

FALSE ACCOUNTING: WHY WE SHOULDN'T ASK PEOPLE WHO COMMIT CRIMES TO PAY THEIR DEBTS TO SOCIETY

Alice levins, Ben Jarman and Thea Reimer¹

The Prime Minister is putting prisons at the heart of our bold plan to create a justice system which cuts crime and protects law-abiding people. More and better prison places mean less re-offending and a lower burden on the taxpayer in the future. Boris's vision for policing shows this Government is serious about fighting crime. It is vital we have a world-leading prison estate to keep criminals off our streets and turn them into law-abiding citizens when they have paid their debt to society.²

This statement, given in response to the Prime Minister's announcement of 10,000 new prison places, puts the notion of a 'debt to society' at the centre of political discourse about punishment. The metaphor is familiar from daily life, but its mundanity discourages us from both questioning its justifications and understanding its implications. Most commonly, societal debt is understood to be 'paid off' when the offender has been punished enough. How this version of punishment pays *into* society, or how this form of repayment could add up to what criminal activity subtracts, remains unclear.

Despite (or because of) this lack of clarity, the debt metaphor is often used by theorists of punishment. It is perhaps most famously operative in the *lex talionis*, or rule of 'an eye for an eye', the logic of which is often considered vengeful to modern thinkers, and to imply without explanation that equitable injury can redress wrongdoing. Philosophers have attempted to give reasons why debts should be paid, most notably Herbert Morris, who argued that wrongdoers receive the benefits of social order without taking on the burdens of obeying the law. Punishing the wrongdoer resets the balance of benefits and burdens, Morris

¹ Authorship note: all three authors participated equally in the writing of and thinking for this article.

² Robert Buckland, UK Secretary of State, for Justice, and Ministry of Justice, "10,000 Extra Prison Places to Keep the Public Safe," Gov.uk - Prisons and Probation, August 11, 2019, <https://www.gov.uk/government/news/10-000-extra-prison-places-to-keep-the-public-safe>.

argues, by “taking from the individual what he owes, that is, exacting the debt.”³ Morris envisages punishment as not simply beneficial to society but as a *right* of the wrongdoer, as punishing them is the only way to respect their capacity to make choices and their responsibility for them, and with these, their humanity. The metaphor also asserts the right of the punished to have their punishment end. Buckland’s rhetoric, at least, implies that debts can be repaid. He speaks as if this balancing of the books permits newly-minted ‘law-abiding’ citizens to return to the moral community, once their debt has been paid.

Retributive thought is deeply concerned with questions of social responsibility, social order and social membership, then. Paying our moral debts is imagined as something we have both an obligation and a right to do. It affirms the norms by which we live and allows us to regain our membership of the civic community, which therefore has a corresponding duty to recognise our status within it. This way of thinking about penal debts certainly seems more attractive than that implied by the *lex talionis*, but it creates its own ethical and practical difficulties.

As it is commonly used, the metaphor of punishment as debt extraction imagines that those who are punished are expelled from the civic community, and the debt is imagined as a fee for readmission. This vision of expulsion is fundamentally exclusionary and does not help us think about what happens to people while they are being punished: for the metaphor to work, what matters is *that* debts are paid, not *how*. Furthermore, the metaphor offers no way to imagine what the process of re-entry might require or involve. It traps us in the past. All that the debt requires is repayment. What happens once the accounts are balanced—if they can be—is not of interest.

In what follows, we shall tell the story of one man imprisoned for murder in England and Wales, using it to show the limits of the ‘debt to society’ metaphor. In our conclusion, we offer a more inclusionary and generative metaphor to describe what we should do when a crime has been committed. This metaphor, which is inspired by the work of penal theorist Antony Duff,⁴ models a response to crime which does not solely seek to mend the past—as though that were possible—but instead to build a better future.

Before moving on, it is worth briefly noting that the story which we tell is based on research conducted in England and Wales, where two of the authors live and work. Some particularities will be specific to that jurisdiction, but our basic

³ Herbert Morris, “Persons and Punishment,” *The Monist* 52, no. 4 (1968): 478.

⁴ R.A. Duff, *Punishment, Communication, and Community*. (Oxford: Oxford University Press, 2001); R.A. Duff, “Offenders as Citizens,” in *The Routledge Handbook of the Philosophy and Science of Punishment*, ed. F. Focquaert, E. Bruce, and N. Waller (New York, NY: Routledge, 2020).

argument is applicable to any other in which the justifications for punishment are at all retributive.

Case study: The impracticality and injustice of paying your debts

It is one thing to argue that the metaphor is impossible to implement and that it upholds an unjust ideal, but another to show how. In early 2020, Derek was in his fifties, and had been in prison since his teens. Ben met him during research examining ethical thinking among men serving life sentences for murder. Derek had served his sentence in more than fifteen different prisons. His progress towards the low-security or ‘open’ prison where Ben met him had been halting and very slow. Resident there for many years, he was compliant and was trusted not to abscond, but plans for his release were complicated by his lack of social connections, the perception that he was risky, and his utter dependence on the state.

In England and Wales, the notion that the life sentence ‘pays a debt to society’ is questionable, not least because this contradicts the lifelong nature of the penalty. It is divided into two distinct parts. The first is a minimum term of imprisonment fixed in court by a judge (the ‘tariff’), lasting in very rare cases for the offender’s natural life, but mostly exacting a retributive penalty of prison years, calibrated to the offender’s culpability in the crime. If the ‘tariff’ represented a debt, Derek had paid it off some twenty years before Ben met him.⁵ But he remained in prison, during the second distinct part of the sentence. Legally speaking, then, his confinement was now no longer a punishment, but a measure protecting the public from him. The distinction meant little to Derek, for whom his imprisonment remained a punishment. His release, if ever ordered by a parole panel, would only ever be conditional: the meaning of the life sentence is that recall to prison is always a possibility. The ‘debt’ metaphor therefore does not function here, unless we accept that the debt can only be paid by his death.

But the most obvious flaw is that the past offers no guidance on how some moral debts (particularly the most serious) can be repaid. What is done cannot be undone. In Martha Nussbaum’s words,⁶ expecting punishment to *undo* the past is no more than ‘magical thinking’. This is most obvious in cases such as Derek’s:

⁵ When Derek was convicted, life sentence tariffs were set by the Home Secretary and not communicated to the prisoner until much later. Release decisions also rested with the Home Secretary. This untrammelled executive power was eroded gradually by human rights litigation in the 1990s and early 2000s, after which existing tariffs were all reviewed by the Court of Appeal. Derek learned his new tariff after it had already expired. If the ‘debt’ metaphor means anything, then in effect he did not know the extent of his ‘debt’ until he was told (while still in prison) it was already ‘paid’.

⁶ Martha Nussbaum, *Anger and Forgiveness: Resentment, Generosity, Justice* (Oxford: Oxford University Press, 2016), 24.

no matter what his punishment, his victim will not come back to life. Undoing the past therefore cannot justify punishing him, and some other justification for punishing him is required as a response to his wrongdoing, or else some other intervention altogether.

Alternative justifications for punishment have been suggested. One, proposed by Margaret Urban Walker⁷ and Jean Hampton⁸, would be to punish Derek to show that his crime mattered and that the harm done to his victim was wrong. Other justifications for punishment might include persuading Derek of the wrongness of his offence⁹ or helping him change his behaviour. These explicitly productive goals are more persuasive than the ‘magical thinking’ that a wrongdoer’s suffering rights their wrongs.

But Derek’s case raises questions about each alternative. Having pleaded guilty to the murder, it is questionable whether he needed persuasion of his wrongdoing. Of a police interview after he handed himself in, he recalled: “I was beside myself, really. I didn’t know how to explain my actions.” Derek might actually have welcomed a punishment helping him understand (and perhaps change) his behaviour. But he did not get this help, at least not in the early years of his sentence. The nature of his offence resulted in ostracism and stigma he found hard to bear:

“The offence I committed was so horrible that it warranted the gallows [...] I wasn't happy with my life. I had a feeling that [I'd] rather die [...] No indication of ever progressing. Spend the rest of my life in prison. I didn't really care whether I lived or died [...] It would be more humane for me to have gone out by the gallows [...] It was torment. There's no other way around it [...] It [was] prevalent in every establishment, in every jail, in every year.”

Derek’s hopelessness and indifference to his own life persisted for over twenty years. He made suicide attempts, self-harmed prolifically, isolated himself as much as he could, and was often heavily medicated. His experiences changed only after a member of prison staff pointed out that greater engagement with offending behaviour courses could result in Derek’s eventual release, a possibility Derek said had never occurred to him before.

⁷ Margaret Urban Walker, *Moral Repair: Reconstructing Moral Relations after Wrongdoing*. (Cambridge: Cambridge University Press, 2006).

⁸ Jean Hampton, “Correcting Harms versus Righting Wrongs: The Goal of Retribution,” *UCLA Law Review* 39, no. 6 (1991): 1659–1702.

⁹ For example: Duff, *Punishment, Communication, and Community*; Jean Hampton, “The Moral Education Theory of Punishment,” *Philosophy and Public Affairs* 13, no. 3 (1984): 208–38.

His experience of the courses was complex: he gained ‘insight into what I did, how I did it, and why I did it’, but groupwork also pushed him into disclosures which carried lasting consequences:

“The worst experience [was] having to declare the sexual element [of the offence] in front of other prisoners. That was always the trepidation [...] Because ever since [...] it's been passed on year by year to different establishments [...] Even here, I have to live with that [...] It follows you through word of mouth by other people [...] Even if they don't know you and have never spoken to you before in their life, they will comment about it [...] I mean, you get accused of certain things day in, day out, week in, week out, month in, year in, year out.”

Derek’s self-disclosures fulfilled his moral obligation to take seriously the wrongs he had done, and to try and be different. But they simultaneously renewed his ostracism and exclusion.

If serving the sentence and fulfilling its moral obligations were no more or less than what Derek owed, we miss how the price he pays for his offence differs from that paid by others for the same offence (murder). The debt metaphor distracts us from relevant questions about how to respond to wrongdoing, by implying that only the fact (and not the quality or the terms) of the repayment matters.

Another—again quite obvious—flaw with the metaphor is its limiting bidirectionality. It positions Derek as the debtor and the state as the creditor. This makes it hard to identify who owes what to whom, and to reflect the reality that the benefits and burdens of rule-following are unevenly distributed in society. On this basis too, the idea that punishment could restore equilibrium is unlikely, as is the idea that retributive punishment alone can achieve justice.

This point can be illustrated by shifting the focus from Derek’s crime to its antecedents. Born into a large family amid what he described as ‘squalor and violence’, he was taken permanently into state care before reaching school age, following neglect and violent abuse by his mother. He spent the rest of his childhood in a succession of children’s homes and boarding schools. Some memories of these places were warm, but others were only too familiar from accounts of similar institutions in the 1970s. Aged six, Derek was sexually abused by adult staff. Abuse continued, in a succession of institutions throughout his childhood. By his early teens, he was emotionally withdrawn, but was also having sex with other children and being abused by adults. Speaking of his mindset a few years later, around the time of his offence, he said:

“[All those] years of children’s homes [...] It’s hard work to live with. You don’t have any room in your head left for anything else. The thought I had, even when I was [with my mother], was: ‘Why is this happening to me?’ I didn’t warrant what she did, what was happening to me. I didn’t warrant the matrons... I didn’t warrant the abuse... the

physical abuse, the sexual abuse, the torture. I didn't warrant that. I was a child. Completely mixed up. And not exactly knowing what was going on [...] I couldn't make any sense out of what was happening and why, and so I just had to live each day as it came."

Of course, none of this can excuse the murder Derek committed. But the questions it raises—particularly about Derek's developing attitudes to authority, and his experiences of trust and betrayal—were highly relevant to his account of the offence. If his propensity to violence stemmed in part from the unpunished violence he was subjected to, then blame and punishment directed at him go only some of the way to addressing the wrongs.

The debt metaphor therefore again obscures much that is important. It suggests that the imbalance or disorder to be righted by the justice process is straightforward, linked only to the offence itself, and payable by Derek to the state. If the lethal and irreversible harms he inflicted on the victim cannot be righted, it implies that what must be put right are his transgressions against laws and the moral boundaries they delineate. But the harms done to other relevant parties hardly feature: the victim's family, for one (entirely absent from any of the prison records Ben reviewed);¹⁰ but also Derek himself. He had broken some of society's most important rules, but had also seen few exemplars of rule-following. Others had abused him, breaking laws with impunity, such that even he could not recognise his own victimisation at the time. This is not a moral order we should want to restore, even if punishment could do that.

In prison, Derek read in a newspaper that one of his abusers was being investigated by police for historical offences against children:

"[When I saw that] I thought, 'I know who he is'. [And] I thought, 'I'll sort him out' [by making my own allegations to the police] [...] And then it came out... he had a long... he had past convictions for it! And they still employed him in a children's home! I was down as a T[aken] I[nto] C[onsideration], an add-on to his prosecution.¹¹ A multiple abuser. And I'm just a TIC."

A note of indignation is evident here, prompted perhaps by the immense symbolic expectations Derek loads onto a bureaucracy which is nevertheless responsible for the cost-effective disposal of its caseload. Instead of being able to give his account of how *he* was victimised, he found himself just "an add-on", with his allegations appended to an existing prosecution. His words seem to question

¹⁰ The offence took place before victims' families acquired the legal right to make impact statements during the criminal justice process.

¹¹ We were not able to verify the facts here, but what this probably means is that when Derek's abuser entered a guilty plea to other charges, he asked for other allegations including Derek's to be taken into consideration in his sentencing.

whether criminal prosecution alone offered him a sufficient framework for justice.

The third flaw with the metaphor therefore becomes visible as we pursue it to its conclusion. We use the notion of a ‘debt to society’ as though everyone who commits the same crime incurs a similar debt. From this we conclude that punishments for similar crimes should be of equivalent severity. But debts are differentiated by interest rate, according to the debtor’s perceived ability to pay. Financial debts therefore have different effects for different people. Just as differentiated rates of interest can mean that those who have less pay more to borrow the same sum (and vice versa), so also punishments extract more from some, according to their pre-existing circumstances. This was particularly evident when Derek was compared to the very small number of men Ben interviewed who had owned property before their imprisonment. They had material security and capital usable after release. For those starting with less, by contrast, punishment destroyed even more. Derek had received one visit during nearly four decades in prison. His sole personal connections in the outside world were his probation officer and a handful of volunteers. His meagre social, economic and cultural capital made him all the more dependent on state welfare. He also had to contend with the dizzying technological and social changes that had occurred between the 1980s and the 2020s, evident for example when he described not knowing how to buy a bus ticket with a debit card. To suggest that release from prison would ‘write off’ his debt and enact his reintegration to society is to grossly underplay the persistent exclusion he faced.

Conclusion: Duff as an inclusionary alternative?

Derek’s case *is* an extreme one: his experiences may not be typical, but they reveal difficulties faced less intensely by others. But the very extremity of his case stress-tests our ideas about punishment: what it is for, what offenders want (and deserve), and the mutual responsibilities of punishers and punished. And as we have seen, the ‘debt to society’ metaphor provides practically and ethically limiting guidance for responding to crime. It looks to the past, as though what is done can be undone. Contradictorily, it relies on an equation (crime against the state plus punishment by the state equals a repaid debt) which whitewashes victims, and ignores the multiple debts and credits which we accrue over our lives. It is also fundamentally exclusionary, in that it suspends rights, demands repayment before they are restored, and offers no safeguard against the ill-treatment of coercing a debtor into paying an unpayable debt.

One possible response to the flaws with the debt metaphor would be to stop assuming that the wrongdoer has a special responsibility to pay the debt. Such an

approach has often been termed *restorative* and is offered as an alternative to a more retributive framework of justice. The goal of restorative justice, an approach employed in many different ways, is to recognise that harms have been committed, with all relevant parties—victim, wrongdoer, and community—coming together to repair them.¹² True, in some cases only action by the wrongdoer can mend the harm (if a traumatised victim needs to no longer see them, for instance). But in many others, the wrongdoer need not play a part. Other members of a community can fix damaged property, for instance, or provide physical or psychological therapy. While there is much to praise in the restorative approach, we believe that people who commit wrongs carry a special responsibility to respond to them, and that there is a moral distinction between harms (damaging experiences) and wrongs (unethical actions) If we are harmed by someone, the hurt feels different if we perceive it was deliberate than if it was by accident. Wrongs *feel* different, the more so as they become more serious. This distinction means that people who commit wrongs do carry a special responsibility to somehow respond to them, especially where the harm cannot be put right.¹³ In a phrase beloved of modern penal abolitionists, employing yet another financial metaphor, people who have committed wrongs ought to be ‘accountable’ for what they have done.¹⁴

It does not work to replace ‘paying your debts’ with ‘repairing the harm’, then. Drawing on the work of penal theorist Antony Duff, we suggest the metaphor of “fulfilling a civic obligation” as an alternative tool to guide our responses to crime. Duff argues that, done very differently, “criminal punishment could and should be inclusionary, as something we can do, not to a ‘them’ who are implicitly excluded from the (law-abiding) community of citizens, but to *ourselves* as full, if imperfect, members of that community.”¹⁵ He argues that punishment could do this by operating as a sort of moral communication, conveying to those who offend “the censure they deserve for their crimes,” and aiming thereby “to persuade them to repent those crimes, to try to reform themselves, and thus to reconcile themselves with those they have wronged.”¹⁶ Duff’s punishment is more than just persuasion, though. It should also function as a secular penance, representing an apology and a burdensome practice—that is, a “civic duty”—something the wrongdoer actively undergoes, not something to which they are

¹² Nils Christie, “Conflicts as Property,” *The British Journal of Criminology* 17, no. 1 (1977): 1–15.

¹³ Hampton, “Correcting Harms versus Righting Wrongs: The Goal of Retribution.”

¹⁴ Danielle Sered, *Until We Reckon: Violence, Mass Incarceration, and a Road to Repair* (New York, NY: The New Press, 2019).

¹⁵ Duff, *Punishment, Communication, and Community*, 77. Emphasis in the original.

¹⁶ Duff, *Punishment, Communication, and Community*, xvii.

passively subjected. Thus imagined, punishment becomes “an essentially civic enterprise, in which citizens engage with each other as citizens.”¹⁷

In this metaphor the criminal law is not the exercise of power by a sovereign (which might be a single person or a body) on its subjects, nor is it the accounts management of the bureaucratic state extracting readmission fees from expelled debtors. Instead, criminal law is understood as a distinctive kind of civic practice that seeks to provide an appropriate response to “public” wrongs.¹⁸ It affirms the legal reality that criminal offenders remain citizens,¹⁹ but goes further by suggesting they also have particular responsibilities to the civic community, as do their fellow citizens to them. Duff admits it might seem incongruous or inappropriate to talk as though someone who commits a crime acquires a particular civic duty, since a criminal offence is precisely a failure to discharge one’s civic responsibility. Here he suggests a comparison with formal roles such as doctors or teachers, or with informal ones like romantic partners. Both codes of professional practice and norms of interpersonal behaviour allow for when things go awry: when teachers engage in misconduct, or romantic partners fall out, they acquire new obligations and might undertake steps in reparation. “Analogously,” argues Duff, “a citizen who engages in civil misconduct...can be said to acquire new responsibilities by doing so.”²⁰

We argue that this is equally true for those who commit crimes. These responsibilities will vary, but are likely to include the responsibility to publicly mark the wrongness of the crime, the responsibility to make amends (where possible) to the victim, and the responsibility to endeavour to change elements of one’s life which contributed to the crime. Such a response to wrongdoing—whether called ‘punishment’ or not—does not seek to undo the past, but is justified by it. It instead seeks to build a civic community and does not narrow our attention to focus on only on the crime and the offender’s relationship to the state. Crucially, it is also inclusionary, in that it treats the wrongdoer as someone who matters while they are fulfilling their obligations, and whose treatment should foreground this possibility. Indeed, one benefit of this metaphor is that it reminds us of the mutual bonds of citizenship, so that just as people who have

¹⁷ Duff, “Offenders as Citizens.”

¹⁸ R.A. Duff, *The Realm of Criminal Law* (Oxford: Oxford University Press, 2018).

¹⁹ Citizenship is not an uncomplicated category – what of short-term residents, tourists and other migrants (both documented and undocumented)? – but it is a term that we and he use because it is a category which recognises public obligation. Duff briefly considers people who are not citizens and he suggests the normative category of “guests.” R.A. Duff, *The Realm of Criminal Law*, pp 117-127.

²⁰ Duff, “Offenders as Citizens.”

committed crimes have obligations, so do other members of the community to people who have committed crimes.

What practical difference would it make if we moved from understanding punishment as the extraction of a debt from expelled debtors, to understanding it as the fulfilling of an obligation, undertaken by citizens? What's so much more fecund about the metaphor of civic responsibility (versus punishment as debt extraction) is that it can facilitate what we envision for actual policy and practice. What obligations can citizens properly and meaningfully demand of one another? What modes of punishment can citizens properly demand? What obligations does an offender owe to her fellow citizens? It is worth noting that the inclusionary metaphor we are suggesting does not necessarily preclude the possibility of coercion or imprisonment in all cases, but it does demand that imprisoned people are understood to retain their membership of the civic community. Within our metaphor, the carceral sentence is understood as a type of seclusion within the civic community rather than an expulsion from it. It does, however, preclude incarceration as it is currently practiced in England and Wales, as well as within other countries with which we are familiar.²¹

It would require enormous and structural changes for our penal institutions to become "sites of genuine civic punishment."²² Were our metaphor to be operationalised, crime would be responded to judiciously and parsimoniously. Fewer people would be sent to prison, and they would serve much shorter sentences in more legitimate institutions which would be reimagined as part of our communities. We would recognise the citizenship of people in prison by recognising their right to vote and participate in political life. This would include reasonable expansions to people's freedom to shape what happens during their sentence and upholding their capacity to say how resources assigned to their rehabilitation should be distributed. We would also facilitate opportunities for work, education and training that aim to improve the futures of those engaging in them. Where possible we would enable these opportunities to cross prison boundaries, and people would be imprisoned where they are able to fulfil the obligations which they incur through punishment, including to family, society and the self. If both parties wanted to, victims and offenders would be given the opportunities to meet and discuss what happened. When the sentence was served, people would be given concrete and substantive help with resettlement and

²¹ Certainly, some countries punish in more inclusionary ways, but they do not meet the exacting demands of our metaphor. Norway, for instance, runs a much less painful prison system than England & Wales, but its institutions still degrade many of their inhabitants (Crewe et al., in progress), and the punishment which it delivers is often experienced as morally meaningless (Ievins & Mjåland, in press).

²² Duff, "Offenders as Citizens."

disabling post-release restrictions on their liberty would be the exception not the norm. Most importantly, their punishment would end. Only under such conditions might it be appropriate think of undergoing punishment as a civic obligation, and only under such conditions could we come close to properly responding to Derek and his crime.