

## ***JUSTIFYING LIBERAL RETRIBUTIVE JUSTICE: PUNISHMENT, CRIMINALIZATION, AND HOLISTIC RETRIBUTIVISM\****

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**RESUMO** *Neste artigo, exploro se justiça retributiva liberal deve ser concebida ou individualista ou de forma holística. Examinando criticamente a conta individualista da justiça retributiva e sugiro que a questão da retribuição – quando a punição de um indivíduo é compatível com o tratamento justo desse indivíduo – deve ser respondida de forma holística. Recorrendo ao ideal de razões sensíveis, um modelo de legitimidade na base dos nossos melhores modelos normativos de democracia, argumento que, nas democracias liberais modernas, a punição de um delinquente  $A$  para  $\phi$  é compatível com o tratamento justo de  $A$  só se punição de um indivíduo para  $\phi$  pode ser legítimo aos olhos de  $A$  e seus concidadãos. Uma vez que a justiça retributiva é entendida dessa forma holística, a imposição da pena pode ser compatível com o tratamento justo de indivíduos.*

**Palavras-chave** *Justiça Retributiva, Punição, Criminalização, Liberalismo, John Rawls.*

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**ABSTRACT** *In this article I explore whether liberal retributive justice should be conceived of either individualistically or holistically. I critically examine the individualistic account of retributive justice and suggest that the question of retribution – i.e., whether and when punishment of an individual is compatible with just treatment of that individual – must be answered holistically. By resorting to the ideal of sensitive reasons, a model of legitimacy at the basis of our best normative models of democracy, the article argues that in modern liberal democracies, punishment of an offender A for f is compatible with just treatment of A only if punishment of an individual for f can be legitimate in A's and A's fellow citizens' eyes. Only once retributive justice is understood in this holistic fashion the imposition of punishment can be made compatible with just treatment of individuals.*

**Keywords** *Retributive Justice, Punishment, Criminalization, Liberalism, John Rawls.*

A way to enquire into the institution of the criminal law is to look at the justification of punishment. This article does not distance itself from this approach, but doubts the assumption that we can offer a justification of punishment without adopting a more comprehensive understanding of this institution. The criminal law is not made up of discrete monads calling for philosophical analysis, but of interrelated practices and principles, the analysis of which extends beyond the criminal law to include broader questions in moral and political philosophy. This article's general concern is the nature of liberal criminal law understood as a state institution in charge of state punishment. The question it addresses is whether the most central aspects of just criminal punishment should be conceived either individualistically or holistically.<sup>1</sup>

To frame this question more precisely, the article considers one of the premises of Samuel Scheffler's account of the asymmetry of desert in distributive and retributive justice and uses it as a guiding thread in the

1 The use of the adjective 'criminal' before punishment is necessary to mark out the focus of my argument. Depending on the context in which judgments and practices of retributive justice occur, we can talk about, for example, parental punishment, natural punishment, or divine punishment. This article focuses exclusively on questions of *criminal* retribution. This means that the practices of retribution that concern us here are those in which the state, and only the state, is in charge of imposing on individuals the burdens of punishment.

argument. Following John Rawls' understanding of desert, Scheffler has argued that the role of desert in the retributive and the distributive spheres is asymmetrical (see Scheffler, 1995; 2000; 2003). At the core of this asymmetry is the idea that the just imposition of punishment depends on considerations of an individualistic character, as opposed to considerations that are holistic or comparative. This is the view this article evaluates and finally rejects.<sup>2</sup> To be sure, this article speaks to the asymmetry of the role of desert in distributive and retributive justice, but it is not about that asymmetry. Rather, the argument I advance supports the idea that criminal law is an institution whose practices are embedded within the sphere of politics and that any attempt to justify these practices cannot overlook the political nature of this institution. In short, independent of the consequences that these arguments have for the asymmetry of the role of desert, this article articulates the thought that the criminal law we ought to have is the offspring of politics, and that theorizing about the criminal law requires substantive political theorizing.<sup>3</sup>

The article proceeds as follows: section 1 briefly outlines Rawls' view on the asymmetrical role of desert in retributive and distributive justice and Scheffler's interpretation of this view. Section 2 reviews some of the arguments that, *pace* the individualistic conception of retribution, have been offered to articulate a holistic understanding of the retributive sphere. In order to accommodate the challenges that these ideas represent for the individualistic approach, in section 3 I suggest a revision of the individualistic account of retribution. In section 4, I argue that, in spite of responding successfully to these challenges, the revised version of individualistic retributivism does not succeed and that a holistic account of the retributive sphere is required. Section 5 articulates and defends my account of holistic retributivism in terms of the ideal of sensitive reasons. Finally, section 6 offers some further clarifications and responds to some criticisms this account may attract. The article concludes that a liberal theory of retributive justice must be consistent with a holistic account of the retributive sphere.

2 I must emphasise that I am not concerned here with perhaps the three most important claims in Scheffler's 'Justice and Desert in Liberal Theory', *viz.*, (i) that Rawls does not defend a purely institutional account of desert in distributive justice, (ii) that he incorporates a prejusticial understanding of desert in the retributive sphere, and that (i) and (ii) imply (iii) that there is an asymmetry in the role of desert in retributive and distributive justice. I believe that the arguments I offer here may have consequences for each of these claims, but an analysis of what these consequences are is left for a different time.

3 The gist of this reasoning is not new. In presenting it I borrow from Jeremy Waldron's emphatic line that "the law is the offspring of politics" (Waldron, 1999, p. 36). See also Besson, 2005, and Lacey, 1999.

## 1 The Asymmetry of Desert and Individualistic Retributivism

In interpreting John Rawls' account of moral desert,<sup>4</sup> Samuel Scheffler has developed the argument that the asymmetry of desert – the claim that desert plays asymmetrical roles in retributive and distributive justice – results from the different types of considerations at work in these two spheres of justice. Both in retribution and distribution, justice is about giving an individual his or her due, but what is due to individuals in each of these spheres is determined differently. While distributive justice “always depends – directly or indirectly – on the justice of the larger distribution of benefits in society”, in retributive justice the question is rather whether “society can ever be justified in imposing the special burden of punishment on a particular human being” (Scheffler, 2000, pp. 984 and 986).

According to this position, comparative considerations are central to justice in distribution.<sup>5</sup> The just allocation of benefits and burdens to an individual is (importantly) a function of the overall allocation of benefits and burdens throughout society. Put differently, distributive justice – what is due to individuals in the distributive context – cannot be pursued by focusing on individuals as separate and independent entities. This is to say that, in this sphere, justice hinges on considerations that have a holistic character, which supposes that people's contributions in the distributive context are mutually dependent. This mutual dependence, at the basis of holistic distributive justice, means at least three things: “that each person's capacity to contribute depends on the contributions of others”; that “the economic value of people's talents is socially determined”; and “that virtually any decision to assign economic benefits to one person or class has economic implications for other persons and classes” (Scheffler, 2000, p. 985).

Some of those who believe that there are good reasons to support this view and its consequences in distribution also believe that the state has good reasons – as a matter of retributive justice – to punish wrongdoers according to considerations that underline the separateness of individuals. For example, when an individual commits a criminal wrong, his comparatively disadvantageous background is not relevant in determining just treatment in retribution. Generally, to serve justice in this context we only need to focus on the individual's wrongful action and state of mind at the moment of his wrongful action (and perhaps at the moment of his trial, sentencing

4 Rawls' account is in this respect influenced by Feinberg, 1963.

5 For an account of comparative and noncomparative justice see Feinberg, 1974.

and punishment).<sup>6</sup> Considerations other than what is due to him for his wrongful action (independently of what is due to others) are beyond the point of retributive justice. On this view, justice in retribution does not depend on holistic considerations but only on individualistic ones.

What grounds the asymmetry of the role of desert is the idea that the justificatory bases for claims of just distribution, on the one hand, and claims of desert, on the other, are different in a crucial respect. Thus, Scheffler contends that “the basis for a claim of personal desert must be *individualistic*” (Scheffler, 2000, p. 983).<sup>7</sup> This means that at the basis of a desert claim there must always be a fact that refers to, and only to, the subject of that claim (see Scheffler, 2000, p. 984). Thus, on the individualistic retributivist’s view, an individual deserves to be punished simply because he acted in a way prohibited by the criminal law (provided that he acted without justification or excuse). This is all that matters for holding the claim that he deserves to be punished; and this explains why, despite his comparatively disadvantageous social background, he deserves the same treatment for a similar wrongdoing as someone with a comparatively advantageous background. By contrast, desert claims do not match the more complex calculation required for the allocation of benefits characteristic of the distributive sphere. Unlike justice in retribution, distributive justice is not about finding a fact in the agent (so to speak) that justifies the allocation to her of benefits or burdens, which is why it is inadequate to say that someone with an advantageous background deserves the distributive advantages of her social background. Unlike desert claims, claims of distributive justice are based on non-individualistic analyses of the distributive demands and contributions of different individuals throughout society.

These conclusions track John Rawls’ account of desert and its role in the justification of principles of distribution and retribution. At the end of §48 of “A Theory of Justice”, Rawls argues that “[t]o think of distributive and retributive justice as converses of one another is completely misleading and suggests a different justification for distributive shares than the one they in fact have” (Rawls, 1971, p. 315). We should not think, Rawls says, that the arrangements in distributive justice are the opposite, “so to speak, of the criminal law, so that just as the one punishes certain offenses, the other rewards moral worth” (Rawls, 1971, p. 315). For Rawls, what matters in justice as fairness is not

6 For an account of the importance for justice of the state of mind of the offender at the time of her wrongful action, trial, sentencing and punishment, see Duff, 1986.

7 Scheffler follows Joel Feinberg’s account of desert on this point (see Feinberg, 1970).

how natural endowments, traits of character, or social positions are distributed, but how institutions deal with these distributions. In other words, distributive justice depends on how institutions constrain their principles of distribution according to principles of justice. Central to these principles is the idea that the benefits one may legitimately expect from the allocation of distributive goods are not the result of one's moral worth or natural skills, but of just institutional arrangements determined independently of morally arbitrary factors. By contrast, what matters in retributive justice is independent of institutions and the way they allocate burdens – or so Rawls argues: “This is because the purpose of the criminal law is to uphold basic natural duties, those which forbid us to injure other persons in their life and limb, or to deprive them of their liberty and property, and punishments are to serve this end” (Rawls, 1971, p. 314). Unlike distributive justice, retributive justice hinges on basic natural duties – pre-institutional principles and constraints – that provide the fundamental guidance for the functioning of retributive institutions.

All this is to suggest that distributive justice bears a strong link to social circumstances and contextual analysis, which connects with the idea that distributive justice is holistic. As Scheffler puts it, “the justice of any assignment of economic benefits to a particular individual always depends – directly or indirectly – on the justice of the larger distribution of benefits in society” (Scheffler, 2000, p. 984). By contrast, the individualistic retributivist holds that social considerations do not play such a central role in determining the retributive burdens an individual is to endure; instead, these burdens are defined by reference to pre-institutional, non-holistic, and non-comparative considerations. This is the claim held by the individualistic retributivist that I test in the following sections.

## 2 Holistic Retributivism

Some of the authors who oppose the asymmetrical function of desert have challenged the individualistic conception of retribution and have advanced substantive arguments in support of a holistic understanding of this sphere of justice. Let us consider three of these arguments.<sup>8</sup>

Matt Matravers has argued that retributive justice is holistic to the extent that the hard treatment offenders deserve is “a complex matter determined in

8 Other important challenges have been offered by Moriarty, 2003, Mills, 2004, and Smilansky, 2006. My analysis does not include these critiques because, unlike the authors I consider in this section, Moriarty, Mills and Smilansky endorse some version of individualistic retributivism.

part by what is decided to be just overall and thus, within that overall system, to what level of hard treatment the individual offender is entitled (where entitlement is a holistic idea)” (Matravers, 2011, p. 139).<sup>9</sup> In other words, there is not a fixed and prejusticially determined amount of hard treatment deserved by the offender to be administered by the criminal law. This mirrors the distributive sphere, where “there is no prejusticially given distributive share deserved by the intelligent and able that is the job of our system of distributive justice to hand out” (Matravers, 2011, p. 142). In a Rawlsian spirit, what follows from this is that in order to share one another’s fate we must also think “about the impact of social structures on those who might fall foul of the criminal law” (Matravers 2011, p.142). In this respect, Matravers’ central point is that – as fairness demands of us in the distributive sphere – justice requires that we look at the structures of institutions and minimise the disadvantageous effects that these structures have on those who are subject to their coercive power. These are holistic demands without which justice cannot be served.

Another theorist who has conceived of retributive justice in holistic terms is Thomas Hurka (2003). He has advanced the argument that desert is not only individualistic but also holistic and, therefore, is similarly relevant to both retributive and distributive justice.<sup>10</sup> Hurka argues that a complete theory of retributive justice requires a holistic principle that derives from the concern that the criminal law should treat citizens equally. This principle, in turn, has at least two different practical implications. First, principles of sentencing demand not only that like cases be treated alike, “but also that unlike cases be treated in an appropriately unlike way” (Hurka, 2003, p. 54). Since there is no exact optimal punishment for a given crime, holistic considerations – comparative considerations about the appropriate sentences for both similar and different offences – provide the support required for the equal treatment of offenders. A second implication of this principle relates to the support it gives to the levelling down of those sentences that are judged to be arbitrary or discriminatory.<sup>11</sup> To determine whether or not a given sentence is arbitrary and

9 For the distinction between desert and entitlement see Feinberg, 1970.

10 However, he claims that the most plausible theory of distributive desert is more holistic than the most plausible theory of retributive desert.

11 What explains the priority of levelling down as opposed to levelling up sentences is the optimality structure of the individualistic dimension of desert combined with a condition of proportionality (see Hurka, 2003, p. 46). In conjunction, optimality and proportionality suppose that receiving an extra amount  $n$  of punishment from the optimal is worse than receiving an  $n$  amount less. This support for levelling down sentences does not imply that Hurka’s position works as an argument for abolitionism because, at some point, the holistic gain from levelling down is outweighed by the absence (or lack of sufficient severity) of punishment. For a complete argument see Hurka, 2003, pp. 46-49, 55-57.

in need of reform we must take into account diachronic, and therefore holistic, patterns of sentencing (e.g., in order to determine whether there is racial bias against blacks in death penalty sentences, we need to consider comparative patterns of death penalty sentences that include blacks and non-blacks). These practical implications, in the end, illustrate the dual character of desert and mean that an argument for the separation of the retributive and the distributive spheres in terms of desert is yet to be found.

Finally, let us consider Douglas Husak's response to Scheffler. Husak (2000) advances a case for the holistic character of retributive justice by arguing that the retributive sphere "can appear non-holistic only if we artificially narrow our conception of the nature of 'the problem of retributive justice'" (Husak, 2000, p. 993). The way in which we adequately account for retributive justice is, Husak believes, by asking not only whether a person deserves punishment (an individualistic question), but also whether a person should actually be given what she deserves (a holistic question). This means that, "[a]t some point, the justification of punishment must appeal to many of the same kinds of social considerations that lead Scheffler to describe distributive justice as holistic" (Husak, 2000, p. 995). To ground this claim, Husak draws our attention to different drawbacks that must be considered before the practice of punishment is justified. These shortcomings – reasons that play against the existence of the institution of punishment – are the enormous cost of the institutions required to treat people according to their negative desert; the susceptibility to error of this institution; and the risk of the abuse of authority.

Husak thinks that, for punishment and the criminal law to be justified, we need a good that overrides these serious drawbacks and this good surely must encompass broader (and holistic) considerations such as social justice. In order to determine the justifiability of the criminal law, we need "nothing less than a comprehensive theory of the state, complete with weights attached to each of its several functions. The need for such a theory in the task of justifying the institution of punishment seems to [Husak] to demonstrate that retributive justice is holistic" (Husak, 2000, p. 999). I think this must be right. On the one hand, the existence of an institution whose benefits do not outweigh its cost is surely a strong consideration against the existence of that institution. On the other hand, the costs and benefits of the criminal law are to be calculated holistically, mainly because the criminal law is an institution whose practices impact heavily on the whole structure of society.

Although we should acknowledge Husak's considerations, there is room for disagreement as to whether his account genuinely undermines individualistic retributivism. In effect, Scheffler dismisses Husak's reply on

grounds that he misunderstands the main point of his individualistic argument. In a footnote, Scheffler makes the important clarification that “the question [he is] concerned with here is not the question of society’s all things considered justification for establishing institutions of punishment. It is rather *the question whether and when society’s punishment of an individual is compatible with just treatment of that individual*” (Scheffler, 2000, p. 987 fn.73. My emphasis). This is a significant point that adequately characterises the central concerns of individualistic retributivism. The individualistic retributivist’s analysis is narrower in scope than Husak’s, and concentrates on a specific, and crucial, aspect of the whole institution of retributive justice. This is what I call the question of the permissibility of retribution, which shall concern us in the rest of this article. In his response to Husak, Scheffler correctly separates the question of permissibility from questions about the social justification of retributive justice, and although Husak does provide insight into the latter issue, his arguments do not target what the individualistic retributivist takes to be, correctly, a central point about retribution.

Having established more precisely the question that concerns us here, let us now return to the two defences of holistic retributivism mentioned above. Since Matravers’ and Hurka’s arguments are different from Husak’s, we may expect them to fare better (or at least differently) when facing the question of the permissibility of retribution. Recall that for Matravers there are no ‘celestial mechanics’ that determine the level of hard treatment that an individual deserves for her wrongdoings. For him, a fair level of hard treatment is something to be decided in terms of individuals’ entitlements, which, in turn, depends on institutional considerations of a holistic character. Similarly, Hurka points out that in the absence of prefixed principles of proportionality in sentencing, central aspects of the principle of equality before the law can be maintained only by reference to the comparison of patterns of punishment meted out to offenders committing similar (and different) penal wrongs. All of these are holistic considerations that focus on an aspect of retributive justice that is different from the concerns of Husak’s analysis above. In effect, both Hurka and Matravers make related points about the non-individualistic character of retributive justice that seem to undermine Scheffler’s individualistic characterisation of the question of the permissibility of retribution. *Pace* individualistic retributivism, “we cannot know conclusively whether a given punishment for a person is just unless we know how other people are being punished” (Hurka, 2003, p. 67).<sup>12</sup>

12 Eugene Mills suggests something similar when he says that “the individualism of retributive justice is perfectly compatible with the view that the justice of any punishment meted out to a particular individual

Should we then accept Matravers' and Hurka's responses as genuine answers to the individualistic retributivist's question of the permissibility of retribution? In my judgement, their views do represent a response to the question of whether and when society's punishment of an individual is compatible with just treatment of that individual. In the retributive sphere we can make justice and the imposition of punishment compatible only if through complex holistic considerations we compare different sentences and establish how much hard treatment a wrongdoer deserves. In other words, to serve retributive *justice* we must fix the content of desert not absolutely, but in relative or comparative terms. These are conclusions that cannot be denied and that challenge an individualistic treatment of the question of the permissibility of retribution.

### 3 Individualistic Retributivism Revisited

Despite these conclusions, I believe that the individualistic retributivist would still have a reply available to resist a holistic answer to the question of the permissibility of retribution. He could argue that even though both Hurka and Matravers have a point, their analyses do not respond to the more fundamental question. He could say that the question that ultimately grants the non-holistic character of retributive justice is not a question of amount and/or general proportionality of retribution but a question of liability; not a question of how much hard treatment should be inflicted upon an individual *A*, but a question of whether hard treatment should be inflicted upon *A* at all.<sup>13</sup>

With additional precisions and clarifications, I believe this reformulation of individualistic retributivism can neutralise Hurka's and Matravers's arguments for a holistic answer to the question of the permissibility of retribution. It

always depends – directly or indirectly – on the justice of the larger patterns of punishment in society" (Mills, 2004, p. 266f).

<sup>13</sup> These distinctions follow H.L.A Hart's famous argument in Hart 2008, pp.1-27. It is worth noting that this amendment of individualistic retributivism would also serve as a response to an argument advanced by David Miller 2003, pp. 25-44. To defend the holistic character of retributive justice, Miller distinguishes between types of punishment and amount of punishment. In answering the question of whether the type and amount of punishment that an individual deserves depend on what others have received for similar or different crimes, Miller concludes that what individuals deserve in retributive justice involves both comparative and non-comparative elements. However, Miller's answer addresses only part of a complete story of retributive justice. There is still another, prior and more fundamental, question that needs to be answered in order to ground the holistic character of the retributive sphere, that is, the question of retribution: whether punishment of an individual *A* is compatible with just treatment of *A*. Because this question is independent of both whether *A* deserves punishment *P* (a type of punishment) and whether *A* deserves punishment of magnitude *m* (an amount of punishment), to answer these questions holistically – or comparatively – does not mean that the prior and more fundamental question of retribution is to be answered in the same way.

suffices to say here that, to support his position, the individualistic retributivist would have to rearticulate part of his account of retribution and specify that he is not talking about the question of the permissibility of retribution *simpliciter*, but about an aspect of this question, namely, the question of liability. Indeed, this question is perhaps one of the most central parts of any theory of retributive justice, and to focus on this aspect is certainly a plausible way to both distinguish retribution from distribution on grounds of desert and characterise justice in retribution individualistically.

This defence of the individualistic character of retribution well suits Rawls' own account. As we saw above, Rawls believes that the purpose of the criminal law is to uphold natural duties, the violation of which makes an individual liable to punishment (see sec.1 above). Thus, following the specified version of the question of retribution, we could rearticulate Rawls' account in the following two theses: (I) Punishment of an individual *A* is just only if *A* has violated a natural duty and punishment is inflicted because *A* has violated that duty (the natural duties thesis) (see Rawls, 1971, p. 314). Additionally, Rawls contends that the propensity to violate these duties "is a mark of bad character, and in a just society legal punishments will only fall upon those who display these faults" (Rawls, 1971, pp. 314-5). This is the second thesis (II): *A*'s propensity to violate natural duties is a mark of *A*'s bad character and a just criminal law punishes only those who display propensities similar to *A*'s (the bad character thesis).

Theses (I) and (II) seem to capture the individualistic character of retributive justice: deserved punishment is a function of individual violations of natural duties, as expressed in the natural duties thesis, and retributive justice distributes penal burdens only on considerations relative to the individual punished, as expressed in the bad character thesis. So considered, this account establishes who falls within the coercive penal power of the state (the question of retribution specified by the question of liability), which is a matter conceptually independent of both how much an individual should be punished (the question of amount that concerns Hurka and Matravers) and what justifies socially the existence of an institution that imposes these punitive burdens (Husak's point).

With these considerations in place we may now be tempted to conclude that the specified question of retribution – whether and when punishment of an individual is compatible with just treatment of that individual – must be considered individualistically: the state must only punish individuals for their (voluntary, intentional) violations of natural duties and these acts are an expression of their bad characters. However, before we can push this

any further we need to consider one of these theses more carefully. Since the bad character thesis is neither a necessary nor a sufficient condition of the individualistic conception of retributive justice I leave it aside from the analysis to come. It is rather the first thesis – the violation of natural duties thesis – that offers a more substantive ground for the individualistic character of retribution. Because natural duties are, arguably, pre-institutional and context-independent, and because determining the violation of a natural duty is something that does not require comparative considerations of justice, the truth of this thesis seems to provide enough support for individualistic retributivism. But, does it?

#### 4 Back to Holistic Retributivism

In what follows, I would like to contest the idea that the natural duties thesis grounds individualistic retributivism. To be sure, this argument is meant to neither deny nor affirm the truth of Rawls' natural duties thesis, but to resist the view that this thesis makes us endorse individualistic retributivism. On the contrary, I will argue, this thesis makes us endorse a holistic conception of retributivist justice. If successful, my analysis should count strongly against the individualistic position; it would mean not only that the just amount of punishment (the question of amount) but also the just imposition of punishment (the question of liability) must be determined holistically. To be sure, the argument to come does not try to resist the truth of the claim that the purpose of the criminal law is to uphold basic natural duties and that punishment is to serve this end. Instead, my aim is to show that even if this claim is true, this truth does not make us endorse individualistic retributivism. More substantively, my proposal is that in a modern liberal democracy – like the one Rawls envisaged – this claim should make us endorse holistic retributivism.

In order to pursue my argument in this and the following sections I shall respond to two intermingled questions: (i) is the purpose of the criminal law to uphold natural duties? And (ii), can the criminal law uphold these natural duties without adopting a holistic stand?

Since my position does not take issue with the role of the criminal law as being defined in terms of natural duties, I will respond to the first question affirmatively and accept that the purpose of the criminal law is, at least in the large part, to uphold natural duties. However, in so answering, something else needs to be noted. In affirming that the criminal law is to uphold natural duties, we are required to consider the notion of *malum in se*. *Mala in se* offences –

offences that prohibit an action whose wrongness is recognised independently of the existence of a penal law sanctioning it – relate to natural duties in the sense that committing an offence of this type involves the violation of a moral obligation that binds us even if our action was committed in circumstances in which that legal offense did not exist. This means that committing a *malum in se* offense entails the violation of a natural duty.

However, although the criminal law must punish actions that match our best understandings of *mala in se* offenses, we are well advised to maintain that the criminal law of modern liberal democracies is to punish wrongs of all sorts, not only *mala in se* actions. More precisely, the criminal law is also to criminalize and punish *mala prohibita* – offenses that specify as crime a type of conduct that is not wrong previous to or independent to the criminalization of this type of conduct.<sup>14</sup> Additionally, we are also well advised to maintain that the criminal law of liberal pluralist democracies is not to criminalize and punish every inherent evil that exists. In other words, we have good reasons not to punish every *malum in se* action that could count as a *malum in se* offense. Thus, we have good reasons not to criminalize and punish unfaithful husbands/wives, un-trustable friends, or extramarital intercourse, actions that under some reasonable ascriptions are intrinsically wrong.

Perhaps, Rawls meant neither that the only purpose of the criminal law is to punish *mala in se* nor that its purpose is to punish all intrinsic wrongs. Perhaps, what Rawls meant was that, at a minimum, the role of the criminal law is to punish wrongs of the relevant type that provide good (conclusive?) reasons for criminalization. This is a plausible alternative. However, for this rejoinder to succeed, we would have to fill gaps and draw some lines. At the very least, we would need to complete our account of wrongdoings by providing the normative limits that separate wrongs of the relevant type from wrongs of the non-relevant type. This is the minimum necessary task to achieve a general account of justified punishment that is consistent with the violation of the natural duties thesis.

Unfortunately, Rawls does not undertake this task (why would he?) and nor are these distinctions clear in our systems of penal law (judges or legislators criminalize, and have the power to criminalize almost whatever they think fit).<sup>15</sup> Of course, that Rawls does not engage in this analytical task

14 For justifications of the criminalization of actions that constitute *mala prohibita*, see Green, 1997, and Duff, 2014, *inter al.*

15 For an enlightening account of this problem see Husak 2008. For a critical evaluation of this account see Donoso, 2010b.

and that legislators and judges do not create or apply the law by resorting to this distinction does not mean that establishing these limits is impossible. In effect, I will argue that insofar as we adopt a holistic approach to the specified question of retribution we can obtain a normatively adequate account of the wrongs that have to be responded to by the criminal law *and* we can make punishment consistent with just treatment. More precisely, and this I defend in the next section, in order to distinguish wrongs that are the proper concern of the criminal law from wrongs that are not, we cannot adopt a merely individualistic approach. If this is correct, it cannot be maintained that the natural duties to be upheld in the retributive sphere are pre-institutional *and* that all the binding force of these duties is the product of principles independent of the circumstantial and complex realities of the state and its citizens. This suggests that the second question – can the criminal law uphold these natural duties without adopting a holistic stand? – calls for a negative answer.

### **5 Retributive Justice and Sensitive Reasons**

So far I have suggested that in order to provide adequate limits to the expression of natural duties in the criminal law – as demanded by Rawls in “A Theory of Justice” – we must adopt a holistic approach to the question of retribution. In this section I elaborate on this point and argue that in a liberal theory of retribution this approach can be captured by the ideal of sensitive reasons. The ideal of sensitive reasons is a holistic conception of public legitimacy at the basis of our best understanding of democratic liberal institutions.

According to the ideal of sensitive reasons, citizens (including legislators, judges, officials, voters, offenders and non-offenders) should be prepared to justify their actions in the public domain by advancing reasons that are sensitive to other fellow citizen’s reasons. This is an ideal that yields social stability within the margins of the recognition of human diversity and disagreement. An example that instantiates this ideal of sensitive reasons is the notion of public reason, as considered by Rawls in “Political Liberalism” (Rawls, 1993a).<sup>16</sup> According to public reason, citizens “should be ready to explain the basis of their actions to one another in terms each could reasonably expect that others might endorse as consistent with their freedom and equality” (Rawls, 1993a, p. 218). So understood, public reasons are reasons sensitive to the reasons of

16 See also Rawls, 1993b, pp. 245-269 and Rawls, 1999, pp. 129-180.

others. More precisely, they are reasons sensitive to those reasons that satisfy public reasonableness and that, in good faith, can be affirmed by all members of the political community.<sup>17</sup>

Public reason is a holistic form of justification. This is because the outcome of public reasoning cannot be established uniquely by reference to the reasons of isolated individuals; the legitimate result of a process of public reason depends on whether the public reasons of each reasonable member of the political community have been taken seriously. In turn, this hinges on the extent to which the result of public reason is sensitive to the reasons of all those who may legitimately take part in the public reasoning process. Put differently, an individual's public reasons – i.e., those reasons that can justifiably be part of an instance of public reasoning – vary according to (and therefore, depends on) the set of public reasons held by his or her fellow citizens. This idea of mutual dependence amongst the public reasons of members of the political community makes the ideal of public reason holistic in a sense that resembles the holism that guided the discussion on distributive justice above. In contrast, non-public reasons, or unilateral reasons, or reasons that simply silence other reasons (all of them cases of non-sensitive reasons), are distant from this ideal and involve a simplistic way of approaching public matters. Given that the ideal of sensitive reasons requires a complex consideration – assessment, comparison, balance – of various reasons in order to achieve a common ground for public action, we must grant the holistic character of this way of reasoning.

It is also important to consider that the ideal of sensitive reasons is a crucial aspect of our conception of legitimacy of state action in modern liberal democracies. In effect, sensitive reasons are necessary for any conception of justice that may legitimately be affirmed in a liberal democracy. Such is the case because sensitive reasons embody the values of reciprocity and equality that must guide public action within the liberal political community. A process of justification undertaken in sensitive reasons realizes these values and makes evident to all participants their worth as individuals with equal dignity within the political community. In other words, when sensitive reasons are at work, members of the polity can endorse these reasons together, as equal participants of the common enterprise of political coexistence. Thus, it is not only that an individualistic approach to public action is simplistic; such an approach is also wrong, since its denial amounts to forfeiting the values that underpin

17 For a more recent account of this form of liberal theorizing, see Quong, 2011.

individuals' worth and equality. By extension, the enforcement of the criminal law – that is, the enforcement of coercive penal practices and principles in the public domain – on grounds different from the ideal of sensitive reasons amounts to the illegitimate imposition of the coercive power of the state.

Two things must be noted at this point. First, I have mentioned public reason only as an example of the wider ideal of sensitive reasons. This is to say that sensitive reasons could be put to work through other forms of public reasoning, such as deliberative democracy or even, in special circumstances, through monarchical procedures, when the highest authority acts only after having considered the relevant reasons of the members of the polity. Second, in endorsing sensitive reasons as the basis of legitimacy in a liberal polity I am suggesting that the individualistic retributivist has good reasons for reconsidering her understanding of the retributive sphere and, thus, favouring a conception of retributivism in holistic terms. Even further, she has reasons for doing so which are at the core of the most plausible normative conceptions of justice. This is especially clear in the case of Rawls and his endorsement of public reason. If members of the political community really agree to share each other's fates,<sup>18</sup> the imposition of punishment on an individual – a paradigmatic instance of public action – must be articulated and justified in terms of reasons that are sensitive to the reasons of the members of the political community. It is only then that the values backing Rawls' theory of justice as fairness are respected in the retributive sphere.

Thus, since a liberal theory of retributive justice is most likely a theory of the criminal law in a liberal democratic society, the ideal of sensitive reasons has much to tell us about legitimacy in the retributive sphere. However, from this conclusion (that sensitive reasons is holistic and at the basis of the legitimacy of state action) it does not immediately follow that the specified question of retribution must be addressed holistically. To ground holistic retributivism in the ideal of sensitive reasons we must explain how this ideal provides sufficient support for the holistic character of retribution. In order to attempt such an explanation, I would like to defend the view that in order to determine what type of natural duty the criminal law is meant to uphold, and what the scope and limits of these duties are, we need to move from punishment to criminalization and appeal to a public justification of penal statutes the violation of which is responded to with penal burdens.<sup>19</sup> As I shall

18 Of course, I am borrowing here from Rawls in §17 of "A Theory of Justice".

19 This move expresses part of the comprehensive understanding of retributive justice stated in the first paragraph of this article. Because the criminal law is a *system* of retributive justice, to understand the

argue below, sensitive reasons – a holistic way of reasoning – is a promising way to provide this justification.

Punishment involves treating the subject of punishment in ways that we would normally judge inadmissible. Thus, punishing an individual requires a strong justification. In addition, this justification cannot be offered without a more complete description of the question of liability (see section 3). To justify punishment we cannot only ask ‘who may be punished?’ without assuming a series of other constitutive parts of the punitive practice. In other words, we cannot understand, let alone justify, punishment without conceiving it as a practice integrally constituted by additional elements. Punishment as it should be is always part of something else. One of these elements, one that is part of our common understanding of this practice, is that punishment is a response to an agent’s action – the action of the agent that is responded to with hard treatment.<sup>20</sup> This understanding provides us with a more adequate account of the question of liability. We do not only ask ‘who may be punished?’, but ‘who may be punished for what?’ Thus, what requires a strong justification is the practice of punishing someone for an action. In what follows, I argue that a necessary ingredient of this justification depends on the legitimacy of penal statutes. More precisely, I defend the idea that such a degree of justification can be fulfilled if we appeal to the holistic ideal of sensitive reasons in order to legitimate those norms the violation of which is to be responded with punishment.

The ideal of sensitive reasons in retributive justice means that punishing an individual *A* for action *f* is a legitimate state practice only if punishing an individual for *f* can be justified to *A* and to *A*’s fellow citizens (assuming all are reasonable). In this context, *A* and *A*’s fellow citizens are conceived of as individuals coexisting within a political community and capable of reciprocity and mutual cooperation. Because sensitive reasons are reasons sensitive to the reasons of the other members of the political community, and because the ideal of sensitive reasons is at the basis of the legitimacy of state democratic practices, then we are allowed to conclude that punishment is legitimate only if it is grounded in a holistic type of reasoning, such as sensitive reasons.

practice of punishment as the culmination of a whole system of coercion, which includes, among others, the criminalization of conduct, should not be seen as a too contentious move (more on this shortly). In effect, Rawls’ treatment of retributive justice in “A Theory of Justice” seems to approve this move. He not only refers to punishment, but to the criminal law and the duties it must uphold (presumably) through the criminalization of conduct.

20 As I say, this is only *an* aspect of our common understanding of punishment. At the very least, we should also include a series of elements relative to *mens rea*.

Society's punishment of an individual for action *f* is a legitimate imposition of state power on that individual only if such an imposition results from a process of (holistic) sensitive reasons that includes that individual and her or his fellow citizens.<sup>21</sup>

A crucial step in the argument I am advancing here is that the question of legitimacy in punishment directs us to the question of legitimacy in criminalization. This is a step required by the revised version of the question of retribution – the question of liability – considered above. What results from all of this is a much more determined question of retribution. This question is concerned not only with the practice of punishment and the infliction of punishment upon an individual, but also with the infliction of punishment upon a specific individual for a specific action. When the question of retribution is understood in this fashion, the justification of punishment cannot be adequately articulated without considering at the same time the question of the legitimacy of criminalization. In other words, this argument entails that an adequate justification of punishment within the context of liberal democracy must bridge the justificatory gap between punishment and criminalization.<sup>22</sup>

Although it is true that the separation of punishment and criminalization has analytical value as a way to make conceptual distinctions and differentiate the various stages of the whole criminal justice process, when the question that concerns us is the justice of the imposition of punishment upon an individual, this separation is misleading. According to what we could call a principle of integrity in retributive justice, punishment for *f* is legitimate only if criminalization of *f* is legitimate. What follows from this principle of integrity is that punishment of *A* for conduct *f* is compatible with just treatment of *A* only if criminalization of conduct *f* can be legitimate to *A*. A central aim of criminalization is punishment, and legitimate criminalization is a *sine qua non* of just punishment. Thus, on pain of depicting our systems of retribution in a too artificial fashion and at odds with the principle of integrity in retributive

21 It is worth noting that this passage partakes of some elements influentially developed by Duff, 2010a, 2010b, and 2014. See also Duff, 1986 and 2001. In these places Duff advances a form of republican legal moralism with which I agree in various (but not all) aspects. However, my purpose in this paper is of a different nature. First, my account of sensitive reasons does not depend on the truth of any form of legal moralism and my concern with natural duties and *mala in se* offenses is due only to my interest in reconstructing a justification of retributive justice that is consistent with ideas central to Rawlsian liberalism. Second, and as I have emphasised throughout the text, my aim here is to advance an argument against individualistic justifications of retributive justice and propose a type of non-individualistic justification that liberal (Rawlsian) retributive justice theorists should espouse once they put individualistic retributivism aside. This is a goal that is both much less ambitious and more specific than what Duff undertakes in the works mentioned above.

22 For additional development of this idea, see Donoso, 2012.

justice, we must concede that the possibility of just punishment is inseparable from legitimate criminalization.<sup>23</sup>

In conclusion, in a liberal democracy the imposition of state punishment upon an individual is legitimate only if this individual has committed a crime as defined by authoritative criminalization. Since in a liberal democracy legitimate criminalization ought to be the result of sensitive reasons, the legitimacy of a society's punishment of an offender *A* for *f* must be articulated holistically. That is, articulated by a process whose legitimate outcome depends on whether the reasons of each reasonable member of the political community have been taken seriously. Returning to the violation of natural duties thesis, this analysis leads us to the following conclusion: punishment of *A* is just only if *A* has violated a rule that, through sensitive reasons, society (which includes *A*) has deemed it expresses natural duties of the relevant type and adequate scope, and the violation of which, again through sensitive reasons, society has deemed it needs to be responded to with state punishment. Thus, whether and when punishment of an individual is compatible with just treatment of that individual is a question that must be addressed holistically.

## 6 Clarifications and Objections

First, the conclusions of the previous section follow only if we understand legitimacy in criminalization as a necessary condition of justice in punishment. Thus, in consistency with the principle of integrity in retributive justice, I accept that it can be the case that unjust punishment may be the product of legitimate criminalization (as when the state sentences an individual to 30 years of forced labour for bike theft), but I deny that it can be the case that illegitimate criminalization may give rise to just punishment. In this regard, it is important to remember that my focus is on retribution understood as a state practice. Thus, my analysis does not consider whether it is possible to have just punishment through illegitimate means, for instance, in cases of retaliation. Similarly, it does not consider cases in which legitimate criminalization has been achieved through illegitimate means, as happens when legislators deceive others in order to advance reasonable statutes. I am agnostic about these possibilities here. It must also be emphasised that my argument for a holistic

23 In maintaining that the criminal law is to uphold natural duties and that punishment is to serve this end, Rawls – who provides the theoretical framework for the individualistic analysis – realizes well that there is a strong normative connection between criminalization and punishment. It is this connection that my account aims to underline.

approach to criminalization does not deny that theories of criminalization may have goals that are independent of a process of sensitive reasons. Deterrence is perhaps the most obvious of those aims.<sup>24</sup> Rather, what my account denies is that within a liberal democracy like the one envisioned in Rawls' theory the content and scope of deterrence can be determined in non-holistic terms.

Second, because I am suggesting that legitimate criminalization is only necessary for just punishment, my proposal could be accused of triviality. My critic could say that of course legitimate criminalization is necessary for just punishment (as much as legitimate pre-trial and trial arrangements), but this does not say anything interesting about the conditions of just punishment. I object to this criticism because, at least in a liberal democracy, just treatment of a reasonable individual must be consistent with (and partly depends on) the ability of this individual (and her fellow citizens) to tell a reasonable story about the treatment meted out to her by the state. She needs to be able to understand the infliction of punishment as a legitimate state practice grounded, necessarily but not uniquely, in legitimate penal laws that bind her and all her fellow citizens. This is why my proposal defends closing the justificatory gap between punishment and criminalization. The principle of integrity in retribution captures this idea by requiring that retribution ought to be conceived of as a comprehensive system, the justice of which depends necessarily on the legitimacy of its different parts. Moreover, even if this still says too little about the conditions of just punishment, this judgment does not touch my central claim here, that is, that because there is not just punishment without legitimate criminalization, just punishment depends necessarily on holistic considerations.

Third, another avenue of objection is that I have presented natural duties in a revisionist way, at odds with the context-independent character they have. Indeed, an adequate and uncontroversial account of natural duties takes it that natural duties are moral requirements that apply independently of the status of the individuals involved, the voluntariness of the actions under consideration, and the circumstances in which these agents find themselves. Natural duties are, in short, moral obligations owed to persons generally.<sup>25</sup> Without denying

24 It has been pointed to me that it is unclear why deterrence would be a consideration independent of sensitive reasons. Surely, any sensible public debate conducted in sensitive reasons will include a discussion that considers the importance of deterrence. I certainly agree with this. My point here is rather to offer a response to someone who may believe that the criminal law – as a matter of conceptual definition – must have deterrence as one of its aims. If this belief is true, then it makes sense to say that deterrence is a goal for the criminal law independent of sensitive reasons.

25 This account of natural duties is similar to the account of natural duties in Rawls, 1971 (see especially §19).

this aspect of natural duties, I believe that a non-revisionist account of these duties is perfectly compatible with my argument. This is because granting the existence of natural duties does not mean that we know what these duties and/or their normative limits are. Besides, we may also be uncertain about why the retributive sphere is responsive to only some of those duties and uncertain about why this sphere should be responsive to this set of duties instead of another. Under these circumstances of epistemic limitation and uncertainty, sensitive reasoning in criminalization – the outcome of which is ultimately expressed in the punishment of an offender for his offense – is required to support, and provide legitimacy to, any account of natural duties that is to be expressed in the criminal law of a liberal democracy.

This response opens a new avenue to my critique. My argument assumes that we have a limited and insufficient knowledge about the natural duties that are relevant to the criminal law. But, the objection goes, what if we know what those natural duties are? In effect, Rawls seems to know that, at least, to injure other persons in their life and limb, or deprive them of their liberty and property, are natural duties that should be part of any plausible account of the wrongs to be punished by the criminal law and, therefore, of any plausible system of criminalization. The idea that pre-institutional duties and rights can be translated straightforwardly into spheres of public policy is not uncommon. Joseph Raz, for example, in denying the existence of a general obligation to obey the law, asks us to “[c]onsider [...] the law of defamation. Assuming that it is what it should be, it does no more than incorporate into law a moral right existing independently of the law. The duty to compensate the defamed person is itself a moral duty” (Raz, 1986, p. 103). In this account, the law of defamation is simply enforcing a moral duty that we have an obligation to obey with or without a law of defamation having been enacted. The law is simply acting as a “centre of power which makes it possible to enforce natural duties” (Raz, 1986, p. 103). These cases illustrate the idea that when we know that such and such is a natural duty of the relevant type, this knowledge is sufficient, all things considered, to legitimately include that duty into the law’s corpus.<sup>26</sup> If this is correct, my claim that the question of retribution is to be thought of holistically loses bite, as it would only apply to those cases characterised by

26 To be sure, Raz’s task is of a different nature, and in this place I am not trying to convey any thoughts on his arguments about the authority of the law and our obligations to obey it. I am simply illustrating the idea that natural duties can be incorporated directly into the law, without further adjustment or consideration. To go further in this qualification: elsewhere, Raz has offered an argument that seems to support an analysis along lines similar to what I offer here (see Raz, 1998).

uncertainty and where there are epistemic limitations concerning the natural duties that are relevant to the criminal law.

However, we need to be cautious with respect to this type of reasoning. Whatever they are, natural duties are not criminal statutes. Natural duties may well be expressed in, or enforced through, criminal statutes, but they are distinguishable from criminal statutes. This distinction is important and should be maintained. It suggests that there is a difference to be kept between pre-institutional principles and duties, on the one hand, and state practices and policies, on the other. Within the context of state practices and policies, the imposition of punishment on an individual cannot be made legitimate, uniquely, by resorting to an abstract natural duty (how much do I need to injure another person in his limb to be criminally liable? Does all injury in the life of another count as a violation of a natural duty? What counts as a violation of the duty not to defame others?).<sup>27</sup> At first sight, this may seem to contradict my endorsement of sensitive reasons. If we pursue this ideal, it may be argued that abstract reasons are precisely what we need, as they are capable of living up to the promise of a process of justificatory reasons that most citizens could embrace and, therefore, that satisfies the ideal of sensitive reasons. However, and as I will elaborate below, this way of grounding legitimacy is mistaken and must be resisted; the generality and indeterminacy of natural duties raise serious difficulties about the workability of the enforcement of these duties through the criminal law.

As I have noted, in a liberal democracy penal statutes must gain legitimacy in the eyes of those who are subject to its rule. This is what the ideal of sensitive reasons captures. Connected to the legitimacy of penal legislation is the idea of workability of these enforcements. The workability of a penal command is necessary for its legitimacy, and the workability of this command is, importantly, a function of its determinacy. Given circumstances of diversity and disagreement about fundamental issues, the degree of determinacy required for the workability of duties in the public sphere is more demanding than (or at least, different from) what it is required in more abstract ethical domains. This means that for natural duties to do their job in the retributive sphere we need more than merely to identify the natural duties that are to be upheld by our penal statutes.<sup>28</sup> We need to *re-present* these duties in the

<sup>27</sup> Anthony Duff captures well this idea when he says that the law has sometimes “to provide precise *determinationes* of values whose precise prelegal meanings or implications are uncertain or controversial” (Duff, 2001, p. 64).

<sup>28</sup> I do not take the premise of this argument to be too controversial. The following paragraph defends it through an illustration.

law through adequate mechanisms of public justification. My claim here is different from the idea that many of us would not respect natural duties but for the existence of a generally effective penal system that gives us prudential reasons for doing so. Rather, the claim is that to be workable, penal norms must meet a degree of specificity that is more demanding than the generality and abstraction characteristic of natural duties. In a modern liberal democracy we need institutions that reflect and express these duties in a way that is workable and appealing to all those who are subject to the coercive power of the criminal law.<sup>29</sup> The ideal of sensitive reasons correctly understood achieves this.

To see this more clearly, consider how a central aspect of one of the duties mentioned by Rawls – the duty not to injure others in their life and limb – is incorporated in the American Model Penal Code (MPC).<sup>30</sup> According to the MPC, bodily injury “means physical pain, illness or any impairment of physical condition”, and “‘serious bodily injury’ means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ” (MPC 210.0 [2], [3]). In the hypothetical jurisdiction of the MPC, this definition of bodily injury and serious bodily injury would determine the *actus reus* necessary to establish whether and when an individual can be legitimately punished for simple assault, aggravated assault, and reckless endangerment (actions presumably covered by Rawls’ duty not to injure others in their life and limb). Although these different categories can be understood as expressing various degrees of seriousness of a given conduct (which relate to the question of the amount of punishment to be dispensed for that conduct), they also establish with greater precision the content and normative limits of the duty not to injure others in their life and limb (which relate to the question of liability – who ought to be held liable for what). In this sense, the way the MPC re-presents the natural duty not to injure others in their life and limbs, because of its degree of determinacy, separates itself importantly from Rawls’ original natural duty. For the reasons presented above, this duty, although prior and fundamental, cannot do the job demanded by retributive justice in a liberal democracy. To make this duty workable in the retributive sphere we need something like the determinacy provided by the definitions in the MPC.

29 A consequence of this argument is that the criminal law of a complex liberal democracy may have to adopt a minimalist form. In Donoso, 2010a, I have defended a model of the criminal law and criminalization of this sort.

30 Of course, my claim is not that the MPC is an expression of holistic reasoning, because it is not. Instead, I am using the MPC to illustrate the type of determinations and clarifications that may be required for a penal code to make statutes workable in a complex liberal democracy.

In a liberal democracy – and this is my central claim – this determination gains legitimacy only if achieved through sensitive reasons.

In conclusion, my proposal does not need to be understood as implying a radical revision of natural duties. These duties may well be immutable, context-independent and pre-institutional, but from this it does not follow that the criminal statutes that are to enforce and protect these duties are similarly immutable, context independent, and so on. What I have argued is that within the context of modern liberal democracies, and given the abstract and general character of natural duties, these duties need to be recognised and specified publicly and reasonably in the law by legislators and judges in the name of all the citizens of the polity. It is only through this holistic articulation of the retributive sphere that the allocation of burdens through the criminal law can be made compatible with just treatment of individuals.

## **7 Conclusion**

In this article I have argued that the question of whether and when punishment of an individual is compatible with just treatment must be treated holistically. This conclusion should be taken seriously by any liberal theory of retributive justice. More precisely, liberal theories of this sort would have to articulate most, if not all, different stages of the criminal law system in holistic terms. Thus, it is not only that the question of whether and when state punishment of an individual is compatible with just treatment must be approached holistically, but also that criminalization, sentencing, and the existence and enforcement of the criminal system as a whole must be considered in a similar fashion. This is not to say that a liberal theory of retributive justice would not include some individualistic features, but that this theory, its most central aspects, cannot be fully articulated in non-holistic terms.

My arguments here have remained mute about the plausibility of the asymmetry of desert and, more importantly, about many of the possible consequences of a holistic conception of retributivism. Instead, I have defended the idea that, in a liberal democracy like the one Rawls' influentially envisaged, a theory of retributive justice that does not respond to the most important justificatory questions of retribution in terms of the ideal of sensitive reasons ought not to be considered a just retributive model. A liberal theory of retributive justice must be consistent with a holistic account of the retributive sphere.

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