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PROCEDURAL RIGHTS

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ABSTRACT
In this essay, I argue that absent special circumstances, there are no moral, judicial procedural rights. 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.

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."[1] 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.[2] In fact, not only do I now

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[1] James W. Nickel, Making Sense of Human Rights 110 (2d ed. Blackwell, 2007).
[2] 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. As with

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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.[3]

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.

I. 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 preinstitutional procedural rights. Space considerations obviously do not allow me to 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 the reader less resistant to the more radical conclusions that follow.

Given my view that there is no general moral right not to be tried 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

most orthodox positions, the existence of procedural rights is more often presumed than defended. Indeed, some 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*, for instance, John Rawls specifies that:

> a person is said to suffer punishment whenever he is 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.

JOHN RAWLS, *Two Models of Rules*, *in* JOHN RAWLS: COLLECTED PAPERS 26 (Samuel Freeman ed., 2001).

[3] More precisely, I should say that there are no general, moral, judicial, procedural rights. The various components of this more cumbersome description are explained below.

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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 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 do citizens not also have a *moral* right against double jeopardy? Perhaps, but if so, it is not because this right is a preinstitutional moral right (like an innocent person's right not to be punished) that 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 special duty to act in accordance with this announcement. 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 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 be just to summarily acquit everyone. 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 to convict 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 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 is not clear.

Even if one ratio were incontrovertibly better than another, 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

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that case, no one could complain that a criminal legal system was made less reliable when it was amended to allow double jeopardy. Most important, 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 this section, it is worth comparing double jeopardy to the statute of limitations in the criminal law; I would urge that we conceive of the two in similar terms. There is a variety of good reasons to limit the amount of time after a crime during which one may be prosecuted. Suppose that in view of these reasons, Nora's jurisdiction enacts a statute of limitations that precludes the authorities prosecuting crimes that were committed more than seven years before. 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 preinstitutional moral right that no criminal legal system with jurisdiction over her be designed so as to prosecute crimes committed more than seven years before. 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 maintain a prohibition against allowing someone to be tried more than once for the same crime (just as there might be good policy arguments in

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

II. FAIR, RELIABLE, AND PUBLIC PROCEDURES

I am inclined to understand the right to a fair trial just as I analyze 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 be merely because those who operate the judicial system have a special duty to adhere to their publicly promulgated rules.

My position obviously flies in the face of the standard view that each of us has a preinstitutional right not to be punished until we have been duly convicted in a fair trial. To vindicate my unorthodox view, then, I construct an imaginary case in which this putative right is egregiously disrespected, and then 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?[4] Given the radical nature of this 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 of every citizen were then fed into a computer program, which randomly selected Sandra's number. Everyone understood

[4] Given that no one seriously believes that this person is guilty, one might question whether this condemnation and hard treatment actually constitute 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 necessarily believe that the defendant is actually guilty. I am grateful to Antony Duff for raising this potential concern.

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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 method 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 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 the society voted democratically 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 preinstitutional right not to be punished unless we have acted wrongly, Sandra can righteously 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.[5] But this objection is obviously inapplicable to our original scenario in which Sandra stole the money from the treasury, because in that case she would have forfeited 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.

[5] Christopher Heath Wellman, *The Rights Forfeiture Theory of Punishment*, 122 ETHICS 371–393 (2012).

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Second, 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 select someone randomly 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 would 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.[6] 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 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 righteously 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 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,

[6] Those who hold that one's rights cannot be violated unless one is harmed will be skeptical of this claim. If one believes that risk is a purely epistemic matter, for instance, then one might deny that A wrongs B when A engages in (what appears from A's perspective to be) risky behavior that does not result in harm to B. *See* Larry Alexander, *Are Procedural Rights Derivative Substantive Rights?* 17 LAW & PHIL. 19–42 (1998). In order to be maximally concessive to defenders of procedural rights, I argue that Sandra's rights are not necessarily violated even if we presume that each of us enjoys a right not to be exposed to unreasonable risks.

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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 not to be punished. And because she has no right not to be punished, she lacks the standing to object to a policy that 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 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 not to be exposed to the risk. And if Ingrid can *waive* her right not to be exposed to what would otherwise be an unreasonable risk of harm, presumably Sandra can *forfeit* her right not to be 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.[7] 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 she accurately determines which of the defendants are innocent and which are guilty. After all, if those guilty of wrongdoing have forfeited their rights not to be 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, 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 that institutionally constrain those

[7] I am indebted to Carl Wellman for pressing this question.

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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 nonculpably) 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.

III. 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*.[8] Nozick focuses on preinstitutional 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 decide unilaterally which processes qualify as sufficiently fair and reliable.

[8] ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

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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 specify unilaterally which procedures qualify as fair and reliable, 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 reason 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 not to be exposed to risks that 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 our guilt is first established via a fair and reliable process.[9]

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

[9] In fairness to Nozick, I should note that he has several other (extremely original and sophisticated) arguments regarding procedural rights that I do not review here, in part because (as he acknowledges; *id.* at 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.

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surveys several considerations in favor of the conclusion that "we cannot . . . distinguish just ends from just means in the context of a criminal trial."[10] 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 to adopt appropriate measures that enable us to distinguish reliably 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.[11]

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 bar, 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 from Elizabeth's stack and puts it on top of her own stack. And 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 that 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 were (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)

[10] R.A. DUFF, TRIALS AND PUNISHMENTS (1991), at 114.
[11] *Id.* at 113.

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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)[12] precisely as I do, he arrives at the same ultimate 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*."[13]

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 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.[14]

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

[12] 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 approach, *see* Peter A. Graham, *In Defense of Objectivism about Moral Obligation*, 121 Ethics 88–115 (2010).

[13] Duff, *supra* note 10, at 112–113. Similarly, Nozick, *supra* note 8, at 103, wonders:

> 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?"

[14] Duff, *supra* note 10, at 115.

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that Philippa must return what she has stolen and 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 be not only 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 distinct things. So while I would obviously prefer justice and publicity to merely justice, I do not 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.[15] And in the absence of a rights violation, I see no grounds for positing the presence of injustice.

Several prominent scholars have defended the idea that justice is not fully done unless it is publicly done in other contexts, so it is not unreasonable to think that one might try to counter my skepticism about categorizing publicity as an ineliminable component of justice.[16] I do not explore this

[15] One might object that Elizabeth not only acts culpably, she acts impermissibly. As John Simmons, *Locke and the Right to Punish*, 20 PHIL. & PUB. AFF. 340 (1991), insists, "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*." Against this objection, and in defense of the claim 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"?

[16] Perhaps most notably, Thomas Christiano invokes publicity in his egalitarian defense of democracy in his impressive book, THOMAS CHRISTIANO, THE CONSTITUTION OF EQUALITY (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 to 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

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possibility here, 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."[17] 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."[18] 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 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.[19]

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 is a variety of good instrumental reasons in favor of criminal legal institutions that allow defendants to defend themselves publicly, 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 defendant's presence in the room consistently distracted or otherwise impaired the jurors' ability to weigh the evidence clearly and impartially, for instance.) Would we violate anyone's rights if we changed our institutions accordingly? I think not.[20]

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.)

[17] DUFF, *supra* note 10, at 115.

[18] DUFF, *supra* note 10, at 117.

[19] *Id.* at 119.

[20] 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, as he emphasizes in TRIALS AND PUNISHMENTS, 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 do

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Depending upon how weighty a right 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 this procedural right 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 that must be followed by all, then I should be 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 is 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 the loss of her sanity.[21] 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 overpunished 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 someone else's rights; more modestly (and more plausibly), we forfeit only our right

not think one violates another's rights whenever one fails to provide reasons publicly for one's actions to this person. I do not believe that Elizabeth violates Philippa's autonomy when she takes the twenty-dollar bill from Philippa's stack without publicly justifying this action, for instance.

[21] I am grateful to Ron Mallon for suggesting this possible response.

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against a "fitting" or proportionate punishment. And if so, then not only can an innocent person's rights be violated when she is punished, but a guilty person's rights can be violated when she is overpunished. Finally, if one regards Sandra's loss of sanity as a form of punishment, one might 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, while 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, 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.")[22] 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 merely because her life has gone so much worse 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 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 of 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 morally responsible for Sane Sandra's actions. Consider, for instance, Victor Tadros's observation that:

[22] H.L.A. HART, *Prolegomenon to the Principles of Punishment*, *in* PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 5 (1968).

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> 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 between the person as she is now and the person as she was when she offended may help to explain this appearance.[23]

If Tadros is correct to suggest that the passage of time can undermine the requisite connection between a wrongdoer and her future self (as I believe he is), then it seems unproblematic to suppose that a dramatic psychological shift such as the complete loss of sanity might explain why the now-insane person is not responsible for the crime committed by her earlier, sane self. One way to articulate this idea is in terms of personal identity. On this view, while Insane Sandra is clearly related to (and perhaps a descendent of) Sane Sandra, the former is a distinct person (assuming that she remains a person). Thus, just as it would clearly be impermissible to punish Sandra if (unbeknownst to Sandra) Sandra's mother had stolen the money from the state treasury and then bequeathed it to Sandra, it would be unjust to punish Insane Sandra for Sane Sandra's act (even though Sandra/Insane Sandra would not be entitled to keep the money that Sandra's mother/Sane Sandra stole). As Patrick Tomlin has emphasized to me, though, I need not couch this point in such stark (and metaphysically controversial) terms. Even if Sandra remains the same person despite her loss of sanity, there is plenty of room to assert that Insane Sandra is not morally responsible for Sane Sandra's act. As Tomlin expressed in personal correspondence:

> The persistence conditions of personal identity may differ from those of moral responsibility. Given that personal identity with someone who committed an objectively wrongful act is not sufficient for becoming morally responsible (for example, if they were sleepwalking), it is not clear why personal identity would be sufficient for retaining moral responsibility. If we look at the kinds of theories compatibilists in particular advance for one's becoming responsible (such as "real self" or "intellectual process" views), then these would seem to suggest particular persistence conditions (an act's still being the product of one's "real self," or one's still having the right connection to the "intellectual process").

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 preinstitutional 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 that requires all societies to design their judicial systems to utilize inclusive, fair, and reliable processes for publicly determining the guilt of each defendant.

[23] VICTOR TADROS, THE ENDS OF HARM (2011), at 308–309.

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And I do not regard the requirement that we refrain from prosecuting and punishing defendants who have lost their sanity as a glaring counterexample to my position because I believe this prohibition is better explained by the impermissibility of punishing people for acts for which they are not morally responsible.

IV. THE HUMAN RIGHT TO DUE PROCESS

Article 10 of the Universal Declaration of Human Rights (UDHR) 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 about the human right to democracy, but *no one* doubts that there is a human right to due process.[24] So the fact that my 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 that are distinguished in terms of their connection to basic human interests, and they are also typically understood to be particularly urgent moral rights that 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 explicitly argue 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 such as the 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 inclined to 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 preexisting) moral rights. In other words, documents like the UDHR are designed to create legal rights that faithfully capture our convictions regarding moral human rights.

[24] John Rawls, The Law of Peoples (1999).

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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. Allen Buchanan, for example, 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."[25] Against the mirroring view, Buchanan advocates a "pluralistic justificatory methodology" that "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."[26]

To see the logic behind this approach, notice that domestic lawmakers routinely create legal rights that do not correspond to antecedent moral rights and make laws that fail to protect antecedent moral rights legally. 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 preexisting moral rights in the domestic realm, it should be clear that the two need not mirror one another in the international legal arena either.

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.[27]

For our purposes, we can focus on the first two steps, which (as Nickel acknowledges) follow from Henry Shue's recommendation that human rights

[25] ALLEN BUCHANAN, THE HEART OF HUMAN RIGHTS (2013), at 17.
[26] *Id* at 43.
[27] NICKEL, *supra* note 1, at 70.

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should be thought of as "a rationally justified demand for social guarantees against standard threats."[28] Putting all of this together, we conclude that while the framers of international legal documents like 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.[29]

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, but 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 that most of us are pretheoretically inclined to accept, it does not place me at odds with the best understanding of core international legal documents such as the UDHR.

V. CONCLUSION

Few believe that there is a preinstitutional 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. Some judicial procedural rights, however, are typically regarded as nonnegotiable. If any country refused

[28] Henry Shue, Basic Rights (2d ed. 1996), at 17.
[29] Nickel, *supra* note 1, at 106.

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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 are on target, however, then such a critique would be misguided. Governments clearly have pressing reasons to design their criminal legal institutions carefully so that all of their citizens are not vulnerable to being wrongly punished, overpunished, 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 preinstitutional procedural rights, not even a right against being punished without first being found guilty by a fair and reliable process.

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