

## Dialog with a Retributivist

On January 1, 2009, I posted a link on the Crim-Prof list serve:

This link will take you to a letter from Missouri Supreme Court Judge Michael A. Wolff (former Chief Justice) and Chair of the Missouri Sentencing Advisory Commission, and Oregon Chief Justice Paul J. DeMuniz to the [Obama] Transition Team regarding civil rights and sentencing: <http://home.comcast.net/~smmarcus1/SCtJsLettertoTT-r4.pdf>

On the same day, Professor Tony Dillof of Wayne State University responded:

Judge Marcus,

Thank you for providing a link to the letter to the Obama Transition Team. I cannot gauge the level of interest across crimprof, but it was of interest to at least one member. Skimming through the letter, the following thought occurred to me, which I will pass on to you. (Please feel no need to reply.) There are many in the legal academic community, and likely in the legal community generally, who adhere to some measure to the principle that retributivism should be the primary guide to the imposition of criminal sanctions. Perhaps I am one of those. From my readings of your writings, you clearly are not. You and retributivists likely will disagree on the appropriate penalty for a seventy year old man who kills in the heat of passion and who will never likely engage in such acts again. Nevertheless there is a lot that retributivists and you can likely agree on, for example, that the current sanctions for drug offenses and some property crimes are too high. I suggest that it would be to your strategic advantage to form limited alliances with retributivists on such issues. Piecemeal reform might be a more practical approach to sentencing reform than trying to achieve the wholesale adoption of the evidence-based risk-assessment measures you champion.

On January 2, 2009, I responded:

Prof Dillof: I think you miss the point where I am simply asking that we identify what "retribution" is supposed to be accomplishing, and demand that it be held to those tasks instead of allowed to provide immunity by its mere invocation for sentencing that accomplishes neither public safety nor that which retributive functions legitimately seek to accomplish. Surely, the legitimate function of punishment cannot be to immunize judges and prosecutors from any and all accountability for serving any social purpose other than invoking a label. As for the tactical issue, I have become convinced [which of course doesn't mean I'm right] that allowing retributive labels to justify sentencing which spawns brutality without serving utilitarian goals or any others is the enemy of any meaningful reform and must be dealt with directly. I do not reject the legitimate purposes of "just deserts," but attempt to identify them: preventing vigilantism and private retribution; promoting pro-social values; serving the needs of victims. At the very least, we should not deviate from sentences best crafted to reduce criminal behavior by the offender unless responsible consideration of how and

to what extent those legitimate purposes actually require deviation. So I don't see this to be a crime control vs retributivism debate, but one between accountability and irresponsible immunity.

On the same day, Prof. Dillof replied:

Michael, I still feel that there is a significant crime control versus retribution debate underlying a lot of this. Retributivists are for transparency and are against using labels and slogans as shields for unreasoning sentencing. So there is common ground. But I think dodge the debate when you redefine the ends of retributivism in ways most retributivists would reject. Everyone believes some things are intrinsically valuable and most believe that justice is one of those things. Thus, just compensation to tort victims is a legitimate goal even if it furthers no other ends, like deterrence or vigilantism, at all. Likewise, the retributivist believes that harsh treatment to culpable wrongdoers is just and needs no further justification. Obviously you disagree as a general matter, and that's fair. (I'm not quite sure what your position is on recidivist drunk drivers, intrafamilial sex cases, etc.) But there is a real disagreement. Disagreement on principle, however, should not prevent agreement in practice. The most obvious case I think is drug cases. I believe that both you and most retributivists would be in favor of lesser penalties in many drug cases. So I do not see retributivism, even defined in the strict sense that I use it, as the enemy of meaningful reform.

On the same day, I responded:

I think the punishment for the case types I mentioned should be crafted to serve the purposes I identified with responsible attempts to gage what that really takes. The child sex abuse victim may need significant punishment for the offender to accept her innocence in the event(s). the family of the victim of the drunk driver may need some years in prison, as might the public for a sense of justice sufficient to maintain public trust and confidence for the law, etc. But the notion that "the retributivist believes that harsh treatment to culpable wrongdoers is just and needs no further justification" is essentially a declaration of independence from responsibility for accomplishing even those purposes which "harsh treatment to culpable wrongdoers" should serve. It is inconsistent with meaningful reform because if sentencing can avoid justification merely by invoking retribution, it can [and generally does] escape all accountability. The notion is fundamentalist and spawns archaic, brutal irresponsibility while amounting to the single largest impediment to improvement in sentencing.

On January 4, 2009, Prof. Dillof replied:

Michael, You write: "But the notion that 'the retributivist believes that harsh treatment to culpable wrongdoers is just and needs no further justification' is essentially a declaration of independence from responsibility for accomplishing even those purposes which 'harsh treatment to culpable wrongdoers' should serve. It is inconsistent with meaningful reform because if sentencing can avoid justification merely by invoking retribution, it can [and generally does] escape all accountability."

But invoking retributivism no more avoids accountability than invoking any other theory of punishment. For example, if utilitarianism is invoked to justify punishment P, then P may be criticized on the grounds that (a) it is inconsistent with utilitarianism, or (b) utilitarianism is irrelevant to

punishment. Likewise, if retributivism is invoked to justify punishment P, then P may be criticized on the grounds that (a) it is inconsistent with retributivism, and (b) retributivism is irrelevant to punishment. So, as a formal matter, retributivism no more avoids accountability than invoking any other theory of punishment. Furthermore, I do not believe that with respect to either (a) or (b) retributivism is more immune to legitimate criticism than others theories, such as utilitarianism.

Finally, retributivism, as I sure you are aware, contains a limiting component--a person should be punished no more than retributive justice requires. I think that harsh penalties that many states have enacted for drug offenses exceed retributive limits. Since harsh drug penalties are perhaps the major target of reform for "progressive" penologists, I would think there would be common ground with retributivists.

On the same day, I responded:

Thanks for continuing this discussion.

My proposition is not that retributivism inherently avoids responsibility, but any theory that "needs no further justification" can, and retributivism as practiced does, avoid responsibility for any outcome. It's that "needs no further justification" part that makes it irresponsible. That one or another explanation or theory of application can or cannot be "criticized" is besides the point; the issue is whether it can be measured, quantified, or held to any measure of validation.

Utilitarian theories can be at least in large part validated: this sentence did nor did not prevent the offender's next crime, generally reduce (or not) the recidivism of like offenders sentenced for like crimes.

True, many of the components that I concede to be legitimate functions of "harsh treatment" [or any other means that might seek utilitarian or other purposes of sentencing] may be harder to measure. But that doesn't spare them the need for "further justification." We can and do measure a good deal of this, and can and should measure a lot more. The utilitarian goal of general deterrence is as evasive of reliable quantification as the "public trust and confidence" part of what I consider a legitimate component of just deserts. The needs of actual victims are also a legitimate part of just deserts; they are often easier to assess than the utilitarian theory of general deterrence.

Note that although general deterrence is difficult to measure [the economic model approach reduces to an analysis of severity, certainty, and celerity -- with severity usually coming in last in terms of likely impact], merely having the discussion about whether we really expect general deterrence to work has had a remarkable impact on whether and when advocates actually invoke it. The impression of most advocates has clearly grown that impact in the form general deterrence is rarely a rational expectation in any meaningful sentencing choice. That growth is the function of unwillingness to spare general deterrence "further justification."

When any component of purpose is afforded immunity from "further justification," it has the potential to shield all participants from any accountability. Just deserts has that impact on mainstream sentencing. Accepting that anything needs no "further justification" is tautologically and in fact affording that thing immunity from accountability.

Accordingly, I see no common ground whatever in the notion that harsh consequences need no further justification.

The common ground I see is in the propositions early in the joint letter that drew your attention.

Public safety is surely a purpose of sentencing. These include specific and general deterrence [to the extent that they are rationally pursued and reasonably expected] as well as incapacitation and rehabilitation [with the same qualifications]

The rest of the legitimate purposes of sentencing I group as "public values." The "harsh consequences" means of pursuing public values [apart from the specific and general deterrence utilitarian objectives, which are public safety objectives] includes denunciation to promote the values at stake when the criminal conduct is condemned, and obviating vigilantism and private retribution. Harsh consequences often promote public trust and confidence, and sometimes serve victims, as do other means such as restitution and victim-offender mediation. Public values are also served by the proportionality limits that you mention [a subset of "public values" in my formulation, which is a mere analytic convenience], as are the restorative justice objectives of addressing empathy, respect for the persons, property, and rights of others.

The piece now in print [more advanced versions are in the pipeline] that addresses all of this is Responding to the Model Penal Code Sentencing Revisions: Tips for Early Adopters and Power Users, 17 S Cal Interdiscipl LJ 68 (2007) (includes A Harm-Reduction Sentencing Code) <http://ourworld.compuserve.com/homepages/SMMarcus/USCIDLJTips.pdf>

So I see the bases for common ground are that rational assessment of what we are trying to accomplish and what is likely, or not, under what circumstances to accomplish those objectives, does not require that we adopt wholesale adoption or rejection of retributive or rehabilitative or utilitarian approaches. It requires identifying the goals; I believe I've captured them all under "public safety" or "public values." The other basis for common ground is that we should be accountable when allocating public resources, as sentencing surely does, that we are accomplishing something of value with public resources.

The tent I envision is enormously inclusive.

It has no place for immunity from accountability.

On the same day, Prof. Dillof responded:

Thanks for your response. I'll try to keep this brief because I think it may be a more efficient way to pursue the conversation.

I think your criticisms of retributivism are misplaced. You criticize it on the ground that it "needs no further justification." On one hand this is correct. The retributivist believes (roughly) that harsh treatment in proportion to blameworthiness is intrinsically desirable and hence needs no further justification. The same, however, can be said for utilitarianism. The utilitarian believes that a net increase in social welfare, which results from harsh treatment, is intrinsically desirable and hence needs no further justification. The theories are equal in this respect.

You also criticize retributivism on the ground that its recommended punishments cannot be measured, quantified, or held to a measure of validation. Not so. Retributivists believe (roughly) that harsh treatment should be in proportion to blameworthiness. Thus the harshness of the treatment must be measured, as well as the blameworthiness, which is a function of responsibility and harm.

Executing shoplifters or the insane fails the retributive measure of validation. Of course, measuring responsibility and harm is not a purely empirical matter; some evaluation is needed. But this is no different from utilitarianism. The utilitarian seeks to increase net social welfare and so must try to measure social benefits and costs and weigh them against each other. Doing this can involve empirical questions that are practically unanswerable. Doing this also involves evaluative assessments. How much "harm" does one incident of rape produce? How does this harm compare with the harm of putting a person in prison for life, or of denying a school child an education because funds have been diverted to prisons? This is empirical/evaluative question is no different from the type of empirical/evaluative question retributivist asks. Both, for example, must assess the harm of rape.

In sum, I think it is fair to reject retributivism on the ground it's morally in error insofar as it asserts that punishing the blameworthy has intrinsic value. You might think that it doesn't have intrinsic value and that the only thing that does is social welfare. But this is a substantive disagreement about a moral matter, rather than a critique based on retributivism "needing no further justification" or being immune from validation.

I apologize if there are part of your previous email that I should have addressed, but I failed to.

On the same day, I replied:

First, it is not retributivism but rejecting the need for justification that I criticize. My point is, largely, that both retributive and utilitarian theories of punishment have legitimate components, and that each must be held to some level of accountability to keep it from misallocating resources, causing harm, and preventing actors from being held to some measure of outcome.

Second, that one can attempt to equate an offender's suffering with his victim's, or the degree of pain we should inflict as a matter of moral equivalency, begs the question of accountable to what.

Yes, you can continue the debate whether social benefit or outcome is "intrinsically" desirable, just as you can argue for or against the "intrinsic" value of punishment.

But I am paid by taxpayers, as are prosecutors. Taxpayers pay for prisons, probation, and some programs. The laws we act under variously direct our purposes, and holding us accountable for the purposes of sentencing and for responsible stewardship of the resources our sentencing choices allocate is quite a different matter than pondering whether social benefit has intrinsic value. The latter takes place in a realm which presupposes the potential illegitimacy of the rule of law - it's fine for philosophers, but not for public servants.

The law presumes that at least in general achieving compliance to its dictates is a good thing. Achieving that compliance [through utilitarian means or indirectly through the public value strategies I've alluded to] is a legitimate premise in the slice of social reality to which I have taken an oath of loyalty. Perhaps as a professor, you don't have to take an oath [which may depend on whether you teach at a state school and how its history corresponds with the McCarthy era]. Debate what values are intrinsic all you want in academia [or the sectarian world], but the real world in which I work and to which I have obligations does not allow me to see "theories are equal" when one would label social

benefit irrelevant to the validation of how we craft sentences. Perhaps that's the difference between the academic reality and the public one.

It is noteworthy that to dispute my proposition, you must equate the justification for harsh punishment beyond those benefits I identify [obviating vigilantism and private retribution, serving the legitimate needs of victims, promoting respect for the persons, rights and property of others (through negative means such as denunciation and positive such as restorative justice), maintaining trust and confidence] with the justification for social benefit. The work of a public servant is to benefit society; only ecclesiastical courts can with arguable legitimacy subvert that goal with speculations or faith that there are intrinsic values beyond those which serve society.

So I am not persuaded that we are free to end our inquiry about what it takes to achieve moral equivalency for, say, a rape, without also attending to how our choices affect the public value issues I've identified. The difference between the question you [and not I] attribute to the retributivist is that the retributivist you [and not I] postulate has done his work when he arrives at the "equivalent" punishment. The retributivism I embrace recognizes the role of "harsh consequences" in the welfare of a society, but continues the inquiry to determine how that role serves the purposes of victims and society as applied to a specific sentencing inquiry. Part of that analysis is what does it take to achieve tangible justice for the victim, to maintain public trust and confidence, respect for the persons, rights, and property of others, to avoid vigilantism and private retribution, etc. The next step is whether any of that requires an adjustment to the sentence that best pursues public safety. If it requires adjustment, I adjust.

Retributivism, by the way, involves not just the blameworthiness of the offender but also the harm caused or threatened by his crime.

I don't reject utilitarian or "harsh consequences." I embrace proportionality, though as a subset of public values in my public safety/public value construct. You are free to promote any notion you feel like promoting; you can argue that there is no intrinsic evil or intrinsic good; that social welfare is as arbitrary a standard as any other; that God is alive or dead.

I don't have and don't want that freedom. I serve a social order which demands that I value public safety and act responsibly with the choices the law gives me subject to real restrictions of resource and priority.

But I submit that retributivism that "needs no further justification" is unavoidably irresponsible to social welfare when it competes with and subverts the allocation of resources to achieve social benefit. You may disagree, but I cannot follow you into the rarified realm of what I perceive as sophistry. [no disrespect intended - really]

On January 10, 3009, Prof. Dillof replied:

Sorry for the delay in response, but I've been grading exams . . . .

Let me try again to explain my position, which I hope to show you is not sophistry.

1. Some things are intrinsically valuable.
2. Two things that are plausible candidates for having intrinsic value are states of affairs of high social welfare and just states of affairs.
3. Examples of high social welfare are physical safety and feelings of security.

4. Examples of arguably just states of affairs are people getting compensated for tortious injuries by tortfeasors and culpable wrongdoers getting treated harshly by society.

5. Rules of criminal sentencing ("Life imprisonment of murders") may arguably be justified on the ground they produce either intrinsically valuable state of affairs, that is, either security or justice.

6. My sort of retributivist who believes that people should be punished for culpably doing wrong (period) and your sort of utilitarian who believes people should be punished for increase security both seek to justify rules of punishment based on those rules' bringing about intrinsically valuable states of affairs.

7. Therefore the retributivist (my sort) no more can be accused of punishing without justification than a utilitarian. They just have different views about what is valuable.

8. The idea that just states of affairs are intrinsically valuable is not an academic one, but one that resonates with citizens generally.

If you disagree, please let me know at what point in my argument, so I may try to defend that point.

On January 11, 2009, I responded:

The intriguing difference between academia and the administration of justice is that an advocate who declines to respond to an argument supporting a motion in a court generally loses that motion, even if that advocate makes some other point eloquently. Had I moved for judgment on the pleadings, I would have won this conclusion by now: whatever the philosophical debate may continue between your position and mine, I am bound by my oath and my position as a public servant in criminal justice not to allow anything that "has no justification" to compromise my efforts to achieve what society wants me to pursue. Recall that I have consistently accepted accountability for pursuing in sentencing both public safety and public values, and that the latter certainly include recognizing that citizens expect harsh consequences to follow at sentencing when morally required by an offender's blameworthiness. The difference I have been attempting to argue with you is that I contend we in the sentencing business have no justification for allowing "harsh consequences" (or, for that matter, a disposition that is merely labeled rehabilitative) to displace best efforts at reducing criminal behavior when there is no justification for that displacement – because there is no responsible basis for the conclusion that the displacement is necessary to serve any of the pro-social purposes bundled within those "harsh consequences."

Instead of responding to that argument, you have continued to recast the issue as between utilitarianism and retributivism – a recasting that I have repeatedly resisted. What you are arguing instead is that from your logic it is incorrect to label your position "academic" or "sophistry." Remember that I essentially concluded my last email with the notion that you are right in your world, I in mine, but that I have duties that foreclose me from allowing precepts that have "no further justification" from compromising my pursuit of pro-social outcomes in sentencing. My conclusion was that "I cannot follow you into the rarified realm [your world] of what I perceive [in mine] as sophistry" – so you do not really respond to the question of what I perceive, but argue in the abstract that your position is in fact not sophistry [or "academic."]

Since we obviously have the “argue with a buzz saw” gene in common, I will respond even to the argument you pose from your world.

It is useful to define our terms. I’ve looked at the OED and Webster’s just to make sure, but the meaning I’m using for “sophistry” is the characteristic of an argument that appears plausible but ultimately is without substance. And the meaning of “academic” is not the favorable one of relating to formal study at an institution of higher learning, but that other one – “having no practical or useful significance.”

The core of your argument is this: “My sort of retributivist . . . believes that people should be punished for culpably doing wrong (period [= “without further justification”]) and your sort of utilitarian who believes people should be punished for increase[d] security both seek to justify rules of punishment based on those rules’ bringing about intrinsically valuable states of affairs [i.e., security or justice]. . . . Therefore the retributivist (my sort) no more can be accused of punishing without justification than a utilitarian. They just have different views about what is valuable.”

I must note that your characterization of “my” sort of utilitarian continues to ignore my repeated attempt to communicate that it is not just recidivism reduction [incapacitation, or deterrence] that I seek to optimize, but the “public values” part of my structure, which addresses all of the components of “harsh” treatment [and all legitimate aspects of sentencing other than direct crime reduction] I classify as legitimate. These are necessary to maintain public trust and confidence, which in turn is necessary to reinforce proscriptions of unlawful conduct [typically via denunciation] and promotion of respect for the persons, rights, and property of others. Our difference is the role of “harsh punishment” which goes beyond demonstrably serving any of those purposes.

I realize, of course, that you can reclassify all of my “legitimate purposes” of non utilitarian aspects of sentencing as “utilitarian” because they seek to serve the social order – a case that Paul Robinson makes quite well [except when he refuses to acknowledge that a sentencing paradigm which disavows directly seeking public safety can never achieve or merit public trust and confidence].

There are several levels on which even in your world your defenses against “academic” and “sophistry” are unpersuasive.

First, consider the sources of “intrinsic” value. Why is it that “just states of affairs” has intrinsic value? I suppose that you would argue that I’m missing the point of “intrinsic,” but consider the limits of “just states of affairs.” As you are undoubtedly aware, “eye for an eye” was a civilizing improvement on the previous dominance of unrestrained vengeance as a “just” response to violation of security of persons or property. So instead of annihilating the clan that kills a native son, we progressed to the just state of affairs of killing only one son of that clan. Do we now consider such a response “just”? No, because our sense of justice has evolved. But consider how that evolution works – we have learned [in addition to the social order consequences of vigilantism and private retribution] that it is not “just” to kill the innocent son of the offender’s clan. For the same reason, it is a logical fallacy that you can ignore public safety outcomes to craft a sentence based on “a just state of affairs” because in doing so you are reducing your attention to, responsibility for, and success at preventing the next victimization of an innocent victim. How can a pure pursuit of a “just state of affairs” tolerate the injustice of a victimization a more responsible consideration of justice would have avoided? Remember, here, that my approach is to serve public safety directly except to the extent that pursuing public values [including satisfying a public’s or victim’s sense of what harshness is



required in response to a crime] demonstrably requires adjustment of the sentence that best pursues public safety.

Second, This is as good a place as any to respond to your invocation of resonance with citizens generally. Yes, citizens generally agree that assault, theft, and violent crimes require punishment. But that's not responsive. What is responsive is that when asked, citizens rank public safety and "rehabilitation" ahead of punishment for its own sake – ubiquitously. [Cites on request]. Since citizens want recidivism reduction even more than they want punishment, you cannot separate responding to either demand from the other; an argument constructed on that separation is sophist and academic as defined above.

Third, since you are not proposing retributivism in the abstract but as a plausible guide for sentencing, you cannot escape its connection to the social order. We can [except for the nihilists among us], assume "intrinsic" social notions that murder, rape, and robbery call for punishment. But how does your paradigm fare across the full spectrum of the criminal law – particularly where the most common crimes dwell, and among the peculiar? We have chosen through the mechanisms of a complicated democracy to categorize some plants as unlawful to grow, some intoxicants as lawful and others unlawful to use or sell, and some times of the year as unlawful to kill some kinds of animals. The consensus weakens along all of these lines, as the diversity of state laws grows. We also have many laws which call for criminal penalties purely to preserve social order, criminalizing certain sorts of interference with elections and with various activities of government, and responding to the political weight of special interest groups – such as the utilities that insisted that posting flyers or graffiti on their equipment ought to be a felony.

The point is either you reserve retributivism for the biblical crimes or their ilk [and abandon the rest of sentencing], or you posit that there is "intrinsic" value in visiting some degree of harsh punishment for behavior whose proscription has meaning only in relationship to the real or supposed consequences for social wellbeing that underlie the criminal laws in question. If the latter, you are doomed to the logic that you cannot escape the social function which you disavow as soon as you insist on "no further justification."

Should you respond that there is intrinsic justice in harsh consequences merely for breaking the [criminal] law, I would ask why, exactly, is that? How is it that, say, the suffering inherent in "survival of the fittest" is not equally arguably of "intrinsic value," even if the result is the starvation and death of millions of poor people? Or that murder is not intrinsically valuable in service of the intrinsic value of natural selection? And how do you deal with the now-discredited Jim Crow laws, the Bush pretence of the lawfulness of torture, and numerous other examples of laws we would now deem morally wrong?

I submit that the ultimate answer must be some tie to the well-being of society, to social welfare. If "harsh consequences" are naturally required for law violations across the spectrum of the criminal law, that can only be because of the need for obedience to the law for the well-being of the social order. For that reason, and because you cannot spare "harsh consequences" "further justification" without spawning the obviously unjust avoidable victimizations resulting from unwarranted deviance from smarter sentencing, you can escape neither the accusation of "sophistry" in the sense of nice try, but ultimately without substance – nor the label of "academic" in the sense of "having no practical or useful

significance.” You cannot persuasively separate justice from the victimizations of innocents; there can be no “just state of affairs” in which harsh consequences without “further justification” cause future crimes; and punishment for crime cannot be “just” without conceding the underlying function of social benefit. The only escape is in a world divorced from the premise of social well-being – a world as remote from legitimacy as that of the nihilists.

At least this is so in my world, where I stand to entertain these perceptions. It is also the world in which I function as a public official.

By the way, I’ll know you got this far if you answer this question: I think this debate of some value beyond our own interest in pursuing it; do you mind if I make it available on my website?

On January 15, 2009, Prof. Dillof responded:

Please feel free to post all our correspondence.

Tony Dillof