a wacky “solution” to close the books on this case: In light of their inability to apprehend the thief, why not simply hold a lottery and then punish the person whose name is drawn?<sup>6</sup> Given the radical nature of this

---

legally deprived of some of the normal rights of a citizen on the grounds that he has violated a rule of law, the violation having been established by trial according to due process, provided that the deprivation is carried out by the recognized legal authorities of the state, that the rule of law clearly specifies both the offense and the attached penalty, that the courts construe statutes strictly, and that the statute was in the books prior to the time of the offense.”

<sup>6</sup> Given that no one seriously believes that this person is guilty, one might question whether this condemnation and hard treatment actually constitutes punishment. This is a reasonable question, but my view is that a person who has been framed by a corrupt authority makes perfect sense when she complains of being wrongly punished. And if this is correct, then punishment does not require that those who impose the hard treatment



proposal, the Prime Minister was reluctant to move forward with it unilaterally, so she held a plebiscite on the issue. After extensive public discussion and deliberation, all ten million Justlanders voted in the plebiscite, and the motion was affirmed by a two-thirds majority. The social security numbers for every citizen were then fed into a computer program which randomly selected Sandra's number. Everyone understood that Sandra was no more likely to be guilty than any of her ten million compatriots, but in keeping with the verdict of the plebiscite, the authorities swiftly apprehended and duly punished Sandra. Finally, let me add just one more wrinkle: by a spectacular coincidence (and unbeknownst to any of the authorities who apprehended and punished her), Sandra is the one who actually stole the money from the treasury.

Have any of Sandra's rights been violated? If one believes that there is a general moral right not to be punished unless one has been duly convicted by a fair and reliable process, then one should certainly think so. Insofar as having one's name drawn in a random lottery is a quintessentially unreliable process for determining one's guilt, this would appear to be a paradigmatic instance of such a rights violation. In my view, however, no rights have been violated. In defense of this conclusion, let me juxtapose this case with two very similar scenarios in which I believe Sandra's moral rights would have been violated.

In the first variation, let us suppose that Sandra did not steal the money from the treasury. In this case, her right not to be subjected to the hard treatment of punishment has been violated. Given that Sandra is innocent, she has done nothing to forfeit this

---

necessarily believe that the defendant is actually guilty. I am grateful to Antony Duff for raising this potential concern.

right, and the citizens of Justland cannot hide behind the fact that the lottery was democratically endorsed any more than they could justify enslaving Sandra on the grounds that society democratically voted to institute slavery. The crucial idea here is simple: whatever one thinks about the instrumental and/or intrinsic desirability of making collective decisions democratically, even democratic groups are constrained by individual moral rights. And because each of us has a weighty pre-institutional right not to be punished unless we have acted wrongly, Sandra can rightfully object to her punishment even though the decision to hold the lottery was reached via a perfectly democratic process.

As a proponent of the rights forfeiture theory of punishment, I am entirely sympathetic to this analysis.<sup>7</sup> But this objection is obviously inapplicable to our original scenario in which Sandra stole the money from the treasury, because in that case she did forfeit her right not to be punished, and we cannot object that the Justlanders have violated Sandra's right not to be punished when she has clearly forfeited that right. (Of course, one might counter that Sandra forfeits her right against being punished only if and when she has been *duly convicted* of committing the crime, but this response begs the crucial question by presuming that there is an antecedent moral right to have one's guilt established by a fair and reliable process.) So while it is plausible to suppose that the punishment would have violated Sandra's rights if she were innocent, it does not appear that her rights were necessarily violated in our original case, where she was the one who stole the money from the treasury.

---

<sup>7</sup> Citation suppressed to preserve anonymity.

Secondly, it is important to distinguish our original scenario from one in which a society *routinely* uses a lottery to determine whom to punish. Imagine, for instance, that instead of voting to randomly select someone to be punished in only this one instance, the Justlanders voted to use the lottery for all crimes that are not solved within forty-eight hours. In a society that regularly selected people for state punishment in this fashion, a citizen's capacity to live a good life might well be undermined by the constant fear of being wrongly punished. In other words, even those whose names are not selected and thus are never punished will be wronged by being exposed to the risks of serious harm. Of course, none of us has a right to be sheltered from all risks, but we have rights against being exposed to unreasonable risks.<sup>8</sup> And because nothing substantial would be gained from instituting a policy of randomly selecting a person to be punished for any crime that is not solved within forty-eight hours, the risks of this practice seem patently unreasonable. And again, the mere fact that this policy was approved in a free and fair plebiscite is not enough to sanitize it of its moral impropriety, since the majority has no more of a right to expose innocent individuals to such grave and unnecessary risks than it does to enslave them. (In fact, if the punishments often involve incarceration, then this

---

<sup>8</sup> Those who hold that one's rights cannot be violated unless one is harmed will be skeptical of my claim that one's rights are necessarily violated when one is exposed to unreasonable risks. In part because I believe that one can be wronged without being harmed (as you would be if someone secretly subjected you to what turned out to be a harmless game of Russian roulette), but also because adopting my position makes the case against procedural rights *more* difficult, I will not engage here with someone who insists that a secret punishment lottery would not necessarily violate any rights.

practice seems morally tantamount to a democratically-approved policy of enslaving randomly selected citizens.)

As with our first variation, I am receptive to this explanation of how moral rights would be violated in this scenario. And unlike in the first variation, this analysis appears to have implications for our original case. I say this because it seems plausible to suppose that even a single iteration of this type of lottery might be ruled-out as a matter of principle insofar as it exposed folks to unreasonable risks. Presumably most people's lives will be much less affected if they are exposed to only one such lottery than if they had to awake each morning to learn if they (or any of their loved ones) have been selected in the daily lottery, but the mere fact that a single iteration of this type of lottery generates *less* risk does not show that these risks are *reasonable*. And because no such lottery would produce any significant benefits, the citizens of Justland could rightly object to the risks created by even the single lottery we imagined in our original scenario. Thus, just as I violate the rights of everyone standing below when I chuck a grand piano off of a tall building, even if I throw only one piano and it hits only one person, each citizen of Justland (or at least each citizen who did not vote in favor of the plebiscite) would have her rights violated by the single use of the lottery, even though Sandra was the only one selected and punished. Those not hit by the piano and those not selected for punishment have their moral rights violated by being exposed to unreasonable risks of harms.

It is important to appreciate, however, that while this reasoning seems apt for virtually every citizen of Justland, it does not apply to Sandra in our original case. Given that Sandra is guilty of the crime in question, she has forfeited her right against being

punished. And because she has no right against being punished, she lacks the standing to object to a policy which exposes her to a *risk* of being punished. To appreciate this point, imagine a variation on the piano case. Suppose that Ingrid is an adrenaline-junky who asks me to throw a piano off of a tall building while she stands below, so that she can enjoy the high-risk sport of piano-dodging. If I then throw this piano off the building while a hundred unsuspecting bystanders are milling about below, it seems plausible to conclude that, while I have violated the rights of these other one hundred folks, I have done no wrong to Ingrid (whether or not the piano hits her), because she has waived her right against being exposed to the risk. And if Ingrid can *waive* her right against being exposed to what would otherwise be an unreasonable risk of harm, presumably Sandra can *forfeit* her right against being exposed to what would otherwise be an unreasonable risk. If this is correct, then even the lone iteration of the punishment lottery envisioned in our original thought experiment may be impermissible, but this would be neither because it punished Sandra without first establishing her guilt via a fair and reliable process nor even because it subjected Sandra to an unreasonable risk of harm; it would be impermissible instead because it violated the rights of every citizen of Justland other than Sandra not to be exposed to unreasonable risks of harm.

Before concluding this section, it is worth considering a less far-fetched example, that of an aggressive district attorney who is happy to break various rules (such as overlooking the fact that evidence was gathered illegally) when she is convinced that the defendant is in fact guilty.<sup>9</sup> At first blush, it might appear that my stance on procedural rights precludes me from condemning this attorney's disregard for the rules, as long as

---

<sup>9</sup> I am indebted to (name suppressed to preserve anonymity) for pressing this question.

she accurately determines which of the defendants are innocent and which are guilty. After all, if those guilty of wrong-doing have forfeited their rights against being punished, and they have no procedural rights, then what does it matter how the evidence was collected? As our analysis of the two variations on my initial thought-experiment makes plain, however, there is ample room to criticize this rogue prosecuting attorney. The two obvious points are first that, given that we have no reason to believe that prosecuting attorneys are less likely to be fallible than the rest of us, we have compelling reasons to construct criminal legal procedures which institutionally constrain those who occupy these positions. And second, once these laws are duly enacted, prosecuting attorneys are morally bound to respect these rules.

Finally, notice that few would deny that an innocent person's rights are violated if she is punished after being duly (and non-culpably) convicted in a fair, reliable and public trial. But if being duly convicted does not preclude one's rights from being violated, why think that *not* having been duly convicted entails that one's rights *are* necessarily violated? Symmetry suggests that if the presence of a procedurally impeccable determination of guilt cannot ensure that no rights are violated, then the absence of these same procedures would not entail a rights violation. Of course, there is space to adopt an asymmetric stance here, since one can simply assert that punishment necessarily violates rights unless the defendant is both guilty and has been proven to be guilty via an appropriate process. But given that the position I defend here treats the presence and absence of procedural safeguards symmetrically, and because it does not leave us unable to criticize a rogue prosecuting attorney, perhaps critics will be less troubled by my thesis that procedures are justified solely on instrumental grounds.

## **Assessing the Arguments in favor of Procedural Rights**

The most prominent discussion of judicial procedural rights in the literature is Robert Nozick's landmark analysis in *Anarchy, State, and Utopia*. Nozick focuses on pre-institutional, moral procedural rights because he regards their existence as pivotal to explaining how a group of people might permissibly move from a situation in a state of nature with a dominant protection agency to an ultra-minimal state (a situation in which the dominant protective agency comes close to having a de facto monopoly on the use of force within a given territory). Nozick's crucial step boils down to an argument from analogy. He contends that living in a society in which many people personally punish suspects without establishing their guilt via a reliable procedure is analogous to being exposed to a game of Russian roulette; even if one is not wrongly punished, one is exposed to unreasonable risks. And because the clients of the dominant protective agency pay this company to protect them from precisely these types of risks, the agency will legitimately take it upon itself to prohibit "independents" (i.e., those who have not signed up for the agency's services) from punishing any of its clients without first establishing their guilt via a fair and reliable process. What is more, although there is bound to be controversy about whether any given process is fair and/or reliable, the dominant protective agency will be so much more powerful than any of the independents that it alone will have de facto power to unilaterally decide which processes qualify as sufficiently fair and reliable.

Like so much of Nozick's writing, this argument is ingenious. As critics have pointed out, however, it does not work. Most notably, merely establishing that the dominant protective agency's relative power would enable it to coercively impose its own

standards of fairness and/or reliability upon the independents does not establish that it is *morally entitled* to do so. And because we seek an explanation of why the state violates no moral rights when it unilaterally asserts itself in this way, Nozick's speculations about the power relations among the various actors is simply beside the point. Even if Nozick could somehow establish that the dominant protective agency could gain the moral right to unilaterally specify which procedures qualify as fair and reliable, though, this would show neither why independents may not permissibly punish clients of the dominant agency as long as they first established the guilt of these clients via the approved procedures, nor why the independents would have to follow these procedures before punishing other independents.

Perhaps Nozick could somehow fortify his arguments so as to rebut these standard objections. We need not explore this possibility here, though, because even if Nozick could successfully buttress his argument against the anarchist, it would not undermine my own claim about the nonexistence of the moral right to a fair trial. The reasons for this can be gleaned from our discussion of the second variation on our initial case involving Sandra. Specifically, while I presumably have a right not to be shot during an unsolicited game of Russian Roulette, the guilty criminal has no analogous right against the hard treatment of an appropriate punishment. To put this point in terms of Nozick's example, imagine that, after surviving the piano episode, Ingrid asks me to play Russian roulette with her. Given this request, it seems clear that Ingrid has waived her right against my firing a partially loaded gun at her, and thus whatever risks I expose her to are not unreasonably imposed. And just as Ingrid has waived her rights against being exposed to risks which would otherwise be unreasonable, a criminal might forfeit her right against



such risks. So, while those of us who have not acted wrongly may well righteously object to being exposed to the risk of being punished, the criminal has no standing to object to the risk that she might receive the punishment she deserves. Thus, whether or not Nozick's arguments ultimately defeat the anarchist, they clearly do not show that each of us has a moral right not to be punished unless her guilt is first established via a fair and reliable process.<sup>10</sup>

R.A. Duff writes on the morality of our criminal legal institutions with unparalleled insight, subtlety and sophistication, so it is no surprise that his arguments in defense of the right to a fair trial give me the most pause. Duff surveys several considerations in favor of the conclusion that "we cannot...distinguish just ends from just means in the context of a criminal trial."<sup>11</sup> One focuses on our responsibility to avoid mistaken convictions; another utilizes the notion that justice is not done unless it is publicly done; and a third depends upon the defendant's right to be heard. Let us consider each of these in turn.

The first argument Duff considers is essentially that our duty not to punish the innocent combined with our lack of antecedent knowledge about who is guilty requires us

---

<sup>10</sup> In fairness to Nozick, I should note that he has several other (extremely original and sophisticated) arguments regarding procedural rights which I do not review here, in part because (as he acknowledges on page 103) some of these arguments merely *assume* the existence of procedural rights, but also because the criticisms I offer below of R. A. Duff's arguments apply equally, *mutatis mutandis*, to Nozick.

<sup>11</sup> R.A. Duff, *Trials and Punishments*, p. 114.

to adopt appropriate measures which enable us to reliably distinguish the innocent from the guilty. As Duff puts it:

If justice requires that we convict only the guilty, every citizen has the right to be convicted only if she is guilty. But we cannot know in advance who is guilty, and we therefore owe it to every citizen to convict her only if we have made reasonably sure that she is guilty; only if we have proved her guilt by reliable procedures which protect the innocent against mistaken conviction. Any citizen accused of an offense thus has the right to be tried in accordance with the requirements of Natural Justice, which specify such reliable procedures, and to be convicted only if her trial has observed these requirements.<sup>12</sup>

Given that innocent folks have not forfeited their rights against being punished, it is hard to deny that we should take great care not to punish those who have done nothing wrong. As Duff ultimately acknowledges, though, this line of reasoning cannot show that any procedural rights exist. The problem, of course, is that even if the person who metes out the punishment would be culpable if she did not observe certain procedural safeguards, it does not follow that defendants have a right that these safeguards be followed. One might behave culpably and then—merely because of luck—violate no rights. Imagine, for instance, that Philippa and Elizabeth are in a pub taking turns buying round after round of drinks. And to facilitate payment, each of them has a stack of twenty dollar bills on the table. Suppose that when Elizabeth excuses herself to visit the bathroom, Philippa steals twenty dollars off of Elizabeth's stack and puts it on top of her own stack. And

---

<sup>12</sup> R.A. Duff, *Trials and Punishments*, p. 113.

finally, imagine that when Philippa visits the bathroom shortly after Elizabeth's return, Elizabeth takes the top twenty dollar bill from Philippa's stack (the very twenty dollar bill Philippa has just stolen from Elizabeth) and places it on her own pile. Is Elizabeth morally culpable? And if so, has she violated anyone's rights?

My own view is that, while Elizabeth is clearly culpable, she did not violate any rights. Elizabeth is culpable because she *attempted* to steal twenty dollars from Philippa. But because the twenty dollars she tried to steal was (unbeknownst to her) her own money, she merely reclaimed the twenty dollars Philippa had just stolen from her. And since Philippa clearly had no right that Elizabeth not take her money back, Elizabeth (as luck would have it) violated no duties, despite the fact that she is just as culpable as she would have been if she had successfully stolen Philippa's money. If this is correct, it suggests how we should analyze a situation like our initial scenario in which Justland's lottery generated Sandra's name. That is, the Justlanders (or at least the authorities and those who voted in favor of randomly selecting someone to punish) were clearly culpable, because they did not take sufficient care to avoid punishing the innocent. But because the lottery happened to select the person who (unbeknownst to them) did in fact steal the money from the treasury, the Justlanders (as luck would have it) did not violate Sandra's rights. And while I am not sure if Duff conceives of an agent's moral culpability (which I take to be a subjective matter) and the rights she violates (which I take to be an objective matter<sup>13</sup>) precisely as I do, he arrives at the same ultimate

---

<sup>13</sup> Another way of characterizing this distinction is to say that permissibility turns on the facts, whereas culpability depends upon the agent's beliefs. For a recent defense of this

conclusion when he writes, “But one who is in fact guilty as charged is in no danger of suffering an unjust conviction: if the verdict is in fact correct she suffers neither injustice nor injury. The court acts wrongly, in following an unreliable procedure, but does not wrong *her*.”<sup>14</sup>

Duff’s second argument is that criminal justice is not done unless it is publicly done. As he explains:

But there is more than this to the trial’s rational character, and to the injustice suffered by even a guilty defendant whose conviction is secured by improper or unjust procedures. For just as the law itself must be justified *to* those on whom it is binding, so too a criminal verdict must be justified *to* the defendant on whom it is passed. The aim of a criminal trial is not merely to reach an accurate judgment *on* the defendant’s past conduct: it is to communicate and justify that judgment – to demonstrate

---

approach, see Peter A. Graham, “In Defense of Objectivism about Moral Obligation,” *Ethics* 121 (2010): 88-115.

<sup>14</sup> R.A. Duff, *Trials and Punishments*, pp. 112-3. Similarly, on page 103 of *Anarchy, State, and Utopia*, Nozick worries: “It is true that an unreliable procedure will too often find an innocent person guilty. But does applying an unreliable procedure to a *guilty* person violate any right of his? May he, in self-defense, resist the imposition of such a procedure upon himself? But what would he be defending himself against? Too high a probability of a punishment he deserves?”

its justice – *to* him and to others. In this context at least, if justice is not both seen and shown to be done, it is not and cannot be done at all.<sup>15</sup>

To appreciate the force of Duff's stance, we need look no further than the example of Philippa and Elizabeth. Here Duff might suggest that justice was not fully done when Elizabeth took back her twenty dollars from Philippa precisely because Elizabeth did not publicly take it back for the right reasons. There is a huge difference, Duff might continue, between Elizabeth's publicly demanding twenty dollars from Philippa on the grounds that Philippa must return what she has stolen versus Elizabeth's trying to steal twenty dollars from Philippa (which, unbeknownst to Elizabeth, is actually her own money). And just as Elizabeth's public demand of repayment is preferable to her attempted theft, Justland's punishment of Sandra after determining her guilt via a publicly fair and reliable process is preferable to selecting Sandra by lottery.

In response, I would urge us to distinguish clearly between the *desirability* of these contrasting cases and their *justice*. I certainly agree that it would be preferable, even morally preferable, that justice should not only be done but publicly done, but I deny that justice is not done unless it is publicly done. I acknowledge that it would be *better* if Elizabeth righteously demanded that Philippa return the twenty dollars that she stole and that the Justlanders publicly establish Sandra's guilt before punishing her, but I am not convinced that Elizabeth necessarily violates anyone's rights when she attempts to steal twenty dollars from Philippa or that Justland violates any rights when it punishes Sandra merely because her name was selected in a random process. To emphasize: I appreciate that justice and publicity are both good things, but they also strike me as

---

<sup>15</sup> R.A. Duff, *Trials and Punishments*, p. 115.

distinct things. So while I would obviously prefer justice and publicity to merely justice, I don't see how justice somehow magically turns into injustice in the absence of publicity. Or put in terms of our examples, I do not understand how Philippa's rights are violated merely because no one has publicly offered the appropriate reasons for why she may not keep Elizabeth's money, or why Sandra's rights are necessarily violated merely because no one has publicly demonstrated that it is rational to believe that she stole the money from the treasury.<sup>16</sup> And in the absence of a rights violation, I see no grounds for positing the presence of injustice.

A number of prominent scholars have defended the idea that justice is not fully done unless it is publicly done in a variety of other contexts, so it is not unreasonable to think that one might try to counter my skepticism about categorizing publicity as an

---

<sup>16</sup> One might object that Elizabeth not only acts culpably, she acts impermissibly. As John Simmons insists in "Locke and the Right to Punish" (*Philosophy & Public Affairs* 20 [1991], p. 340), "If I take property from someone who, completely unbeknownst to me, had previously stolen my property, my taking is still theft (and morally impermissible)—even though the property I took from him I might have been entitled to take, if I had taken it *as reparation*." To confirm that Elizabeth's rights are not violated, notice how awkward it would be to suggest that an informed third party might permissibly interfere with Philippa's actions. After all, what would this third party say to Philippa to justify this interference: "You are in fact entitled to the twenty dollars you are taking, but I will stop you from reclaiming it because you *believe* it belongs to Elizabeth."?

ineliminable component of justice.<sup>17</sup> I will not explore this possibility here, though, because Duff does not place much emphasis on his general claim that “if justice is not both seen and shown to be done, it is not and cannot be done at all.” Instead, he focuses on the more specific claim (which I suspect he regards as the crucial instance of his more general contention about publicity) that “Both guilty and innocent defendants have a right to be heard which is independent of the right to be acquitted if innocent.”<sup>18</sup> This is Duff’s strongest and most developed argument on this topic, so it is worth quoting him at length:

To convict a guilty defendant without giving her a hearing is not to produce a just verdict by unjust means; for the justice of a verdict is internally related to the justice of the procedures which produce it. The verdict may express a true judgment on her conduct; but it no longer

---

<sup>17</sup> Perhaps most notably, Thomas Christiano invokes publicity in his egalitarian defense of democracy in his impressive book, *The Constitution of Equality* (Oxford: Oxford University Press, 2008). Christiano argues that equality requires democracy because one is not fully treated as an equal unless one is publicly treated as an equal. And since only democracy publicly treats all citizens as equals, it alone satisfies the requirement that all citizens be treated as equals. (Not surprisingly, my reaction Christiano’s argument parallel’s my response to Duff’s: I agree that it is preferable to be publicly treated as an equal, but I am not convinced that one is not fully equal unless one is publicly equal. I agree that publicity and equality are both good things, but, contra Christiano, I am inclined to insist that they are distinct things.)

<sup>18</sup> R.A. Duff, *Trials and Punishments*, p. 117.

expresses, as a just verdict must express, the conclusion of a process of rational argument *with* her; she has not been shown that she ought to accept this verdict, since she has not been allowed to participate in the trial. To say that the trial aims to reach an accurate judgment on her conduct, either as a justification for condemning her or as a precondition for punishing her, is therefore at best inadequate and at worst misleading; for it ignores her essential role in her trial as one who is to receive the verdict and participate in the argument which justifies it. The right to be heard is neither simply an instrumental means to some further end, nor simply a side-constraint on our pursuit of consequential goals, but a right which is integral to the meaning and purpose of the criminal trial.<sup>19</sup>

I have a great deal of sympathy for Duff's account, but I regard it as an exceptionally insightful rational reconstruction of what liberal democratic societies currently do (or at least what we aspire to do), rather than an explanation for why we must continue to act as we currently do. I presume that there are a variety of good instrumental reasons in favor of criminal legal institutions which allow defendants publicly to defend themselves, but I am not convinced that a regime would necessarily violate anyone's rights if it designed the process so that defendants could not be present at the trial. Imagine that we could somehow make trials more likely to convict the guilty, less likely to convict the innocent, and less expensive if we prohibited defendants from entering the courtroom. (Suppose that the defendants' presence in the room consistently distracted or otherwise impacted the jurors' ability to clearly and impartially consider the

---

<sup>19</sup> R.A. Duff, *Trials and Punishments*, p. 119.



evidence, for instance.) Would we violate anyone's rights if we changed our institutions accordingly? I think not.<sup>20</sup> Depending upon how weighty Duff understands this procedural right to be, however, he must either insist that it would be impermissible for us to alter our existing practice or allege that the right to be heard would be outweighed only because the competing values are sufficiently compelling.

Against this dismissal, Duff might cite our practice of refusing to prosecute, let alone punish, someone who has become insane *after* committing a crime. Imagine, for instance, that Sandra was perfectly healthy when she robbed the treasury, but then lost her sanity before the authorities apprehended her. We would refuse to prosecute and punish Sandra on principled grounds, Duff alleges, because our trials and punishments are essentially about calling upon a fellow citizen to answer for her conduct, and an insane person is patently not capable of answering for her actions. And if I insist that Duff's spiel about publicly answering for crime is merely a description of our current practice rather than a moral prescription which must be followed by all, then I should be

---

<sup>20</sup> Duff might respond that citizens are owed the right to be heard and surely they do not forfeit their right against punishment *and* their standing as citizens. After all, Duff believes liberals must conceive of trials (and punishments) as communicative because liberals are committed to respecting the autonomy of their citizens. I am a card-carrying liberal, and I agree that we should respect citizens' autonomy, but I also believe that citizens can forfeit their autonomy. Thus, I ultimately differ from Duff in thinking that there is at least a sense in which citizens can forfeit their standing as citizens. (And as a consequence, I cannot antecedently rule out the possibility that felons might forfeit their rights to vote, for instance.)

prepared to prosecute and punish Insane Sandra, even though she is now unable to answer for her earlier actions. After all, while Sandra's insanity may now render her incapable of forfeiting her rights against being punished, she was perfectly sane when she robbed the treasury, and thus was entirely capable of forfeiting her rights. And if Sandra forfeited her rights when she stole the money, it is hard to see how or why she regained them once she lost her sanity.

There are a number of ways for me to respond to this challenge. Most obviously, I could simply bite the bullet and insist that, while we currently abstain from prosecuting and punishing individuals who have lost their sanity after their criminal activity, this choice is purely elective. According to this line of thinking, we would no more violate anyone's rights if we were to reverse course and begin punishing folks like Insane Sandra than if we changed a speed limit or altered the time period covered in our criminal statute of limitations. Some may be comfortable with this suggestion, but I must confess that I am not. And given my disapproval of any society that prosecuted those who have lost their sanity after the commission of their crimes, it is incumbent upon me to explain what rights would be violated by this practice.

One possible explanation for the injustice of punishing Insane Sandra is that she has already been punished enough by her loss of sanity.<sup>21</sup> Implicit in this suggestion is the premise that we not only have a right against being punished when we are innocent, we have a right against being over-punished when we are guilty. Put in terms of rights forfeiture, this is the idea that we do not forfeit all of our rights any time we violate

---

<sup>21</sup> I am grateful to (name suppressed to preserve anonymity) for suggesting this possible response.

someone else's rights; more modestly (and more plausibly), we forfeit only our right against a "fitting" or proportionate punishment. And if so, then not only can an innocent person's rights be violated when she is punished, a guilty person's rights can be violated when she is over-punished. Finally, if one regards Sandra's loss of sanity as a form of punishment, one might plausibly allege that any additional punishment administered by the state would be excessive, and thus would violate Sandra's right against being subjected to a disproportionate punishment.

I have two worries about this very intriguing suggestion. First and most obviously, I have some sympathy for the notion that the misfortune a criminal has experienced since committing the crime is a mitigating circumstance that may be taken into consideration when determining an appropriate punishment, but I remain uncomfortable with the idea that "the universe" can punish criminals. (In this vein, consider element (iv) of H.L.A. Hart's iconic definition of punishment: "It must be intentionally administered by human beings other than the offender."<sup>22</sup>) More specifically, if Lucky and Unlucky commit a crime together and are not caught until five years later, I certainly would deny that Unlucky can assert a moral *right* to a lesser punishment because of how much worse her life has gone than Lucky's over the last five years. And second, it is not clear to me that losing one's sanity would always necessarily be at least a proportionate punishment. Imagine an alternate conclusion to World War II, for instance, wherein Hitler fled to Argentina where he was finally captured, but only

---

<sup>22</sup> H.L.A. Hart, "Prolegomenon to the Principles of Punishment," reprinted in H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Oxford University Press, 1968), p. 5.

after he had lost his sanity. I know of no algorithm with which to determine precisely what punishments fit which crimes, but it does not seem unreasonable to suggest that Hitler behaved so monstrously that (while he may not have forfeited his right against any conceivable punishment) even his complete loss of sanity would not be a proportionate punishment. This observation is important because I am more confident that it would be wrong to prosecute and punish Insane Hitler than I am that punishing Insane Hitler would necessarily be an *over*-punishment. In light of this, it seems to me that the source of my worries about punishing criminals who have lost their sanity after committing their crimes must be something other than my concern to avoid excessive punishment. And given these two reservations, I would not want to rely on this proposal as my account for why there are principled grounds on which to object to punishing those who have lost their sanity since the commission of their crimes.

My own explanation as to why it is impermissible to punish Insane Sandra for Sane Sandra's crime is that Insane Sandra is not the same person as Sane Sandra. (Without taking a stand on whether Insane Sandra is a person or not, let me simply say that, if she is a person, she is not the same person as Sane Sandra.) Insane Sandra certainly seems *related* to Sane Sandra (the former strikes me as something of a descendent of the latter), and she may well be a direct beneficiary of Sane Sandra's crime, but neither of these facts renders Insane Sandra morally liable to punishment. To appreciate this point, imagine that Sandra's mother had stolen the money from the treasury and then bequeathed it to Sandra when she died. I concede that Sandra may not be entitled to keep the loot that her mother stole, but everyone recognizes that Sandra should not be punished for her mother's crime. It is telling, I think, that we would say the

same thing about Insane and Sane Sandra; namely, while Insane Sandra's insanity does not entitle her to keep the money Sane Sandra stole from the bank, it does entail that Insane Sandra should not be punished for Sane Sandra's crime. In sum, just as Sandra is related to, but distinct from, her mother, Insane Sandra is related to, but distinct from, Sane Sandra. As a consequence, Insane Sandra may have no right to retain what Sane Sandra stole, but she does have a moral right not to be held criminally responsible for Sane Sandra's wrongdoing.<sup>23</sup>

---

<sup>23</sup> Against my contention that Sane Sandra and Insane Sandra are distinct persons, one might note that friends and family would likely continue to visit, care for, and pray for Sandra's recovery. In response, I would point out that friends and family often visit (and "talk to") the grave sites of their loved ones, so our behavior towards Insane Sandra may not be an infallible guide as to her personal identity with Sane Sandra. On my view, regardless of how friends and family might describe their hopes that Sandra will "recover from her insanity," we should understand these as hopes that Sane Sandra will return.

As Patrick Tomlin has suggested to me, those who are uncomfortable with this account of personal identity have a number of less extreme options open to them, including insisting that (although Sane Sandra and Insane Sandra are the same person) Insane Sandra is not morally responsible for Sane Sandra's actions. As Victor Tadros notes, "As the connection between the person as they are now and the person who committed the offence weakens, as it does over time, we have less reason to punish the person, and we are more likely to conclude that punishing her is disproportionate. Imposing severe punishments for offences committed many years ago, even if those offences were very serious, can seem disproportionate. The strength of the connection

In the end, then, I agree with Duff that there are principled reasons not to prosecute or punish those who have become insane after their wrongdoing, but I deny that this vindicates the pre-institutional right to be heard. I continue to value Duff's account of trials and punishments as an insightful rational reconstruction of what liberal democratic regimes currently (aspire to) do, but I do not think there is a general moral right to be heard which requires all societies to design their judicial systems to utilize inclusive, fair and reliable processes for publicly determining the guilt of each defendant. And I do not regard the requirement that we refrain from prosecuting and punishing defendants who have lost their sanity as a glaring counter-example to my position, because I believe this prohibition is better explained by the impermissibility of vicarious punishment.

### **The Human Right to Due Process**

Article 10 of the Universal Declaration of Human Rights states that "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." People routinely mock the putative human right to paid holidays, many question the human right to health care, and since the publication of Rawls's *The Law of Peoples* it has become fashionable to wonder aloud about the human right to democracy, but *no one* doubts that there is a human right to due process.<sup>24</sup> So the fact that my

---

between the person as she is now and the person as she was when she offended may help to explain this appearance." *The Ends of Harm* (OUP, 2011), pp. 308-9.

<sup>24</sup> John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999).

position seems to imply that we must dramatically revise the core international human rights documents will strike many as a decisive objection. The reasoning behind this criticism is straightforward: Human rights are often conceived of as being a subset of individual moral rights which are distinguished in terms of their connection to basic human interests, and they are also typically understood to be particularly urgent moral rights which must be respected by all legitimate states. But if I deny that there are moral rights to due process, clearly my view is incompatible with the existence of universal and especially weighty moral rights to due process. And given that I have explicitly argued that states are at liberty to play fast and loose with their criminal legal procedures if doing so would enable them to maximize various institutional goals, I certainly cannot allege that due process rights are morally sacrosanct commitments from which no country may permissibly deviate.

This line of critique is tempting, but it should be resisted because of its failure to distinguish between moral and legal human rights. I think the best way to read the core human rights documents like the Universal Declaration of Human Rights (UDHR) is as statements of international law. In other words, the UDHR undeniably purports to list human rights, but these are best understood as international *legal* rights. Of course, those who press this critique against my view might concede that human rights documents are designed to create international legal human rights but insist that these documents champion the particular rights they do only because of a belief in corresponding (and pre-existing) moral rights. In other words, documents like the UDHR are designed to create legal rights which faithfully capture our convictions regarding moral human rights.

I do not doubt that many conceive of the UDHR in these terms, but the most sophisticated theorists in this area certainly reject this approach. In *The Heart of Human Rights*, for instance, Allen Buchanan emphatically rejects the idea (which he calls “the mirroring view”) that “to justify an international legal human right typically involves defending the claim that a corresponding moral human right exists.”<sup>25</sup> Against the mirroring view, Buchanan advocates a “pluralistic justificatory methodology” which “allows for the possibility that in some cases, perhaps many cases international legal human rights can be justified without appealing to corresponding, preexisting moral rights, but instead by appealing to other moral considerations.”<sup>26</sup> To see the logic behind this approach, notice that domestic lawmakers routinely create legal rights which do not correspond to antecedent moral rights and make laws which fail to legally protect antecedent moral rights. Consider how such lawmakers might deliberate about whether to legalize physician-assisted suicide, for instance. Legislators should no doubt consider whether physicians have a moral right to assist in suicides, but this is certainly not the only relevant consideration. Lawmakers might have compelling reasons to create a legal right to physician-assisted suicide even if there is no antecedent moral right, and they may have sufficient reason to criminalize this practice even if physicians have a moral right to engage in it. And if we recognize that legal rights need not strictly correspond to pre-existing moral rights in the domestic realm, it should be clear that the two need not mirror one another in the international legal arena either.

---

<sup>25</sup> Allen Buchanan, *The Heart of Human Rights* (New York: Oxford University Press, 2013), p. 17.

<sup>26</sup> Allen Buchanan, *The Heart of Human Rights*, p. 43.



With this in mind, it is worth retracing James Nickel's defense of human rights to due process. In general, Nickel proposes six steps to justifying a specific human right:

The first step requires showing that people today regularly experience problems or abuses in the area protected by the proposed right. The second step is to show that this norm has the importance or high priority that is a key feature of human rights. We do this by showing the right protects things that are central to a decent life as a person...The third step in justifying a specific human right involves seeing if the proposed norm...can...be formulated as a right of all people that they have independently of recognition or enactment at the national level...The fourth test requires showing that a norm as strong as a right is needed to provide this protection, that no weaker measures will be sufficiently effective. The fifth criterion is that the burdens the right imposes are neither excessive nor severely unfair. The sixth and final test requires that human rights be feasible to implement in an ample majority of countries today.<sup>27</sup>

For our purposes, we can focus on the first two steps which (as Nickel acknowledges) follow from Henry Shue's recommendation that human rights should be thought of as "a rationally justified demand for social guarantees against standard threats."<sup>28</sup> Putting all of this together, we conclude that, while the framers of international legal documents like

---

<sup>27</sup> James W. Nickel, *Making Sense of Human Rights*, p. 70.

<sup>28</sup> Henry Shue, *Basic Rights*, 2<sup>nd</sup> edition (Princeton: Princeton University Press, 1996), p.

the UDHR need not ignore questions about antecedent moral rights, their primary focus should be on the standard threats to living a minimally decent life in modern society.

Having adopted this approach, Nickel is well-positioned to furnish a strong defense of international legal human rights to due process, given his observation that “Tyrants throughout history have used the institutions, personnel, and sanctions of the criminal law as means of imposing their arbitrary and unjust rule. They throw their enemies and political opponents into jail, have them executed, or take away their property. The authors of historic and contemporary bills of rights were well aware of these dangers and accordingly gave due process rights a prominent place.”<sup>29</sup> In short, we can offer a compelling case for creating international legal human rights to due process in view of the obvious fact that one of the standard threats to living a decent life has historically been the abuses perpetrated by those who control the criminal legal institutions.

Nickel’s analysis is particularly instructive, in part because he is one of the most sophisticated human rights theorists, but also because he believes in moral rights to due process and thus has no stake in my thesis that there are no general, moral, judicial procedural rights. Thus, not only do I take solace in the fact that nothing about my position precludes me from affirming Nickel’s defense of international legal human rights to due process, I am especially heartened that a leading human rights theorist would pursue this particular approach *even though he could have focused exclusively on moral rights to due process instead*. We can thus safely conclude that, while my position certainly denies the existence of an entire category of moral rights which most of us are

---

<sup>29</sup> James W. Nickel, *Making Sense of Human Rights*, p. 106.

pre-theoretically inclined to accept, it does not place me at odds with the best understanding of core international legal documents like the Universal Declaration of Human Rights.

### **Conclusion**

Few believe that there is a pre-institutional moral right to drive a certain speed along a given stretch of highway, and not many of us would claim that states are morally barred from altering their statute of limitations so as to extend the amount of time before citizens become legally immune to criminal prosecution for earlier crimes.<sup>30</sup> Some judicial procedural rights, however, are typically regarded as non-negotiable. If any country refused to treat its subjects as innocent until proven guilty, if it prosecuted citizens multiple times for the same crime, or if it punished suspected criminals without first duly establishing their guilt via a fair, reliable and public trial, for instance, then critics would rush to denounce the offending regime for egregiously violating the basic moral rights of its constituents. If my arguments in this paper have been on target, however, then such a critique would be misguided. Governments clearly have pressing reasons to carefully design their criminal legal institutions so that none of their citizens is vulnerable to being wrongly punished, over-punished or otherwise harassed by government officials, but their reasons for doing so do not derive from antecedent moral procedural rights. Absent special circumstances, there are no pre-institutional procedural

---

<sup>30</sup> Interestingly, in the midst of some extremely helpful comments on an earlier draft of this essay, Duff acknowledged that there is no pre-institutional moral right not to be tried twice, or tried more than N years after an alleged offense.

rights, not even a right against being punished without first being found guilty by a fair and reliable process.