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Mad, Bad, or Faulty? Desert in Distributive and Retributive Justice¹

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6.1 Introduction

Rawls says only a few things about punishment in *A Theory of Justice*, but two of them in particular have caused both controversy and puzzlement amongst philosophers of both distributive and retributive justice. Towards the end of the book, Rawls writes of those for whom acting justly is ‘not a good for them’ that ‘one can only say: their nature is their misfortune’. This has struck many commentators as quixotic given that it comes eleven pages from the end of a very long book much of which is dedicated to removing misfortune and chance from justice. The explanation—at least of why Rawls did not think his remark in conflict with the rest of his theory—lies earlier in the text, where he explicitly denies that ‘retributive justice’ is like ‘distributive justice’. In particular, in the latter, personal characteristics such as natural and socially developed talents are morally arbitrary whereas in the former ‘legal punishments’ rightly fall on those of ‘bad character’ who violate penal statutes.²

Although Rawls provides the starting point of this chapter, and his arguments act as the hook on which much of the rest of the chapter hangs, my interest here is not in Rawls exegesis or in contributing to the discussion of whether Rawls is consistent.³ Rather, I am interested, first, in beginning to develop a broadly Rawlsian-inspired approach to some aspects of crime and criminal justice and, second, in defending this

¹ Versions of this chapter, and related papers, have been given at the Morrell Theory Workshop at York; at the LSE Forum in Legal and Political Theory; at the Northern Political Thought Conference at Edinburgh; and at the UK ALPPC. I am grateful to my colleagues, to Philip Cook, Cécile Fabre, and Matthew Kramer, for the invitations, and to them and all the other members of these gatherings for their comments. In addition, I am particularly grateful to Annabelle Lever for written comments, and to Samuel Scheffler—whose work is discussed at length here—for taking the time to read and to give me feedback on an earlier version of this chapter.

² All quotations from J. Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), 576, and 314–315.

³ I have said a fair bit about that elsewhere: M. Matravers, *Responsibility and Justice*, (Cambridge: Polity Press, 2007); *Justice and Punishment: The Rationale of Coercion*, (Oxford: Oxford University Press, 2000).

against the most sophisticated version of the argument that to attempt to adapt Rawlsianism to retributive justice is a mistake because Rawls's arguments in relation to distributive justice do not generalize to the retributive case. Finally, I make some general, and highly speculative, remarks about where a Rawlsian-inspired argument might end up if I am right in thinking it can be pursued at all.

If Rawls provides the starting point in distributive justice, one motivator in the retributive sphere is the recent re-emergence of non-desert based responses to crime such as 'therapeutic jurisprudence'.⁴ Or, as the evolutionary biologist Richard Dawkins has put it: 'isn't the murderer just a machine with a defective component? Or a defective upbringing? Defective genes? Why do we vent hatred on murderers when we should regard them as faulty units that need fixing or replacing?'⁵

This is a recognizable—albeit unfashionable—position in criminal justice. It may be that the problem with the murderer is that he is wicked, or it may be that he is weak-minded or personality disordered. The purpose of the criminal trial ought to be to establish whether the accused is guilty, and if so, to find out what drove him to act. The focus is not on the offender's responsibility or culpability, but on discovering how best to fix him. The purpose of punishment, then, is to try to achieve this 'fix' and to 'set him on the road to virtue' as Barbara Wootton puts it.⁶ Society might then deploy moral education in the case of the wicked, therapeutic interventions in the cases of the weak-minded or personality disordered, and so on.

Liberals tend to recoil at this kind of argument. They do so in part because of its association with paternalism and with dystopian visions in which offenders are locked away and forgotten in mental health institutions. However, this seems to me too quick, and to lead to the possibility that we are overlooking interesting philosophical arguments because of their possible political implications. Indeed, one of those arguments has impeccable liberal credentials for surely one way in which Dawkins's thought unsettles us is through a background appeal to fairness.

This argument might be thought to have weight only for a very small number of those who come before the criminal justice system. A judge punishing a child, or someone who is insane, would be acting unfairly precisely because we think that the insane and those under the age of 'reason' lack the capacity for responsibility. Thus, we discipline children to set them on the road to virtue; we do not—or should not—punish them.

In order for the argument to have any general applicability, we have to accept some relevant similarity between children, the insane, and sane rational adults. Wootton, for example, thought that science and psychiatry had sufficiently blurred the line between

⁴ See generally, D. B. Wexler and B. J. Winick, *Law in Therapeutic Key: Developments in Therapeutic Jurisprudence* (Durham, NC: Carolina Academic Press, 1996).

⁵ *Daily Telegraph*, 3 January 2006.

⁶ B. Wootton, *Crime and the Criminal Law: Reflections of a Magistrate and Social Scientist* (London: Stevens and Sons, 1963), 79.

mental health and illness to a degree that made it impossible to distinguish between ‘the wicked and the weak-minded’.⁷ This, of course, is what the liberal rejects; paternalistic treatment and (coerced) therapeutic interventions are acceptable for children and the insane because children and the insane are different from the rest of us.

One way to take this argument forward would be to consider the idea of responsibility and the capacities needed by individuals for them to be properly held responsible. Such an argument might take the form of first trying to get the idea of responsibility right and then, having done so, asking whether or not this or that class of people is properly held responsible. For reasons given elsewhere, I do not think this strategy will work.⁸ Rather, I think we have to put our practices of ‘holding responsible’ at the centre of the enquiry. What I mean by this will (I hope) become clear below. That said, it is necessary to say something about human beings if the argument is to have any purchase at all. In short, is there any interesting sense in which ordinary human beings can be talked of as ‘faulty’? I believe that there is, but that it is a very different sense from that which drives Wootton (and Dawkins).

Consider the following, very weak, claim. What, for the sake of brevity I shall call ‘the constitution’ of individual agents—that is some notional complete account of their biological and personal characteristics (including their personalities)—in interaction with environmental factors has a profound effect on the behaviour of those agents. For example, some people find it easy to control their aggression, others find it difficult, and some find it impossible. No doubt the full explanation of that would be enormously complex, but one part of it is undoubtedly down to different brain function, just as another part is down to environmental factors. Whatever the mix, a person’s constitution, interacting with her environment, will have a significant effect on her behaviour.⁹

I take the above claim to be so weak as to be uncontroversial. Nevertheless, it allows for the introduction of the idea of a faulty constitution: a faulty constitution (or a faulty element of one’s constitution) is one that is either or both harmful and/or a handicap.

The distinction between a *harmful* element and one that is a *handicap* is rough and ready, but not in a way that damages the argument. It is meant to capture the thought that there are elements of a person’s constitution that are straightforwardly *harmful* given the kind of organisms that human beings are and elements that are a *handicap* given prevailing social norms and structures. For example, being born with spina bifida is always harmful whereas a predisposition to violence and a reduced ability to

⁷ Wootton, *Crime and the Criminal Law*, 73.

⁸ Matravers, *Responsibility and Justice*.

⁹ For a discussion of some of the ways in which the environment interacts with the constitution, see Susan Hurley’s chapter in this volume. For discussion of the epistemic difficulties of disentangling constitution from the environment, see Marc Fleurbaey’s chapter in this volume, esp. section 3.9.

recognize risk may be a handicap in one society (or social setting) but not in another (for example, it may not be a handicap in a martial society or in conditions of war).¹⁰

To summarize: there is a way we are, the way we are has a profound effect on what we do, and both have a similarly significant effect on whether we flourish given certain biological and social standards. That claim is too weak to underpin incompatibilism, and nothing in what follows rests on a commitment to denying the possibility of individual responsibility. So, the question is, what if anything follows from the basic position outlined above; from the idea that human beings can have faulty constitutions?

6.2 Natural assets

In one of the most passionate of the arguments in *A Theory of Justice*, Rawls takes to task those who think that injustice is inevitable given that human beings differ in their natural assets and social starting points and that a refusal to accept this ‘is on a par with being unable to accept death’. That is to say, some might point to the obvious differences between people—differences in height, intelligence, and so on—and say that it is pointless to rail against the injustice of these unequal starting points (just as it is pointless to object to the fact that we are mortal). Rawls agrees, but thinks it beside the point. The critic is right to think the ‘distribution of natural talents and the contingencies of social circumstance are [*not themselves*] unjust’. Rather, they are ‘neither just nor unjust’ given that they are ‘simply natural facts’. However, ‘what is just and unjust’, Rawls argues, ‘is the way that institutions deal with these facts’. The critical point is that we need not resign ourselves to the translation of these facts into an inequalitarian social structure. We must recognize that ‘the social system is not an unchangeable order beyond human control but a pattern of human action’. That system can be just or unjust and it is up to us which it is. Given that the simple natural facts include inequalities between people, and that, in a just society, these inequalities are not allowed to dictate the shape of the social system, in justice as fairness, we (in one of Rawls’s more memorable phrases) ‘agree to share one another’s fate’.¹¹

I want to hang on to this central claim—justice requires that we ‘agree to share one another’s fate’—whilst putting all technical, and exegetical, questions about Rawls to one side (for example, about his use of primary social goods as the currency of justice). An example of how the central claim works is as follows: people are born with different and unequal natural assets. For example, some people are born blind. Whilst that is certainly unlucky, it is not unjust. However, it *is* unjust if society fails to adjust its institutions and social systems to accommodate the fact that some of its members are blind. Of course, those of us who are not blind could advance our own interests better by ignoring, or expelling, the blind, but we do not do so because it would be unjust.

¹⁰ Arguments over deafness show the importance, but also the controversial nature, of this distinction. For some, deafness is not harmful, and is only a handicap because of discriminatory social norms and structures.

¹¹ All quotations from Rawls, *A Theory of Justice*, 102.

It is in this sense that we share one another's fate (not as some criticisms of egalitarianism would have it by levelling down, or by redistributing one good eye from the sighted to the blind, but by using joint resources to advance the position of those less able).

Famously, Rawls extends this argument by adopting a fairly broad account of natural talents and assets (including the capacity to work hard).¹² The point is that such things are not only neither just nor unjust, they have no moral status whatsoever. Thus, they have no moral authority when it comes to the design of the social system—no claim to be translated into that system—and so desert tied to moral worth must be rejected as the basis for distribution.

To put this in the language used above, in a modern developed economy having a constitution that includes low intelligence is a handicap. The social structures of such economies systematically favour intelligence. There may be good reasons for this—for example, we have good reason to want intelligent people in certain jobs—but those reasons have nothing to do with translating the natural fact that intelligence is unequally distributed into the social fact of an inegalitarian, intelligence-tracking, system of distributive justice. Those without this handicap could, of course, better advance their interests by excluding or discriminating against the less intelligent, but to do so would be to refuse to share one another's fate; that is, it would be to refuse to be just.¹³

I take what I am calling Rawls's central claim to have a very powerful moral appeal. The question that drives this chapter is whether a similar story can be told for those natural facts that are connected to some criminal behaviour. If so, some people might conclude that we should reject the Rawlsian argument whilst others might embrace the further extension of it. For the purposes of the argument here, that does not make a difference.

Consider a brief application of the central claim to the retributive sphere: in contemporary developed societies, given the need for social order and the circumstances of justice, a disposition to react aggressively to minor slights, and difficulty with controlling one's aggression once triggered, are *handicaps*. If so, and if Rawls's central claim has the kind of moral appeal that I think it does, then justice requires that we agree to share one another's fate and refuse to translate these unequal starting points into an inegalitarian system of retributive justice.

For this argument to work, Rawls's central claim must generalize from the distributive to the retributive realm. In what follows, I first try to counter the argument that it does not. I then briefly consider what it would mean to 'to agree to share one another's fate' in the retributive sphere.

¹² Rawls, *A Theory of Justice*, 312.

¹³ Cf. T. Nagel, 'Equal Treatment and Compensatory Discrimination', *Philosophy and Public Affairs*, 2 (1973), 348–363.

6.3 Distributive and retributive justice: one thing or two?

One immediate response to the argument of the last section might be to say that it rests on the mistake of thinking that distributive and retributive justice are relevantly similar (indeed, are both aspects of the one thing: namely, justice) in particular with reference to desert. This is Rawls's response: 'to think of distributive and retributive justice as converses of one another', he writes, 'is completely misleading.'¹⁴

It is clear that it is possible to distinguish between distributive and retributive justice in the way envisaged by Rawls. Critically, one can say that distributive justice, on the one hand, does not aim at giving people what they (prejusticially) deserve. Rather, people deserve (are entitled to) whatever the account of distributive justice determines that they are entitled to. In short, the institutions of distributive justice are not there to ensure that when they operate they give people what they deserve. Rather, what people deserve is established by justice and just institutions will ensure that they get whatever it is that they deserve. Retributive justice, on the other hand, does appeal to an independent notion of desert and just institutions will operate, other things equal, so as to ensure that people get what they deserve.¹⁵

In terms of the language I have used above, in distributive justice we accept that people's constitutions do not establish a 'desert basis'—that is they do not provide the basis for differentiating between people in terms of desert—but in retributive justice they do.¹⁶ The question, of course, is why should one think that there is this asymmetry between distributive and retributive justice?

One answer to that question is given by Samuel Scheffler in 'Justice and Desert in Liberal Theory'.¹⁷ Scheffler argues that distributive justice is *holistic* and this contrasts with both desert and retributive justice. What Scheffler means by 'holistic' is that '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'.¹⁸ Why should we think that distributive justice is like this? Because, Scheffler says, of certain empirical conditions that ally with the liberal egalitarian's commitment to the moral equality of persons. Those empirical conditions concern the interconnections that effect people's productive prospects. In short, a given individual's capacity to contribute depends on others, as does the value of that contribution, and both depend on the overall distribution of economic benefits throughout the system.¹⁹

¹⁴ Rawls, *A Theory of Justice*, 315.

¹⁵ Rawls, *A Theory of Justice*, §48; S. Scheffler, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (Oxford: Oxford University Press, 2001), 184–185.

¹⁶ J. Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton, NJ: Princeton University Press, 1979).

¹⁷ Scheffler, *Boundaries and Allegiances*, ch. 10. Scheffler's concern, as he has noted to me in correspondence, is not with defending retributivism or a prejusticial account of desert on which it might rest, but is with showing that Rawls's arguments in distributive justice need not generalize to the retributive sphere.

¹⁸ Scheffler, *Boundaries and Allegiances*, 190.

¹⁹ Scheffler, *Boundaries and Allegiances*, 191.

Combine these features with the background that distributive justice is concerned with the distribution of goods that are moderately scarce and distributive justice does indeed look holistic. That is to say, more succinctly, that a theory of distributive justice is a theory of distributive *shares* (of some moderately scarce goods) and so is a theory in which one person's proper share will be a factor of the overall distribution of shares.

Contrast this with retributive justice. Here it is worth quoting Scheffler:

The problem of retributive justice is not the problem of how to allocate a limited supply of benefits among equally worthy citizens but rather the problem of how society can ever be justified in imposing the special burden of punishment on a particular human being. To put it another way, the establishment of penal institutions is a social response, not to allocative concerns, but rather to exercises of individual agency that society deems intolerable.²⁰

All of this is pretty abstract, so perhaps an example of both the holistic nature of distributive justice and its lack of connection with desert will help. Consider a society in which the production of some good is in surplus and/or there are independent reasons to wish to reduce production. It might be, for example, that agriculture is producing too much food and damaging the environment or that in general we need to reduce production and consumption to secure decent living conditions for future generations. In these cases, a just social system might allow or determine that farmers should be paid not to work their land, or that people in general should be paid disproportionately for job sharing so that those who wish to keep in full time employment are comparatively worse off.

In both these cases, what is due to people is determined by justice and depends on solving an overall allocation problem. Moreover, in both cases, the hard-working and talented may actually be entitled to less if they do not do what the system announces will be rewarded. Of course, the farmer or anyone else may use their spare time to do voluntary work, say, in assisting at their local youth centre. In such cases, they would be due praise and moral approbation, but there is no translation here of natural assets into distributive desert.

It is worth noting that the deserving of praise is only possible if one does not go down the route of arguing that Rawls derives his position on desert from a commitment to incompatibilism (there are many additional reasons not to go down this route, but it is worth making this clear as many people seem to be attracted to an interpretation of Rawls that has it that he denies that people deserve anything because he denies that people can ever be responsible for their natural or social characteristics). The incompatibilist claim that no differences between persons can be the basis for different desert claims *because* all differences between people are themselves undeserved does of course deliver the irrelevance of desert to distributive justice, but it delivers far too much. It is both generalizable to retributive justice (which is what the argument of this section is trying to avoid), and it would rule out all claims for praise and blame on the

²⁰ Scheffler, *Boundaries and Allegiances*, 162–163.

basis of natural talents and assets such as generosity or the capacity to work hard. Such a position is, of course, both possible and coherent, but it is not one embraced by Rawls and it is not one being considered here.²¹

To summarize: Scheffler's claim is that distributive and retributive justice are asymmetrical because the former is holistic and the latter individualistic. Retributive justice finds its desert basis in some fact about the subject. That is:

No assessment of the overall distribution of benefits and burdens in society or of the institutions that produced that distribution is normally required in order to decide whether a particular individual deserves a certain [punishment]. Instead, it is a constraint on the justice of distributions and institutions that they should give each individual what that individual independently deserves in virtue of the relevant facts about him or her.²²

This contrasts with holistic distributive justice, as noted earlier, in which 'the justice of any particular assignment of benefits always depends—directly or indirectly—on the justice of the larger distribution of benefits and burdens in society'.²³

Is distributive justice holistic? In order to assess this argument, we can ask whether it is plausible that distributive justice is holistic, and if so why, and whether it is plausible that retributive justice is individualistic, and if so why.

As we have seen, Scheffler offers two arguments for the holism of distributive justice: the *moral* argument is that, given a commitment to the fundamental equality of persons, there is no "natural" baseline' of differentially deserving people. This is, of course, where the argument connects with the moral arbitrariness of natural fortune. From the perspective of distributive justice there is no 'pre-social' order of persons distinguished by facts that relate to desert.²⁴ The *empirical* argument is that 'the life prospects of individuals are so densely and variously interrelated...that virtually any allocation of resources to one person has morally relevant implications for other people'.²⁵

Clearly, both Scheffler's arguments for distributive holism could be challenged. People have, and do, believe that the institutions of distributive justice ought to ensure that people get what they, prejudicially deserve (because people are differentially virtuous, hard-working, capable, and so on). However, I want to grant that distributive justice is holistic in the way described by Scheffler both because my main concern is with retributive justice and because I think Scheffler is largely right.

Is retributive justice individualistic? That leaves the question of whether retributive justice is individualistic, which I am going to approach by asking whether the arguments for the holism of distributive justice apply to retributive justice.

²¹ See, however, Larry Temkin's chapter in this volume.

²² Scheffler, *Boundaries and Allegiances*, 168.

²³ Scheffler, *Boundaries and Allegiances*, 166.

²⁴ Scheffler, *Boundaries and Allegiances*, 167.

²⁵ Scheffler, *Boundaries and Allegiances*, 132.

First, then, consider the moral argument: Is there a ‘pre-social’ baseline in which persons can be differentiated in terms of desert by facts about them? One reason to think the answer to that is ‘yes’, is to think about the standard distinction between *mala prohibita* and *mala in se* crimes. The latter would be wrong even in the absence of a criminal system that makes them illegal. So, if Bert intentionally kills another person without justification or excuse and Ernie does not, then Bert deserves punishment even in the absence of a system of justice that will give it to him. The purpose of the system of justice, when established, is to translate Bert’s individual desert standing into the world by giving him what he deserves.

Second, consider the empirical argument: Is there a difficulty in identifying the contribution of a given agent to a given outcome? Clearly there may be in certain cases, but it is not hard to devise a core example in which no empirical difficulties arise. Assuming Bert did not have an accomplice, etc., then he (and he alone) is the murderer. There is no complex system of production and exchange here such that it is impossible to distinguish one person’s contribution, or the value of that contribution, from another’s. In short, the empirical argument that appeals to the interconnections between people within the structures of distributive justice does not seem to hold.

Thus, Scheffler’s position seems to be vindicated and the force of the question about what it would mean ‘to share one another’s fate’ in retributive justice is blunted. However, in the next section I argue that neither the moral nor the empirical argument is so straightforward.

6.4 Retributive holism: the moral argument

Scheffler’s moral argument depends on the Rawlsian position identified at the start of this chapter. People’s natural assets are merely natural facts that are neither just nor unjust. They do *not* determine the ‘deservingness’ of the person, and they have no moral authority such that the institutions of justice should translate them into unequal distributive shares. We start with a commitment to an egalitarian moral baseline in which each individual is thought of as fundamentally equal; that is, equal once abstracted from particular contingencies such as his or her talents, abilities, natural assets, and so on. The question with which I began, though, was why this argument should not apply to, say, the unequal distribution of the ease with which people can control their aggression. That is to say, what is the difference between thinking, prejudicially, about a person disposed to hard work and one disposed to anger?

Scheffler’s answer—that we expect the systems of (retributive) justice to punish those who act on their anger (because they deserve it), but we do not expect the systems of (distributive) justice to reward those who work hard (unless there are other, non-desert related reasons to do so)—begs the question. *That* is the conclusion that Scheffler needs in order to distinguish holistic distributive justice from individualistic retributive justice, so it can hardly be the argument for that conclusion. In short, the moral argument seems to be largely stipulative in distinguishing certain features of

people's constitutions that ought to be considered prejusticially relevant from those held to be irrelevant. If this is to be defended, then Scheffler needs to import an argument. There are three possibilities that are worth distinguishing.

Undeserved all that way down. Of course, one possibility is to say that assets such as intelligence and the capacity to work hard are not themselves deserved. However, that is true of all features of our constitutions and, if relevant, delivers incompatibilism (moreover, it is that interpretation of Rawls's account that Scheffler is trying to avoid).

Compatibilism. Another, more plausible, but more complex, position would be to distinguish between, say, the capacity for hard work (or, to make it easier, height) and, say the disposition to be quick to anger by arguing that the latter is morally relevant for all the reasons usually given by compatibilists.

Scheffler does not explicitly endorse this strategy, but it may well be that it sits in the background to do the necessary work. What is needed is some plausible compatibilists account. Take, for example, Fischer and Ravizza's reasons-responsiveness account. This holds that 'an agent must *control* his behavior in a suitable sense, in order to be morally responsible for it' where the suitable sense of control is one linked to the agent's ability to act in a way that is responsive to reasons.²⁶ In short, the compatibilist holds that whilst it (usually) makes no sense to hold a person responsible for her height, gender, or skin colour, it does (usually) make sense to hold her responsible for acting aggressively. Some characteristics, relevant to morality, are thus properly the basis for prejusticial distinctions between people.

For reasons given elsewhere (and that would take too long to repeat here), I think compatibilist strategies of this kind are problematic.²⁷ However, assume that some such strategy can be successful. Does it, then, underwrite the distinction that Scheffler needs between those natural facts, like intelligence and the capacity to work hard, that are irrelevant to distributive justice and those, like a disposition to anger, that are relevant to retributive justice? Perhaps in core cases it does. The natural facts that some people are stronger or taller than others, and that some are blind, are morally arbitrary. We agree to share one another's fate by refusing to organize society in a way that translates these inequalities into distributive shares. The account that we now have of their moral arbitrariness is that these facts are not under the control of the agent in the relevant sense. It would make no sense to ask the agent to give a reasoned account of himself and his strength, height, and capacity to see. In organizing society so that we do *not* agree to share the fates of those with tendencies to aggression, we hold that tendency to be morally relevant because (assuming the tendency is not irresistible), it is under the control of the agent in the relevant sense. It does make sense to demand to know of

²⁶ J. M. Fischer and M. Ravizza, *Responsibility and Control: A Theory of Moral Responsibility* (Cambridge: Cambridge University Press, 1998), 13.

²⁷ Matravers, *Responsibility and Justice*.

the agent, ‘why did you do that?’ when he acts aggressively and to expect an answer in terms of reasons.

This is a familiar and, to many, a plausible, account. Yet it is problematic to apply it to rescue the distinction to which Scheffler is appealing for three reasons. First, although it seems clear in a case such as blindness, it seems far less clear in a case such as the willingness, or capacity, to work hard. Moreover, although ‘native intelligence’ (or its absence) may be akin to blindness, the disposition to develop that intelligence through schooling and application seem more like the disposition to be easily angered. In other words, by treating all contingent aspects of the person as arbitrary, we cut through all the problems of defining desert and reassert the liberal commitment to an egalitarian prejudicial baseline. By unpacking that and redefining the baseline in accordance with some or other compatibilist theory, we risk both impractical complexity and the egalitarian commitment.

Second, for all that compatibilist theories are technically adept marvels of the modern philosophical imagination, it is not clear that they go far enough to rescue the broad intuition that we have about fairness that underwrites some of Rawls’s appeal. When Rawls writes in response to the argument that moral desert can be understood in terms of conscientious effort, that ‘the effort a person is willing to make is influenced by his natural abilities and skills’, he is not making a claim about the metaphysics of responsibility or about whether ‘effort’ is responsive to reasons; he is making a claim about fairness. It is unfair to translate natural facts into distributive outcomes. My question is, why is not unfair to do the same in the sphere of retributive justice?

Third, and finally, even if one grants that there is a differential desert basis in the retributive case that does not apply to the distributive sphere, that is not the whole story. One point of Rawls’s central claim is that some things are handicaps in a given social structure that might not be handicaps in some alternative structure. If so, then those who benefit from the structure owe a justification for it to those who are disadvantaged by it. Thus, although it may make sense for us to call the aggressive person to account for his behaviour in a way that it does not in the case of the very tall or the blind, it is also possible for him to ask for a justification from us of the social structures that have converted some natural fact about him into a handicap; after all, a tendency to be quick to anger is not a *harmful* characteristic (in the sense defined above), it is a natural fact that is turned into a *handicap* by social structures of a certain kind.

6.4.3 Holism

Scheffler has one other route available, which is to appeal directly to the idea that distributive justice is holistic and argue that this means that there is no ‘thing’—no reward or penalty—that is such that it would relate in the right kind of way to difference in the prejudicial desert of persons. This is, in a sense, to turn the argument around. Rather than say that individuals are all equal, in that the differences between them are morally arbitrary, and so distributive justice ought not to reflect those differences, it says that since distributive justice is holistic there is no point in

distinguishing prejusticially between people because no distinction could be a desert basis; there is nothing to be ‘deserved’.

I think this argument is right. Even, say, were we to hold ‘being hard-working’ as morally relevant—say, the desert basis for praise—there is nothing that can be said about, for example, the income level that should be attached to being hard-working. Indeed, as we saw above in the case of the over-supply of some good, there may be cases in which the appropriate ‘reward’ for hard work is a smaller share (albeit that we might otherwise praise and admire the hard-working). The problem for those who would distinguish between retributive and distributive justice is that this applies in exactly the same way to retributive justice. *Pace* Kant, there is no unique fitting and deserved punishment for a given offence. There are no ‘celestial mechanics’ that require that murderers are punished with death.²⁸

6.5 Retributive holism: the empirical argument

The argument from holism above, connects to Scheffler’s empirical argument. This, recall, rests on the claim that ‘the life prospects of individuals are so densely and variously interrelated...that virtually any allocation of resources to one person has morally relevant implications for other people’. Does this holism apply to retributive justice?

In order to answer that question, it is necessary to unpack the term ‘retributive justice’, which I have used carelessly up to now to refer to the system of criminal justice and the social practice of imposing punishment on a particular offender. Clearly, for present purposes, the critical question is that of punishment. What, if anything, justifies imposing this punishment on this offender?

We have seen that the equivalent distributive question—What, if anything, justifies rewarding this person with this benefit?—is said to be answerable only by reference to the entire system of distributive shares (by reference to what others have got in the system). Whereas, Scheffler claims, we can consider whether this particular punishment can be deserved by this particular offender without considering the overall system of punishment and what it has delivered to others.

As noted above, there are punishment theorists who believe that there is some prejusticially given punishment that is uniquely suited to each crime and that it is the job of our system of criminal justice to ensure that people get what they deserve (and neither more nor less), but this does not seem to me to be a plausible position.²⁹ Instead, it seems to me—and here I do not have space to defend what follows so offer it only as a conclusion—that a plausible account of punishment will separate the element

²⁸ The phrase ‘celestial mechanics’ is taken from M. Cohen, ‘A Critique of Kant’s Philosophy of Law’ in G. T. Whitney and D. F. Bowers (eds), *The Heritage of Kant* (Princeton, NJ: Princeton University Press, 1939), 279–302.

²⁹ See M. Matravers, *Justice and Punishment*, ch. 3.

of criticism or communication from the element of hard treatment (a fine, prison, or whatever). For the sake of brevity—and at the risk of some inaccuracy—let us say that it will separate issues of criticism from issues of penal hard treatment.

Is criticism, understood as above, individualistic? The answer to that is ‘yes’, but only given the restriction on the meaning of the term. Other things equal, people who commit wrong acts (*mala in se*) deserve moral condemnation. In the same way, though, people who do morally good acts—including in the distributive sphere—deserve moral praise.

What of penal hard treatment? Clearly, the just, or deserved, sentence for a particular individual for a particular crime depends on the overall system of penalties both in the sense that it needs to be ordinal and cardinal proportional, and in the sense that the overall pattern of sentencing needs to be determined by reference to the social circumstances. Note, this is *not* to say that it is unjust to sentence one murderer to twenty years unless one can sentence all murderers to twenty years (which one clearly cannot since not all murderers are convicted). It is to say that *this* murderer only deserves twenty years if that is the tariff for murders of this seriousness and with this degree of culpability. However, this is not enough to establish holism.³⁰ This is because the principle of treating like cases alike is not sufficient for holism (for example, it is a principle that could be incorporated into an individualistic account of distributive justice).

On one account sentencing is not holistic. This account would have it that if we grant that offenders deserve moral criticism *and* there is an intrinsically connected amount of hard treatment that is deserved as the unique means to express that criticism, then individual hard treatment is deserved and the level of it does not depend on the allocation of criticism and hard treatment to others. Of course, given limited resources, it may be that no one gets their fair share (because, after all, the supply of hard treatment in a given society is not actually likely to be endless), but that does not mean that the share that each deserves is not fixed individually.

For independent reasons, I think any such account is unlikely to be successful. Particular levels of hard treatment simply do not have that kind of internal connection to criticism. Rather, levels of hard treatment are likely to be set for broadly consequentialist reasons (constrained, of course, by the need not to contradict the message of deserved criticism). If so, then hard treatment is indeed likely to be an allocative question; it is a matter of how much the society can afford and the just distribution of one share of that allocation to one individual will be a factor of the overall effect of allocations to all relevant individuals. This, though, is not a fully satisfactory argument. In so far as it relies on detaching hard treatment from punishment, and then associating the distribution of hard treatment with consequentialism, it shows that the distribution of hard treatment *rather than* the distribution of punishment is holistic.

³⁰ In the first version of this chapter, I thought it was. However, Scheffler convinced me that this was wrong for the reasons that follow.

However, the key is not to detach criticism and hard treatment, but rather to appeal to the very complexity that underpins Scheffler's empirical argument for distributive holism. One can do this in two ways: first, the supply of punishment understood as consisting of both moral criticism and penal hard treatment is not endless and its distribution will not be fixed only by individual desert. Offenders may deserve individually fixed levels of criticism, but the levels of penal hard treatment they deserve will be 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). Second, we have reason to be cautious in thinking about the desert of individual offenders given that, as Scheffler puts it, 'the life prospects of individuals are so densely and variously interrelated'. Recall that this chapter began by pointing out that some things related to criminality are *handicaps*. It is, in part, the social structure that has made it the case that some natural facts have been converted into handicaps. The tendency to act aggressively, and the tendency to work hard, are not only 'influenced by...natural abilities and skills', but are also both related to certain kinds of outcomes only because of arbitrary circumstances that converted one into an advantage and the other into a handicap.³¹

6.6 Concluding remarks

The basic issue at stake here is as follows: there is something enormously attractive about Rawls's vision of justice as an agreement 'to share one another's fates'. We establish social practices and are accountable for them. Those practices could simply reflect the inequalities between people—at the limit the most able could enslave the least able—but (on the liberal egalitarian model) that would be unjust. Instead, social practices should abstract from 'natural facts' and treat people as equals. This is not because natural facts are themselves undeserved, or because Rawls has doubts about the metaphysics of responsibility, it is because those natural facts have no moral authority when it comes to the construction of principles of justice.

This vision has set the agenda for liberal egalitarian political philosophy and it has been developed and refined in millions of words. Yet the argument is limited to distributive justice. Many philosophers do not even note that limitation. What drives this chapter is the thought that this argument might apply also to retributive justice.

One of the few philosophers who has been troubled by this is Scheffler. As we have seen, he thinks we can distinguish between distributive and retributive justice because the former is holistic and the latter individualistic. The case is in two parts: a moral argument that says that there are no relevant prejudicial differences between people,

³¹ There is an additional argument suggested to me by John Gardner, which is that in the non-ideal world we inhabit, punishment—and, in particular, penal hard treatment—spills over from the person punished to his relatives, children, partner, and so on. That is, punishment has a devastating effect on the life prospects of related persons.

and an empirical argument that says that the distributive case is so complex that it would, in any case, be impossible to establish who individually deserved what, even if it made sense to think of people as differentially deserving.

My argument is that the reasons we have to endorse prejudicial egalitarianism apply equally to the retributive case. Whilst a distinction can be drawn using some or other compatibilist theory of moral responsibility, I do not believe that the distinction would mirror the distributive/retributive divide and nor do I believe that it is the appropriate *kind* of argument. As for the empirical argument, I do not think that this distinguishes distributive rewards and penalties from deserved hard treatment imposed as punishment.

It is important to note that this is not an incompatibilist argument (it would be much easier if it were). The claim is not that persons are not responsible for any individual features of themselves because none of those features is deserved. Rawls nowhere denies the appropriateness of prejudicial notions of deserved moral praise and blame. The argument is rather that what we should *do* beyond praise and blame, in both the distributive and retributive spheres, depends on what the account(s) of justice that we endorse tells us we should do. There is no prejudicially given suffering that is deserved by the criminal offender that it is the job of our system of retributive justice to ensure he gets, just as there is no prejudicially given distributive share deserved by the intelligent and able that it is the job of our system of distributive justice to hand out.

Finally, then, what follows from the (no doubt counter-intuitive) idea that when it comes to those who have a tendency to aggression and those who do not we should 'agree to share one another's fates'? Clearly, nothing follows at the individual level. We are not required by distributive justice to employ lazy and inept builders to do our construction projects because their laziness and natural disadvantages are morally arbitrary in the construction of the system of justice. Similarly, we are not required to volunteer to be mugging victims for those disposed to violence.

Rather, we share one another's fate in the retributive sphere by thinking about the impact of social structures on those who might fall foul of the criminal law. Take just one example: the social system we have established means that there are strong economic pressures for people to live in reasonably large towns and cities, and to engage with modern productive technologies (using that word in the broadest sense). These things make life more difficult for the blind, for example, than they might otherwise be (they make blindness more of a handicap than it would be in some alternative sets of arrangements). The requirement that we share one another's fates means that we build into our towns and cities, and into our productive technologies, things that are expensive, but that make it easier for the blind to live fulfilled lives. There are limits to what justice requires, but it requires us to do something.

Similarly, we know that living in towns and cities with relatively dense populations and stressful, intensive, productive technologies is difficult for those who find it hard

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to control their aggression. A disposition to respond aggressively to situations is more of a handicap in our society than it would be otherwise. The requirement to share one another's fate might, mean for example, that we think differently about avoiding criminogenic situations. The point is not simply to protect the potential victims, but also to minimize the chances of the offender acting in ways that may well come to disadvantage him.