# Liberal Retributive Justice:
# Holistic Retributivism and Public Reason

Alfonso Donoso
University of York

A traditional way to enquire into the institution of the criminal law is to look at its coercive practices. 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 within this context is whether the most central aspects of just criminal retribution should be conceived of either individualistically or holistically.[1]

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 argument. Following John Rawls' understanding of desert, Scheffler has argued that the role of desert in the retributive and the distributive spheres is asymmetrical. 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.[2]

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* Rawls' and Scheffler's conception of retribution, have been offered to articulate a holistic understanding of the retributive sphere. In

---

1 The use of the adjective 'criminal' before retribution is necessary to mark out the specific focus of my argument. Practices of retribution apply to different contexts, and these different contexts may affect differently the aspects that need to be considered in order to determine the justice of these practices. Thus, depending on the context in which judgments and practices of retribution occur, we can talk about, for example, family retribution, natural retribution, and divine retribution. 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.

2 Rawls, J. (1971). *A Theory of Justice*. Cambridge, Mass.: Harvard University Press; Scheffler, S. (2000). Justice and Desert in Liberal Theory. *California Law Review , 88*, 965-990. See also Scheffler, S. (2003). Rawls and Utilitarianism. In S. Freeman (Ed.), *The Cambridge Companion to Rawls* (pp. 426-459) Cambridge: Cambridge University Press, specially at pp. 444-450; and Scheffler, S. (1995). Individual Responsibility in a Global Age. *Social Philosophy and Policy , 12*, 219-236. I must emphasise that in this article I am not concerned 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 issues, but an analysis of what these consequences are is left for a different time.

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 public reason. 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.

## 1. The Asymmetry of Desert and Individualistic Retributivism

In interpreting John Rawls' account of moral desert,[3] 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".[4]

According to this position, comparative considerations are central to justice in distribution.[5] 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".[6]

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

3 Rawls account is in this respect influenced by Joel Feinberg's "Justice and Personal Desert" reprinted in Feinberg, J. (ed.) (1970) *Doing and Deserving*. Princeton: Princeton University Press.
4 Scheffler 2000, pp.984, 986.
5 For an account of comparative and noncomparative justice see Feinberg, J. (1974). Noncomparative Justice. *The Philosophical Review*, 83 (3), 297-338.
6 Scheffler 2000, p.985.

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 and punishment).[7] 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. "[T]he basis for a claim of personal desert", Scheffler contends, "must be *individualistic*".[8] 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.[9] Thus, on this 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 social 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.

Scheffler reaches these conclusions by interpreting 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".[10] 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".[11] For Rawls, what matters in justice as fairness is not 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

7 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, A. (1986). *Trials and Punishments*. Cambridge: Cambridge University Press.
8 Scheffler 2000, p.983. Scheffler follows Joel Feinberg's account of desert on this point (see Feinberg 1970).
9 See Scheffler 2000, p.984.
10 Rawls 1971, p.315.
11 Rawls 1971, p.315.

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".[12] 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 Rawls 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".[13] 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.[14]

Matt Matravers has argued that retributive justice is holistic to the extent that the hard treatment offenders deserve is "a complex matter determined in 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)".[15] 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".[16] 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

12 Rawls 1971, p.314.
13 Scheffler 2000, p.984.
14 Other important challenges to this asymmetry have been offered by: Moriarty, J. (2003). Against the Asymmetry of Desert. *Nous* , 518-536. Mills, E. (2004). Scheffler on Rawls, Justice, and Desert. *Law and Philosophy* , 261-272. Smilansky, S. (2006). Control, Desert and the Difference between Distributive and Retributive Justice. *Philosophical Studies , 131* (3), 511-524. 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.
15 Matravers, M. (2011). Mad, Bad, or Faulty? Desert in Distributive and Retributive Justice. In C. Knight, & Z. Stemplowska (Eds.), *Responsibility and Distributive Justice* (Forthcoming ed., pp. 114-144). Oxford: Oxford University Press, at p.139. For the distinction between desert and entitlement see Feinberg 1970.
16 Matravers 2011, p.142.

foul of the criminal law".[17] 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.[18] He has advanced the argument that, *pace* Scheffler, desert is not only individualistic but also holistic and, therefore, is similarly relevant to both retributive and distributive justice.[19] 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".[20] 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.[21] To determine whether or not a given sentence is arbitrary and 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's article.[22] Husak advances a case for the holistic character of retributive justice by arguing that the retributive sphere "can appear nonholistic only if we artificially narrow our conception of the nature of 'the problem of retributive justice'".[23] 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 he deserves (a holistic question). This means that, "[a]t some point, the justification of punishment must appeal to many of the same

17 Matravers 2011, p.142.
18 Hurka, T. (2003). Desert: Individualistic and Holistic. In S. Olsaretti (Ed.), *Desert and Justice* (pp. 45-68). Oxford: Clarendon.
19 However, he makes the precision that the most plausible theory of distributive desert is more holistic than the most plausible theories of retributive desert.
20 Hurka 2003, p.54.
21 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.
22 Husak, D. (2000). Holistic Retributivism. *California Law Review , 88* (3), 991-1000.
23 Husak 2ooo, p.993.

kinds of social considerations that lead Scheffler to describe distributive justice as holistic".[24] 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".[25] 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 Scheffler acknowledges Husak's considerations, he dismisses his reply on grounds that Husak misunderstands his article's main concern. 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*".[26] This is an important precision that suggests that Scheffler's concern for retributive justice is of a specific nature. His 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 retribution, which shall concern us in the rest of this article. In his response to Husak, Scheffler correctly separates the question of retribution 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 Scheffler 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 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

24 Husak 2000, p.995.
25 Husak 2000, p.999.
26 Scheffler 2000, p. 987 fn.73. My emphasis.

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 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".[27]

Should we then accept Matravers' and Hurka's responses as genuine answers to Scheffler's question 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. These are conclusions that cannot be denied and that challenge an individualistic treatment of the question of retribution.

### 3. Individualistic Retributivism Revisited

Despite these conclusions, I believe that an individualistic retributivist would still have a reply available to resist the holistic character of retribution.[28] He could argue that even though both Hurka and Matravers have a point, their analyses do not respond to the more fundamental question of retribution. The individualistic retributivist 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.[29]

---

27 Hurka 2003, p.67. 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 always depends – directly or indirectly – on the justice of the larger patterns of punishment in society" (Mills 2003, p.266f).

28 More precisely, to resist a holistic answer to the question of retribution.

29 This distinction between the question of amount and the question of liability follows H.L.A Hart's famous argument in "Prolegomenon to the Principles of Punishment" in Hart, H.L.A. (2008). *Punishment and Responsibility* (2nd ed.). Oxford: Oxford University Press. It is worth noting that this amendment of individualistic retributivism would also serve as a response to an argument advanced by David Miller. See Miller, D. (2003). Comparative and Noncomparative Desert. In S. Olsaretti (Ed.), *Desert and Justice* (pp. 25-44). Oxford: Clarendon. 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

With additional precisions and clarifications, I believe the reformulation of Scheffler's question of retribution can neutralise Hurka's and Matravers' arguments for a holistic answer to the question of retribution. It 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 retribution *simpliciter*, but about an aspect of this question, namely, the question of liability. Indeed, this question is perhaps one of the most central aspects 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. Thus, following the revised 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). 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".[30] 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 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 all these precisions 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 punishes individuals for their (voluntary, intentional) violations of natural duties and these acts are an expression of their bad characters. However, before ascertain this conclusion any further we need to consider these two theses more carefully. For the specified question of retribution to be answered in individualistic terms it is necessary that at least one of the two theses considered above is true. Thus, it must be true that the state should only punish those who display bad characters and/or

---

amount of punishment), to answer these questions holistically – or comparatively – does not suppose that the prior and more fundamental question of retribution is to be answered in the same way.
30 Rawls 1973, pp.314-315.

that the state punishes the violation of natural duties. Let us consider each of these claims in turns.

The bad character thesis is that the violation of natural duties – the duties to be upheld by the criminal law – is a mark of individuals' bad character and that in a well-ordered society punishment will only be imposed on those individuals who present these faults. If true, this would count as a satisfactory defence of individualistic retribution: bad character is an individual trait and punishments would be imposed and justified by virtue of that individual trait only. However, the bad character thesis is difficult to defend. In a just society punishment is meted out irrespective of the character of those who violate natural duties, and individuals violate natural duties irrespective of the character they have. Thus, Mary may break into Paul's house out of considerations that have nothing to do with bad character. She might be desperate for money or food, but Mary's despair is independent of the character she has.

The bad character theorist could respond that being disposed to break into houses when desperate for money or food is the mark of bad character, so that Mary is rightly punished because her action is an expression of her bad character. I find this response difficult to undermine, mainly because it seems to be unfalsifiable: a case of criminal wrongdoing can always be described as a result of the offender's bad character. However, this response is also difficult to maintain. First, because it is dangerously close to the idea that the criminal law should punish people for the characters they have. Second, if the bad character thesis is true, it follows that wrongful conduct that is not the result of bad character must be left beyond the pale of the criminal law. For example, if during a non-culpable shift in character Mary assaults her neighbour, the bad character theorist must claim that she cannot be the subject of legitimate punishment because that action is out of Mary's character. Moreover, since performing certain actions for the first and only time can hardly be the expression of a bad character, it follows that on occasions many actions normally considered criminal must not be responded to with punishment because the wrongdoer could offer as a defence that her isolated action cannot be shown to be the expression of a bad character. These are unpalatable consequences for any theory of the criminal law. The state ought to punish a wrongdoer even if her conduct is not the result of a bad character; bad character may be, but need not be, part of the adequate description of those who violate natural duties.[31]

It is the first thesis – the violation of natural duties thesis – that offers a more substantive and promising ground for the individualistic character of retribution. As was seen above, this thesis establishes that "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

31 Defending this position Michael Moore says that it is "choice to do evil on a particular occasion that makes a person morally responsible for any wrong that flows from such a choice, *irrespective of whether such choice expresses bad character or not*" (Moore, M. (1993) *Act and Crime*. Oxford: Clarendon, p.51, my emphasis). For a defence of the bad character theory see Tadros, V. (2005). *Criminal Responsibility*. Oxford: Oxford University Press. But see Alan Brudner's critique in Brudner, A. (2009) *Punishment and Freedom*. Oxford: Oxford University Press at pp.64-70.

property, and punishments are to serve this end".[32] 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 second 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 provides support for individualistic retributivism. Thus, this argument is not meant to deny the truth of the natural duties thesis (even though I am not fully convinced about it), but to resist the view that this thesis makes us endorse individualistic retributivism. On the contrary, I will argue, this thesis should make 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 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 the first question affirmatively and accept that the purpose of the criminal law is 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, at the very least, 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 offence did not exist. This means that committing a *malum in se* offence entails the violation of a natural duty.

However, although the criminal law must punish actions that match our best understandings of *mala in se* offences, 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. Additionally, and *pace* strong penal moralism, we are also well advised to maintain that the criminal law of liberal pluralist democracies is not to criminalise and punish every inherent evil that exists. In other words, we have good reasons not to punish every *malum in se* action that

32 Rawls 1971, p.314.

could count as a *malum in se* offence, and thus we have good reasons not to criminalise 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 criminalisation. 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 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 criminalise, and have the power to criminalise, almost whatever they think fit).[33] Of course, that Rawls does not engage in this analytical task 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 consistent punishment 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 Public Reason

So far I have suggested that in order to provide adequate limits to the expression of natural duties in the criminal law 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 well captured by the ideal of public reason.[34] This is a holistic conception of public legitimacy at the basis of our best understanding of liberal democratic institutions.

---

33 For a recent account of this problem see Husak, D. (2008). *Overcriminalization. The Limits of the Criminal Law*. New York: Oxford University Press.

34 Rawls, J. (1993a). *Political Liberalism*. New York: Columbia University Press. See also Rawls, J. (1993b). The Domain of the Political and Overlapping Consensus. In D. Copp, J. Hampton, & J. Roemer (Eds.), *The Idea of Democracy* (pp. 245-269). New York: Cambridge University Press. And Rawls, J. (1999) The Idea of Public Reason Revisited. In *The Law of Peoples* (pp. 129-180). Cambridge, MA: Harvard University Press.

According to the ideal of public reason, citizens (including legislators, judges, officials, voters, offenders and non-offenders) "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".[35] So understood, public reasons are reasons sensitive to the reasons of 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. In this sense, public reason is a holistic ideal. It is holistic because the outcome of public reasoning cannot be established only 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. Put differently, an individual's legitimate public reasons 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, are distant from this ideal and involve a simplistic way of approaching public matters. Given that public reason 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 emphasise that this ideal is a crucial aspect of our conception of legitimacy of state action in modern liberal democracies. In effect, public reason is necessary for any conception of justice that may legitimately be affirmed in a liberal democracy. Charles Larmore puts this nicely when he affirms that "[t]he conception of justice by which we live is then a conception we endorse, not for the different reasons we may each discover, and not simply for reasons we happen to share, but instead for reasons that count for us because we can affirm them together. This spirit of reciprocity is the foundation of a democratic society".[36] Thus, it is not only that an individualistic approach to public action is simplistic; such an approach is also wrong. By extension, the enforcement of the criminal law – that is, the enforcement of coercive penal practices and principles – on grounds different from public reason amounts to the illegitimate imposition of the coercive power of the state.

Since a liberal theory of retributive justice is most likely a theory of the criminal law in a liberal democratic society, the ideal of public reason has much to tell us about legitimacy in the retributive sphere. However, from this conclusion (that public reason 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 public reason 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

35 Ibid, p.218.
36 Larmore, C. (2003). Public Reason. In S. Freeman (Ed.), *The Cambridge Companion to Rawls* (pp. 368-393). Cambridge: Cambridge University Press, at p.368.

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 criminalisation and appeal to a public justification of penal statutes the violation of which is responded to with penal burdens.[37] As I shall argue below, public reason – a holistic way of reasoning – is a plausible way to provide this justification.

Punishment involves treating the subject of punishment in ways that we would normally judge inadmissible. Thus, punishing an individual *A* requires a strong justification. In addition, this justification cannot be offered without a more complete description of the question of liability. 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. An element of our common understanding of this practice is that punishment supposes an agent's action – the action of the agent that is responded to with hard treatment.[38] 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 public reason in order to legitimate those norms the violation of which is to be responded with punishment.

The ideal of public reason in retributive justice means that punishing an individual *A* for action $\phi$ is a legitimate state practice only if punishing an individual for $\phi$ 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 reasonable individuals capable of reciprocity and mutual cooperation. Because public reasons are reasons sensitive to the reasons of the other members of the political community, and because public reason is at the basis of the legitimacy of state practices, then we are allowed to conclude that punishment is legitimate only if it is grounded in a holistic type of reasoning, such as public reason. Society's punishment of an individual for action $\phi$ is a legitimate imposition of state power on that individual only if such an imposition results from a process of (holistic) public reason that includes that individual and her or his fellow citizens.

In this account, the question of legitimacy in punishment directs us to the question of legitimacy in criminalisation. This is a step required by the revised version of the question of

37 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 practice of punishment as the culmination of a whole system of coercion, which includes, among others, the criminalisation 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 criminalisation of conduct.

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

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 criminalisation.

Although it is true that the separation of punishment and criminalisation 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 $\phi$ is legitimate only if criminalisation of $\phi$ is legitimate. What follows from this principle of integrity is that punishment of $A$ for conduct $\phi$ is compatible with just treatment of $A$ only if criminalisation of conduct $\phi$ is legitimate to $A$. A central aim of criminalisation is punishment, and legitimate criminalisation 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 justice, we must concede that the possibility of just punishment is inseparable from legitimate criminalisation.[39]

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 criminalisation. Since in a liberal democracy legitimate criminalisation ought to be the result of public reason, the legitimacy of a society's punishment of an offender $A$ for $\phi$ 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 public reason, society (which includes $A$) has deemed it expresses natural duties of the relevant type and adequate scope, and the violation of which, again through public reason, 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

The conclusions of the previous section follow only if we understand legitimacy in criminalisation 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 criminalisation (as when the state sentences an individual to 30 years of

39 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 – realises well that there is a strong normative connection between criminalisation and punishment. It is this connection that my account aims to underline.

forced work for bike theft), but I deny that it can be the case that illegitimate criminalisation 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, I do not consider whether it is possible to have just punishment through illegitimate means, for instance, in cases of retaliation. Similarly, I do not consider cases in which legitimate criminalisation has been achieved through illegitimate means, as happens when legislators deceive others in order to advance reasonable statutes. I am agnostic to these possibilities here. It must also be emphasised that my argument for a holistic approach to criminalisation does not deny that theories of criminalisation may have goals that are independent of a process of public reasoning. Deterrence is perhaps the most obvious of those aims.[40] Rather, what my account denies is that within a liberal democracy the content and scope of deterrence can be determined in non-holistic terms.

Because I am suggesting that legitimate criminalisation is only necessary for just punishment, my proposal could be accused of triviality. My critic could say that of course legitimate criminalisation is necessary for just punishment (as much as legitimate pre-trail 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. 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 criminalisation, just punishment depends necessarily on holistic considerations.

Another avenue of objection is that I have presented natural duties in a revisionist way, at odds with the context-independent character they have. Without denying 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, public reasoning in criminalisation – the outcome of which is

40 It has been pointed to me that it is unclear why deterrence would be a consideration independent of public reasoning. Surely, any sensible public debate conducted in public 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 public reasoning.

ultimately expressed in the punishment of an offender for his offence – 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 critic. 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 criminalisation. 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".[41] For Raz, 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 being enacted. The law is simply acting as a "centre of power which makes it possible to enforce natural duties".[42] 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 include legitimately that duty into the law's corpus.[43] 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 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?). As I will argue, this way of grounding legitimacy must be resisted because the generality

41 Raz, J. (1986). *The Morality of Freedom*. Oxford: Oxford University Press, p.103.
42 Raz 1986, p.103.
43 Of course, 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 thought 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, J. (1998). "On the Authority and Interpretation of Constitutions." In *Constitutionalism: Philosophical Foundations*, ed. Larry Alexander. Cambridge: Cambridge University Press.

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. 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 conflict 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.[44] We need to *re-present* these duties in the 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.[45] Public reason is a way to achieve 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).[46] 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

44 I do not take the premise of this argument to be too controversial. The following paragraph defends it through an illustration.

45 A consequence of this argument is that the criminal law of a complex liberal democracy may have to adopt a minimalist form. In my doctoral thesis I have defended a model of the criminal law and criminalisation of this sort.

46 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.

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. In a liberal democracy – and this is my central claim – this determination gains legitimacy only if achieved through holistic public reason.

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. 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 criminalisation, 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, a theory of retributive justice that does not respond to the most important questions of retribution in holistic terms 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.

**Acknowledgments**: Thanks to Peter Chau, Alejandro Chehtman, John Charney and Matt Matravers for very helpful comments and suggestions.

**References**

--- Duff, A. (1986). *Trials and Punishments*. Cambridge: Cambridge University Press.
--- Brudner, A. (2009) *Punishment and Freedom*. Oxford: Oxford University Press.
--- Feinberg, J. (ed.) (1970) *Doing and Deserving*. Princeton: Princeton University Press.
--- Feinberg, J. (1974). Noncomparative Justice. *The Philosophical Review*, 83 (3), 297-338.
--- Hart, H.L.A. (2008). *Punishment and Responsibility* (2nd ed.). Oxford: Oxford University Press.
--- Hurka, T. (2003). Desert: Individualistic and Holistic. In S. Olsaretti (Ed.), *Desert and Justice* (pp. 45-68). Oxford: Clarendon.
--- Husak, D. (2000). Holistic Retributivism. *California Law Review , 88* (3), 991-1000.
--- Husak, D. (2008). *Overcriminalization. The Limits of the Criminal Law*. New York: Oxford University Press.
--- Larmore, C. (2003). Public Reason. In S. Freeman (Ed.), *The Cambridge Companion to Rawls* (pp. 368-393). Cambridge: Cambridge University Press.
--- Matravers, M. (2011). Mad, Bad, or Faulty? Desert in Distributive and Retributive Justice. In C. Knight, & Z. Stemplowska (Eds.), *Responsibility and Distributive Justice* (Forthcoming ed., pp. 114-144). Oxford: Oxford University Press.
--- Miller, D. (2003). Comparative and Noncomparative Desert. In S. Olsaretti (Ed.), *Desert and Justice* (pp. 25-44). Oxford: Clarendon.
--- Mills, E. (2004). Scheffler on Rawls, Justice, and Desert. *Law and Philosophy, 23*, 261-272.
--- Moore, M. (1993) *Act and Crime*. Oxford: Clarendon.
--- Moriarty, J. (2003). Against the Asymmetry of Desert. *Nous* , 518-536.
--- Rawls, J. (1971). *A Theory of Justice*. Cambridge, Mass.: Harvard University Press.
--- Rawls, J. (1993a). *Political Liberalism*. New York: Columbia University Press.
--- Rawls, J. (1993b). The Domain of the Political and Overlapping Consensus. In D. Copp, J. Hampton, & J. Roemer (Eds.), *The Idea of Democracy* (pp. 245-269). New York: Cambridge University Press.
--- Rawls, J. (1999) The Idea of Public Reason Revisited. In *The Law of Peoples* (pp. 129-180). Cambridge, MA: Harvard University Press.
--- Raz, J. (1986). *The Morality of Freedom*. Oxford: Oxford University Press.
--- Raz, J. (1998). On the Authority and Interpretation of Constitutions: Some Preliminaries. In Larry Alexander (Ed.) *Constitutionalism: Philosophical Foundations* (pp. 152-193). Cambridge: Cambridge University Press.
--- Scheffler, S. (1995). Individual Responsibility in a Global Age. *Social Philosophy and Policy , 12*, 219-236.
--- Scheffler, S. (2000). Justice and Desert in Liberal Theory. *California Law Review , 88*, 965-990.
--- Scheffler, S. (2003). Rawls and Utilitarianism. In S. Freeman (Ed.), *The Cambridge Companion to Rawls* (pp. 426-459). Cambridge: Cambridge University Press.
--- Smilansky, S. (2006). Control, Desert and the Difference between Distributive and Retributive Justice. *Philosophical Studies , 131* (3), 511-524.
--- Tadros, V. (2005). *Criminal Responsibility*. Oxford: Oxford University Press