

SPECIAL ISSUE: CONSTITUTIONAL CRIMINAL LAW

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REVIEW ESSAY: CRIMINAL LAW IN THE AGE OF THE ADMINISTRATIVE STATE

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Vincent CHIAO, *Criminal Law in the Age of the Administrative State* (Oxford University Press, 2019).

The monograph *Criminal Law in the Age of the Administrative State*¹ (*CLAAS*, in what follows) deserves to be placed against a background. It deserves so due to its high caliber and ambitious aim. That background is nothing less than the evolution of the Modern State (and its Law). In the words of a prominent Anglo-Saxon author, Martin Loughlin,² that evolution can be described as a project of progressive secularization and desacralization of the State, beginning with the very source of normative-coercive power and continuing with its institutional manifestations.

In the wake of that project –for our field– can be found Cesare Beccaria’s work, *On crimes and punishments*,³ so dear to those of us trained within the continental European tradition. It attempted to distinguish criminal law from morality (laying the groundwork for the objective, or at least inter-subjective, dimension of *harmfulness*), to distinguish penalty from atoning suffering (laying the groundwork for a program of *procedural and material guarantees*). In sum, a (civilizing) attempt at reducing violence: that of *resentment* and that of *blame* (chap. 7, pp. 220 ff.), to use Vincent Chiao’s terms. I think Vincent Chiao would do well to reread that ancient work, not because it may be of any use today (more than 250 years since its publication), but so that he can recognize himself in a spirit moved by the same good intentions.

Thus, *CLAAS* takes one more step (the final one?) on that desacralizing path, and it does so taking by storm one of the last “hallowed” strongholds. For do we have any doubt that criminal law is still resisting that attack? Perhaps the nature of its object may explain that: it is, in the end, a matter of drastically modifying the living paths of people of flesh and bone. The whole of law has that power of altering human lives, but here it occurs in a specially radical manner. That can perhaps explain the “sacred aura” which is still attached to our field.

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1 CHIAO, (2019), (hereinafter *CLAAS*).

2 LOUGHLIN (2010).

3 BECCARIA (1764). A contemporary version can be found at http://www.letteraturaitaliana.net/pdf/Volume_7/t157.pdf.

So that the place from which I will present my criticism may be immediately clear, I need to say that I sympathize with that secularization or desacralization and I will not object to it (doing so would be like wishing to turn back time). On the other hand, I am not prepared to embrace it if such a desacralization is understood as a complete “de-spiritualization” or “de-culturization”, a sort of radical technocratic objectivization that threatens to sweep away what there is of Law in Criminal Law.⁴ If Criminal Law (or any kind of Law) is reduced to mere “management”, to merely the redistribution of costs and benefits, I can no longer recognize myself in it. I mean to say: It no longer seems to me interesting (or even plausible). But this is not Prof. Chiao’s purpose, certainly; otherwise he could not recognize among his intellectual debts the efforts of H.L.A. Hart in his fundamental *Punishment and Responsibility*. In the lucid words of Vincent Chiao himself, Hart’s work sought:

to show how the philosophy of criminal law could avoid a moralistic retributivism without falling into an oppressively technocratic conception of crime and punishment (*Introduction*, p. xiii).

Prof. Chiao is thus aware of the risks that lie at the extremes.

But let’s turn back to the book.

I. CRIMINAL LAW AS PUBLIC LAW (IN THE SENSE OF ADMINISTRATIVE LAW)

A central thesis of the book is that criminal law must be understood as *public law* (a thesis avowedly indebted to the work of Malcolm Thorburn, though not exclusively). That concept is in need of an explanation, at the very least in order to avoid the charge of triviality: Any criminal law scholar trained within the continental European setting would say “well, what else can criminal law be if not public law?”. The title of the book itself suggests the answer: criminal law is public law like modern “administrative law” under a welfare state model is (pp. 4-6 especially). That is, a social service within the purview of the State and its apparatus, with a view to collective improvement. Chapters 1 through 3 of *CLAAS* focus on the justification of this reading, arguing from a specific politico-philosophical background.

In my opinion, the operational *locus* of this proposal of *public law theory* is not directly *criminal law*, but *criminal policy*. For this statement to be warranted, some context must be given.

Criminal law, then, is public law. But what else could it be? The contribution of Prof. Chiao must be understood in its context, “deep within” the Anglo-Saxon politico-philosophical debate. Thus, in line with the liberal constitutionalism of Malcolm Thorburn, *CLAAS* rejects the moralistic private law legalism of authors

⁴ For is it not precisely in this spiritual-cultural sensitivity where the basis for the progress of law as such lies? Isn’t its civilizing spring precisely there? It seems to me that this is the thesis (regarding the of idea of *guilt*) presented in the classic VON IHERING (2013), *passim*.

like Antony Duff or John Gardner (who view the State's punitive power [*ius puniendi*] as analogous to *home discipline*, as if society-state were a large family). But I will come back to this shortly.

Now I want to highlight –again with Loughlin⁵– that the expression *public law* is ambiguous and bears at least two meanings: (1) as the law to which the ruler is subject; that is, as a limit, like a “fundamental right” (*ius publicum, droit politique, allgemeines Staatsrecht*); in this first sense, as opposed to the law that emanates from the ruler; the latter being referred to as *ordinary law* and the former as *public law* (in a broad or strong sense) or *fundamental law*; but also (2) as a right that regulates *vertical relations* between the State and citizens; that is, as *public law* in a more limited sense, simply as opposed to the law that regulates *horizontal relations* between individuals (*private law*); “administrative law” is commonly put under this second understanding of public law, and with it the law of *welfarism*.

Well, I think that we criminal law scholars (at least those trained in a predominantly legal environment) usually associate *criminal law* with the first sense: that is, as a *limit* to the State's punitive power. The novelty of *CLAAS*, thus, lies in placing it under the second sense: as public law in a vertical-administrative sense and not as limiting law. For a criminal lawyer trained in the continental European tradition, this second field is no longer expressive of *criminal law in the strict sense* (the *charter of rights* of the accused-convict, in *Lisztian* terms), but of *criminal policy*; it is there, effectively, that the State finds a wide channel to prevent crimes, protect interests and victims, and ultimately provide this “social service” which is –under the *welfarist* perspective of *CLAAS*– the criminal system.⁶

The matter is in any case more complex, as Loughlin himself points out: for the law limiting or controlling power is, in turn, as an institutionalizer of power, a creator of new power. That which *controls justifies*, and what *justifies empowers*.⁷ So the controlling reasonableness of criminal law would justify the power of criminal policy, which without criminal law would be seen as intolerable facticity. To be sure, here a door is opened for critical criminologists to enter, with Alessandro Baratta et al. But let us close that door, gently.

More importantly, and going back to Loughlin, the idea (avowedly not without danger) that there is no such thing as pre-existing freedom shows up: because within State *Order*, in its commands and prohibitions, conditions for freedom are put, which

5 LOUGHLIN (2010), pp. 1 ff.

6 In the words of *CLAAS*: “This book defends a different view of both the criminal law, and of the significance of public institutions more generally. DeShaney notwithstanding, we now live in the age of the administrative state. We have created public institutions that have sweeping mandates to devise, promulgate, and enforce legal rules over incredible swaths of individual and social life. Public law regulates the product safety standards for the cradles in which we place our newborn, and it specifies the health and zoning regulations that govern how we bury our dead. The institutions and substantive legal rules they promulgate are oriented toward the public welfare” (p. 4). See, of interest, DeShaney, 489 US 189 (1989)] and Osman v. UK (28 October 1998).

7 LOUGHLIN (2010), *Foundations*, op. cit., p. 11-12.

would not otherwise take place.⁸ Thus can the old Prussian adage (a foreshadowing of the Age of *Administrative State*) be understood: freedom depends much more on administration than on constitution.⁹⁻¹⁰

8 LOUGHLIN (2010), *Foundations*, op. cit., p. 12.

9 LOUGHLIN (2010), *Foundations*, op. cit., p. 435, quoting Krieger, Leonard, *The German Idea of Freedom*, University of Chicago Press, 1957, p. 217, itself quoting Niebuhr, Barthold Georg, 1815.

10 It is worth asking whether it's here—in the understanding of the notion of *freedom* (and consequently of *the people* and the *State*)—where the divide is, and whether idiosyncratic factors play a role in that understanding. I'll allow myself a couple of observations. In LOUGHLIN (2010, *op. cit.* p.11) it's always acknowledged that every political project tends toward reconciling (without ever being able to achieve it completely) two different human dispositions: the desire to be *autonomous* and the desire to *belong*, understood as *taking part in a common project*. This passage is, I think, most interesting: “Strictly conceived, the science of political right is simply unachievable: the world is littered with normative schemes that have foundered on the rocks of modern political realities. But even as normative schemes they remain unconvincing, and this is largely because of their inability to reconcile two equally powerful but contrary human dispositions: the desire to be autonomous and the desire to be a participant in a common venture. Since this is the situation, the objective of a positive theory of public law can only be that of developing the most effective apparatus we can that acknowledges the power of these competing claims.” (op. cit. p. 11). Freedom, then, as autonomy or as belonging? Consider, on the other hand, the view of ORTEGA Y GASSET, in his *Hegel y la filosofía de la historia* [Hegel and the philosophy of history] (in *Ideas y Creencias y otros ensayos*, Alianza, Madrid, 2019, pp. 221-243; originally published in 1931 under the same title): after presenting various notions of the idea of *the people*, Ortega presents a counterpoint between the notion of *the people* and *freedom* within German *Idealism*—which tends to dissolve the *particular* in the *organic whole*—as opposed to the idea of people and freedom of “English inspiration”, which tends to the conflictive opposition of the *individual* against the *inorganic collective* (cf. op. cit., p. 236). It is not too much to offer the passage exactly: “[...] let us not forget that for Hegel, freedom does not mean what is usually does for us. For us it is the ability to deny what is other than me, it is to ‘free oneself from’, and only this, only this movement of evasion and escape that is, at the same time, a returning of everyone to themselves and staying away from the rest. For Germans, and Asians a little always, pantheists, freedom is a denial of oneself, a restricting oneself or self-determining. Now, I cannot limit myself if not by accepting something other than me that limits me—therefore, accepting in me the rest, the others, filling me with the other, with others, joining, de-individualizing, generalizing me— in short, merging with what is outside me, with the neighbors of my people and forming with them the collective unity of a nation. For Hegel, only through a given people can the individual be free or, better yet, only the people, as an undivided, united spiritual unit, is free. // The English inspiration is the opposite of this one. According to it, freedom is the status of being in plurality. A sole, lonely being has no place to exercise its freedom. To say that the loner is free entails a deceit and an excess. Of course, if there is only him, how could he not be free! The attribute of freedom then adds nothing. Free is he who, living among many, in obligatory company, nevertheless has the right to his solitude, to be apart, before the others. That is why for the English society, the people, are a mere sum of individuals, a complex [...] of atoms. // This idea exasperated Hegel. The mere aggregation of persons—he says—is often called a town; but as such an aggregation is nothing more than vulgus, not populus, and, in this sense, the exclusive purpose of the State is to prevent such an aggregate, a mere aggregate of individuals from existing, acting and exercising power. The State, then, represents for Hegel the unity of the people as opposed to their dispersion into mere individuals. The isolation in which they appear to be is an optical illusion— The individual lives ‘off’ and ‘in’ his people, because only this, the people, consists of an interpretation that the universal spirit gives itself. History is not the history of individuals, but of popular units [...] [For Hegel] individuals are simple materials for the work of the spirit, which occurs on a dimension higher than all of private life.” (op. cit., pp. 238-239). Finally, it is worth asking whether the discrepancy is as radical between “Germans” and the “English”, as Ortega presents it. Isn't there margin to recognize that without otherness, the individual cannot

Bringing that into our field, the hypothesis would be that criminalization and the execution of punishments would be a condition of possibility for citizens' freedom. This perspective perfectly combines –I think– with the position found in *CLAAS*, in which punishment is understood “as a means of fostering social cooperation” (*CLAAS*, p. viii). Specifically:

Punishment promotes the development of attitudes of reciprocity and willingness to engage with others on shared terms of social cooperation (*CLAAS*, p. viii).

We will return to this shortly, but let us now let the author himself give an account of the instrumental meaning he attributes to criminal law as public law:

What is the place of the criminal law within this picture of public law and public institutions? The criminal law is a means to an end, and that end is: to help secure the rule of stable and just public institutions. The basic principle of public institutions, in turn, is to extend the equal protection of the law to all– that is, to promote the common good on terms befitting social and political equals. In this sense, criminal law rests on the same principle of universal entitlement that animates public law more broadly (*CLAAS*, p. 5).

It is adequate to close this section by letting the author speak again, where he recognizes his intellectual debts as regards his *public law* approach:

The public law approach I defend in this book is not sui generis. The ambition and, in many ways, the conclusions that I defend in this book flow out of David Garland's *The Culture of Control* and, especially, John Braithwaite and Philip Pettit's *Not Just Deserts*. Like Garland, I emphasize the connections between criminal justice and the welfare state, both in terms of how the criminal law was once understood to be part of a broader panoply of state provided services, social insurance programs, and welfare oriented policies, and in terms of its interpretation as a retributive, moralistic, and compensatory institution as the welfare state has been rolled back. Like Braithwaite and Pettit, my ambition is to develop a comprehensive approach to criminal justice, one that is sensitive to its inevitable tradeoffs and uncertainties while nevertheless being protective of basic rights. And, like Braithwaite and Pettit,

properly constitute itself, without that entailing that it dissolves in that otherness? Be that as it may, taking up both approaches (Loughlin and Ortega), it turns out that there is a *being autonomous* (*free* in the manner of the English, in Ortega's reading) or a *belonging* (*free* in the German manner). For the rest, cfr. *CLAAS*, pp. 1-14, showing how a specific radically liberal conception in England at the beginning of the nineteenth century opposed the implementation of police and public prosecution services, because “*the gains in protecting people from criminal victimization in a more systematic manner were outweighed by the costs to liberty of a system of public policing and prosecutions*” (*CLASS*, p. 14, based on a contemporary report, quoted by Mark Koyama, “The Law & Economics of Private Prosecutions in Industrial Revolution England,” *Public Choice*, 159 (2014): 277-98 at 286, n.28, who nonetheless adds that “*given the level of corruption and patronage in English institutions at this time, these fears were neither irrational nor necessarily driven by ideology*”).

my preferred framework draws upon republican ideas, particularly as they have been developed by Pettit in his subsequent political philosophy. Other important political theories of punishment include the contractualist and Rawlsian theories developed by Matt Matravers and Sharon Dolovich, respectively; Lindsay Farmer's historicist account of criminal law and civil order; Malcolm Thorburn's Kantian constitutionalism (from whom the label "criminal law as public law" is borrowed); and, most foundationally, HLA Hart's efforts, in *Punishment and Responsibility*, to show how the philosophy of criminal law could avoid a moralistic retributivism without falling into an oppressively technocratic conception of crime and punishment (*CLAAS*, p. xii).

II. GROUNDS AND POLITICAL POSITION OF THE *CLAAS* MODEL

With that plenty has been said, but before moving on to the consequences of the *CLAAS* model (corollaries on which the last four chapters of the book, 4 through 7, focus), it is necessary to give an account of the meaning and content of this administrativizing program for criminal law:

As regards the function of criminal punishment [or of administrative sanctions, because there are no differences, it is understood], a consequentialist or anti-retributionist inspiration can be immediately perceived. In a manner similar to *game theory*, Prof. Chiao sees in punishment a contribution to social cooperation, by providing *reasons for action*, that is, by stabilizing the reasons of those who are willing to cooperate: "punishment makes cooperation not just reasonable, but rational as well" (*CLAAS*, p. vii). I suppose that continental lawyers will relate this description to certain well-known functionalism among us, of a positive general preventive persuasion.¹¹

But if certain functionalism is latent here –and it is–, then it's relevant to ask about its meaning or purpose. Specifically: is it a noncommitted functionalism (the mere facilitation of any system) or a politically oriented functionalism? The facilitation of any form of cooperation (as in, precisely, *game theory*) or the facilitation of a form of –let's say– *benign* cooperation? Although a *positivist* nerve runs throughout the book, no one can resist some form of *perfectionism*, and neither can Prof. Chiao (man is a being that dreams of better worlds, and so it should be: if perhaps those better worlds are sought in an unknown past, or if he finds them in his inner nature or in otherness, that is a matter that cannot be dealt with here). I was saying that the author's view of criminal law is a proposal for a delightful world, in which I would like to live, right now (if possible). Thus, the social cooperation that punishment favors only makes sense under what the author calls an "egalitarian ideal of anti-deference—an ideal of a society of peers in which [in Philip Pettit's evocative phrase] each person can look every other person in the eye without fear or deference" (*CLAAS*, p. ix). A world in which we can look into each other's eyes without fear or submission. Cooperation to live as "a peer among peers" (*CLAAS*, p. ix).

11 Certainly, I am referring to the perspective held by Günther Jakobs.

Prof. Chiao clarifies in any case that although he favors an egalitarian and democratic model (in this sense, *CLAAS*, p. ix), he does not mean “equalizing”. His drive thus coincides with a form of *freedom* that he defines as “effective access to central capabilities”, that is, a central capacity or ability, precisely that which make it possible to live as “a peer among peers” (*CLAAS*, p. ix). If criminal law (the punishment that it involves) does not serve to bring us closer to that world, it is of no use, in Prof. Chiao’s terms.

On the other hand, it can be noted that the author devotes a sizable part of the work to attack a form of *retributivism*, which Prof. Chiao equates to an “individualistic and moralistic legalism”. In part, he fights Malcolm Thorburn’s battle against Antony Duff and John Gardner, who –as has been said– see in the criminal system little more than a large-scale model of private moral systems of conflict management and confrontation of evil behaviors.

It is adequate to close this section by letting the author himself speak:

In a nutshell, in this book I defend the claim that we should look beyond individualistic notions of responsibility and desert for guidance about the design of criminal justice institutions and laws. Instead, I propose drawing from a conception of democratic equality. Looking at the criminal law in this way suggests that ‘because you deserve it’ is neither a necessary nor sufficient basis for a public institution, including one engaged in the administration of criminal law, to deny you access to the basic rights and prerogatives of civic membership. I interpret those basic rights and prerogatives expansively, including not only rights of equal political participation but also access to the range of capabilities required in a given society to lead a life as a peer among peer (*CLAAS*, p. xii).

III. COROLLARIES OF THE *CLAAS* MODEL

That is the groundwork of the book. But *CLASS* does not restrict itself to that, without dealing with the working consequences (chapters 4 through 7). Here I must proceed more quickly. The consequences of such a consequentialist, egalitarian and administrativizing reading of criminal law follow naturally:

A first corollary coincides with a critique of the current state of imprisonment (ch. 4): namely, intolerably “massive”, above all in a country like the United States, which contributes 20% of the world’s prison population. Here the author denounces the sterility of retributivism, which can do nothing but weep or lament, without being able to offer any constructive criticism.

The criticism of mass incarceration can be shared –how could it not!– but not the one addressed to retributivism. The retributivist is not prevented from forming a judgment and even a proposal to improve the world (within the framework of public policies, for now). It’s just that he does not intend to make punishment (in its phase of concrete or personal adjudication) a space for the betterment of the world. For, of what *peers* would we speak –deep down– if the punishment of some were imposed by directly having in view the improvement of the environment? Coherently, this consequentialist operation is forbidden for retributivism, but it’s the only one: the

retributivist is not blind to consequences, and nothing prevents him from dealing with them *ex ante*, at the legislative level, or *ex post*, with policies of varied nature. What he cannot do is introduce this variable as an evaluative criterion for the assessment of the specific case.

In this refutation lies the core of one of my main criticisms of *CLAAS*: I perceive a certain conflation of planes, for there exist distinct subjects and objects in the application of criminal law. I put it this way: a public policy openly oriented toward the improvement of the environment (the social world) does not frighten me as much as does the idea of a (criminal) judge-adjudicator that sees itself as oriented toward the improvement of the environment, as an actor of public policy. I don't have sympathy for an activist judiciary.¹² Because, from what frame of action can such a policy be offered? For what purpose? Can it be other than what is in one's hands? And the matter at hand is always personal and incommensurable (while limited for carrying out public policy from there).

My observations on the rest –in defense of a certain retributive anti-consequentialism– are located on the same horizon of the likes of Robert Spaemann or Germain Grisez: show me someone who can consider *inputs* and offer a plausible calculation of *outputs* in the real world (that which comprises *non-extensive* realities) and I will pledge myself to be his servant. It's more feasible, therefore, to look at a more or less definable past event, to decide whether it is covered under certain legal linguistic framework (if it's the case of an adjudicator) or, to look at a phenomenon or kind of cases (in the case of politics), to try to present reasons (based on moral intuitions, cultural convictions, etc.) in order to declare that such or such conduct is to be omitted or carried out, that it is desirable or undesirable, etc., to then assess the more plausible means to achieve such a ban or promotion (which do not necessarily have to be criminal law means, to be sure).

A second consequence of the *CLAAS* model (chap. 5) is located at the level of the grounds for criminalization, where the notion of *wrongdoing* no longer plays a role at all. It's best here to let Prof. Chiao speak:

(3) From a public law point of view, the content of the criminal law should be determined by a fully political standard of justification. (4) As one such standard, anti-deference suggests that the only reasons that would make it permissible to criminalize X are those that tend to show that criminalizing X is the best available means of promoting universal and effective access to central capability on terms acceptable to social and political equals. (5) Possibly there are further deontological constraints on criminalization, but wrongfulness is not one of them (*CLAAS*, pp. 180-181).

This approach is directly connected with the administrativizing vision of criminal law in *CLAAS*. As stated by the author himself:

Criminal law is no longer [...] primarily a matter of publicly vindicating pre-politically negative rights [...] [but has] become more statist

¹² See LONDOÑO (2014).

and more redistributive than ever before. It should also become more egalitarian than it is [...]. For this to happen, we must move beyond our preoccupation with what people deserve for their assorted transgressions. We should be more concerned than we are with determining when a criminal law intervention is most likely, out of the range of possible interventions, to optimally promote everyone's basic rights and interests; by the same token, we should be more concerned than we are with ensuring that the criminal law does not itself undermine this very ideal of social equality (*CLAAS*, pp. 33-34).

A further clarification would be necessary here (about the very idea of *wrongdoing* in *CLAAS*¹³), but I state my main objections in advance:

A criminal law that dispenses with the idea of *wrongdoing* as a marker or identifier (as intentional attempt, at least, not to mention as completed attempt) loses *touch* with the common citizen. On the other hand, a similar (non-deontological) notion seems highly manipulable. Doesn't it run the risk of transforming this normative dimension into an arbitrary tool at the service of a policy? A tool without a pivot, without an anchor: as fluid and expansive as the ends of political action. I believe that Prof. Chiao is aware of the risk he runs (turning criminal law into an elitist social engineering technique, "for the people but without the people", in the manner of enlightened despotism), and it should be if, as has already been stated, among his intellectual debts he recognizes the efforts of H.L.A. Hart in his fundamental *Punishment and Responsibility*.¹⁴

A third corollary of the *CLAAS* model operates in the identification of the notion of "criminal" (chapter 6), for purposes of appropriateness of the corresponding procedural guarantees (where the "punishing" intention of the State is irrelevant). *CLAAS* proposes here the need to move away from formalism (teleological or subjectivist, such as the one affirmed by the United States Supreme Court), as well as from an (objectivist) pragmatism that is concerned with the effective limiting quality of the sanction. That is commendable; I have no objections on that regard. I would simply suggest reviewing the abundant European case law on the subject, from *Engel and others v. the Netherlands* (8 June 1976) onwards, which precisely seeks to avoid deceptive labels, via an analysis based on three variables: where only the first one agrees with American formalism, and, I think, the rest are close to the pragmatism postulated by Prof. Chiao.

A fourth and final corollary of the *CLAAS* model concerns the system of responsibility (chapter 7), one without *resentment*, without *blaming*, very objective or neutral, pragmatic in a certain sense. That is the criminal law that Prof. Chiao wants. It is consistent with the proposed administrativization, to be sure. It is, moreover, on the path to a civilizing reduction of violence. This relates directly to the reasons for criminalization (chapter 5) and in that context there are critical observations that

13 One may wonder if according to such concept the connection with morality is inescapable, necessary.

14 See *CLAAS* (2019), p. xiii.

bear repeating, first of all, the one that points to the risk of losing connection to the common citizen. More radically, it can be doubted that it is a civilizing progress, at least when there is a risk of doing away with the notion of *culpability*.¹⁵

IV. CLOSING

CLAAS is optimistic and believes that the criminal system can help improve the world. I commend its optimism. Others are pessimistic, however, and their pessimism (often retributivist) warrants at times accusing them of individualistic insensitivity. Pessimistic as they are, the world hurts them little. They have anesthetized themselves.

Others hold a mixture of both (pessimism and optimism) and a strange, unflinching faith: the idea that a *just* and *safe* world (I don't use the two variables by chance) is also a more *efficient* world. And that is why they are still determined to grasp the sense of the *unjust* and to requite soberly and modestly, *in legality* (hopefully without much *resentment*, with the least possible *blaming*). Everything else, all the externalities that follow from there, will be *better* if the *input* (the specific case) has been fair and equally treated, and *worse* if it has not been. The calculus and engineered programming of the "present for the future" is something that overwhelms me, and I prefer to leave in better hands. Not ours for now. And certainly not those of the judges.

And all this because as the venerable Hart says: "because we are men, not gods".¹⁶

15 Cf. *supra* note 4 in relation to IHERING, *El elemento de la culpabilidad*.

16 HART, H.L.A. (2012), on the insurmountable limitations of any regulatory activity.

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