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DESERT, DEONTOLOGY, AND VENGEANCE

Youngjae Lee*

In a series of recent writings, Paul Robinson has defended “empirical desert” as the way of deriving distributive principles for determining who should be punished and by how much.¹ “Empirical desert” has two principal dimensions: methodological and instrumental. As a methodological matter, Robinson defines “empirical desert” as assessments of the blameworthiness of offenses “determined through social science research into peoples’ shared intuitions of justice.”² The way Robinson sees it, “empirical desert” is valuable as an instrument for fighting crime because when the criminal law more or less accurately reflects shared intuitions of justice, “the law gains access to the power and efficiency of stigmatization, it avoids the resistance and subversion inspired by an unjust system, it gains compliance by prompting people to defer to it as a moral authority in new or grey areas . . . , and it earns the ability to help shape powerful societal norms.”³

Desert is, of course, an idea with a long history, and its precise role in criminal law has been much debated.⁴ In addressing various criticisms of desert in criminal law, Robinson distinguishes empirical desert from what he calls “deontological desert” and “vengeful desert.”⁵ According to Robinson, “deontological desert,” unlike “empirical desert,” is derived “from the arguments and analyses of moral philosophy,”⁶ and “vengeful desert” is “associated with the victim’s perspective,”⁷ unlike empirical desert, which focuses on “the blameworthiness of the offender.”⁸

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1. See, e.g., PAUL H. ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH?* 4, 110–11 (2008) [hereinafter ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW*]; Paul H. Robinson, *Empirical Desert*, in *CRIMINAL LAW CONVERSATIONS* 29, 31 (Paul H. Robinson et al. eds., 2009) [hereinafter Robinson, *Empirical Desert*]; Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 *CAMBRIDGE L.J.* 145, 149 (2008) [hereinafter Robinson, *Competing Conceptions*].

2. Robinson, *Empirical Desert*, *supra* note 1, at 29.

3. ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW*, *supra* note 1, at 140.

4. See, e.g., David Dolinko, *Some Thoughts About Retributivism*, 101 *ETHICS* 537 *passim* (1991).

5. Robinson, *Competing Conceptions*, *supra* note 1, at 146.

6. *Id.* at 148.

7. *Id.* at 147.

8. *Id.* at 149.

Robinson's strategy, which I call "divide and deflect," fights off various objections traditionally leveled against the use of desert in criminal law by arguing that most of those objections may be valid for "deontological" and "vengeful" desert but are not applicable to "empirical desert." So, for instance, "vengeful desert" can be too harsh, may be based on anger and hatred, and give only vague guidance, and "deontological desert" judgments may be too contested to be useful for policy makers, but, Robinson claims, empirical desert suffers from no such defects.⁹

As I will explain further below, I am sympathetic to Robinson's view that the criminal law's desert judgments should be "empirical" at least in the sense that they should closely resemble ordinary intuitions of desert. Also, in principle, I have nothing against using social scientific research as at least one way of getting at such ordinary intuitions.¹⁰ Neither do I have any quarrel with the idea that there are crime-control benefits to derive from having the criminal law conform to ordinary moral intuitions.¹¹ Therefore, I am in substantial, albeit not complete, agreement with Robinson's core claims. I have, however, some reservations about how he arrives at them, especially the ways in which he dismisses some of the other "competing conceptions of desert" along the way. In the end, I am doubtful that the option of taking only what is attractive and leaving out what is unattractive from desert is as available as Robinson appears to think it is.

Let me start by saying a few things about Robinson's use of the words "empirical" and "deontological." To the extent that the word "empirical" is used to distinguish Robinson's preferred type of desert from other types of desert, the word is highly misleading. The problem lies in the ambiguity of the term, which could mean something as general as "based on experience" or something narrower, as in "empirical studies," which is a phrase used to designate academic approaches that are primarily characterized by observations and laboratory experiments as opposed to theories. Robinson rightly points out that many working in the area of criminal law theory rely on "philosophical analyses"¹² as a way of exploring various moral issues raised by criminal law doctrines, and those scholars are properly characterized as "not doing empirical work." However, calling the output of

9. *Id.* at 156–73.

10. *Cf.* Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 716 n.170 (2005).

11. *Cf.* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 25 (2d ed. 2008) ("[M]aintenance of proportion . . . may be important: for where the legal gradation of crimes expressed in the relative severity of penalties diverges sharply from this rough scale, there is a risk of either confusing common morality or flouting it and bringing the law into contempt.").

12. Robinson, *Competing Conceptions*, *supra* note 1, at 145.

their endeavors as something other than “empirical desert” also suggests that “deontological” assessments of blameworthiness are not “based on experience,” which in turn makes the idea of “deontological desert” seem completely nonsensical.

Take the crime of child molestation for instance. If you ask a randomly selected desert theorist, “deontological” or not, what she thinks about blameworthiness of child molestation, she will most likely have an opinion. But in order to form a view about child molestation, one needs to know something about what child molestation does to, or what effects it has on, the victims and the society at large. Without such “empirical” knowledge, as in knowledge based on experience, no desert judgment is possible. There is no such thing as a purely non-“empirical” school of desert. Robinson, of course, understands this, as he notes that, for example, “[t]he extent of the harm caused or the seriousness of the evil done will be part of” deontological desert’s calculation of blameworthiness of an offender.¹³ The point here is merely that the word “empirical” may invite confusion along the lines I suggested, even if Robinson himself does not suffer from such confusion.

Robinson uses the word “empirical” also to highlight the fact that “empirical desert” draws its content from “the community’s intuitions of justice.”¹⁴ Robinson describes “deontological desert” as, in contrast, a conception of desert that “transcends the particular people and situation at hand,” seeks to “produce justice without regard to political, social, or other peculiarities of the situation at hand,” and generates “moral judgments . . . from the point of view of the universe.”¹⁵ I cannot speak for every desert theorist, but I must confess that I do not recognize what Robinson calls “deontological desert” as desert at all.

In order to unpack this complaint, we need to start by asking what desert is. As Joel Feinberg explained in his seminal discussion, desert statements have the form, “*S* deserves *X* in virtue of *F*,” where *S* is the person deserving, *X* is *what* he deserves, and *F* is the desert basis, or whatever serves as the basis for *X*.¹⁶ The relationship between *X*, what is deserved, and *F*, the desert basis, is that of “fittingness” or “appropriateness.”¹⁷ “Fittingness,” in the punishment context, has two dimensions, type and amount. First, when choosing how to respond to a criminal behavior, it

13. *Id.*

14. *Id.* at 149.

15. *Id.* at 148.

16. JOEL FEINBERG, *Justice and Personal Desert*, in *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 55, 61 (1970).

17. *Id.* at 81–82.

would be “fitting” or “appropriate” only if the response takes the form that symbolizes or expresses the society’s condemnatory attitude towards the criminal conduct.¹⁸ The second dimension of “fittingness,” that of amount, refers to the idea that the harshness of the punishment should reflect our level of condemnation or disapproval.¹⁹ What this means is that the validity of desert judgments turns on appropriateness or fittingness of responses to desert bases. Such assessment of appropriateness or fittingness, in turn, can be made only within the context of a community of shared values.²⁰ Given such an expressive dimension of punishment, and what it expresses, it would not make any sense to attempt to answer questions of who deserves what without referring to the ways in which the relevant communities would react to different kinds of stimuli that inspire praise and blame. The idea of characterizing desert as “transcendent” seems to me almost like a contradiction in terms for this reason. Of course, it may be that certain desert judgments transcend boundaries in the sense that different communities converge on them, but we would have to work from bottom up to see whether there is in fact such a consensus on particular desert questions,²¹ which is different from deriving concrete desert statements top-down from general propositions of “right and good” from “the point of view of the universe.”²²

The terminological issues multiply when we come to his uses of the term “deontological.” As noted, Robinson distinguishes between “empirical desert” and “deontological desert” on, among other things, methodological grounds. But the word “deontological” is in general used to mark substantive, not methodological, commitments. More specifically, “deontology” commonly refers to a way of thinking about morality that speaks in terms of moral rights and wrongs that are resistant to consequentialist considerations about what would produce the best outcome.²³ In criminal law, the word “deontological” is commonly

18. *Id.* at 67–71; JOEL FEINBERG, *The Expressive Function of Punishment*, in *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY*, *supra* note 16, at 95, 98–99.

19. FEINBERG, *supra* note 18, at 118.

20. *See* R.A. DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* 80 (2001); NICOLA LACEY, *STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES* 176–77 (1988); *see also* ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 250 (2d ed. 1984) (“[T]he notion of desert is at home only in the context of a community whose primary bond is a shared understanding both of the good for man and of the good of that community and where individuals identify their primary interests with reference to those goods.”).

21. *Cf.* Youngjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. PA. L. REV. 63, 99–110 (2007).

22. Robinson, *Competing Conceptions*, *supra* note 1, at 148.

23. *See, e.g.*, SHELLY KAGAN, *NORMATIVE ETHICS* 70–78 (1998).

associated with the view that people should not be punished more than they deserve even if doing so would be socially beneficial.²⁴

If we understand the term “deontological” in this substantive way, it is perfectly coherent to treat assessments of blameworthiness from social scientific studies—what Robinson calls “empirical desert”—as an aid to implementing the deontological constraint that people should not be punished more than they deserve. It is also perfectly coherent to treat assessments of blameworthiness derived from philosophical theorizing—what Robinson calls “deontological desert”—as a set of useful guidelines to follow when designing a consequentialist punishment system. The problem with Robinson’s use of the phrase “deontological desert,” then, is that it suggests that other types of desert are necessarily consequentialist and that “deontological desert” is necessarily deontological, when Robinson’s distinction of the two in methodological terms do not carry such implications. My complaint is, again, not what Robinson believes or does not believe but how Robinson’s unusual use of the word “deontological” in the methodological sense may lead one astray.

At the same time, by using the word “deontological,” Robinson appears to be gesturing at a substantive, not just methodological, difference between “deontological desert” and “empirical desert.” Robinson argues that, unlike “deontological desert,” “empirical desert” is not vulnerable to utilitarian objections by pointing out that “empirical desert is a utilitarian, consequentialist theory of punishment” and that empirical desert is “specifically designed to minimize future crime—by harnessing the crime-control power of social influence that comes with building the criminal law’s moral credibility.”²⁵ This answer does not quite settle the issue, however, because it conflates the purpose of empirical desert with the effects of empirical desert. If it turns out that the best way of “building the criminal law’s moral credibility” and “minimi[zing] future crime” is by rigidly sticking to the principle that people should not be punished more than they deserve, then the deontological approach would not be vulnerable to utilitarian objections, and the fact that the deontological approach is purely about “doing justice” and not about preventing crime should not make a difference.²⁶ On the other hand, if sticking to “the community’s intuitions of justice” in implementing empirical desert is at odds with optimal crime prevention policies, then empirical desert, too, would be

24. See, e.g., Alice Ristroph, *How (Not) to Think Like a Punisher*, 61 FLA. L. REV. 727, 737–38 (2009).

25. Robinson, *Competing Conceptions*, *supra* note 1, at 167.

26. *Id.*

vulnerable to utilitarian objections.²⁷ Which scenario is closer to the truth is, in fact, an empirical question.

Perhaps Robinson's point is rather that empirical desert, because it is a consequentialist theory, is likely to be more flexible than "deontological desert" and tolerate deviations from desert judgments when doing so would be beneficial. If so, empirical desert would indeed be less vulnerable to utilitarian objections than deontological desert, and perhaps *this* is the substantive difference between the two conceptions of desert.

These issues may be largely semantic in that they arise from Robinson's uses of various terms; however, the root of these terminological differences can be traced to substantive considerations about the role of desert in criminal law. As noted above, Robinson's strategy of divide and deflect distinguishes "empirical desert" from "vengeful desert" and "deontological desert," and defends "empirical desert" as not being vulnerable to objections that "vengeful desert" and "deontological desert" face. I am not sure whether these different conceptions of desert can or should be teased apart this way. Ordinary intuitions, vengeance, and deontology go hand-in-hand in this context, and separating them is likely to be not only artificial and unsustainable, but also undesirable.

The reasons for my skepticism are as follows.²⁸ First, as many have argued, an important function that criminal law serves is to *displace* feelings of resentment and desires for vengeance by responding to wrongdoing through the institution of punishment.²⁹ It is not just that the institution of punishment has a close relationship to feelings of resentment, but it is also that a core purpose of criminal law and punishment is to sublimate them, displace them, and provide an outlet for them. Whether criminal law succeeds or fails in a society depends, not entirely of course but importantly, on how well it responds to punitive emotions of its

27. *Id.*

28. Parts of the discussion below draw from Youngjae Lee, *Desert and the Eighth Amendment*, 11 U. PA. J. CONST. L. 101 (2008).

29. For a particularly cogent statement of this view, see John Gardner, *Crime: In Proportion and in Perspective*, in FUNDAMENTALS OF SENTENCING THEORY: ESSAYS IN HONOUR OF ANDREW VON HIRSCH 31, 31–33 (Andrew Ashworth & Martin Wasik eds., 1998). See also EMILE DURKHEIM, THE DIVISION OF LABOUR IN SOCIETY 11–174 (W. D. Halls trans., Free Press 1984) (1933). For an excellent, and appropriately critical, discussion of Durkheim's views, see DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 28–35 (1990). For common statements of these views, see, for example, LACEY, *supra* note 20, at 34; WILLIAM WILSON, CENTRAL ISSUES IN CRIMINAL THEORY 74–76 (2002).

citizens.³⁰ Of course, there are ways to understand the role of criminal law that may better fit our self-image as a modern, civilized society, such as deterrence and rehabilitation; some may also think that a modern state should play no role in reproducing primitive, barbaric, uncivilized sentiments like vengeance. It is true that these emotions can sometimes be ugly and disturbing, and it is also true that criminal law serves other functions. However, it would be misguided to lose sight of the ways in which our institution of punishment both shapes and responds to people's punitive emotions and the ways in which such interactions lie at the very core of criminal law, and are not a mere incidence of it.³¹ All the great compliance-promoting benefits of empirical desert that Robinson refers to can be lost if the people feel that the state is doing an inadequate job of responding to their desires for vengeance, and the success of "empirical desert" as an instrument for fighting crime depends on the state's ability to manage such emotions. It seems to me that Robinson's decision to distance himself from "vengeful desert" carries the cost of obscuring this crucial relationship.

In addition, it is unrealistic to separate the idea of vengeance and its associated emotions from desert judgments in criminal law. The difficulty is that desert judgments in the context of punishment indicate not just disapproval, which may be formed from a distance and in a cold, rationalistic, judgmental manner, but also an emotive state. Emotions associated with the practice of blaming are, for example, anger, resentment, indignation, and hatred.³² Such emotions may be thought to be subjective or irrational in that they can get "out of hand," but because of their cognitive content they can be evaluated as appropriate or inappropriate, rational or

30. Gardner, *supra* note 29, at 33 ("[T]he criminal law's medicine must be strong enough to control the toxins of bitterness and resentment which course through the veins of those who are wronged, or else the urge to retaliate in kind will persist unchecked.").

31. *Id.* at 33–38.

32. See Jean Hampton, *Forgiveness, Resentment, and Hatred*, in FORGIVENESS AND MERCY 35, 54–79 (Jeffrie G. Murphy & Jean Hampton eds., 1988) [hereinafter Hampton, *Forgiveness, Resentment, and Hatred*]; Jean Hampton, *The Retributive Idea*, in FORGIVENESS AND MERCY, *supra*, at 143–47; see also ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 79–81 (Knud Haakonssen ed., Cambridge Univ. Press 2002) (1759); Peter Strawson, *Freedom and Resentment*, in FREE WILL 72, 75–80, 90–93 (Gary Watson ed., 2003). For a subtle discussion of such feelings, both pointing out their importance for understanding the institution of punishment and warning us against complacently accepting them as moral sentiments as opposed to expressions of cruelty, see GARLAND, *supra* note 29, at 61–67.

irrational.³³ When such emotions are felt, their appropriateness can be judged through reflection, and sometimes inappropriately felt emotions even disappear once there is a recognition of such inappropriateness, the way, for instance, anger at a friend based on a misunderstanding can evaporate once the misunderstanding is corrected. But it would be a mistake to ignore the fact that such emotions *are* emotions, part of what Peter Strawson called a “complicated web of attitudes and feelings which form an essential part of the moral life as we know it,”³⁴ and they are too bound up with our intuitions of desert to be neatly separated out and hidden away somewhere.

It is precisely for all the same reasons that it is important to put various deontological constraints in place when operating a criminal justice system.³⁵ As noted above, when we punish, we blame, condemn, and stigmatize the offenders as recipients of blame and punishment.³⁶ Even though it is commonly stated that our criminal justice system judges acts, not people, we cannot make sense of the practice of blaming if we try to think about it exclusively in terms of wrong acts that are detached from actors. Blaming actors for what they have done implies that the acts that they have engaged in “reflect badly” on them.³⁷ As John Gardner once put it, “[t]he criminal law gets personal.”³⁸ Because the practice of placing

33. See R. JAY WALLACE, RESPONSIBILITY AND THE MORAL SENTIMENTS 11–12, 18–19 (1994); Hampton, *Forgiveness, Resentment, and Hatred*, *supra* note 32, at 54 (“Resentment is . . . more than instinctive rage following an attack: it is an idea-ridden response.”); *cf.* MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 24–31 (2004); MARTHA C. NUSSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS 19–88 (2001); BERNARD WILLIAMS, *Morality and the Emotions*, in PROBLEMS OF THE SELF: PHILOSOPHICAL PAPERS 1956–72, at 207, 224 (1973).

34. Strawson, *supra* note 32, at 91.

35. *Cf.* Lee, *supra* note 10, at 680–85.

36. GEORGE SHER, IN PRAISE OF BLAME 7 (2006); BERNARD WILLIAMS, *Nietzsche’s Minimalist Moral Psychology*, in MAKING SENSE OF HUMANITY AND OTHER PHILOSOPHICAL PAPERS 65, 72 (1995) (“Blame needs an occasion—an action—and a target—the person who did the action and who goes on from the action to meet the blame.”); *cf.* FEINBERG, *supra* note 16, at 55, 61.

37. For a more detailed discussion of the relevance of character in judging culpability, see Youngjae Lee, *Recidivism as Omission: A Relational Account*, 87 TEX. L. REV. 571, 578–83 (2009).

38. John Gardner, *On the General Part of the Criminal Law*, in PHILOSOPHY AND CRIMINAL LAW: PRINCIPLE AND CRITIQUE 205, 236–37 (Antony Duff ed., 1998) (“To be convicted of a crime is to be criticized, or even sometimes condemned, as a person.”); SHER, *supra* note 36, at 7 (stating that blame has the structure of a reaction “to a person on the basis of the wrongness of what he has done,” as opposed to a reaction “to the wrongness of what a

blame in punishment is of such a “personal” nature, the state must ensure that its acts of condemning are fair to, and are in fact deserved by, their recipients. Neither should the state blame offenders more than what they deserve simply because doing so would be expedient as a matter of deterrence or incapacitation.³⁹ We need to be especially careful because of the relationship we noted above between state punishment and vengeance. Punitive passions may be correctly generated by one’s sense that a moral wrong has been done, but they can also be excessive and driven by other less desirable, yet no less common, sentiments such as cruelty, sadism, inhumanity, and racial hatred and prejudice.⁴⁰ On top of all this, the state faces tremendous pressures to reduce the incidence of crime. Unless we treat the constraint against punishing people more than they deserve as close to inviolable, desert-based limitations on criminalization and punishment will give way all too often. I am worried that Robinson’s rejection of “deontological desert” may leave his endorsement of desert insufficiently robust to withstand numerous pressures sure to be placed on it.

None of this is to deny the validity of Robinson’s core claims about the need to tie desert assessments close to ordinary intuitions and the substantial crime control benefits to be derived when the state can successfully command respect as a moral authority. The point, rather, is that Robinson’s “empirical desert” needs “vengeful desert” and “deontological desert” to succeed and his attempts to make his proposal resistant to the usual anti-retributivist objections by jettisoning the latter two may in the end hurt his project more than help.

person has done”); VICTOR TADROS, *CRIMINAL RESPONSIBILITY* 48 (2005) (“In holding an agent responsible for an action, we imply that the action reflects on the agent in some way.”).

39. Cf. Lee, *supra* note 10, at 708 n.147.

40. FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALITY* 43–49 (Keith Ansell-Pearson ed., Carol Diethe trans., Cambridge Univ. Press 1994) (1887).
