Many questions were troubling the explorer, but at the sight of the condemned man he asked only: ‘Does he know his sentence?’ ‘No’ said the officer, eager to go on with his exposition, but the explorer interrupted him: ‘He doesn’t know the sentence that has been passed on him?’ ‘No,’ said the officer again, pausing a moment as if to let the explorer elaborate his question, and then said, ‘There would be no point in telling him. He’ll learn it corporally, on his person.’ The explorer intended to make no answer, but he felt the prisoner’s gaze turned on him; it seemed to ask if he approved such goings on. So he bent forward again, having already leaned back in his chair, and put another question: ‘But surely he knows that he has been sentenced?’ ‘Nor that either,’ said the officer, smiling at the explorer, as if expecting him to make further surprising remarks. ‘No,’ said the explorer, wiping his forehead, ‘then he cannot know either whether his defence was effective?’ ‘He has had no chance of putting up a defence,’ said the officer, turning his eyes away, as if speaking to himself and so sparing the explorer the shame of hearing self-evident matters explained. ‘But he must have had some chance of defending himself,” said the explorer, and rose from his seat.

(Kafka 1987, “In the Penal Settlement” 174)

In this paper I offer an account of the criminal process that serves as an explanation of the extraordinary wrong embodied in the case of the condemned prisoner in the gloomy passage of Kafka’s story. The condemned does not know his sentence. He does not even have a clue about the fact that he has been sentenced. No defence is provided; no explanation of his alleged fault is presented. On the one hand, all this illustrates is that the process carried out towards the achievement of the sentence is seriously vicious. On the other, it makes us ask what is so special about the criminal process that it has to be performed in certain specific ways. It makes us question what are the relevant conditions, requirements and aims to be met throughout this process. These are the general concerns I explore and attempt to answer in the following pages.

In order to do so, I begin in by describing the criminal process, without explaining its intricate details, procedures and exceptions in different communities, but simply offering its basic skeleton in a way that makes it recognizable as criminal process throughout these communities. The communities that I have in mind are modern democracies which are, at least in principle, committed to respect and protect individuals within the community. Furthermore, these communities are pluralistic, by which I mean that some or many different conceptions of the good endorsed by the members of the community share a common public space of interaction. In this context, this paper will be concerned with what I call identity-offences, which are offences importantly motivated by ethical commitments and beliefs that constitute the agent’s identity.

In the second part of the paper I defend a particular conception of the criminal process which describes it—at least partially and when a relevant case arises—as an instance of recognition, moral education and ethical

understanding. All this is achieved by conceiving of the criminal process as an occasion of communication among individuals as I believe is demanded by fundamental principles of criminal justice.

The third part of the paper focuses on the main criticism that may appear once we understand the criminal process as an identity-sensitive instance of the whole system of criminal justice. This particular sensitivity ascribed to the normative understanding of the system of justice seems to be at odds with the blindfolded image of Justitia. The impartiality she must endorse appears to be undermined by my claims of recognition. It may seem that my proposal removes her blindfold and allows her to see the different identities of those taking part of the process. Is this an unacceptable conclusion of my analysis? I will say ‘No’, and will argue so in the last section of the paper by offering an interpretation of Harry Frankfurt’s doctrine of sufficiency. If successful, my argument will show in which sense equality before the law is a principle of equality and will provide a defence of the liberal values of freedom, autonomy and equality of respect within the community and particularly within the criminal process.

All these issues are explored whilst trying to offer a general vision of the matters to be considered while thinking of the criminal process and identity-offences. Hence, my purpose here is not to offer a detailed analysis of the difficulties faced by the criminal process when dealing with plurality, but rather to try to present a general structure of these difficulties and a first attempt to answer them. A more context specific inquiry on these issues remains a task to be undertaken in future investigations.

1. The Criminal Process

The criminal process is carried out by a complex system of institutions that are part of the state. Unlike other, more visible institutions of the state, those concerned with the criminal law are characterized by being, at least in principle, independent of the contingencies of the political arena. Criminal procedures are not meant to be grounded on political or prudential reasons, but rather and importantly on more substantive principles and reasons that, as I shall argue later, are internal to the criminal process itself.

This separation of the spheres of the political and the criminal process does not preclude the evolution, adjustment, or reformation of either the institutions in charge of the process or the process itself. These changes can be developed and enforced by the current state or take place throughout longer processes involving different

---


3 See for example Taylor, Lord Chief Justice (1993) 17th Leggett Lecture—What do we want from our Judges? (University of Surrey).
political actors and beliefs. However, the relevant point is that to a great extent the criminal process should be a process grounded on certain principles and reasons that are independent of the day-to-day political struggle.\footnote{Again, this does not mean that many times the decision to develop new policies within the sphere of the criminal process are based on electoral considerations, popularity reckons, political agreements and the so.}

The institutions I refer to as constitutive of the system of criminal justice and that ultimately are responsible for the sound performance of the criminal process are particular to each community, so it is practically impossible to establish an unequivocal terminology for them. There is, however, a minimal structure that all these different institutions in different communities share, and that is what I shall present.

The criminal process always begins with the report of an alleged offence to the responsible authorities.\footnote{Although substantive parts of the following argumentation can be applied to any kind of criminal offence and the process following it, my concern here—and in coherence with the general scope of this paper—is with what I call identity-offences, i.e., offences primarily caused by ethical commitments and understandings which are constituent of the agent’s identity.} It is the report of an alleged offence to the institution in charge, and not the offence itself, that marks the beginning of the criminal process. This distinction is not minor, as it is the first sign of the values and principles involved in the very idea of the process that interests us here. A member of the community—and member here stands for an individual, a group, institution or an authority of the community— informs the relevant institution (let us say, the police) that an offence has been committed. The information delivered has a demanding content as it not only sets down a fact—the alleged offence—but also claims to have a normative strength that will be discussed later.

The fact that a community member reports an alleged offence does not necessarily mean that an offence has been committed. The community member reports what she believes is an offence and, if the police consider this belief as reasonable and sufficiently grounded, the machinery of the criminal process is allowed to continue. Otherwise, the police may decide not to take further action and the process ends.\footnote{On warnings, formal and informal cautions, trivial offences see Ashworth & Redmayne (2005) \textit{The Criminal Process} (Oxford: OUP), 146-59; Davis, Croall & Tyrer (1998) \textit{Criminal Justice: an introduction to the criminal justice system in England and Wales} (London: Longman), (128-34). For an official account on cautions see ‘National Standards’ in Home Office Circular 18/1994.} The aim of action taken after the report—if it is not dismissed—is not to conclude about the wrongness of the alleged act but to find sufficient evidence to decide whether or not to continue with the formal criminal process. In this stage the police are entitled to question and investigate suspects and all those who may help to obtain further evidence supporting (or otherwise) the progress of the process (see PACE Code of Practice C, para. 11.4) . The police are even entitled to arrest a suspect when sufficient elements of proof (about a committed offence or an offence about to be committed) justify this decision (see PACE, s.24). All these accepted procedures raise important issues about rights that will be further explored in subsequent sections.\footnote{For the actual standards of the Police procedure in England and Wales see The Codes of Practice under the Police and Criminal Evidence Act 1984. See also Ashworth & Redmayne 2005.}
If sufficient evidence is obtained within a reasonable period of time the process moves onto the stage of charge and prosecution. Charging a person represents an act by which the responsible official accepts the original report as reasonable and sufficient to begin a prosecution. It may be the case that, because of the evidence found throughout the investigation the final charge differs from the original report. If so, it is still possible to distinguish an original report which has been supported by the investigation and which stands as the first step in the process. The report may not well be the one presented in the first place by the person who motivated the primary investigation, but once an act is found to be suspicious and once the police keep investigating in spite of the dismissal of the original report, a nominal report is still identifiable as the first step towards the charge and the prosecution.

Once the charge has been decided, the prosecution starts by communicating it to the alleged offender. She might be told of the decision either by way of summons or after being arrested, depending primarily on the seriousness of the alleged offence. Similarly, it is the seriousness of the offence charged that defines the next part of the process. Hence, a general classification of offences exists in the criminal system. For the sake of brevity, and following the English and Welsh legislation, I will simplify this classification into summary offences and indictment offences (depending on the particular jurisdiction, other terminology is used, for instance, felony, misdemeanours or infraction).

Summary offences classify a group of less serious wrongdoings, such as common assault, drunk and disorderly, and motoring offences (e.g. driving under the influence or whilst disqualified). These offences are normally penalized with limited fines and/or minor imprisonment. By contrast, indictment offences are the most serious offences and receive the most serious punishments. Within this second group we find wrongdoings such as murder, intentional wounding, rape and robbery. These last offences are normally punished by imprisonment and far less commonly, by fines which, unlike summary offence penalties, do not have an upper limit.

The classification of the charged crime in one of these two categories determines what kind of trial will be adopted and what court will be responsible for it. There are different kinds of courts which dedicate themselves to different kinds of crimes. To name these courts is, again, an implausible task as there are almost as many different kinds as there are jurisdictions. However, in general terms, and in accordance with the classification of crimes already presented, I will refer to them as low and high courts depending on whether they are responsible for summary or indictment offences respectively.

---

8 For example, in England and Wales the maximum penalty for this kind of offence is £5000 and no more than 6 months of imprisonment.
9 For instance, in England and Wales there are the magistrate’s courts and the Crown Court, in Japan there are the Summary, District, High and Supreme Courts, in Germany the Federal Court of Justice and the Superior and Inferior State Courts, and so on.
As we can see, there is a big gap between indictment and summary offences. This is to say that there are an important number of crimes that do not fit straightforwardly within the description of either minor or very serious offences. As a consequence, some jurisdictions have established a third category. Following the British practices I will call them either-way or indictable offences. As the name makes explicit, this is a category of offences that, depending on a series of factors, can be treated either as summary or indictment offences. The responsibility for a decision usually rests with a lower court, which must consider in detail the complexity of the case in order to decide its seriousness and finally allocate it either within the summary or indictment jurisdiction. The rationale behind this categorization is that the seriousness of this kind of offences greatly depends on the circumstances in which the action took place (Davies, Croall & Tyrer, 181).

Once the decision on the adequate category under which the offence falls has been made, the prosecution continues either in low or high court. In this stage of the process a series of constraints determine what the procedures are and what the court can legally perform. The defendant has special rights or privileges which preclude the system from abusing its power. These rights are at the basis of what is called ‘due process’, as opposed to a crime control model or plain oppression.¹⁰ They exist to ensure that the final sentence is grounded on reasonably undoubted facts and to make explicit that it is not the role of the suspect positively to help the court to prove her culpability (Davies, Croall & Tyrer, 182). In practical terms, and depending on the seriousness of the alleged offence, the rights of the defendant include knowing the exact nature and details of the charges against her, the provision of legal defence, the entitlement to apply for bail, access to the evidence considered against her, the right to appeal from a low to a high court, and the right of silence.

As I shall argue in the next section of this paper, identity-offences are a class of offence that should be treated in high courts. For this reason, I confine the following presentation to procedures and stages that take place only in that kind of court (or in both).

Trial is a stage in the criminal process which only takes place in high courts and which, despite the fact that only very few offences lead to it, is at the core of the criminal process. Although the great majority of defendants plead guilty before this stage and the system itself tends to avoid its occurrence, the trial determines a great deal of the rules and guidelines of the pre-trial stages. The most relevant example of this is the rule of evidence that constrains the ways in which data relevant to the case are collected.¹¹

As with the previous stages of the criminal process, the lack of consistency of terminology, procedures and rules among the varying ways that different jurisdictions deal with trials makes my endeavour here more difficult than

it may seem. Again, I am offering a general sketch of a trial that should be recognizable as such throughout the different communities that I am considering in this work.

Generally speaking, there are two kinds of trials: by judge alone and by judge and jury. Although there is an extensive debate about the constitution and value of the jury, its most fundamental rationale is both that it makes possible a more accurate final decision as well as that it represents the population of the jurisdiction in a way that a single judge or a group of judges cannot. The fact that juries are constituted by common citizens, it is said, assures and honours the representation of the community in deciding the fate of one of its members. The trial, by using a jury, becomes not an entity beyond and above its constituents, but rather a direct—as opposed to merely symbolic—expression of the community and its values.

Trial procedures are particularly intricate. There are many formalities to be satisfied and guidelines understood almost exclusively by experts. However, the court scene during a trial can still be described in a way that, although lacking of many details, is intelligible and useful for my task in this section. In judge and jury trials, the role of the judge is to focus mainly on legal matters, guiding the jury on these issues and, in the case of a guilty verdict, to determine the sentence. The jury, if the defendant pleads not guilty, is concerned rather with questions of fact from which the final decision about the guilt of the defendant is made. In consideration of the greater expertise of the judge in relation to the jury, some jurisdictions have recommended, or have directly enforced, rules that allow the judge to quash a case when she believes that the final decision by the jury will be unsafe and unfair. Furthermore, either in judge alone or in judge and jury trials, the judge has the authority to exclude evidence when it has been obtained in a legally improper manner (e.g., confessions obtained by undue pressure, lies or disinformation; evidence obtained by violation of other rights like the right to privacy; procedures that contravene standard codes of practices of the jurisdiction). Thus, the judge’s power has an enormous influence on the final verdict as it may cancel fundamental and conclusive evidence either in favour of the defendant or against him.

---


13 For arguments against jury trials see Matthews, L. et al. (2004) *Juror’s Perceptions, Understanding, Confidence and Satisfaction in the Jury System: A Study in Six Courts* (London: Home Office); Schopp, R. (1996) “Verdicts of Conscience: Nullification and Necessity as Jury Responses to Crimes of Conscience” in *California Law Review* 69: 2039. Baldwin & McConville 1979 clearly describes this general disparagement of jury trials: “[T]he very conception of a jury might be thought absurd. Twelve individuals, often with no prior contact with the courts, are chosen at random to listen to evidence (sometimes of a highly technical nature) and to decide upon matters affecting the reputation and liberty of those charged with criminal offences. They are given no training for this task, they deliberate in secret, they return a verdict without giving reasons, and they are responsible to their own conscience but to no one else. After the trial they melt away into the community from which they are drawn.” (1)


15 It is important to note, as it will be shown below, that the unfairness of ill-gotten evidence is primarily neither a protection for the defendant nor for the prosecutor. It is rather a way to keep the standards of a fair process. See for example PACE section 78: “In any proceedings the court may refuse to allow evidence […] if the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.” (my italics). See also the Fourth Amendment and *Mapp v Ohio* (367 US 643 (1961)).
Beyond these general constraints guiding the trial in court, there are other characteristics that I shall briefly mention. During trial, either by judge alone or judge and jury, both the defendant and the prosecutor—or the person who represents them—present to the jury and/or the judge their arguments, evidence, and witnesses supporting their own position (which for the sake of simplicity I will simply classify as not-guilty and guilty respectively).

The trial develops under the principle of presumption of innocence. This means that the trial should always end with a not guilty decision unless it is proved otherwise. On the one hand, the prosecutor has the role of proving—under the constraints mentioned above—the guilt of the defendant on the basis of the accepted evidence. On the other hand, the defendant may, at least in principle, be passive and do nothing. However, this attitude is unlikely as once the case has got to a high court, the burden of proof against the defendant is important and serious, so the defendant’s role is often to defend herself against the charges and evidence presented and to ensure that her rights are respected.

Once all the accepted evidence has been presented and cross-examination has taken place, the judge normally summarises the evidence for the jury (in the case of a judge and jury trial) and the verdict can be decided. Normally this decision is made in private, without access to the process from someone external to the jury, or to the judge if there is no jury, and without further explanations or justifications.

When the verdict is reached, the last part of the criminal process I am considering in this paper takes place: the sentencing stage. In sentencing, the judge applies the standards of sentence of her jurisdiction for the crimes of which the wrongdoer has been convicted. These standards vary in aim, justification and severity throughout different communities. For example, there are jurisdictions where capital punishment has been abolished while in others it is still enforced. And there are jurisdictions where the aim of the sentence is to deter future crimes or incapacitate the criminal while in others it is to rehabilitate or reform him. The justification for the sentence will similarly vary depending on the aims that the jurisdiction may consider.

In each jurisdiction sentencing is ideally guided by a principle of uniformity or parity (von Hirsh & Ashworth 1993). According to it, similar sentences are to be given for similar offences to offenders with similar circumstances and background. This principle works differently depending on the aims that the jurisdiction holds. Consequently, the principle of parity applies within the limits of the jurisdiction and not trans-jurisdictionally, as each jurisdiction may endorse different and equally valid aims. Thus, it is not necessarily a matter of dispute or concern whether in a jurisdiction A for a crime X a sentence P is applied, and in a

---

jurisdiction B for a crime X a sentence ¬P is applied. The concerns one may have for applying, say, ¬P to a crime X are not a matter to be discussed under the principle of parity but rather under the principle of retribution.

Regarding the different criteria to be considered by the judge when sentencing an offender, the two most salient of these are mitigation and aggravation. The former has to do with considering the factors that lessen the fault or responsibility of the offender. These mitigations can eventually be presented by the defendant (a plea in mitigation) or may have appeared throughout the criminal process and in the presentation of evidence, witnesses and so on. Among these factors are physical and mental health and mens rea. The judge may also consider aggravating factors which may end up making the offence or the responsibility of the offender more serious. Factors considered include premeditation, the motivation for the offence (was it, for example, racially motivated or homophobic), the vulnerability of the victim, and so on. After all these factors are taken into account, the sentence is decided and communicated to the offender and the process moves onto the punishment stage.

2. Criminal Process, Identity Offences and Justice

In the previous section I described the basic structure of the general criminal process from the report of an alleged offence to the achievement of a sentence. Many questions to be answered and issues to be explored remain to be tackled in this section. These are questions and issues about rights, procedures, principles and justifications which are relevant not only to the criminal process but also to the entire criminal system. In what follows, I address these issues keeping in mind the main concern of this paper: identity-offences and the way the criminal process should deal with them. In the first part of this section I explore some of the most relevant values and principles involved in the criminal process. I then move on to consider some practical consequences derived from those values and principles.17

Internal Values and Principles of the Criminal Process

As I have already claimed, the report of an offence is more than a simple description of a state of affairs. The report of an offence by a community member has a normative or evaluative content as it is the expression of the belief that something is wrong; that certain expected standards of the community (or of the legal jurisdiction of the norm that indicates and prescribes these standards) have not been met. The report indicates the belief that a wrong has been committed and not merely that an illegal act has taken place.

17 These values and principles also have relevant consequences in the pre-trial stage of the criminal process, particularly in the tasks undertaken by the police while investigating a report. However, I will not refer to these consequences as the principle of integrity explored below demands that the requirements of justice of any stage of the process be coherent with any other of its stages. Since from the point of view of identity-offences the trial stage is the most relevant part of the process, I will refer exclusively to the practical consequences of these demands within that stage. That should be enough to cast light on the justifications for the practical consequences in the pre-trial stages of the criminal process.
It is true that what is reported is an illegal act, but this is done not because it is illegal but because to act illegally is wrong. It may be said that in many cases the report emerges as a straight reaction not to the believed wrongness of an act, but to its illegality. But again, once the reporter is asked why she has done what she has done and she offers as an answer (let us say, a decent or normatively proper answer)\textsuperscript{18} ‘Because what he has done is illegal’, I believe that there is no strong reason not to translate such an answer into ‘Because he has broken a law, and to break a law is to do something wrong’. An illegal act is, other things being equal, always wrong, either because the act itself is wrong or because breaking the law is wrong.\textsuperscript{19}

Based on these premises, the criminal process is understood as a process in which morality plays an important role. The voice of morality puts the process in movement and it is that voice which should certainly guide it.\textsuperscript{20} In other words, the criminal process deals with wrong acts within the community that have been labelled as criminal. To ‘deal with’ acts means to look at, investigate, present, explicate, justify, and judge acts.

Although all this is true, the role of the criminal process cannot be reduced just to dealing with acts; this process it is not merely an instance in which a given act is juxtaposed with a set of laws, from which is determined whether or not the act in question is consistent with the set of legally accepted acts. The criminal process is also and importantly about internal procedures that have to meet certain accepted standards and principles not related to categories of acts or types of law. These standards will tell us a great deal about the internal values of the criminal process—i.e. values which are not contingently but logically connected to the criminal process.

For the purposes of this paper I will refer explicitly to only one of these procedures as it is enough to provide a strong sense of the internal values of a just criminal process. The procedure that I have in mind here is that of gathering evidence in stages prior to a trial.\textsuperscript{21} As was seen above, the collection of evidence against, or in favour of, the defendant must meet certain standards (the rule of evidence) which, as we shall see, are encompassed in a more general principle of the criminal process.

\textsuperscript{18} By means of this awkward expression I am trying to eliminate those possible answers that, although may be honest, emerge from not virtuous reasons, like hate, revenge, self-satisfaction and so on.

\textsuperscript{19} This does not preclude the existence of overriding principles that may have a more stringent claim when judging an illegal act. Thus, on occasions an illegal act, although wrong, is the best possible alternative.

\textsuperscript{20} It must be noted that this assertion does not necessarily align my analysis with natural law theory. My claim is that a criminal system as a whole should be guided by certain moral principles, and not that a rule that is not in conformity with these moral principles is never a law.

\textsuperscript{21} This is not the position of Ashworth and Redmayne who understand the rule of evidence as encompassing external values because “there is nothing in the theory of criminal process itself which tells us whether or not courts should exclude improperly obtained evidence” (Ashworth and Redmayne 2005, 27). As will be seen in the following paragraphs, my position offers an argument in favour of the internal nature of the values defended by the rule of evidence.
In simple terms the rule of evidence establishes that the judge can refuse to accept certain kind of evidence because it was obtained by inappropriate means or from unreliable sources. It may even be the case that this evidence (say, E) is sufficient to demonstrate that the defendant is guilty. However, if the judge says that E is inadmissible, E cannot be presented in court. These restrictions can certainly undermine the achievement of truth in the criminal process. In fact, if evidence E is not only sufficient but also necessary to demonstrate the culpability of an individual \( p \), it should be the case that \( p \) ends up not being convicted (recall that \( p \) is not-guilty unless proven otherwise). If evidence is obtained, for example, by trespassing on private property without having legal permission, or if a confession is the result of torture or undue psychological pressure, the proof obtained should be considered inadmissible.

The rule of evidence is grounded on a more general principle of the criminal process: the principle of integrity (PI), which I define as follows:

\[
(\text{PI}): \quad \text{Every legal decision made at any stage of the criminal process by any member of the system of criminal justice must be coherent with the others and in accordance with minimal moral standards.}\]

This principle restricts the way in which each part participating in the different stages of the process can legitimately behave, demanding that the criminal process as such be carried out in accordance with minimal established standards applicable to the whole system of justice. These standards, as we shall see, have a moral character and stand as standards of integrity and not of efficiency.

PI challenges the primacy of truth as the aim of the criminal process. Although truth is important, it is neither the main purpose of the criminal process nor an aim to be achieved regardless of means and costs. As the rule of evidence shows, if \( p \) were responsible for an offence and E were accepted despite being obtained inappropriately, we would obtain a correct verdict but an unjust criminal process. The means used to obtain justice cannot be disassociated from the ends of justice. In other words, what PI claims is that justice cannot be obtained by means of injustice. This allows us to conclude that the criminal process has different and more fundamental aims and values than epistemic ones.

The question now is: if it is the case that truth is not the main internal value guiding the criminal process, what should it be? As can be seen from the rule of evidence and the requirements of the principle of integrity, the achievement of truth is secondary to the protection of individuals. I shall argue that such a protection is

\[22\] There is a certain similarity to be further explored between this principle and Ronald Dworkin’s ideal of integrity. According to this ideal, judges decide cases interpreting the law but trying to achieve a coherent moral vision and thus obtain a consistent notion of justice. See Dworkin, R. (1986) *Law’s Empire* (Cambridge, Mass.: Harvard University Press). For PI see also Mirfield & Smith (eds.) (2003) *Essays for Colin Tapper* (London: LexisNexis).
demanded by the existence of a stringent sphere of individual rights which is coextensive with a principle of individual respect.23

These demands—for individuals’ rights to be respected and protected—are internal to the criminal process. Thus, they differ from a side-constraint view which asserts that “the rights of others determine the constraints upon [criminal process] actions.” (Nozick 1974, 29)24 Unlike the side-constraint view, respecting an individual’s rights is to be seen here as an inherent demand of the criminal process as such. It is not that the criminal process will be better served by respecting individuals involved in it, nor that given the fact that there are individuals’ rights the criminal process has to be carried out in particular ways (in other words, that were it not for individuals’ rights the criminal process could be carried out with none of these constraints); it is rather that the very notion of a just criminal process necessarily demands both respect for, and protection of, individuals’ rights. The purposes of the criminal process cannot be obtained except under the restrictions posed by the sphere of rights and a strong commitment to the principle of respect.

My claim is that the rights under discussion are not external and contingent impositions on the sphere of the criminal process, but are at the core of its meaning. If the state is going to honour the existence of individuals’ rights, then the criminal process has to be understood as an instantiation of such respect. This is to say that the state’s concern for individuals’ rights is necessarily expressed in the criminal process, and that a state with no criminal system or with a criminal system that sees the principle of respect as an external or side-constraint principle, fails in a fundamental way in respecting individuals’ rights.

How is this so? How can the criminal system be seen as an instantiation of the state’s respect for individuals’ rights? In answering this I have been influenced by R. A. Duff’s account of trials in his Trials and Punishments.25 His main claim in relation to this argument is that “the concepts of law, of a criminal trial, and of punishment themselves embody certain substantive and non-consequentialist values.” (Duff 1986, 12) The criminal system is neither a means to an end in which the connection between one and the other is merely contingent nor is it a process constrained by the demands of external and independent moral values. That is why he calls his account ‘intrinsicalist’, “insofar as it finds the justifying purpose of a system of criminal law and criminal trials in values which are intrinsic to the proper nature of the criminal law and the criminal process.” (Duff 1986, 10) However, in order to make sense of this ‘intrinsicalist’ view we need to add flesh to the bones, and that is the task of the aforementioned principles of respect and integrity.

---

23 For the purposes of this paper I take for granted that individuals have rights and that these rights create duties in others. This is a very general claim which I believe not controversial insofar as individual rights are understood as a demarcation of a sphere of value in which the individual is sovereign and therefore subject to no interference.


The best known version of the principle of respect is the Kantian imperative: treat persons always as ends in themselves and never as mere means.\textsuperscript{26} A plausible account of this imperative is that persons have an intrinsic value which should be recognised, respected and never violated. The violation of an individual’s value amounts to the use of that person as an instrument, i.e., as a mere means; and to reduce her to a means is to treat her as something different from a rational human being.\textsuperscript{27}

Although this is not the place to give a full account of what constitutes the object of value of individuals, I believe that within the criminal process, and more generally, in the context of any political and legal relationship, what is to be valued, respected and never overlooked is an individual’s capacity, and right, to choose and pursue her valued projects. Our relationships with others in the context of the criminal process has to be marked by the understanding that, like ourselves, everyone has a \textit{prima facie} legitimate interest in tracking their projects, their conception of a good life, and, consequently, a legitimate and fundamental interest in being authentic.\textsuperscript{28}

This brings us into the notion of identity, since identity is primarily defined by our projects and our conception of well-being. If being able to be authentic—i.e., being able to freely, rationally and consciously act in accordance with our identity—is a fundamental right, then to respect such an interest integral to people’s identity must be a \textit{sine qua non} of every just relation held between the state and the persons within its jurisdiction and, henceforth, an integral part of the criminal process as such.

How is this principle of respect for individuals’ value and rights honoured? I believe that such a respect is served by considering individuals as rational and moral agents and acting in accordance with this consideration. In practical terms this means that the criminal process has be carried out under what I call the communicative requirement. Under this requirement, the process is not understood as something done against the defendant or in favour of the prosecutor. Even if the defendant seems to be in a more uncomfortable position than the prosecutor, the judge and the jury, the internal rationale of the trial and of the whole criminal process is not that of something done \textit{to} and \textit{against} the defendant. Instead of this unidirectional conception, I claim that the

\textsuperscript{26} See Kant, I. (1978) \textit{Groundwork of the Metaphysics of Morals}, translated by H. J. Paton (London: Hutchinson), 428, 433 \textit{int. al.}

\textsuperscript{27} This is what Stephen Darwall calls \textit{recognition respect}: a kind of respect “which consists, more generally, in a disposition to weigh appropriately in one’s deliberations some feature of the thing in question and act accordingly.” (Darwall, S. (1977) “Two kinds of respect” in \textit{Ethics} 88/1: 36-49, at 38) “Strictly speaking, the object of recognition respect is a fact. And recognition respect for that fact consists in giving it the proper weight in deliberation. Thus to have recognition respect for persons is to give proper weight to the fact that they are persons.” (Darwall 1977, 39)

\textsuperscript{28} Carl Cranor offers an interesting argument along similar lines to that which I have tried to present here. He understands respect for persons as a type of relationship between two people in which the respecter judges that the respected has a normatively valuable characteristic. This characteristic stands as the basis of respect and gives reasons to the respecter to do what is necessary to keep this characteristic in the respected. See Cranor, C. (1975) “Towards a theory of respect for persons” in \textit{American Philosophical Quarterly} 12: 303-319.
criminal process should be seen as a communicative endeavour.\textsuperscript{29} From this premise, the criminal process is done \textit{with} the defendant, which means that the defendant has an active and determinate role to fulfil during the process.

To conduct a process with the defendant—as demanded by the communicative requirement—involves understanding him in a manner demanded by the principle of respect. The defendant is to be seen as a rational agent able to enter in a communicative process with the court and the prosecutor. He must be able to understand the reasons under which he is put before the court and to defend and/or justify himself in rational terms against the charges presented.\textsuperscript{30}

Note that this does not mean that the defendant will actually enter into this process. He must be able to do so, but it is up to him whether or not to participate in the process. The alleged offender cannot be oppressed or manipulated in order to make him participate. It is his (civil) duty to enter in the process and in not doing so (when he is capable of doing so) he is aggravating his fault.\textsuperscript{31} In other words, the criminal process should be carried out from the strict premise that the accused acts as a free and responsible agent who understands the rationale of the process to which he is subjected.

\textit{Practical consequences: Courts and Identity-offences}

As was shown in the first section of this paper, one of the most important criteria in distinguishing crimes is their seriousness. As we can see, this is a slippery and vague concept: what is more serious, stealing a car or a bike?; torture or rape? These are questions about the commensurability of different offences. More than one plausible answer can be advanced to this and each should be explored in detail. However, that is beyond the scope of this paper. Independently of the commensurability question, I shall argue here that identity-offences are an indictment type of offence which are sufficiently serious as to be treated in a high court.

The question that naturally emerges is what do we have to consider in order to assert that identity-offences are serious? My response requires us to focus on the role of the criminal process in particular and the criminal


\textsuperscript{30} Under these premises it becomes clear why the conviction of a mentally ill person, a very young offender or an old unfit individual are acts against justice. The process cannot be undertaken but by those who are able to commit themselves to the principles commanding the criminal process itself.

\textsuperscript{31} This may put us in the uncomfortable situation of an individual who, despite of his ability to participate in the process and despite his being aware of the aggravation that not participating involves, decides not to take part of the process. According to the principles presented, it would be unjust to decide a verdict and a sentence without his participation. In a way, justice cannot be done. However, this does not mean that the defendant should be released and reinserted in the community. The alternative consistent with the principles mentioned would require keeping him in a sort of cautionary detainment, until he freely decides to enter into the process.
system in general. Roughly speaking, the criminal process exists as a way to deal with certain types of acts and behaviour that are considered legally unacceptable within a jurisdiction. From a liberal point of view, the most fundamental basis for such unacceptability is the idea expressed in the harm principle which, again, is problematic. However, I must try to offer a clarification of this principle to set down the criteria for the assertion about the seriousness of identity-offences.  

Harm—understood as a notion relevant to our interests here—is a kind of malevolent intrusion or interference against an individual. The crux of the notion of harm is then the malevolence of the intrusive act against an identifiable individual. From a criminal point of view, malevolence is then tantamount to intentionally blocking or impeding (or trying to block or impede) an individual carrying out a relevant and legitimate action contrary to her will. Thus, on the one hand, stopping a man about to stab an innocent person is not a malevolent interference just as stabbing an innocent is not a legitimate act. On the other hand, the criterion of relevance in criminal justice refers to the blurred line dividing respectful acts that accord with an individual’s rights and disrespectful acts that violate individuals’ rights. Any intentional act that is disrespectful of an individual’s rights is then a harmful act.

So, again, what do we have to consider to justify my assertion about the sufficient seriousness of identity-offences? What is the kind of harm at stake involved in them? From my argument above someone may infer that an adequate answer should focus on the legitimacy and relevance of the action prevented by these kinds of offences. However, this is not true; at least, it is not necessarily true.

When considering the factors that make an identity-offence sufficiently serious as to be treated in a high court, one should not focus uniquely on the harm suffered by the victim, but also on the impact that the enforced law has on the offender’s identity and projects. When an individual with an identity X (which includes A-ing and other practices and beliefs) is told by the state that she cannot A and that if she does A she will be processed and punished, the state is making very serious demands. Such demands have (or can have) a deep effect on the individual and her pursuit of her authentic life. In forbidding A-ing the state may be fundamentally undermining the authentic identity of every individual who has an identity X. Thus, and if we accept the *prima facie* value of being authentic and tracking our life’s projects, there should not be doubts about the juridical importance—let alone the importance for the individual—of rules and acts preventing the achievement of our ends in life or forcing people to renounce their authentic being (or to restrict the actions related to their authentic identities). It

---

32 As it is well-known, the *locus classicus* of this principle is Mill’s *On liberty*: “The only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others” Mill, J. S. (1993) “On Liberty” in *On Liberty and Utilitarianism* (Bantam: New York) p.12.

33 This is true when it is not the case that the victim has been harmed *because* of her identity. In that case the focus should be on the impact for the victim of the harm suffered.
must emphasised that this is a content-independent claim, as I am stating the value and legitimacy of having projects and not the value and legitimacy of the content of those projects.

These considerations force us to enlarge our understanding of the criminal process in a way that makes it appropriate to deal with diversity in modern society. Thus, this process should not be seen merely as an instance in which the state deals with criminal acts, but also as an instance in which values and identities are discussed, defended and criticised. Laws forbidding and punishing acts internal to an identity represented in the community have a deep and practical impact that should be taken seriously. Treating identity-offence cases in high court is a way to do so.

*Practical consequences: Jury trials and Identity-offences*

To say that identity-offences should be treated in higher courts opens the possibility for a judge and jury trial. Beyond the general debate about the efficiency and possible justification of juries, I shall argue here that when treating identity-offences a just trial must include a jury, because I believe that this is the only way to enter into the moral and ethical understandings demanded by such offences.

My justification for this treatment of identity-offences is that a jury represents the community and the values it holds. In modern democratic and liberal communities the value of an individual’s identity should be recognised. This means that the liberal community *qua* liberal community must recognise and value the fact that individuals are agents capable of freely, rationally and consciously tracking their ideas of the good life, and that this idea of a good life is importantly based on their identity. All this is valued not for the consequences it may have on the individual or the community itself, but because the liberal community values individuals as such. An individual’s identity and projects constitute an important part of what she is, as well as providing her with a very important source of reasons for acting in particular ways. In respecting people’s identities, the community and its legal system respects individuals and their choices as is required by the principle of integrity.

It may be argued that a jury is not necessary in order to respect individuals in a trial. It can be said that a judge, or a group of judges, is better prepared to interpret the demands for respect than a group of individuals randomly taken from the community. The judge is an expert in law and that is the basic and most important characteristic that those who determine the fate of the criminal should embody. There is some truth in these claims. The judge is well aware of the law and its details and her experience gives her a particular authority: the authority of the expert.

However, I believe that a trial in particular and the criminal process in general, is neither solely nor primarily about the law and its details. The expert has something important to say, but her saying it is not the most
meaningful part of the criminal process, especially when treating identity-offences. An understanding of the criminal process as a space for mere expertise is at odds with the conception I am endorsing here. The expert contributes with his knowledge to the fair application of norms and procedures but, as an expert, cannot determinate the content of the communicative process. That is the role of the jury trial as a whole that cannot be fulfilled by the judge alone.

The communicative aspects to be developed through the jury trial are fundamental in terms of the meaning and role of the criminal process. The communicative requirement carried out by a jury is firstly an explicit way to express respect for the participants of the process. The jury recognises and honours the capacity of the defendant to enter in a rational dialogue. The idea of a rational dialogue involves the jury’s belief that a common moral language can be spoken. In entering such a dialogue, the jury treats the defendant as a peer. This connection between the jury and the defendant is primarily a moral connection expressing the jury’s recognition of the defendant as a moral agent who possesses moral dignity and who must be treated with respect. The defendant has also something to recognise. In attending the trial, he is accepting both the jury and the criminal system as a whole as a valid interlocutor. He understands that reasons are being required and that he must offer them. His peers require an explanation from him of his acts, and he is there to offer it (or to deny that the acts in question were actually his).

Secondly, this instance of recognition renders the trial a valid scene for presenting, understanding, discussing and judging acts and behaviours of other members of the community that may conflict with the law. Insofar as the jury represents the community, the trial permits the community to engage in a dialogue with the offender and the prosecutor. The jury listen to the reasons of the defendant and to the prosecutor and judge their reasonableness. It is in this sense that the criminal process serves as an instance of moral education and ethical understanding within the community.

To fully satisfy the communicative requirement within the context of jury trials some specific procedures should be established. For example, the jury should justify its verdict and such a justification should be made public. The publicity of the justification of the verdict is an important way to enrich the social discussion of identity issues as well as forcing the jury to establish its arguments reasonably and clearly. The justification of the verdict is also a way to respect the defendant as justifications express the intention to explain to others reasons that can be understood and accepted. The defendant should read the justification of the verdict and be able to understand the reasons that determine the verdict either in favour or against his interests.

Moreover, the jury should represent the community as far as is reasonably possible. This is a tricky requirement as it may appear that I am compromising impartiality in the selection of the juries. However, the idea of representation does not necessarily mean an arithmetical and forced partition of the jury in accordance with the
different groups existing within the society. It does not mean either that the jury should be selected with the identity of the offender in mind so that, for example, when the defendant is a woman there should be a minimal or a maximum number of women in the jury. The criterion of representation that I defend is grounded not on the representation of ethical communities or thick identities but on a representation based on the moral legitimacy of the juries based on a certain public commitment.

That, and not expertise, should be the criterion for choosing the members of the jury while treating identity-offences. The moral legitimacy of a jury relies on the commitment of its members to the principle of respect for individuals. Hence, and as stated above, a member of the community becomes a legitimate and plausible member of a jury as long as she is able to commit herself publicly to the principle of respect of individuals as such.

To put it in simple terms, a person that in the last part of his life has been a member of a homophobic group and has acted against homosexuals is clearly not a representative member of a morally legitimate community. His conception of the value of the individual depends on a contingency, viz., whether or not the individual has a particular sexual identity. In the same vein, a member of an orthodox religious community who acts according to his belief that women belong in the home and who consistently punishes his daughter when she decides not to get married, but rather to go abroad and study, is not a legitimate representative of the moral community. Again, his valuation of persons is not internal to the idea of personhood but depends on a contingency, whether the individual belongs to this or that gender.34

Practical consequences: Sentencing and Identity-offences

To conclude this section I shall now discuss the consequences that the principle of integrity and the communicative requirements have for sentencing. This stage is particularly relevant since it will introduce the

---

34 I am aware that my view on this issue is strongly contentious. From it, one may conclude that some members of a homophobic group or of an orthodox religious community could never participate in a jury and thus, eventually, all verdicts and processes of communication would not consider their own identities as members of their respective groups and communities. However, I do not fear such a conclusion and, in fact, I think that in moral terms it is a positive one. If we only allow the existence of juries who are committed to honour the intrinsic value of personhood, and the capacity of persons to be free, rational and conscious project pursuers, we are taking people’s value seriously. I understand that this may eventually end up with the disappearance of a particular group (those groups that are not represented in a jury and therefore in the communicative process of the trial), but I do not consider this a regrettable outcome of my proposal. Certainly, a liberal community should be strongly committed to both the principle of respect for individuals and identity. Whilst the former is an absolute duty, the latter is not. Only legitimate conceptions of the good life should be respected. However, this also means that as long as the homophobic person or the orthodox religious man of my examples are capable of publicly acting—and have demonstrated to do so—in an ethically neutral way or, in other words, in a manner that honours the value of people as such, nothing would preclude them from being members of the jury. They may think and believe whatever they like, but they act in their public role as juries in a morally legitimate way, i.e., respecting individuals as such.
most substantial part of my argument on the normative demands that identity offences pose to the criminal process.

Sentencing is normatively shaped by several principles, but in light of our interests here the most relevant are the following:

1. Principle of proportionality: every sentence must be proportionate both to the seriousness of the offence and to the degree of responsibility of the offender.

2. Principle of uniformity (or parity): a sentence must be similar to sentences previously enforced upon similar offenders for similar offences committed in relevantly similar circumstances.

3. Principle of relevant knowledge: a just sentence must take into consideration all the relevant circumstances of the case presented in court.

Let me begin by further qualifying a particular aspect of the first principle mentioned. The notion of proportion makes us think of the concepts of aggravation and mitigation as the idea of proportion is to match as far as is possible the sentence not only with the seriousness of the offence but also with the agent’s culpability for that offence. It is on this last aspect that I want to concentrate. What makes an offence X committed by an agent \( p \) something more or less serious than the same offence X but committed by an agent \( m \)?

Let me illustrate this with an example. Geoffrey is a professional and dependable accountant who enjoys spending part of his time off smoking cannabis in the backyard of his house. He does so simply because being high relaxes him and makes him forget all the tensions of his demanding job. Pete is his neighbour, a man who follows and honestly believes in the Rastafarian faith. Consequently, he smokes cannabis daily because he believes that smoking opens his mind to God, purifies his soul and makes him a better being. A very strict lady moves into the house that backs on to Pete and Geoffrey’s respective gardens. One weekend she realizes that her two neighbours are smoking cannabis and immediately reports the fact to the police. Since smoking cannabis is against the law, the report goes through. For the sake of my example, let us say that both Pete and Geoffrey are judged and end up convicted for the consumption of a prohibited substance.

I will not discuss here whether or not the law against smoking cannabis is a good law, but rather whether Pete and Geoffrey—in light of the principles set above—should be sentenced differently. In this particular example,
the issue at stake is that of mitigation from responsibility (in accordance to the principle of proportionality). Both Pete and Geoffrey are equally liable and answerable for their acts. Both know that smoking cannabis is against the law, and even with that knowledge, they do not obey it because of personal reasons. In his defence, Geoffrey may offer to the court reasons such as:

(i) ‘My job is demanding and I need to chill out during weekends in order to maximize my work during the week. Smoking marijuana is the best form of relaxation I know’

(ii) ‘In smoking pot I do not hurt anyone, so I do it’

(iii) ‘I love to get high. I smoke every weekend because it is good fun’

If we think now of the reasons that Pete may give to the court we find:

(a) I am a Rastafarian and the source that justifies and commands me to smoke cannabis is Jah, God. It is the Bible itself that supports my reasons: “He causeth the grass to grow for the cattle, and herb for the service of man.” (Psalms 104:14); “Better is a dinner of herbs where love is, than a stalled ox and hatred therewith.” (Proverbs 15:17)

It seems difficult to think that Pete could offer reasons similar to Geoffrey’s. Pete does not smoke because he needs to get some relief from his demanding job. Nor does he smoke because he believes cannabis does not hurt other people or because it makes him high. Indeed, his reasons appear to be more substantive than Geoffrey’s, from which one may conclude: from (i), that if Geoffrey knew a better means to get relaxed he would not smoke cannabis; from (ii), that if he believed that he was hurting someone he would not smoke it; and from (iii), that if cannabis would not make him high he would not smoke it. All these are contingent reasons to smoke cannabis. If smoking cannabis brings about a state of affairs of which he either approves or disapproves he smokes cannabis or he does not, respectively.

I say that Pete’s claim is more substantive than Geoffrey’s because it is his identity as a member of the Rastafarian faith that gives him reasons to smoke cannabis. He knows he is breaching the law, but his source of justifications overrides the authority of law. It is God, and not human laws, that gives him reasons to act. His most cherished projects in life are determined by these divine commands which are, for him, much more authoritative than the legal code of the society in which he lives.

35 In fact, in what follows I will only refer to this aspect of sentencing, leaving aside the issue of aggravation. However, I also believe that identity issues in committing an offence can also be considered as an aggravation of the fault. Thus, killing a homosexual because of his being homosexual should be considered as a more serious offence than killing someone when trying to assault her. In considering mitigation from identity one focuses on the wrongdoer and his responsibility, whilst when considering aggravation from identity one focuses on the victim and the seriousness of the offence.
This does not mean that he has not acted wrongly, in fact he has: he breached the law. He may consider that such a law is a bad law, a law that should not exist, but that consideration does not make the rule against smoking cannabis something different from a law that should be obeyed. A bad law is still a law. From this it follows that he did breach the law, as much as Geoffrey did. However, is this alone what a judge should consider in sentencing? I think it is not, because Pete, unlike Geoffrey, can offer good moral reasons for his action.\(^{36}\)

I consider identity-reasons good moral reasons, and good moral reasons should be considered by the judge whilst sentencing.\(^{37}\) ‘Good moral reasons’ are reasons that are justified to others on grounds of the value they have given identity (not this or that identity, but identity as such). They are reasons that come from an individual’s commitment to the value of identity and the understanding of the individual as shaped by that commitment. If we understand that God’s commands are normatively very stringent for a God believer, we should recognise that to fulfil those divine orders is for that individual something that is both meaningful and personally demanding. If we understand that someone else’s identity is fundamentally defined by acts that include Y, we should recognise the importance of Y-ing for that person and the \textit{prima facie} legitimacy for that person to Y. To act responsibly as an individual is, at least in an important respect, to act guided by the internal reasons of one’s identity. To dismiss these kind of reasons in court is to dismiss the very personhood of the agent who offers them, which is, in turn, a direct violation of the principle of respect and, in the context of the criminal system, of the principle of integrity.

But it is then legitimate to ask: why should we not also consider Geoffrey’s reasons as good moral reasons to be considered in court? It may seem arguable that Geoffrey had, as Pete, good reasons to smoke cannabis. He has to provide his family with food, housing and education, and his job gives him the chance to do so. Unfortunately being an accountant is quite stressful and Geoffrey’s needs to recover from this by smoking cannabis during weekends. His project in life requires him to keep his job and therefore to find a means of relaxation in order to be efficient during the week and not be fired.

However, these are reasons that demonstrate Geoffrey’s commitment to achieve his cherished project, but they are not reasons that demonstrate the necessary connection—the internal connection—between his legitimate life’s project and smoking cannabis. He does not offer good moral reasons for smoking cannabis but only reasons that are a means to the achievement of his project. They are not internal (neither moral nor ethical reasons), but simply external reasons to pursue his life project and identity. Conversely (and for the sake of the

\(^{36}\) The fact that Pete, unlike Geoffrey, can offer good moral reasons entails that his case should be treated in a high court in a jury trial. Whether Geoffrey’s case is brought to a high court depends, according to my account, on contingent factors that vary among different jurisdictions (he may, for instance, be simply sentenced by a low court or simply get a fixed penalty).

\(^{37}\) I call these reasons ‘good \textit{moral} reasons’ since what is relevant it is not the content of the reasons but their place in the general constitution of what \textit{the} individual is. By contrast, ‘good \textit{ethical} reasons’ are those whose relevance rests on the content of those reasons and their importance for the constitution of \textit{a particular} individual.
example let us assume that this is true), Pete could not stop smoking cannabis without fundamentally compromising his life’s project and identity as a Rastafarian. Consuming cannabis is a fundamental—i.e., internal—aspect of Pete’s identity so, in an important way, Pete, unlike Geoffrey, has acted as a responsible individual.  

It must be stressed that I am not arguing that Pete should not be convicted. The fact that he can offer good moral reasons to the court does not mean that he should not be considered guilty and then sentenced. Although good, his reasons are not sufficient for an acquittal. The law cannot be breached without having sufficient reasons to do so and although one may argue that a law forbidding smoking cannabis is not a good law, it is still a law that should be obeyed. Nevertheless, and this is my claim here, good moral reasons are sufficient to punish people differently for the same offence. If successful, my argument presents a defence for the idea that reasons grounded on identity are an important factor to be considered as mitigation when sentencing.

If all this is right, I have presented the criminal process as a rational and communicative process carried on by and with rational agents and conducted in accordance with both the principle of respect and the principle of integrity. These principles provide the basis for a due process in which people’s rights are protected and where the individual herself is understood as a rational agent whose good moral reasons should be considered in sentencing.

3. The like-cases-alike objection

My previous analysis offers a contentious practical conclusion: that there are cases where a different sentence should be given despite the fact that the offence and its outcome are exactly the same. A conclusion like this is problematic as it seems to violate one of the most fundamental principles of justice, i.e., that like cases are to be treated alike (which is expressed in the second principle of sentencing above). If such a violation follows from my previous argument, a strong objection is rendered against it.

In what follows I shall present the like cases alike principle in a more detailed manner in order to make clearer the idea that my prior argument might breach this fundamental principle. In the last part of this paper I reply to this objection to which, I believe, my argument is immune.

38 I am using the notion of responsibility as something different from liability and answerability. In the example given, both Geoffrey and Pete are equally liable and answerable for their acts, but I claim that Pete has acted more responsibly than Geoffrey as the former is able to offer good moral reasons for his action. The issue at stake here is how we should interpret the idea of responsibility as it appears in the principle of proportionality. I believe that such a notion should not be reduced merely to legal responsibility (which includes the ideas of liability and answerability) and that should also include the idea of moral responsibility in the sense that I have presented in my argument.
The like-cases-alike principle

The idea that everyone is equal before the law is sustained by a series of principles of penal justice. Hence, everyone—indeed, independently of any irrelevant factor characteristic of the agent in question—should be liable and answerable to the court of her jurisdiction; everyone should have access to the system of justice; everyone should be treated with the same respect and under the same principles when facing a criminal process; everyone should obey the law. No distinctions irrelevant to the system of law are to be made between two individuals when facing a criminal process or, more generally, when they simply live in a society organized, at least partly, by a legal system. A criminal law that proscribes X-ing is an authoritative rule demanding universal respect within its jurisdictional scope. No differences are to be made between different individuals when facing a ‘non X-ing’ command: everyone is equal before the law.

The like-cases-alike principle is perhaps the most basic of these principles of penal justice embodied in the idea of equality before the law. If such a principle is violated, by extension the equality before the law command is also dismissed. Since the criminal system must honour justice, any violation of the principle of like cases alike is a miscarriage of justice and, therefore, a fundamental failure of the system.

According to Hart, it is part of the meaning of a legal system that it consists of general rules which, in turn, embody the treating-like-cases-alike principle. This is a formal principle which stands as the constant part of the idea of justice. This is a necessary and not sufficient condition for the existence of a legal system. It has to be supplemented by the shifting part of justice, which establishes the criteria of sameness and difference among cases (Hart 1997, 157-67). From this it is possible to enunciate the principle of treating like cases alike (TLCA) from the point of view of a system of law:

(TLCA): Provide like treatment to those classes of persons and acts that fall under the same relevant category from the point of view of the legal system responsible for those persons and acts. And provide different treatment to those classes of persons and acts that fall under relevantly different categories from the point of view of the legal system responsible for those persons and acts.

---

40 “There is therefore a certain complexity in the structure of the idea of justice. We may say that it consists of two parts: a uniform or constant feature, summarized in the precept ‘Treat like cases alike’ and a shifting or varying criterion used in determining when, for any given purpose, cases are alike or different.” (Hart 1997, 160)
Justice, understood here as the fair allocation of benefits and burdens upon individuals subjected to a legal system, demands that judges and juries be bound to TLCA.\(^{41}\) Any departure from this principle is neither to be justified in terms of the demands of justice or exceptions to the rule of law, but by reference to the shifting part of justice that refers to the different categories under which both particular individuals and acts fall. Thus, a jury and/or a judge that in making legal decisions sticks exclusively (or merely reduces justice) to the constant part of justice without considering the broader and more representative categories and descriptors of the community, fails in providing equal treatment to people (fails in satisfying TLCA) and therefore does not serve justice.

Let me illustrate this. When judging an act \(a\) performed by an individual \(p\), a court will act justly if and only if it considers that according to law and the principles of justice every time that an individual falling under the category \(P\) (to which \(p\) is an instance) performs an act that falls under the category \(A\) (to which \(a\) is an instance) deserves to be treated in such and such a way and acts accordingly.\(^{42}\) From this follows that when the same court in a different time judges an act \(a'\) performed by \(p'\) (when \(a'\) and \(p'\) are instances of \(A\) and \(P\) respectively), the court treats that case in such and such a way because \(a'\) and \(p'\) fall under the same categories as \(a\) and \(p\).\(^{43}\)

Perhaps the most salient reason to value this principle is that equality of treatment in the legal system is a demand of justice. It is required in order to honour the principles of respect and integrity as presented above. One could not properly claim to be acting out of respect for persons if one allocated an uneven amount of legal burdens to two different individuals that belong to the same legal category. That could be defended under principles of self-interest, or for prudential or instrumental reasons, but never under the idea of a serious respect for individuals. Furthermore, TLCA stands as an important principle defending people’s rights from possible abuses of power by the members of the system of justice. Discretionary aspects of judges’ and jury’s decisions are also important and valuable, but they should be overridden by the existing legal categories describing people and actions, which have to be respected and considered as a fundamental constituent part of a just legal system.

Keeping this in mind, is it not the case that an identity-sensitive criminal process as the one I propose is a straight violation of TLCA? How is it defensible to propose different treatment for cases with the same descriptive category of actions?

---


\(^{42}\) This is valid insofar as that law and principles to be applied every time the same meet the standards demanded by the principle of integrity. This is to preclude the objection according to which it would be absurd to say that a court acts justly if and only if consistently endorses a law like: ‘Jews are not allowed to participate in public meetings under any circumstance’. Although a court honouring this law would act in accordance to the demands of some part of the principles of justice, it should not be considered a just court as it dismisses the principle of respect by applying an illegitimate legal category. Being a Jew is a thick ethical category that should not have a place in a liberal system of law.

\(^{43}\) This follows, of course, if the case is judged by a court under similar legal circumstances, i.e., if the same relevant legal categories are still valid.
My response to these difficulties focuses not on the descriptive categories of actions but on the content of the categories of individuals that should exist in the legal system given plurality. In order to establish the criteria to be considered in constituting these different categories, I will further explore the idea of equality before the law by interpreting the principle of sufficiency as it is developed by Harry Frankfurt in his paper “Equality as a Moral Idea”\(^{44}\).

I say that I will interpret this principle of sufficiency, which means that I shall consider it in the light of my interests here which are different from Frankfurt’s. Frankfurt presents this principle in the context of the distribution of economic assets and his criticism of egalitarianism. His main claim is that “what is important from the point of view of morality is not that everyone should have the same but that each should have enough.” (Frankfurt 1995, 135) Such is the core of Frankfurt’s doctrine of sufficiency.\(^{45}\)

Interestingly, Frankfurt recognises that his doctrine also has something to say about other social matters like welfare, respect or satisfaction (see Frankfurt 1995, 135 n.3). He does not explore these issues in his paper, and in harmony with Frankfurt’s acknowledgment, my endeavour here can be seen as an attempt to apply such a doctrine to the criminal process when dealing with identity-offences. In what follows I explain how I see this as a plausible strategy to defend my proposal from the objection posed by TLCA.

Frankfurt’s thoughts translated into what concerns us here are expressed in the following principle of sufficiency (PS):

\[
\text{(PS):} \quad \text{In giving a verdict and sentencing, the agent(s) in power is(are) bound to allocate benefits and burdens both according to the law and constrained by a minimum threshold of recognition of the descriptive category under which the individual subject of that verdict and sentence falls.}
\]

Hence, the key elements of PS are two: (i) the existence of an individual’s descriptive category which serves as the criterion for determining sameness or difference among different individuals and (ii) a minimum and sufficient recognition of the content of that descriptive category of the individual.


\(^{45}\) According to him, an exaggerated “concern for economic equality, construed as desirable in itself, tends to divert a person’s attention away from endeavoring to discover—within his experience of himself and of his life—what he himself really cares about and what will actually satisfy him, although this is the most basic and the most decisive task upon which an intelligent selection of economic goals depends.” (Frankfurt 1995, 136)
If we accept that the law refers both to classes of persons and acts (see Hart 1997, 124), then, when analysing the example presented before, the case of Pete and Geoffrey, one should ask what the focus of the analysis (acts, persons or both) should be to see if my argument aligns or not with TLCA and the more general principle of equality before the law. As can be seen in the paragraphs in which I described that case, the emphasis of my defence for different sentences was not put on the outcome of the defendants’ actions. In fact, both Pete and Geoffrey smoked cannabis in the backyard of their own houses and both were convicted for that action. The act of smoking cannabis in both cases (Geoffrey’s and Pete’s) falls under the same reasonably complete and legally relevant description of an illegal action: that of intentionally smoking cannabis sativa where the law forbids such an action. Unlike this description of actions banned by law, the strategy to defend my argument, and in coherence with PS, focuses on the description of classes of persons.

Let me start with the requirement (i) of PS. Perhaps the most general description of people within the criminal law is that of liable and not liable. The content of each of these descriptions is (or should be) sufficiently precise as to establish the criterion to distinguish between people who are legally responsible and people who are not. Thus, on the one hand, the content of the description of people falling under the category of liable contains elements like: responsible, adult, sufficiently mentally healthy, sufficiently physically healthy, member of the community, participant in the community, and so on. On the other hand, the category of non-liable is the negation of at least one of the necessary conditions of liability. This list is, of course, neither exhaustive nor necessary. Each jurisdiction has its own peculiarities and character, and the content of these descriptions, as well as their necessity and sufficiency, is not part of my concern here. However, it can be asserted that a minimum shared content can be found among the different modern legal systems with which I am concerned here.

According to the given description, an individual $x$ is liable if and only if $x$ satisfies the necessary and sufficient content of the category of liability of the jurisdiction responsible for $x$ and $x$’s actions. Let us assume now that the descriptive category of liability contains as necessary and sufficient factors (a, b, c). If an accurate description of $x$ is (a, b, c), then $x$ is liable. If, instead, $y$’s accurate description is (a, b, d), then $y$ is not liable. Furthermore, and in accordance to TLCA, every individual matching the description (a, b, c) should be treated as a liable person, while every individual failing to satisfy at least one of the necessary factors contained in the category of liability should be treated as a non-liable person.

Thus, to put $x$ under the category of liable and $y$ under the category of not-liable is what justice demands. It is in doing so that TLCA is respected as the notion of ‘like cases’ is determined not only by the outcome and the

---

46 I would also like to note that I am aware of the practical difficulties involve in defining these descriptive categories. However, and although in this chapter I do not develop this further, such an endeavour is not only possible but an actual task of the current legal systems which, I believe, is perfectible and should be perfected.
circumstances of the offence, but also, and importantly, by the categories defining the offender. This may not be the whole of what justice requires from the legal system but it is an important and necessary part of what it demands. To offer a clear description of the categories legally defining the individual, and to match the individuals with their relevant category, is a fundamental task of such a system as it is the basis for an equal treatment.

This argument establishes the criteria of difference and sameness among individuals as required by PS and as required to respect TLCA. However, I have not said anything yet about the second aspect required by PS: the minimal threshold of recognition of the offender. I believe that this particular understanding of the wrongdoer is required to end up satisfying, and therefore, respecting, the demands of justice as determine by TLCA, especially when treating identity-offences.

In order to make this second requirement work I believe that it is necessary to enlarge the descriptive legal criteria classifying the individual before the criminal system. I propose that, among others, the relevant factor is not only if \(x\) is liable or not, but also if \(x\) herself understands her act as an offence or not and, most importantly, on which grounds \(x\) justifies that understanding. This self-understanding of \(x\)’s actions is required both by the principle of integrity of the criminal process and by the communicative requirement that I have defended before. As a liable individual, \(x\) should also be able to articulate and communicate her defence. In doing so, she presents herself in court before the jury and the judge as an agent capable of giving reasons for her actions. Similarly, the jury and the judge are themselves the counterpart that make \(x\)’s presentation an act of communication.

But now, according to PS, what is the minimum threshold of recognition to be respected? What is the relevant ground to be considered in court from which \(x\) justifies or not her actions? To answer this one must consider the reasons the agent can give before the court as some of them should count as a relevant descriptor of the agent’s descriptive category.

As was seen in the analysis of the example presented above, the justificatory reasons offered by the offender for her past act may be either internal or external. The latter includes the kind of reasons offered by Geoffrey (‘my job is too demanding’, ‘I love being high’, ‘this does not hurt anyone’), which are not good mitigating reasons. By contrast, internal (moral) reasons have an intrinsic connection with the agent’s identity and consequently are good enough, according to my proposal, to count (at least, \textit{prima facie}) as mitigating ones. If this minimal threshold of recognition of moral reasons is not considered, then the agent’s project is not considered and, consequently, her very identity and personhood is not considered, as it happens in the case that Kafka describes at the beginning of this paper. This should not be accepted as it is an open violation of the principle of integrity that, as argued, should guide the criminal process.
As can be seen, the rationale for considering these reasons in sentencing, and to consider them as a relevant descriptor of persons’ categories in court, is that they are the minimum necessary to honour the condition of an individual as a free, rational and responsible agent and project pursuer. If we simply dismiss them, the communicative process does not take place and we block the possibility of a dialogue between the parts, and the process as such becomes a mere instance of oppression and/or abuse of power. The minimum requirement for a just trial—i.e., a trial guided by the principle of integrity—is that the person judged be truly recognised as what she is in moral terms, a rational and free project pursuer. The communicative condition requires the system of law to be open to receive and understand (and therefore, recognise) the reasons given by the defendant, and even to re-evaluate its own reasons in light of the challenge that the defendant’s internal reasons represent.

It cannot be sufficiently stressed that I am not claiming that the mere fact that a defendant may be able to offer internal reasons should entail acquittal. My claim here has not pointed in that direction because, as I have said, a defendant should be acquitted only for good and sufficient reasons. Furthermore, the idea of good moral reasons does not involve an evaluative judgment about the content of those reasons—what I would call the ethical content of those reasons. I have only asserted that internal reasons must be taken into consideration in court in order to properly respect people and their identities, and that this consideration should have a mitigating effect when sentencing.

To conclude, let me sum up what I have explored and set out throughout this paper. After describing the general structure of the criminal process in modern democratic states I moved on to establish what I consider the relevant internal values of the criminal process in particular and of the criminal system in general. These internal values provide a normative framework within which the procedures of the criminal process are assessed. It is in this sense that both the principle of integrity and the communicative requirements should shape the different practices and stages of the criminal process.

The outcome of the integrity and communicative requirement is that on occasion, like cases should be treated differently. Although this seems to breach a fundamental principle of criminal justice (TLCA), I claim that this is not the case. The cause of this is that equality before the law requires distinguishing not only between classes of actions but also classes of people and demands treat like cases alike within each of these classes and their descriptive categories. Thus, and supporting my claim, I argue that one of the elements to be considered within the set of descriptors legally describing classes of individuals is that of identity as it is presented by the good moral reasons the defendant may offer (in accordance to PS). I claim that these good internal reasons must be considered by any court that shows a minimum respect for people and is determined by the principle of integrity and the communicative requirements. If successful, I have shown that the criminal process should be seen as an identity-sensitive process that strengthens the value of, and respect for, peoples and which is perfectly consistent with the demands of equality and the basic principles of penal justice.