

# Multilateral Retributivism: Justifying Change

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**Abstract:** In this paper I argue for a theory of punishment I call Multilateral Retributivism. Typically retributive notions of justice are unilateral: focused on one person's desert. I argue that our notions of desert are multilateral: multiple people are owed when a moral crime is committed. I argue that the purpose of punishment is communication with the end-goal of reconciling the offender to society. This leads me to conclude that the death penalty and life without parole are unjustified because they necessarily cut communication short.

## Introduction

I argue for a theory of punishment that I have called Multilateral Retributivism, which espouses a retributive notion of desert that is not limited solely to the offender but extends to others because *we all* deserve to communicate our condemnation of an act that does not live up to the moral standards of our community. I argue that we communicate our condemnation through punishment in order to instigate remorse in the offender, which should lead to a meaningful apology and our forgiveness. I conclude that life without parole and the death penalty are unjustified punishments.

## Multilateral Retributivism

I recommend a retributivism that is multilateral. Ordinarily, retributivism is thought of as *unilateral*, where the only person *owed* anything is the offender. If the offender receives the punishment he or she deserves, then the “moral scale” is re-balanced.

J.G. Murphy explains the “free-riding” theory of retributive justice that embodies the unilateral concept. All agents are forced to exercise some level of self-restraint by accepting our government and living under the rule of law. If someone breaks the law, he or she “violates a basic principle of fairness by being a free-rider on this cooperative scheme since he [or she] derives the benefits without



making the appropriate sacrifice.”<sup>1</sup> Thus, punishment can be seen as a debt owed to everyone else in order to re-even the playing field.

One problem with the free-rider articulation of the unilateral version of retributivism is that we do not naturally think like this. As Murphy points out, we do not think a murderer should be punished because he or she is a free-rider; we think punishment should occur because this person is a *murderer*.<sup>2</sup> More generally, the unilateral version of retributivism does not line up with widely held intuitions. If it only mattered that the offender received his or her desert, then we could, hypothetically, punish the offender in secret; the victim and society should not have to *know* the offender is being punished. According to unilateral retributivism, the scale would be re-balanced simply because the offender got what *the offender* deserved. Again, this does not seem right.

In multilateral retributivism the offender is not the only agent who is or should be *owed* something. Rather, we all deserve to know that the offender is getting what is deserved. A critic may wonder: why do we *deserve* to know that the punishment is taking place? I answer: as a community of moral agents, we deserve to know that we have communicated our condemnation of an act expressed through punishment. I defend this communicative aspect of multilateral retributivism by supporting three claims: (1) the purpose of punishment is communication, (2) punishment is the best mechanism for this communication, and (3) we deserve to see our communication carried out.

## The Purpose of Punishment

The purpose of punishment is to communicate our condemnation of an act that does not live up to our values and moral standards as a community. In “The Expressive Function of Punishment” Joel Feinberg advocates a view similar to mine.<sup>3</sup> He argues that the purpose of punishment is to *express* our condemnation. He distinguishes between penalties and punishments. He says that penalties are like licensing fees: one can park in a reserved spot if one is willing to pay the fee. But there is something seriously different about an action, like a felony, that warrants a punishment. They are

<sup>1</sup> Jeffrie G. Murphy, “Some Second Thoughts on Retributivism,” in *Retributivism: Essays on Theory and Policy*, ed. Mark D. White, (New York: Oxford University Press, 2011), 97.

<sup>2</sup> *Ibid.*, 98.

<sup>3</sup> Joel Feinberg, “The Expressive Function of Punishment,” *The Monist* 49, no. 3 (1965): 400.

both "authoritative deprivations for failures; but apart from these common features, penalties have a miscellaneous character, whereas punishments have an important additional expressive function."<sup>4</sup>

We express our condemnation of an act that does not meet our moral standards and values because, as R. A. Duff says, "We owe it to ourselves collectively, as members of a polity that defines itself by a shared commitment to certain values."<sup>5</sup> Duff explains that civil society is not and cannot be made up of strangers who have nothing in common. He intends "in common" as in a "shared understanding of the values that define [our] civic life."<sup>6</sup> Perhaps the most important shared understanding we have is the standard of how we treat one another. Our laws formally define what we expect from the members of our community, and our criminal justice system enforces that expectation through punishment. "What a community chooses to punish, and how severely, tells us what it values and how much."<sup>7</sup>

Punishment expresses our resentment, indignation, disapproval, and, ultimately, our condemnation. For larger infractions like murder or theft we can see how the expression of our condemnation could escalate to an irrational and inhumane vengeance. Luckily, infringements of this higher level are institutionalized to provide more humane, fair, and objective expression of the community's condemnation. Our criminal justice system tames our natural inclinations towards our potentially over-reactive vengeance. I think J.F. Stephen makes a great analogy: "The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite."<sup>8</sup> The same goes for our retributive notions; these notions are of the utmost importance and should be respected, but they must be constrained in order to be most effective in promoting justice.

Another important aspect to note is that the expression of our condemnation is not separate from the punishment itself. We do not express our condemnation and *then* punish the offender.<sup>9</sup> The expression of condemnation accompanies the punishment because punishment symbolizes public reprobation. Feinberg analogizes this

<sup>4</sup> Ibid.

<sup>5</sup> R. A. Duff, "Responsibility, Restoration, and Retribution," in *Retributivism Has a Past: Has It a Future?*, ed. Michael H. Tonry (Oxford: Oxford University Press, 2011), 72.

<sup>6</sup> Ibid.

<sup>7</sup> Michael Wenzel, Tyler G. Okimoto, Norman T. Feather, and Michael J. Platow, "Retributive and Restorative Justice," *Law and Human Behavior* 32, no. 5 (2008): 382.

<sup>8</sup> James Fitzjames Stephen, *General View of the Criminal Law of England*, (London: 1863), 99.

<sup>9</sup> Feinberg, "The Expressive Function of Punishment," 402.



symbolism to black being the color of mourning or champagne being the alcoholic drink of celebration.<sup>10</sup> Punishment *itself* is expressing the community's condemnation of an action.

I advance Feinberg's view beyond mere expression to communication of condemnation. If an inanimate object fell and caused a drink to spill on you, you would not give the object an expression of your anger like you would a person. This is because a person (a moral agent) has the ability to respond. This can be termed *reactivity* (what you do in response to the moral action) and *co-reactivity* (how the offender reacts to your reaction). We do not merely express our indignation and then walk away. We expect the offender to respond in some way. For our communication to be complete, we will react to the offender's co-reaction. For example, if a person apologizes, we may forgive him or her. Punishment is more than expression; it is part of a communication.

### **The Mechanism of Communication**

Thus far I have argued that the purpose of punishment is to communicate our condemnation of an action. One may wonder: if the point of punishment is communication, why can we not make the mechanism of communication more like normal communication itself? Why do we need to involve hard treatment like jail time? Why not just send offenders angry letters condemning their actions?

R.A. Duff's paper, "Responsibility, Restoration, and Retribution" is very helpful here. He argues that punishment makes our communication of condemnation extremely effective by making it harder to ignore.<sup>11</sup> If our mechanism of communication is just a letter of conviction or some other gesture, it can be easy for offenders to ignore.

The main reason that punishment is an appropriate mechanism is that it can create a *meaningful apology*. We communicate in order to instigate a response (ideally an apology), and punishment is how we communicate. Duff argues that punishment is the best way to create an effective apology: "[when] the wrong is more serious, or when the victim and the wrongdoer do not stand in the kind of relationship in which words can carry sufficient moral weight, words

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<sup>10</sup> Ibid.

<sup>11</sup> Duff, "Responsibility, Restoration, and Retribution," 78.

are not enough, since words can be too cheap and too easy."<sup>12</sup> The *burden* of punishment can give an apology meaning because it allows the offender to understand the weight of the crime committed. And, although we cannot make offenders go through the exact same thing as their victims, we can still enforce the burden of hard treatment. If the offender goes through a proportional hardship, then he or she can further sympathize with the victim's pain and, hopefully, understand the gravity of his or her infringement upon the moral standards of the community, thus allowing for the potential of a meaningful apology.

### **Knowledge of Communication**

If punishment is an apt mechanism to communicate condemnation, we may ask: why do we have to *know* that this communication through punishment is happening? The first and most practical reason is that if we do not know of punishments, then the government cannot be held responsible for, say, reducing sentences for cost-efficiency or sentencing overly harsh punishments. Basically, the government needs to be held in check by the people.

A second reason for public knowledge of condemnation through punishment is because the offender's punishment is the beginning of his or her response: the co-reaction. While a criminal's sentence is not his or her *actual* response to us, we do know that the criminal will experience that sentence as a burden. We are entitled to know the burden the offender will endure. This is something we need to know because, as I mentioned, a burden can make an apology meaningful. If we know the punishment, we know that there is potential for the offender to make a meaningful apology. If we did not know the punishment, we could not know if there were the potential for a meaningful apology. Knowing the burden, and thus the potential for meaningful apology, gives us the ability to truly forgive the offender.

### **Communication Restrains**

It may appear that I am attempting to justify our current criminal justice system as it is. However, the way I have looked at our system entails the need for significant change. We have established

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<sup>12</sup> *Ibid.*, 72.



that offenders and society at large deserve communication when an offense has been committed. This communication is inherently two-way; it is a conversation. We communicate through punishment in order to elicit a meaningful apology. But this cannot be the end of it. The point at which the apology is accepted and forgiveness is given is the point at which the scales are rebalanced; everyone has gotten what they deserve. The victim(s) deserved a meaningful apology that they could accept, and the offender deserved punishment and eventual forgiveness (if earned). The way we communicate our forgiveness as a society is by receiving the offenders back into our community and relieving them of their punishment.

Not every criminal will or should be forgiven, but every criminal *can* be forgiven if the punishment has produced a meaningful apology. Once a meaningful apology is made, it *should* be accepted. If not, we are merely unjustly holding a grudge. It is unhealthy for victims to hold onto grudges of this sort. Kevin Carlsmith argues that people who cling to vengeful attitudes actually become angrier.<sup>13</sup> What makes victims feel best is eventually letting go. “Revenge can prolong people’s hedonic reactions to a transgression because punishing others can cause people to continue to think about (rather than forget) those whom they have punished.”<sup>14</sup>

We must allow for the potential of an apology and forgiveness because the purpose of punishment, as I have justified it, is to communicate our condemnation. Multiple parties are owed something under this justification, and punishments such as the death penalty or life without parole prematurely sever communication. They do not allow the *possibility* of forgiveness. This would be not to allow for the purpose of punishment in the first place (communication) by eliminating the potential for the offender’s co-reaction, thus eliminating his or her chance to be forgiven, and eliminating the opportunity for all to get what is deserved from the conversation. Communication, as the purpose of punishment, begins a moral conversation that we cannot, and should not, cut short.

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<sup>13</sup> Kevin M. Carlsmith, Timothy D. Wilson, and Daniel T. Gilbert, “The Paradoxical Consequences of Revenge,” *Journal of Personality and Social Psychology* 95, no. 6 (2008): 1316–1324.

<sup>14</sup> *Ibid.*, 1324.