

May 2000

## Holistic Retributivism

Douglas Husak

Follow this and additional works at: <https://scholarship.law.berkeley.edu/californialawreview>

---

### Recommended Citation

Douglas Husak, *Holistic Retributivism*, 88 CALIF. L. REV. 991 (2000).

### Link to publisher version (DOI)

<https://doi.org/10.15779/Z38RM7B>

This Article is brought to you for free and open access by the California Law Review at Berkeley Law Scholarship Repository. It has been accepted for inclusion in California Law Review by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact [jcera@law.berkeley.edu](mailto:jcera@law.berkeley.edu).

# Holistic Retributivism

Douglas Husak†

## I

### INTRODUCTION

Many contemporary liberals make relatively little use of the concept of desert in their conceptions of distributive justice. By contrast, the concept of desert is absolutely central to their views about the justification of criminal punishment. Are they consistent? Samuel Scheffler hopes to find a plausible rationale for the asymmetric role played by desert in theories of distributive and retributive justice.<sup>1</sup> According to Scheffler, good reasons can be found to “de-emphasize desert in relation to distributive justice while retaining it as an element of our thinking about . . . retributive justice and the function of the criminal law.”<sup>2</sup>

Why do contemporary liberals “de-emphasize” desert in their theories of distributive justice?<sup>3</sup> The key to Scheffler’s answer is that “there is a fundamental difference between the justificatory bases for claims of desert and claims of distributive justice, respectively.”<sup>4</sup> The justificatory basis for a valid desert claim must be individualistic, whereas distributive justice is holistic. In describing the basis for a desert claim as individualistic, Scheffler means that the fact that provides the basis for the desert claim must be about the person who is the subject of that claim. In describing distributive justice as holistic, Scheffler means that the justice of any assignment of benefits to particular persons always depends on the justice of the larger distribution of benefits in society.

---

Copyright © 2000 California Law Review, Inc. California Law Review, Incorporated (CLR) is a California nonprofit corporation. CLR and the authors are solely responsible for the content of their publications.

† Professor of Philosophy, Rutgers University.

1. Samuel Scheffler, *Justice and Desert in Liberal Theory*, 88 CALIF. L. REV. 965 (2000).

2. *Id.* at 967.

3. Although he makes passing reference to “other egalitarian liberals,” *id.* at 983, Scheffler is especially interested in defending the asymmetric role of desert in the theories of distributive and retributive justice provided by John Rawls. Because Scheffler claims that he is not primarily concerned with the correct interpretation of Rawls’s text, *see id.* at 979, and because he admits that the defense he provides is not explicitly found in this text, I will not comment on Rawls’s views in particular.

4. *Id.* at 983.

According to Scheffler, "the problem of distributive justice" is "the problem of how to allocate scarce goods among moral equals."<sup>5</sup> Of course this problem should not be resolved simply by attending to facts about particular persons. Clearly, "not every judgment to the effect that an individual ought to receive a certain benefit has an individualistic basis."<sup>6</sup> Many of "the reasons in favor of providing some benefit to a given person [are] nonindividualistic"<sup>7</sup> and depend on the positive social effects that follow from conferring that benefit. But Scheffler construes "the problem of retributive justice" to be quite different; it is "the problem of how society can ever be justified in imposing the special burden of punishment on a particular human being."<sup>8</sup> This question is plausibly answered by appealing to the very facts about persons that play a much smaller role in distributive contexts. According to Scheffler, "the establishment of penal institutions is a social response . . . to exercises of individual agency that society deems intolerable."<sup>9</sup> Thus, the individualism downplayed in distributive contexts can be embraced wholeheartedly in the retributive arena.<sup>10</sup>

As I understand him, Scheffler distinguishes the basis for contending that a person deserves some benefit—which is always individualistic—from the ground for thinking that he ought actually be given that benefit—which is seldom individualistic but generally holistic. He admits that "the claim that an individual deserves a certain benefit implies that he ought, *pro tanto*, to receive it."<sup>11</sup> But considerations of distributive justice often provide excellent reasons (of a nonindividualistic, holistic nature) to actually distribute the benefit in some way other than in accordance with desert. How and why does the justice of assigning benefits to particular persons depend on the justice of the larger distribution of benefits in society? Scheffler cites both moral and empirical reasons to conceive of distributive justice holistically. I will mention only one such reason. He points out that the material prospects of citizens are interconnected because resources are scarce. As a result, "virtually any decision to assign economic benefits to one person or class has economic implications for other persons and classes."<sup>12</sup> Therefore, he concludes that we should not adopt a standard

---

5. *Id.* at 986.

6. *Id.* at 984 (citing Joel Feinberg, *Justice and Personal Desert*, in *NOMOS VI* 69 (Carl J. Friedrich & John W. Chapman eds., 1963), *reprinted in DOING AND DESERVING* 55 (Joel Feinberg ed., 1970)).

7. Scheffler, *supra* note 1, at 984.

8. *Id.* at 986.

9. *Id.*

10. Scheffler acknowledges what seem to be *some* holistic aspects of retributive justice. *See infra* text accompanying note 25.

11. Scheffler, *supra* note 1, at 984.

12. *Id.* at 985.

to assign benefits that appeals solely to facts about the proposed beneficiaries.

There is a sense in which I think that retributive justice is more “individualistic” than distributive justice, although this is not exactly the sense that Scheffler seems to have in mind. One factor that may help to explain the asymmetry that Scheffler explores is that retributivists who award a central place to desert in their theories of punishment attempt to decide what a culpable wrongdoer deserves for having committed a single, individual criminal act. They frequently go to great pains to emphasize that they are not endeavoring to make a more global assessment of a person’s desert. That is, they are not trying to decide whether a person deserves his overall lot in life in virtue of the totality of his behavior. Whether the culpable wrongdoer has been a good parent or a loving wife, for example, are generally thought to be immaterial to her desert in a criminal context.<sup>13</sup> Judgments about personal desert based on a single act are certainly more manageable and less complex than judgments that purport to evaluate whether a person deserves whatever particular share of goods are allocated to him by a theory of distributive justice.

In what follows, I will suggest that Scheffler’s attempt to explain the asymmetry between distributive and retributive justice is somewhat problematic. I have no quarrel with his claim that distributive justice is holistic. But I will contend that some of the most fundamental issues about retributive justice and punishment are less individualistic and more holistic than Scheffler acknowledges. Retributive justice can appear nonholistic only if we artificially narrow our conception of the nature of “the problem of retributive justice.”

Even if my subsequent arguments are sound, however, I am unsure and so will reserve judgment about whether or to what extent they serve to refute Scheffler’s attempt to account for the asymmetric role of desert in theories of retributive and distributive justice. I have two reservations. First, distributive justice may be more holistic and less individualistic than retributive justice, thus preserving the asymmetry Scheffler tries to explain. After all, our principles of distributive justice allow us to provide a benefit to A to prevent something bad from happening to B, while our principles of retributive justice do not allow us to impose a punishment on A to prevent something bad from happening to B. My second reservation stems from my uncertainty about what Scheffler means when he describes a kind of justice as holistic. My arguments raise doubts about whether any domain

---

13. To the extent that retributive judgments of desert focus on the particular criminal act, retributivists have difficulty accounting for the widespread view that past criminal acts should affect the severity of the offender’s sentence. For some thoughtful observations, see Andrew von Hirsch, *Desert and Previous Convictions*, in *PRINCIPLED SENTENCING* 191 (Andrew von Hirsch & Andrew Ashworth eds., 1998).

of justice is completely independent of the justice of other social institutions. To this extent, my remarks challenge Scheffler to further clarify what he means by characterizing an area of justice as holistic. Despite these two reservations about whether or to what extent my arguments really undermine Scheffler's central thesis, I now want to emphasize some of the respects in which questions about the justification of punishment require answers that seem to me to imply the holism of retributive justice.

## II

### THE HOLISM OF RETRIBUTIVE JUSTICE

I am unsure whether Scheffler intends to define explicitly the principle of retributive justice. His closest approximation is that "[s]ociety is justified in punishing people who have done things for which they deserve to be punished."<sup>14</sup> But what exactly is involved in "justifying" punishment? I agree that the desert of the offender provides a reason to punish him.<sup>15</sup> I also agree that the bases of desert, here as elsewhere, are individualistic. But these concessions do not show that the actual imposition of punishment is justified wholly in retributive terms. The same distinction that (according to my interpretation) Scheffler believes is crucial in distributive contexts is crucial in retributive contexts as well. That is, we must distinguish the issue of whether a person deserves to be punished from the issue of whether he ought actually be punished. The former question—whether a person deserves to be punished—should, like all questions about desert, be answered individualistically. But the latter question—whether a person should actually be given what he deserves—should be answered holistically.

To support my claim that retributive justice is also somewhat holistic, I begin by considering how philosophers typically defend retributive theories of punishment against their consequentialist rivals.<sup>16</sup> Such defenses frequently appeal to intuitions. These intuitions, cultivated through various thought experiments, are designed to show that the state of affairs in which culpable wrongdoers are punished is intrinsically good—that is, superior to the state of affairs in which they are not punished—even though no utilitarian benefits are thereby achieved. These thought experiments often involve persons who have committed monstrous crimes but whose punishment would serve no (further) useful purpose and thus would be unjustified by nonretributive theories. We come away from these thought

---

14. Scheffler, *supra* note 1, at 987.

15. Actually, I am not confident that what wrongdoers deserve is *punishment*. What wrongdoers deserve is to suffer some hardship or deprivation for their wrongdoing that may or may not be achieved by punishment. Although this distinction is important for some philosophical purposes, I can afford to ignore it here.

16. See, for example, the defense provided in MICHAEL MOORE, *PLACING BLAME* 98-100 (1997).

experiments with a deeper appreciation of our retributive convictions about the rationale of punishment.

I concur with the fundamental retributive insight that the failure to give these monstrous wrongdoers their just deserts is intuitively dissatisfying. I also concur with the crucial point that has divided retributivists from consequentialists: The value of the state of affairs in which these persons are given their just deserts is not dependent on utilitarian gains. Still, I will argue that these thought experiments fail to establish what some retributivists claim: They do not demonstrate that the intrinsic value of punishing culpable wrongdoers actually justifies the imposition of criminal punishment. At 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.

In pondering these thought experiments, we tend to suppose that an institution of criminal punishment is already in place, and the question is whether or not to apply it in cases in which no further good would be achieved. But suppose instead that we are deciding what social institutions should be created. Suppose, in other words, that the society in question has a retributive reason to punish someone but lacks an existing institution to impose punishment. How forceful are these thought experiments in persuading us to create an institution of punishment that functions to give culpable wrongdoers the punishments they deserve? If this is the issue the thought experiments are designed to resolve, my intuitions change dramatically. My position can be explained by invoking the contrast between positive and negative desert.<sup>17</sup> Just as I believe that the state of affairs in which persons with negative desert are punished is intrinsically good, I believe that the state of affairs in which persons with positive desert are rewarded is intrinsically good. Perhaps there is an asymmetry between negative and positive desert, so that the intrinsic value of punishing persons with negative desert is greater than the intrinsic value of rewarding persons with positive desert.<sup>18</sup> Still, there is some intrinsic value, however slight, in rewarding persons with positive desert. Recall Scheffler's admission that "the claim that an individual deserves a certain benefit implies that he ought, *pro tanto*, to receive it."<sup>19</sup> I construe this admission to mean that some value is attained whenever an individual receives the benefit

---

17. My argument does not depend on my subsequent remarks about positive desert. My (eventual) claim is that the intrinsic value of punishing persons with negative desert is too small to offset the disvalue of the drawbacks of punishment and thus fails to provide a sufficient justification for creating an institution to impose punishments. I simply hope to weaken resistance to this claim by pointing out what everyone concedes—namely, that the intrinsic value of rewarding persons with positive desert is too small to provide a sufficient justification for creating an institution to bestow rewards.

18. See, e.g., J.L.A. Garcia, *Two Concepts of Desert*, 5 L. & PHIL. 219 (1986).

19. Scheffler, *supra* note 1, at 984.

he deserves. This intrinsic value is produced when persons with positive desert are rewarded. We might conclude that the state has a reason to create an institution with the function of conferring rewards on persons with positive desert. But we would be unlikely to think that the attainment of this intrinsic good provides a very powerful reason to create a state institution with this function. Why is this reason not very weighty?

Retributivists seemingly suppose that their task is complete when they show that the punishment of culpable wrongdoers is intrinsically good, that more value is produced in the world when criminals receive their just deserts, even though no increase in utility is produced. But retributivists have told only part of the story. I can appreciate why retributivists tend to dwell on this part of the story, inasmuch as consequentialists have refused to concede the crucial point: Punishing culpable wrongdoers is intrinsically good. But the demonstration that some good is produced by giving persons what they deserve does not suffice to justify the institution of punishment—even for retributivists.<sup>20</sup> I believe that a complete justification for creating an institution of punishment must address some of the same non-individualistic considerations that are so crucial in contexts of distributive justice.<sup>21</sup> Retributivists must show not only that giving culpable wrongdoers what they deserve is intrinsically valuable, but also that it is sufficiently valuable to offset what I will refer to as the drawbacks of punishment—negative values that inevitably are produced when an institution of punishment is created.<sup>22</sup>

Punishment has (at least) three drawbacks that must be addressed by attempts to justify it.<sup>23</sup> The first such drawback is the astronomical expense of our system of criminal justice. Institutions that are designed to treat persons according to their negative desert are enormously expensive.<sup>24</sup> They cost taxpayers huge sums of money. This fact alone has troublesome implications for the claim that retributive justice is individualistic rather than

---

20. The difficulty of offsetting the drawbacks of punishment I describe arises for all versions of retributivism with which I am familiar. It arises not only for retributivists who defend punishment as a device to realize retributive justice, but also for retributivists who argue that punishment is justified by its expressive or communicative function. Even if punishment serves an important expressive or communicative function, why suppose that the value of expression or communication suffices to justify the creation of an institution of punishment?

21. For a contrary view, attempting to provide a justification of punishment solely in retributive terms, see MOORE, *supra* note 16.

22. For further thoughts, see Douglas N. Husak, *Why Punish the Deserving?*, 26 *NOUS* 447 (1992); see also David Dolinko, *Retributivism, Consequentialism, and the Intrinsic Goodness of Punishment*, 16 *L. & PHIL.* 507 (1997).

23. I do not begin to describe the disadvantages of institutions of criminal justice that derive from law enforcement. Of course, police must decide where to look for crimes, and their decisions, even when cost-effective, bring charges of class bias and racism. See William J. Stuntz, *Race, Class, and Drugs*, 98 *COLUM. L. REV.* 1795 (1998).

24. These economic costs are described in ELLIOTT CURRIE, *CRIME AND PUNISHMENT IN AMERICA* (1998).

holistic. We cannot make a comprehensive assessment of the justice of an institution funded through taxation unless we are confident that our system of taxation is just. Moreover, opportunity costs arise when resources are expended on the criminal justice system. These funds might well be used to support any number of other worthy goods: education, transportation, the arts, welfare, and a host of others.

Like most philosophers, Scheffler's brief comments about the justification of punishment pay virtually no attention to considerations of economic cost. He explicitly acknowledges that the supply of punishment is finite, but only to point out the difficulty of punishing everyone we may want to punish.<sup>25</sup> He does not mention that penal institutions compete with other institutions for tax dollars, or that taxpayers have reasonable disagreements about how the costs of the criminal justice system should be apportioned among them. Of course, it is well known that many states (including Scheffler's own state of California) currently spend more money on their systems of criminal justice than on their systems of higher education. The generosity toward the former no doubt has contributed to the deterioration of the latter. Whether a society should create an institution of criminal justice at all, and how an existing system should be used, are partly questions of economics in a society in which tax dollars are scarce.

The second drawback is that an institution of punishment is susceptible to grave error. These errors are of two distinct kinds. First, errors arise in attempts to impose retributive justice on persons accused of crimes that are instances of culpable wrongdoing. Despite the best of intentions, the state is bound to apply punishment unjustly, at least occasionally.<sup>26</sup> Even if we are relatively confident that we have enacted the appropriate crimes, we still should lack assurance that the severity of the punishments we impose are proportionate to the seriousness of the offenses we create. When we convict the innocent, lives may be ruined unjustly. When we punish in excess of desert, the quality of lives will be unjustly impaired.

The second kind of error involves decisions about what conduct should be criminalized. We sometimes punish persons for conduct that is not wrongful at all.<sup>27</sup> No one has a precise estimate of how many innocent persons are punished, how many guilty persons are punished in excess of their desert, or how many persons are punished for crimes that should not

---

25. See Scheffler, *supra* note 1, at 986.

26. See Donald A. Dripps, *Miscarriages of Justice and the Constitution*, 2 *BUFF. CRIM. L. REV.* 635 (1999).

27. Scheffler writes that "wrongful conduct—that is, conduct that would be wrong even if it were not illegal—is normally a necessary condition of just punishment." Scheffler, *supra* note 1, at 987. The qualification "normally" is unexplained. In my judgment, retributivists have a very difficult time accounting for why punishment *ever* is justified when imposed on persons whose conduct is not wrongful but for its illegality.

have been enacted in the first place.<sup>28</sup> But the likelihood that this figure is high should give considerable pause to those retributivists who defend the institution of punishment as a device to attain the intrinsic value of giving persons the punishments they deserve. Anyone who decides to create an institution of punishment must be prepared to tolerate the injustice it is certain to produce in the lives of the innocent.

The third drawback of punishment is the risk that authority will be abused. Again, I make no effort to estimate the extent to which authority is abused, but I am confident that the price paid by society is enormous. Recent revelations about the government tactics at the confrontation in Waco or about the extent of corruption among customs officials, are only the latest reminders that we frequently require protection from those who are charged to protect us.

In combination, no one should doubt that these three drawbacks of punishment are extraordinarily costly. They provide powerful reasons *not* to create an institution of punishment. The intrinsic goodness of giving people what they deserve would suffice to justify punishment in a possible world—such as a divine realm—in which none of the foregoing drawbacks obtained. God, I suppose, requires no resources to impose retribution; he never punishes the innocent; he cannot be bribed. Unfortunately, that possible world is not our world. In our world, is the intrinsic goodness of treating culpable wrongdoers as they deserve *sufficiently* valuable to offset these three drawbacks of punishment and thus to justify the creation of penal institutions that serve this retributive objective? In other words, do the retributive reasons for creating an institution of punishment outweigh the foregoing reasons against creating it? I think not.<sup>29</sup> We must sympathize with citizens who balk when asked to fund an institution with each of these three drawbacks that has the sole benefit of imposing punishment on persons with negative desert. Citizens would reasonably prefer to use their precious tax dollars for any number of other important purposes. To decide which worthy purposes should be given priority, 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

---

28. No example of this latter injustice will be uncontroversial. But I believe that the single offense that is driving the criminal justice system today—the offense of illicit drug use and possession—is an excellent candidate. See DOUGLAS HUSAK, *DRUGS AND RIGHTS* (1992). Even if these offenses are justified, the severity of the punishments that are imposed is grossly disproportionate to the seriousness of the offense. See Douglas Husak, *Desert, Proportionality, and the Seriousness of Drug Offences*, in *FUNDAMENTALS OF SENTENCING THEORY* 187 (Andrew Ashworth & Martin Wasik eds., 1998).

29. I am unaware of an argument that I feel confident should persuade persons who do not share my intuitions and who believe that the intrinsic value of giving culpable wrongdoers what they deserve is sufficiently great to offset the foregoing drawbacks and thereby justify punishment. But I am also unaware of an argument that should persuade persons who do not share my retributive intuition that the attainment of just deserts (apart from further good consequences) has *any* intrinsic value.

justifying the institution of punishment seems to me to demonstrate that retributive justice is holistic. Indeed, I will hazard a broader conclusion. The need for such a theory in this context persuades me that questions about what social institutions to create are *always* holistic.

The difficulty I have mentioned is not resolved if we hold that society has not only the *right*, but also the *duty* to impose deserved punishment. The same problem I have posed resurfaces. The burden is not merely to show that the imposition of punishment is a duty, but also to show that it is a duty of sufficient weight or stringency to justify the creation of an institution with the drawbacks I have recounted. Controversy about the weight of this duty is highlighted when we inquire about whether resources should be expended to hunt Nazi war criminals who have escaped their just deserts. But this kind of example only illustrates my basic question vividly; my fundamental difficulty is with ordinary rather than with exceptional cases. Even if the supposed goodness of imposing retributive justice on typical, garden-variety culpable wrongdoers gives rise to a duty, we still must assess the relative stringency of this duty.

My point is that the value of retribution, by itself, is insufficient to justify an institution with the formidable drawbacks I have described. Something else needs to be said on behalf of punishment if it is to be justified. What is needed to answer the problem I have posed is some additional good that punishment can be expected to attain—a good which, when added to the value of realizing retributive justice, will justify the institution of punishment. Many candidates for this additional good have been proposed. A partial list would include the potential of punishment to educate, to express indignation, or to induce repentance, self-reform, reparation, and reconciliation. Prominent among these candidates is crime reduction—a good clearly worthy of precious tax resources. We would not, I think, be tempted to create an institution of criminal justice with the drawbacks I have described unless we were reasonably satisfied that so doing would tend to reduce the incidence of conduct we categorize as criminal. The benefits of crime reduction (and other miscellaneous beneficial consequences), when added to the intrinsic goodness of achieving retributive justice, will (hopefully) offset the drawbacks of punishment. Exactly how the importance of crime reduction should be incorporated into a retributive theory of punishment is complicated and contentious, so I will not pursue that matter here.<sup>30</sup> But whatever the exact nature of the “something else” that is needed to justify punishment, its inclusion in our theory will inevitably show that what Scheffler describes as “the problem of retributive

---

30. For some intriguing thoughts on the possible significance of crime reduction in a retributive theory, see the exchange between R.A. Duff and Andrew von Hirsch in *PUNISHMENT AND POLITICAL THEORY* 48 (Matt Matravers ed., 1999).

justice”—how we can justify the actual imposition of punishment—cannot be answered independently of other issues of social justice.

Perhaps the most direct route to the holism of retributive justice proceeds by returning to the issue of criminalization. Since we use the penal system partly to deter crime, we must decide what conduct should be deterred. The holism of retributive justice becomes apparent once we appreciate that retribution will be imposed not simply on culpable wrongdoers, but rather on culpable wrongdoers who have committed crimes. Decisions about what conduct to criminalize must be made with reference to judgments about the justice of other social institutions. Two examples should suffice. Is our population too large? What is the role of the state in regulating the size of families? Perhaps the criminal law should be used to deter persons from having too many children. Do our citizens spend too much time in a drug-induced stupor? What is the role of the state in regulating recreational activities? Perhaps the criminal law should be used to deter persons from altering their consciousness. If either of these objectives is important, how many social resources should be expended in attempts to attain them? Will our efforts be offset by the drawbacks I have described? Answers to such questions should lead us to understand that, like distributive justice, retributive justice is holistic.