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Paul H. Robinson

University of Pennsylvania Carey Law School

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COMPETING CONCEPTIONS OF MODERN DESERT: VENGEFUL, DEONTOLOGICAL, AND EMPIRICAL

PAUL H. ROBINSON*

I. INTRODUCTION

THE dispute over the role desert should play, if any, in assessing criminal liability and punishment has a long and turbulent history. “Deserved punishment” - referred to variously as desert, just punishment, retributive punishment, or simply “doing justice”¹ - has moved to center stage in the UK and is on its way in the US, both in academic debate and in real world institutions.

The English Criminal Justice Act 1991 was intended to set desert as the dominant principle in sentencing¹ but the failure of the drafters to use language making this explicit led to a serious undermining of the principle in subsequent interpretation and application of the Act by a judiciary who never favored the approach.² The Criminal Justice Act 2003 has only continued the muddle by, on the one hand, simply including desert as one on a list of five traditional alternative, and conflicting, purposes of sentencing in section 142, while on the other hand, apparently adopting a proportionality principle in section 143(1), which has now been adopted as the central principle for sentencing in the first guidelines of the Sentencing Guideline Council.³

In the US, a number of sentencing guidelines have adopted desert as their distributive principle,⁴ and it is increasingly given deference in the “purposes” section of state criminal codes,⁵ where it can be the guiding principle in the interpretation and application of the code’s provisions.⁶ Indeed, the American Law Institute recently revised the

* Colin S. Diver Professor of Law, University of Pennsylvania Law School. The author wishes to thank Andrew von Hirsch, of Cambridge University, for his insights and help, Desiree Liverseidge for her valuable research assistance, and Dean Edward Rubin, of Vanderbilt Law School, for discussions that stimulated much of the work on this article.

¹ A. von Hirsch, *Doing Justice* (New York 1976).

² A. Ashworth, *Sentencing and Criminal Justice*, 4th ed., (Cambridge 2005), pp.98-101; see, e.g., *Cunningham* (1993) 14 Cr. App. R. (S) 444 at 447.

³ Sentencing Guideline Council, *Overarching Principles: Seriousness* (2004).

⁴ E.g., 204 Pa. Code § 303.11 (2005); see M. Tonry, “U.S. Sentencing Systems Fragmenting”, in M. Tonry (ed.) *Penal Reform in Overcrowded Times* (Oxford 2004), pp.21–28, Table 1.1.

⁵ E.g., Cal. Penal Code § 1170(a)(1) (West 1985) (“The legislature finds and declares that the purpose of imprisonment for crime is punishment.”).

⁶ E.g., Model Penal Code § 1.02(2) (Official Draft 1962)

Model Penal Code (the first since the Code's promulgation in 1962) so as to set desert as the official dominant principle for sentencing.⁷ And courts have identified desert as the guiding principle in a variety of contexts,⁸ as with the Supreme Court's enthroning retributivism as the "primary justification for the death penalty."⁹

In both countries there remains substantial controversy over the reliance upon desert as the distributive principle for liability and punishment. A central criticism in the English debate seems to be that desert as a distributive principle would fail to avoid avoidable crime.¹⁰ Interestingly, a central criticism in the American debate is something of the reverse: that desert is inappropriate as a distributive principle because it is mean-spirited and harsh, and because it has an unhealthy preference for prison.¹¹ In both the American and English debates there exist a variety of other complaints, including objections that desert is based upon only vague notions that at most mark punishment extremes to be avoided, objections that people are in hopeless disagreement about what desert requires, objections that it is immoral, and objections that it is impracticable to implement.¹²

This article argues that many of these objections are valid, at least when applied to one or another conception of desert, but that there are at least three distinct conceptions of desert to be found in the current debates, typically without distinction being made between them. The three include what might be called vengeful desert, deontological desert, and empirical desert. Each of the offered criticisms of desert is a fair objection to one of these conceptions of desert but an unfair objection to another. Thus, an accurate assessment of desert as a distributive principle requires that these three conceptions of desert be distinguished from one another, and that the strengths and weaknesses of each conception be judged on its own.

II. COMPETING CONCEPTIONS OF DESERT: VENGEFUL, DEONTOLOGICAL, AND EMPIRICAL

Three conceptions of desert are evident in the present debates over the propriety of desert as a distributive principle for criminal liability and punishment.

⁷ American Law Institute, Model Penal Code § 1.02(2) (adopted May 16, 2007) [hereinafter MPC Amendment].

⁸ See, for example, the US cases *Spaziano v. Florida*, 468 U.S. 447, 462 (1984); *Gregg v. Georgia*, 428 U.S. 153, 183–84 (1976); M. Cotton, "Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment" (2000) 37 Am. Crim. L. Rev. 1313, 1326–27, 1357.

⁹ *Spaziano v. Florida*, 468 U.S. at 461.

¹⁰ See Part III.F. below.

¹¹ See Parts III.A.–C. below.

¹² See Parts III.D., E., G. and H., respectively, below.

A. Vengeful Desert

A conception of desert used by many writers, what might be called “vengeful desert,” is captured in the often-quoted biblical phrase: “eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe.”¹³ It urges punishing an offender in a way that mirrors the harm or suffering he has caused, typically identified as *lex talionis*: “the principle or law of retaliation that a punishment inflicted should correspond in degree and in kind to the offense of the wrongdoer.”¹⁴ In Kant’s words: “For the only time a criminal cannot complain that a wrong is done to him [by punishment] is when he brings his evil deed back upon himself, and what is done to him in accordance with penal law is what he has perpetrated on others.”¹⁵

Some writers argue that *lex talionis* does not require inflicting the exact harm on the offender that the offender inflicted on his victim, but only requires the imposition of a relevantly similar deprivation.¹⁶ This variation thus takes a less demanding form, requiring only that the punishment be proportionate to the harm caused,¹⁷ sometimes captured by the suggestion that “the punishment should fit the crime.”¹⁸ But even in this diluted form, the primary focus of vengeful desert remains the extent of the harm of the offence.¹⁹

Because of this focus on the harm done, the vengeful conception of desert is commonly associated with the victim’s perspective. Retributive justice “consists in seeking equality between offender and victim by subjecting the offender to punishment and communicating to the victim a concern for his or her antecedent suffering.”²⁰ “[I]n willing the crime, he willed that he himself should suffer in the same degree as his victim.”²¹ And the association with the victim’s suffering, in turn, associates vengeful desert with the feelings of revenge and hatred that we commonly see in victims. Thus, punishment under this conception of desert is sometimes seen as essentially an institutionalisation of victim revenge; it is “injury inflicted on a

¹³ Exodus 21:24–25.

¹⁴ *The Random House Dictionary of the English Language* (New York 1966), p.825.

¹⁵ I. Kant, *The Metaphysics of Morals* (Mary Gregor trans., Cambridge 1991) p.169.

¹⁶ See J. Waldron, “Lex Talionis” (1992) 34 *Ariz. L. Rev.* 25, 25–27.

¹⁷ J. Dressler, “The Wisdom and Morality of Present-Day Criminal Sentencing” (2005) 38 *Akron L. Rev.* 853, 860. For a modern defence of this “reciprocity principle,” as it is sometimes called, see L. Crocker, “The Upper Limit of Just Punishment” (1992) 41 *Emory L.J.* 1059, 1065.

¹⁸ See, for example, J.C. Oleson, “Comment: The Punitive Coma” (2002) 90 *Calif. L. Rev.* 829, n. 59; R.L. Christopher, “The Prosecutor’s Dilemma: Bargains and Punishments” (2003) 72 *Fordham L. Rev.* 93, 127.

¹⁹ See N. Lacey, *State Punishment: Political Principles and Community Values* (London 1994), p.17; C. L. Ten, *Crime, Guilt, and Punishment* (Oxford 1987), p.152.

²⁰ G. P. Fletcher, “The Place of Victims in the Theory of Retribution” (1999) 3 *Buff. Crim. L. Rev.* 51, 58.

²¹ J. Feinberg and H. Gross (eds.), *Philosophy of Law*, 2nd ed. (Belmont 1980), p.541.

wrongdoer that satisfies the retributive hatred felt by that wrongdoer's victim and that is justified because of that satisfaction."²²

B. Deontological Desert

The deontological conception of desert focuses not on the harm of the offense but on the blameworthiness of the offender, as drawn from the arguments and analyses of moral philosophy.²³ "It is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing. That a criminal should be punished follows from his guilt, and the severity of the appropriate punishment depends on the depravity of his act."²⁴

Thus, the criterion for assessing punishment is broader and richer than that for vengeful desert: Anything that affects an offender's moral blameworthiness is taken into account in judging the punishment he deserves. The extent of the harm caused or the seriousness of the evil done will be part of that calculation but so too will be a wide variety of other factors, such as the offender's culpable state of mind or lack thereof and the existing conditions at the time of the offence, including those that might give rise to claims of justification, excuse, or mitigation. A typical expression of this conception might be: "The offender deserves a particular punishment not simply for an act which causes harm but according to his personal responsibility for committing the act. This evaluation necessarily includes a review of the broad array of forces operating upon the individual to ascertain the extent of the individual's responsibility."²⁵

A key aspect of the deontological conception of desert, which distinguishes it from empirical desert, discussed immediately below, is that it transcends the particular people and situation at hand and embodies a set of principles derived from fundamental values, principles of right and good, and thus will produce justice without regard to the political, social, or other peculiarities of the situation at hand. As Henry Sidgwick famously put it, moral judgments are made "from the point of view of the universe."²⁶

²² J. Feinberg and J. Coleman (eds.), *Philosophy of Law*, 6th ed. (Belmont 2000), p.793.

²³ The most prominent English advocates of desert, von Hirsch and Duff, conceive of desert in this form, as focusing upon an offender's moral blameworthiness, although they offer different accounts of why this should be so. von Hirsch does so for instrumental reasons, avoiding crime, and Duff for deontological reasons, doing justice. See A. Duff, *Punishment, Communication and Community* (Oxford 2001); von Hirsch and Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford 2005).

²⁴ J. Rawls, "Two Concepts of Rules" (1955) 64 *Philosophical Review* 3, 5. Central here are the writings of Immanuel Kant. See "The Metaphysics of Morals" in H. Reiss, ed., and H. B. Nisbet trans., *Immanuel Kant: Political Writings* (Cambridge 1991), p.156.

²⁵ S. Pillsbury, "Emotional Justice: Moralizing the Passions of Criminal Punishment" (1989) 74 *Cornell L. Rev.* 655, 663.

²⁶ H. Sidgwick, *The Methods of Ethics*, 7th ed., (London 1907), pp.420–21.

C. Empirical Desert

Empirical desert, like deontological desert, focuses on the blameworthiness of the offender. But in determining the principles by which punishment is to be assessed, it looks not to philosophical analyses but rather to the community's intuitions of justice. The primary source of the principles, then, is empirical research into those factors that drive people's assessments of blameworthiness.²⁷ The existing studies suggest that the variety of factors at work are as rich and varied as those at work in determining deontological desert.²⁸ The extent of the harm or evil plays an important role, but is only one of a wide variety of factors, including many related to the offender's situation and personal capacities.

Also like deontological desert, this conception envisions a set of liability and punishment rules to be applied identically to all defendants; it is not the community's view of deserved punishment in a particular case that is relevant here. Further, in collecting data to construct the rules, real cases, especially publicly known cases, typically are not a useful source. People's views on such cases are commonly biased by political or social context or by other factors, such as race, that all would agree have no proper role in setting principles of justice.²⁹ Instead, the community's intuitions of justice are derived from controlled social science studies that determine the factors that influence people's assessment of a violator's blameworthiness, not by asking people about abstract factors but rather by having them "sentence" a variety of carefully constructed variations of cases to see what factors influence their punishment judgements.

It is obvious why one might support a deontological desert distribution: to do justice. But why would one support an empirical desert distribution? Why should we care about the community's intuitions of justice? Just because the community's intuitions suggest a certain punishment is doing justice, it does not make it so, even if there is a strong agreement on those intuitions.

The reasons offered in support of an empirical desert distribution lie not in its moral implications but in its practical consequences. If the criminal law tracks the community's intuitions of justice in assigning liability and punishment, it is argued, the law gains access to the power and efficiency of stigmatisation, 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 (such as insider

²⁷ See P. H. Robinson and J. M. Darley, "Utility of Desert" (1997) 91 Nw. U.L. Rev. 453, 456–58.

²⁸ See, for example, P. H. Robinson and J. M. Darley, *Justice, Liability and Blame* (Boulder 1995), pp.203–208.

²⁹ P. H. Robinson and R. Kurzban, "Concordance and Conflict in Intuitions of Justice" (2007) 91 Minn. L. Rev. 1829.

trading), and it earns the ability to help shape of powerful influence of societal norms.

[T]he criminal law's moral credibility is essential to effective crime control, and is enhanced if the distribution of criminal liability is perceived as "doing justice," that is, if it assigns liability and punishment in ways that the community perceives as consistent with the community's principles of appropriate liability and punishment. Conversely, the system's moral credibility, and therefore its crime control effectiveness, is undermined by a distribution of liability that deviates from community perceptions of just desert.³⁰

Another writer suggests:

[In criminal law enforcement] all is not positivism and command. The criminal law can only truly shape norms if it commands some moral respect. In the absence of a constable on every corner, the mere command of a law that moves too far ahead of existing notions of justice and morality will not succeed in shaping behavior. It is also unlikely to be enforced consistently in a society where the mechanisms of enforcement are susceptible to democratic pressure.³¹

Part II.E.1. examines in greater detail the justifications offered in support of the empirical conception of desert and the distributive implications of those justifications.

D. Vengeful Versus Other Conceptions of Desert

Vengeful desert differs from deontological and empirical desert in several respects with important implications.

1. The Role of Punishment Amount: Ordinal Ranking of Cases Versus Punishment Continuum Endpoint

The most important difference between vengeful desert and the other two conceptions of desert is the importance the former gives to the absolute amount of punishment to be imposed. For vengeful desert, this absolute amount is its central focus: It must be equal in amount, if not also in means, to the suffering caused by the offence conduct. But for deontological and empirical desert, the absolute amount of punishment is of limited interest. Their central concern is the relative amount of punishment among cases of differing degrees of moral blameworthiness. These latter conceptions of justice focus primarily

³⁰ Robinson and Darley, "Utility of Desert," above note 27, at 457–58.

³¹ J. E. Kennedy, "Making the Crime Fit the Punishment" (2002) 51 *Emory L.J.* 753, 838–39 (footnotes omitted).

on ensuring that the offender is given that amount of punishment that puts him in his proper ordinal rank among all cases of differing degrees of blameworthiness.³²

Once a society has committed itself to a particular endpoint for its punishment continuum, which all societies must do - be it the death penalty, life imprisonment, fifteen years imprisonment, or something less - the ordinal rank of any given case necessarily converts to a specific amount of punishment: that amount of punishment that sets the offender at his appropriate ordinal rank. But for deontological and empirical desert, the amount of punishment has no other significance. If the endpoint of the punishment continuum changes, the amount of punishment that an offender deserves under these two conceptions of justice also changes, to the amount of punishment necessary to keep it in its proper ordinal rank.

Thus, while the absolute severity of punishment is central to vengeful desert - it ought to approximate the suffering of the offense - it is of limited relevance to deontological and empirical desert. Those latter conceptions of desert may play some role in a society's setting its punishment continuum endpoint but, even in performing this role, these conceptions of desert operate differently than they do when performing their core function of establishing the proper ordinal rank of each case. In setting the punishment continuum endpoint, these conceptions typically offer only general guidance as to extremes that should be avoided, rather than to give guidance as the specific endpoint to pick.³³

2. The Role of Punishment Method: Punishment Method Versus Amount

Another characteristic that deontological and empirical desert share, which is not shared by vengeful desert, is the significance given to punishment method. The latter cares about the method of punishment: Ideally, it matches the means by which the victim was made to suffer. Failing this, it should be imposed in a way that is at least relevant to the nature of the offense, if that is possible. Thus, for example, the vengeful conception of desert is thought to support the use of the death penalty in cases of murder.³⁴

In contrast, deontological and empirical conceptions of desert have no such interest in the method of punishment. Their focus is on the amount of punishment - an amount that will put the offender in his proper ordinal rank according to his blameworthiness. As long as the

³² A. von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (New Brunswick 1985), pp.39-46.

³³ See the discussion of limiting retributivism at Part III.D.

³⁴ See, e.g., J. Vorenberg, *Criminal Law and Procedure*, 2nd ed. (New York 1981), p.40.

total punitive “bite” of the punishment achieves this ranking, these conceptions of desert have little reason to care about the method by which that amount of punitive “bite” is imposed.³⁵

While a variety of different sanctioning methods might be used, the offender should get punishment “credit” for each only in proportion to the punitive “bite” of that method. This requires, then, establishment of ratios between the different punishment methods that reflect the differences in their punitive “bite.” If the “bite” of one week in jail is equivalent to that of a month of weekends in jail or is equivalent to that of 80 hours of community service, these conceptions of desert would be satisfied with any of these sentences, so long as that amount of punishment was the amount deserved given the offender’s blameworthiness. The ideal equivalency table would be one that generates alternative sanctions about which an offender and a community are indifferent as to which is imposed.³⁶

E. Deontological Versus Empirical Desert

The discussions above suggest that deontological desert and empirical desert have many similarities. Most importantly, they both focus upon the blameworthiness of the offender. But there also are important differences between these two conceptions of desert, as one might expect, given that the notions of blameworthiness upon which they are based are quite different. The deontological conception of desert is based upon reasoned analysis from principles of right and good, which produce a transcendent notion of justice independent of the intuitions of justice of the community. The empirical conception of desert has no such independent basis. It does not look to true moral blameworthiness in any transcendent sense; it looks only to people’s shared intuitions about assigning blameworthiness.

These differences in underlying criterion can produce important differences in the distribution of liability and punishment. For example, moral philosophers disagree about the significance of resulting harm - for example, whether to punish completed attempts the same as the substantive offense - and each side of the debate has plausible arguments to make. In contrast, all available data suggest a nearly universal and deeply held view among the community that resulting harm does matter, that it increases an offender’s deserved punishment.³⁷ This is only one of a host of issues on which moral

³⁵ See, for example, M. S. Moore, “The Moral Worth of Retribution, in Responsibility, Character and Emotions” in F. Schoeman (ed.), *Responsibility, Character, and the Emotions* (Cambridge 1988), p.180.

³⁶ For discussion of punishment “bite” equivalency tables, see text accompanying note 56, below.

³⁷ See, e.g., Robinson and Darley, *Justice, Liability and Blame*, above note 28, at 14–28, 181–96; J. H. Mansfield et al., “Comment, Causation in the Law” (1964) 17 Vand. L. Rev. 487, 494–95.

philosophy's analytic conclusions may vary from the empirical data on lay persons' intuitions of justice.³⁸

Perhaps even more important than such differences in blame-worthiness judgments are the differences between the underlying theories that drive the two conceptions of desert and that thereby shape their application. In its most fundamental form, the difference is this: The special value of the empirical conception of desert is its utilitarian effectiveness in crime-control; the special value of the deontological conception of desert is its ability to produce true principles of justice independent of personal or community opinion.

1. The Utility of Desert

As has been suggested elsewhere,³⁹ there are good arguments to suggest that there is great utility in a distribution of liability and punishment according to people's shared intuitions of justice, perhaps greater than the utility of distributing liability and punishment in the traditional utilitarian manner (to optimise deterrence, rehabilitation, or incapacitation). To summarise the arguments briefly:

First, some of the system's power to control conduct derives from its potential to stigmatise violators - with some potential offenders this is a more powerful, yet essentially cost-free, control mechanism compared to imprisonment. Yet the system's ability to stigmatise depends upon it having moral credibility with the community. That is, for a conviction to trigger stigmatisation, the law must have earned a reputation for accurately assessing from the community's view what does and does not deserve moral condemnation. Liability and punishment rules that deviate from a community's shared intuitions of justice undercut this reputation.

Second, the effective operation of the criminal justice system depends upon the cooperation or at least the acquiescence of those involved in it: - offenders; judges; jurors; witnesses; prosecutors; police; and others. To the extent that people see the system as unjust, as in conflict with their intuitions about justice, that acquiescence and cooperation is likely to fade and be replaced with subversion and resistance. And offenders may be inspired to fight the adjudication and correctional processes rather than to participate and acquiesce in it. If people see the system as failing to do justice, it may inspire, in its may be the most dramatic reaction, vigilantism, but also may inspire other

³⁸ For community views on a wide variety of criminal law issues, see P. H. Robinson, "The Role of Moral Philosophers in the Competition Between Philosophical and Empirical Desert" (2007) 48 *Wm. and Mary L. Rev.* 1831-1843.

³⁹ For a fuller account see Robinson and Darley, "Utility of Desert", note 27 above; P.H. Robinson and J. Darley, "Intuitions of Justice: Implications for Criminal Law and Justice Policy" (2007) 81 *So. Calif. L. Rev.* 1.

less dramatic but more common distortions of the system. A lack of credibility of either sort, regular injustice or failures of justice, can provoke resistance and subversion. Jurors may disregard their jury instructions. Police officers, prosecutors, and judges may make up their own rules. Witnesses may lose an incentive to offer accurate information or testimony.

Perhaps the greatest utility of desert comes through a more subtle but potentially more influential form. The real power to gain compliance with society's rules of prescribed conduct lies not in the threat of official criminal sanction, but in the forces of social influence. The networks of interpersonal relationships in which people find themselves, the social norms and prohibitions shared among those relationships and transmitted through those social networks, and the internalised representations of those norms and moral precepts control people's conduct. The law is not irrelevant to these social and personal forces. Criminal law, in particular, plays a central role in creating and maintaining the social consensus necessary for sustaining moral norms. In fact, in a society as diverse as ours, the criminal law may be the only society-wide mechanism that transcends cultural and ethnic differences. Thus, the criminal law's most important real-world effect may be its ability to assist in the building, shaping, and maintaining of these norms and moral principles. It can contribute to and harness the compliance-producing power of interpersonal relationships and personal morality.

Finally, the criminal law also can have effect in gaining compliance with its commands through another mechanism: If it earns a reputation as a reliable statement of what the community perceives as condemnable, people are more likely to defer to its commands as morally authoritative and as appropriate to follow in those borderline cases in which the propriety of certain conduct is unsettled or ambiguous in the mind of the actor. The importance of this role should not be underestimated; in a society with the complex interdependencies characteristic of ours, an apparently harmless action can have destructive consequences. When the action is criminalised by the legal system, one would want the citizen to "respect the law" in such an instance even though he or she does not immediately intuit why that action is banned. Such deference will be facilitated if citizens are disposed to believe that the law is an accurate guide to appropriate prudential and moral behaviour.

The extent of the criminal law's effectiveness in all these respects - in bringing the power of stigmatisation to bear, in avoiding resistance and subversion to a system perceived as unjust, in facilitating, communicating, and maintaining societal consensus on what is and is not condemnable, and in gaining compliance in borderline cases

through deference to its moral authority - is to a great extent dependent on the degree to which the criminal law has gained moral credibility in the minds of the citizens governed by it. Thus, the criminal law's moral credibility is essential to effective crime control, and is enhanced if the distribution of criminal liability is perceived as "doing justice," that is, if it assigns liability and punishment in ways that the community perceives as consistent with its shared intuitions of justice. Conversely, the system's moral credibility, and therefore its crime control effectiveness, is undermined by a distribution of liability that deviates from community perceptions of just desert.

2. The Problem of Immoral Intuitions

While empirical desert has the advantage of crime control utility, its reliance upon the community's intuitions of justice presents a serious disadvantage. The community's intuitions of justice could be wrong, even if there is a high degree of agreement about them. Empirical desert can tell us only what people think is just; only deontological desert can tell us what is actually just. Like slave owners in the Old South or anti-Semitic Germans before World War II, one may fail to appreciate the injustice of one's views until later, especially if one's views at the time are shared by a large number of other people. Even a popular liability or punishment rule may be unjust. Only deontological desert can spot these justice errors in people's intuitions and can provide a conception of desert that transcends time, community, and culture. Only deontological desert can give us the means by which we can tell the truth of what is deserved, insulated from the vicissitudes of human irrationality.

III. RESULTING CONFUSIONS ABOUT THE NATURE OF DESERVED PUNISHMENT

It is argued here that the failure to appreciate the existence of these three quite different conceptions of desert - vengeful, deontological, and empirical - commonly leads to confusion in the critique of desert as a principle for the distribution of criminal liability and punishment. That is, criticisms of "desert" are sometimes offered without appreciating that the criticism may be valid with regard to one conception of desert but not another, thus leading writers to reject "desert" generally while in fact their criticisms only suggest rejecting one or another specific conception of desert. Further, even when the issue is not the propriety of desert as a distributive principle generally but rather its implications on a specific issue - such as whether it calls for use of prison or the death penalty - the failure to appreciate the existence of these different conceptions of desert leads writers to use

arguments rightly critical of one conception of desert to draw conclusions that they apply to a different conception of desert.

Consider the range of criticisms offered against desert.

A. Harsh?

The most common American complaint against a desert-based distribution is that it necessarily provides “harsh” or “severe” punishment.⁴⁰ As one writer explains, the desert model “is an articulation at the practical, policy level of the new law and order ideology which has replaced the liberal, social democratic consensus that saw crime as a symptom of deprivation or malaise. Disillusion with the effects of the model in practice should lead to a profound dislike of its principles, and its inherent, inevitable, right-wing, repressive slant should be acknowledged.”⁴¹

Because vengeful desert focuses primarily on the harm done, with little reference to the offender’s situation and capabilities, it is easy to see how the resulting punishment can be perceived as being overly harsh (at least from the perspective of deontological or empirical desert), for it ignores many factors that both moral philosophers and the community would think are relevant in assessing blameworthiness. Thus, while the harshness criticism may seem valid when applied to vengeful desert, it is misguided when applied to deontological and empirical desert. Indeed, the primary criterion of deontological desert is that the punishment be precisely that which is deserved, no more and no less. Similarly, empirical desert seeks to give the offender exactly what he deserves according to principles of justice derived from the community’s intuitions of justice. It would be odd indeed, then, to find substantial complaint that an empirical desert distribution was judged to be systematically harsh.

Of course, any particular writer may have his or her own particular views about exactly what desert requires. And often a criticism that “desert” is too harsh or severe (or not harsh or severe enough) is simply a product of that person’s particular view. Thus, a writer may believe that “economic, social, cultural, or psychological deprivations” should excuse criminal conduct, and therefore may conclude that a criminal justice system that does not embody this view is “harshly punitive.”⁴² But this kind of criticism must be taken for what

⁴⁰ E. Rubin, “Just Say No To Retribution” (2003) 7 *Buff. Crim. L. Rev.* 17, 58; C. Haney, “Psychology and the Limits to Prison Pain” (1997) 3 *Psych. Pub. Pol. and L.* 499, 525, 528; G. C. Thomas III and D. Edelman, “An Evaluation of Conservation Crime Control Theology” (1988) 63 *Notre Dame L. Rev.* 123, 125; M. Tonry, “Theories and Policies Underlying Guidelines Systems” (2005) 105 *Colum. L. Rev.* 1233, 1264.

⁴¹ B. Hudson, *Justice through Punishment: A Critique of the “Justice” Model of Corrections* (London 1987), ch. 6.

⁴² D. Dolinko, “Three Mistakes of Retributivism” (1992) 39 *U.C.L.A. Law Review* 1624, 1657.

it is: not a compelling indictment of deontological or empirical desert as being systematically harsh but simply evidence that this writer disagrees with others about what such desert requires. (Both community views and most moral philosophers in fact would recognise that it is possible for “economic, social, cultural, or psychological deprivations” to have an effect on deserved punishment, but only if such deprivations significantly reduced an offender’s capacity to remain law-abiding.)

In the same vein, another writer attacks desert as being unjust because, he argues, in setting offence grades it distinguishes between an attempt and a completed offense.⁴³ But, again, this only illustrates that this writer thinks that doing justice requires a different rule - in this case that it ought not take account of resulting harm. Others, of course, disagree. (In fact, deontologists disagree among themselves about many aspects about what desert requires, the subject of Part III.E.) It can hardly be a criticism of deontological desert generally that not all moral philosophers agree with your view of what desert requires.

This kind of criticism has no more impact when directed against empirical desert: it only tells us one person’s perspective on desert, which may or may not reflect the community’s view. Such dissenting views can be a useful piece of data for the social scientists, but only one piece. In the instance of the first example above - the view that “economic, social, cultural, or psychological deprivations” by themselves (without substantially impairing one’s capacity to avoid offending) should excuse criminal conduct - the data point is a significant outlier; few people would take this view. Again, it is hardly an indictment of empirical desert that there is not complete unanimity on every principle of justice.

Contrast this with application of the same complaint against vengeful desert. There the complaint goes not simply to a disagreement with one or another liability rule but to the foundational criterion by which punishment is to be distributed: to match the suffering caused the victim. In that context, the complaint may have traction, for the distributive criterion of vengeful desert fails to take account of factors, such as culpable state of mind and excusing conditions, thus will regularly and systematically produce punishment that is unduly harsh, at least from the point of view of deontological and empirical desert.

B. Based on Anger and Hatred?

A related complaint against desert is its “legitimation and even glorification of anger and hatred.”⁴⁴ Because it “legitimizes anger and

⁴³ Rubin, note 40 above, at 33.

⁴⁴ Dolinko, “Three Mistakes”, above note 42, at 1651.

hatred, ... it virtually invites the public and the legal system to indulge the passion for revenge untroubled by moral qualms.⁴⁵ It will encourage “a peculiarly self-righteous and smug indulgence in our society’s most punitive reflexes.”⁴⁶

Complaints that deserved punishment is necessarily the product anger and hatred are similar to complaints that deserved punishment is harsh, but also different. One might respond to the two complaints in a similar way: by suggesting that each reveals a confusion between vengeful desert on the one hand and deontological and empirical desert on the other. That is, to the extent that vengeful desert is associated with the special view of victims, it is easy to see how that association might suggest anger and hatred toward the victimiser, a reaction often felt by victims. Thus, one might observe that deontological and empirical desert, in contrast to vengeful desert, take no such victim’s perspective and therefore this complaint has no application to them. They focus on the offender, in particular on his blameworthiness, not the victim and his injury, and certainly not the victim’s anger or hatred. Indeed, because their goal is to assess as accurately as possible an offender’s blameworthiness, it follows that the presence of anger or hatred would be anathema to these conceptions of desert because it risks distorting the accuracy of the blameworthiness judgment.⁴⁷ In other words, the complaint that deserved punishment necessarily is the product of anger and hatred reflects a failure to distinguish vengeful desert on the one hand from deontological and empirical desert on the other - a response analogous to the response above to the complaint that deserved punishment is necessarily harsh.

But the complaint that desert is based upon anger and hatred also is problematic for another reason: it is a complaint about *motivation in punishing* rather than about the *distribution of punishment*. While the complaint is mixed with substantive complaints about lack of justness, it has nothing to do with justness. A distribution consistent with deontological or empirical desert could be motivated by anger in any particular case or by any particular punisher, but the motivation itself does not make the punishment any more or less just. The same is true of punishment based upon a vengeful desert distribution. If a vengeful desert distribution just happens as a matter of dumb luck to produce a sentence that exactly matches an offender’s blameworthiness in a given case, the fact that it is motivated by anger or hatred does not make the sentence unjust. And conversely, if a vengeful desert distribution

⁴⁵ *Ibid.*, at 1652.

⁴⁶ D. Dolinko, “Some Thoughts About Retributivism” (1991) 101 *Ethics* 537, 559.

⁴⁷ Feinberg and Coleman, *Philosophy of Law*, note 22 above, at 794–795; Justice Powell, writing for the majority in *Booth v. Maryland*, 482 U.S. 496 (1987).

produces an unjust sentence (from the perspective of deontological or empirical desert), the absence of anger in its imposition does not make it just. A society has every reason to want its determinations of punishment to be free of anger and hatred for a wide variety of reasons, but the presence of that emotion itself can be only the basis upon which to criticise the punisher, not the punishment.

C. A Preference for Prison, or Worse?

Desert is sometimes associated with a preference for imprisonment,⁴⁸ or worse.⁴⁹ In commenting on the Model Penal Code's recent shift to a desert distributive principle, one writer explains that the reform is a mistake "because it would align the Code with the worst features of contemporary American penal practice ... the highest rate of incarceration in the Western world by a factor of five. [T]his trend has been justified ... by legislation that ... embraces the principle of retribution. If the [Model] Code were to embrace this principle as well, it would inevitably be seen as lending its support to all the irrationalities, immoralities, and inefficiencies of our current addiction to incarceration."⁵⁰

If, under the vengeful conception of desert, "the punishment should fit the crime," it might be argued that prison ought to have a preferred place among punishment methods because it best reproduces the victim's suffering, given the limitations placed on punishment methods by liberal democracies. Any less severe form of punishment would fail to match the victim suffering caused by the offender. By the same token, the vengeful conception of desert might logically suggest the death penalty for murder.⁵¹

But, because neither deontological nor empirical desert have an interest in reproducing the suffering of the victim upon the offender, they have no reason to give special preference to prison or to any other punishment method. Their interest is only in insuring that a certain amount of punishment is imposed – the amount that will put the offender in his proper ordinal rank among other cases according to his relative blameworthiness. Any method or methods of punishment that achieve that result would be fully consistent with the demands of deontological and empirical desert.⁵²

Indeed, because their focus is on the amount rather than the method of punishment, deontological and empirical desert can provide

⁴⁸ See, e.g., "Development in Law: Alternatives to Incarceration" (1998) 111 Harv. L. Rev. 1967, 1971; D. McCord, "Imagining a Retributivist Alternative to Capital Punishment" 50 Fla. L. Rev. 1, 82 (1998).

⁴⁹ Rubin, above note 40, at 69 (2003).

⁵⁰ Rubin, above note 40, at 17.

⁵¹ Above Part II.D.2.

⁵² Above Part II.D.2.

greater flexibility in the method by which punishment is imposed than is commonly available today.⁵³ A sentencing system or sentencing judge could be allowed complete discretion in fashioning any particular sentencing method or combination of methods for a given case, as long as the total amount of punishment imposed was that deserved given the offender's blameworthiness. All that would be needed would be a table that gave punishment "credit" for each punishment method according to the relative punitive "bite" of that method. Once such a table of punishment equivalencies is established (such tables already exist⁵⁴) - setting equivalencies between fine, weekend jail, supervised probation, community service, and other sanctioning methods - a sentencing judge can be left to translate a prison sentence into any other method or combination of methods, so long as the total punitive "bite" totaled the amount deserved.

This kind of sentencing flexibility is particularly useful today, at a time when there is interest in promoting non-incarcerative sanctions. Not only are such sanctions typically much less costly than prison, but they also permit the opportunity to avoid future crime through rehabilitation, incapacitation, or deterrence, without subverting justice.

D. Only Vague Demands?: "Limiting Retributivism"

A common objection to desert as a distributive principle is that it is "too vague,"⁵⁵ that, as one writer explains: "Everyone may agree that five years in prison is unjustly harsh desert for shoplifting, or that a five dollar fine is unjustly lenient desert for rape, but beyond such clear cases our intuitions seem to fail us. Is two years, five years, or ten years the proper sanction for a rape? ... Our sense of just deserts here seems to desert us."⁵⁶ As another writer puts it, "the indeterminacy of [the just deserts] approach ... would at best achieve a system of 'equal misery,' where the scale of equality was prone to flux."⁵⁷

Some writers, such as Norval Morris,⁵⁸ may be willing to concede that desert is not a hopelessly vague concept, that it has some meaning,

⁵³ Above Part II.D.2.

⁵⁴ See, e.g., R. E. Harlow, J. M. Darley and P. H. Robinson, "The Severity of Intermediate Penal Sanctions: A Psychophysical Scaling Approach for Obtaining Community Perceptions" (1995) 11 *J. Quantitative Criminology* 71, 85; P. H. Robinson et al., "Codifying Shari'a: International Norms, Legality and the Freedom to Invent New Forms" (2007) 2 *J. Comp. Law* 1, 47-50.

⁵⁵ A. Ashworth, *Sentencing and Criminal Justice*, 4th ed. (London 2000), p.86. See also B. Bosanquet, *Some Suggestions in Ethics* (London 1918), pp.188, 203; J. Braithwaite and P. Petit, *Not Just Deserts: A Republican Theory of Criminal Justice* (New York 1990), p.180; R.A. Duff, "Penal Communications: Recent Work in the Philosophy of Punishment" (1996) 20 *Crime and Just.* 1, 7.

⁵⁶ L. Katz, "Criminal Law", in Dennis Patterson (ed.) *A Companion to the Philosophy of Law and Legal Theory* (London 1996), pp.80-81.

⁵⁷ A. Norrie, *Crime, Reason and History* (London 1993), p.218.

⁵⁸ N. Morris, *The Future of Imprisonment* (Chicago 1974), pp.75-76.

but would make a related but slightly different criticism: Desert cannot specify a particular amount of punishment that should be imposed; it can only identify a range of punishment that should not be imposed because it would be a seriously disproportionate. Indeed, this is the underlying assumption of the American Law Institute's recent amendment of Model Penal Code Section 1.02(2)(a) that sets out the purposes of the sentencing provisions and the principles governing their interpretation and application: "Subsection 1.02(2)(a)(i) codifies Morris's idea of an approximate retributive ballpark when it speaks of a 'range of severity' of proportionate punishments."⁵⁹

If one has in mind the diluted version of the vengeful conception of desert, the claim of vagueness may make sense; the demand that the punishment be "proportional" to the harm caused might seem to leave a good deal of flexibility in application. That proportionality requirement might be taken to suggest only the need for an approximation. On the other hand, the strict form of *lex talionis* - that punishment "should correspond in degree and in kind to the offense of the wrongdoer"⁶⁰ is not so vague. (Admittedly, there may remain some application questions: Exactly how is victim suffering to be measured, and how is it to be reproduced? Doesn't every victim experience a crime differently?)

But the same vagueness complaint is even more misguided when applied to deontological and empirical desert, with their focus on offender blameworthiness rather than on victim suffering, although the vagueness complaint is made about blameworthiness too.⁶¹ Such complaints are based in part on a failure to appreciate the specific demands of these two conceptions of desert: the demands of ordinal ranking, as opposed to the issue of punishment continuum endpoint, as discussed in Part II.D.1.

Those who complain about desert's vagueness seem to assume, incorrectly, that deontological and empirical desert seek to provide a universal, absolute amount of punishment deserved for a given offense. But deontological and empirical desert make no such claim. The goal of empirical and deontological desert is to ensure that offenders of different blameworthiness are given different amounts of punishment, each to receive an amount that reflects their differences in blameworthiness.⁶² And that ordinal ranking does not require a

⁵⁹ MPC Amendment, note 6 above, at 8. The new Subsection also signals its reliance upon this notion of desert as setting only outer boundaries of disproportionality, when it refers to "the boundaries of sentence severity permitted in Subsection (a)(i)."

⁶⁰ See note above.

⁶¹ Morris, note 58 above, at 74. Other writers have expressed similar views in different terms. See, e.g., P.H. Rossi and R.A. Berk, *Just Punishments: Federal Guidelines and Public Views Compared* (New York 1997) pp.2-3; H.A. Bedau, "Retributivism and the Theory of Punishment" (1978) 75 *J. Phil.* 601, 613.

⁶² See J. Kleinig, *Punishment and Desert* (Amsterdam 1973), p.114; von Hirsch, *Past or Future Crimes*, note 32 above.

specific amount of punishment in a universal sense. It requires imposition of only that specific amount of punishment that will put the offender at his appropriate ordinal rank *given punishment continuum endpoint of that society*.⁶³ That is, the uncertainty about deserved punishment amount that Morris and others observe arises not because of any vagueness in the ordinal ranking of offenses according to offender blameworthiness but rather because of differences in opinion about the punishment continuum endpoint that a society might adopt.

Deontological and empirical conceptions of desert may have something useful to say about placing the punishment continuum endpoint, but the nature of their contribution on this point is quite different than when they serve as a distributive principle for punishment: here they identify only extremes beyond which placement of the endpoint would be problematic. For example, the rationale behind empirical desert suggests a limit to the punishment continuum endpoint: It should not be placed at a point that is either so low or so high that it will have the effect of undermining the community's collective judgment about whether the criminal justice system is in fact doing justice. Notice that this judgment is one that is necessarily culturally dependent. One community might accept stoning to death as being an acceptable end point,⁶⁴ while another could reject fifteen years imprisonment as too harsh on endpoint.⁶⁵

This means, for example, that a society might look to other purposes in setting the punishment continuum endpoint – perhaps optimising deterrence, incapacitation, or rehabilitation – and deontological and empirical desert would have no objection. It is likely this flexibility as to setting the punishment continuum endpoint has misled writers into thinking that conceptions of desert are necessarily vague. It is in this project, setting the punishment continuum endpoint, that “limiting retributivism” is a useful concept. The error of those promoting the concept is only in failing to see that it has application only in this limited role, and has no application in the primary function of desert in serving as a principle for determining how criminal liability and punishment *is to be distributed along that punishment continuum*.

But this does not entirely settle the vagueness complaint against deontological and empirical desert. Some writers argue that even

⁶³ P. H. Robinson. “The A.L.I.’s Proposed Distributive Principle of ‘Limiting Retributivism’: Does It Mean in Practice Anything Other than Pure Desert?” (2003) 17 Buff. Crim. L. Rev. 3.

⁶⁴ One of the traditional *hudud* punishments for a married person who commits adultery (*zina*) is stoning to death. I. Rushd, *The Distinguished Jurist's Primer* (Imran Ahsan Khan Nyazee trans., Reading 1994), p.523; M. Iqbal Siddiqi, *The Penal Law of Islam* (Lahore 1979), p.51 (1979); US Dep't of State, Country Reports on Human Rights Practices for 1993, at 1372 (1994).

⁶⁵ For example, the average offender in the Netherlands was released after 5 months: *United Nations Survey of Crime Trends and Operations of Criminal Justice Systems*, at 308.

ordinal ranking is something that can be done only in the vaguest terms, that establishing specific rankings is impossible.⁶⁶ Many moral philosophers may have an answer to this challenge and may be able to give a reasoned account of how to make the kinds of judgments called for here.⁶⁷ But it is admittedly a problem for deontological desert as a distributive principle that different moral philosophers will have different answers. This is not a problem of vagueness, however, but rather a problem of disagreement, which is the subject of Part III.E immediately below. The disagreement may make it difficult to operationalise a criminal justice system based upon the deontological conception of desert, an issue discussed in Part III.H., but the point here is simply there is nothing in principle to suggest that deontological desert could not produce a principled system for the ordinal ranking of offenses.

As to empirical desert, it might still be argued that the blame-worthiness ranking of offenses is beyond the ability of people's intuitions of justice, that those intuitions are simply too vague to do more than to roughly distinguish between "serious" cases and "not serious" cases and cannot provide the nuance needed to do more. But a wide variety of empirical studies paint a dramatically different picture.⁶⁸ In some studies subjects were asked to put offenses or offense scenarios into one of a set of predetermined categories; in another kind of study, subjects were asked to rank order offenses or offense scenarios; in a third kind of study, subjects were asked to assign numerical values to each of a number of offenses or offense scenarios.⁶⁹ The results in all of these studies are consistent: Subjects displayed considerable nuance in the judgments they make.⁷⁰ Small changes in facts produce large and predictable changes in punishment. Durham summarises the surveys this way: "Virtually without exception, citizens seem able to assign highly specific sentences for highly specific events."⁷¹ The conclusion suggested by the empirical evidence is that people take account of a wide variety of factors and often give them quite different effect in different situations. That is, people's intuitions of justice are not vague or simplistic, as claimed, but rather sophisticated and complex.

⁶⁶ R. L. Christopher. "Deterring Retributivism: The Injustice of 'Just' Punishment" (2002) 96 Nw. U.L. Rev. 843, 893 (footnotes omitted).

⁶⁷ See A. von Hirsch, "Proportionate Sentences: A Desert Perspective in Principled Sentencing" in A. von Hirsch and A. Ashworth (eds.) *Readings on Theory and Policy*, 2nd ed. (London 1998) 173-74.

⁶⁸ For a general discussion of these matters, see Robinson and Kurzban, "Concordance and Conflict", note 29 above, at Parts I-III.

⁶⁹ Id. at Parts I and II.

⁷⁰ Id. at Part I.

⁷¹ A.M. Durham III, "Public Opinion Regarding Sentences for Crime: Does it Exist?" (1993) 21 J. Crim. Justice 1, 2.

What this suggests is that, while the vagueness complaint may be valid with regard to vengeful desert, it is misguided when applied to deontological desert, at least in principle, and simply wrong in both principle and practice when applied to empirical desert.

E. Subject to Profound Disagreement?

Another common objection to using desert as a distributive principle for criminal liability and punishment is the concern that, even if individual people have a clear notion of what desert demands, it is simply “too open to divergent interpretations.”⁷²

Against this complaint, both vengeful and deontological desert have weak responses. The problem for vengeful desert arises from the vagueness of its criterion: the vagueness of “proportionality” to victim suffering and the subjectivity inherent in the victim perspective. The problem for deontological desert is different. The focus of its distributive principle is fixed and specific – an offender’s moral blameworthiness – but moral philosophers simply disagree about just how this principle translates into specific punishment in a given case. “The Retributivist label ... might not seem particularly useful, for the differences on particular issues among some retributivists may seem greater than the differences between some retributivists and some utilitarians.”⁷³

The same too-much-disagreement complaint has been made about people’s intuitions of justice, which would leave empirical desert in a similar situation. It is the common wisdom that little agreement exists among people’s intuitions of justice.⁷⁴ But the common wisdom simply does not match the empirical reality. In fact, empirical studies show broadly-shared intuitions that serious wrongdoing should be punished, and broadly shared intuitions about the relative blameworthiness of different cases.⁷⁵ The striking extent of the agreement on intuitions of justice is illustrated in a recent study that asked subjects to rank order 24 crime scenario descriptions according to the amount of punishment deserved. The researchers found that the subjects displayed an astounding level of agreement in the ordinal ranking of the scenarios. Subjects agreed with the modal ranking of the group for 96 percent of their pairwise ranking judgments. The most common deviation, as one might guess, was for a subject to “flip” the ranking

⁷² Ashworth, note 55 above, at 86.

⁷³ M. Tunick, *Punishment: Theory and Practice* (Berkeley 1992) p.107.

⁷⁴ J. Monahan, “The Case for Prediction in the Modified Desert Model of Criminal Sentencing” (1982) 5 *Int’l J. L. and Psychiatry* 103, 105; M. Tonry, “Obsolescence and Immanence in Penal Theory and Policy” (2005) 105 *Colum. L. Rev.* 1233, 1263; Dolinko, “Three Mistakes”, note 42 above, at 1638–39; E. van den Haag, “Punishment: Desert and Crime Control” (1987) 85 *Mich. L. Rev.* 1250, 1254.

⁷⁵ Robinson and Kurzban, “Concordance and Conflict”, note 29 above, at Part II.A. and B.

of two scenarios that were adjacent in the group's modal ranking - for example, a subject might rank order the scenarios as S6, S8, S7, S9, "flipping" the S7 and S8 scenarios. If these simple "flips" of adjacent scenarios are excluded, the percentage of all rankings that deviate from the group mode rankings is 2.7 percent. In other words, "flips" aside, subjects agreed with the modal ranking of the group in 97.7 percent of their pairwise judgments.

A more sophisticated statistical measure of concordance is found in Kendall's W coefficient of concordance, in which 1.0 indicates perfect agreement and 0.0 indicates no agreement. In this study, the Kendall's W is .95 (with $p < .001$), an astounding level of agreement. One might expect to get this high a Kendall's W if subjects were asked to judge the relative brightness of different groupings of spots, for example. When asked to perform more subjective or complex comparisons, such as asking travel magazine readers to rank the attractiveness of eight different travel destinations, one gets a Kendall's W of .52. When asking economists to rank the top 20 economics journals according to quality, one gets a Kendall's W of .095.

Indeed, the ordinal ranking of deserved punishment in different cases generally is consistent across demographics, including cultural differences examined in cross-cultural studies that replicated domestic studies. Typical of the conclusions in these studies, Newman reports that, "it is apparent that there was considerable agreement as to the amount of punishment appropriate to each act" and that looking at relative rankings indicates "general agreement in ranks across all countries."⁷⁶

The level of agreement is strongest for those core wrongs with which criminal law primarily concerns itself - physical aggression, taking property, and deception in exchanges - and becomes less pronounced as the nature of the offence moves farther from the core of wrongdoing. But even where there is disagreement, empirical desert offers means by which the disagreements can be resolved: by adopting the majority view, or adopting the view that would least undermine the criminal law's moral credibility with the community it governs. No such means exists to resolve conflicting views for deontological desert.

One may wonder how this agreement among people about intuitions of justice, sometimes at astonishing high levels, could have been missed for so many years. One may wonder how the common wisdom got it wrong. First, some sources of apparent disagreement are simply misleading. When a case in the headlines has social or political implications, it is common that its relevant facts will be perceived differently by different people. What one makes of the police

⁷⁶ Id. at 140-141 (see Table 12, pp.142-143).

testimony in the O.J. Simpson case or the Rodney King case may depend upon how one has come to view police officers from one's daily life experiences.⁷⁷ If people draw different conclusions from the testimony, they are likely to have different views of the relevant facts of the case, which would predict different views on the liability and punishment deserved.

Another source of apparent disagreement is found in the ordinal ranking versus endpoint distinction, discussed in Part II.D.1: While people may agree on the relative blameworthiness of a set of cases, some people may prefer generally harsher punishments than other people. That is, some people may set the most severe end of the punishment continuum noticeably higher than others, which would predict different sentences, even if the people agree on the relative blameworthiness of the different offenders.

F. Fails to Avoid Avoidable Crime?

The central criticism of desert in the English debate is that it is not the best crime control policy. On the contrary, it is said to fail in avoiding crimes that could be avoided by relying upon other principles, primarily deterrence or incapacitation.⁷⁸ Such disutility is obviously objectionable to utilitarians. And many would make the claim that such disutility is particularly objectionable in the case of punishment: “[P]unishment - the intentional infliction of pain - is senseless and even cruel if it does no good, and yet retributivists favor precisely that, i.e., the infliction of pain that need not result in future benefit.”⁷⁹ This sort of objection has been aimed at the desert approach embodied in the Criminal Justice Act 1991.⁸⁰

Traditionally, the utilitarian preference has been for distributing liability to optimise deterrence, rehabilitation, incapacitation, or some combination of them.⁸¹ And those consequentialists who seek to minimise future crime would be right to point out that deontological desert as a distributive principle would allow future crimes that could have been avoided by a utilitarian distributive principle, such as one that relied upon these traditional utilitarian distributive principles.

But of course this classic challenge of utilitarianism to deontological desert does not work against empirical desert because the latter's distribution of liability and punishment is specifically designed to

⁷⁷ See Robinson and Darley, *Justice, Liability and Blame*, note 28 above.

⁷⁸ L. Kaplow and S. Shavell, “Fairness Versus Welfare” (2000) 114 *Harv. L. Rev.* 961, 1007; E. Luna, “Punishment Theory, Holism, and the Procedural Conception of Restorative Justice” 2003 *Utah Law Review* 205.

⁷⁹ J. Dressler, *Understanding Criminal Law*, 4th ed.. (New York 2006) p.22.

⁸⁰ A. Sanders, “What Principles Underlie Criminal Justice Policies in the 1990's?” (1998) 18 *Oxford J. Legal Stud.* 533, 538.

⁸¹ See, e.g. Model Penal Code § 1.02(1) (1962).

minimise future crime - by harnessing the crime-control power of social influence that comes with building the criminal law's moral credibility.⁸² In other words, empirical desert is a utilitarian, consequentialist theory of punishment. It is building the community's perception that justice is being done that pays crime-control dividends, not the system's actual success as measured by deontological desert.

G. Immoral?

Just as the utilitarian objection of poor crime-control has been levelled at a desert distributive principle - with some force when applied to deontological desert but missing the mark when applied to empirical desert - the reverse sort of objection also can be made: that a desert distribution is immoral.⁸³ Some writers complain about "the injustice of 'just' punishment."⁸⁴

As one might expect, the response to the immorality complaint is essentially the reverse of the response to the disutility complaint discussed in the previous section: The objection may have weight against empirical desert but makes little sense with regard to deontological desert. That is, while moral philosophers may well disagree among themselves about how to translate desert into specific principles of justice, all would agree that the primary goal of a deontological desert distribution would be to produce criminal liability and punishment that was, above all else, moral.

On the other hand, the criticism is fair when applied to empirical desert: What empirical desert produces is not justice, but only liability and punishment consistent with the community's views about what constitutes justice.⁸⁵ The community's intuitions of justice could be wrong, even if there is a high degree of agreement about them. At any particular time and place, there may be widespread support for the morality of conduct that only later is revealed to be immoral and unjust, as with slave owning. To protect against this error, to be able to identify when people's shared intuitions of justice are unjust, a system must turn to deontological desert to provide that transcendent check on the justness of its liability rules. It is only deontological desert that can give us the truth of what is deserved, insulated from the vicissitudes of human irrationality and emotions.

⁸² Above Part II.E.1.

⁸³ See, for example, Luna, "Punishment Theory", note 78 above; J. G. Murphy, "Symposium on Kantian Legal Theory: Does Kant Have a Theory of Punishment?" (1987) 87 Colum. L. Rev. 509, 517; Dolinko, Three Mistakes, note 42 above, at 1635.

⁸⁴ Christopher, "Injustice of Just Punishment", note 66 above. As one writer expresses in a related concern, "Just deserts tends to mean fair distribution within an existing penalty system, regardless of whether that system is itself just." D. J. Galligan, "Guidelines and Just Deserts: A Critique of Recent Trends in Sentencing Reform" 1981 Crim. L.R. 297, 305.

⁸⁵ M. S. Moore, *Placing Blame, a General Theory of the Criminal Law* (Oxford 1997), pp.207-208.

But an examination of the modern methodology of moral philosophers suggests that they sometimes fail to appreciate the importance of the difference between deontological and empirical desert. They commonly rely heavily upon intuitions of justice in their analyses, and thereby bias their conclusions in favor of principles of justice that match people's shared intuitions of justice. That reduces the extent to which moral philosophy can be relied upon to provide the transcendent check that empirical desert needs.

The current methodology of moral philosophers relies upon intuitions of justice in a variety of ways. A standard analytic form, if not *the* standard form, among moral philosophers today is to test variations in a series of hypotheticals according to philosophers' own intuitions about the proper resolution of each, as a basis for building moral principles, as in Rawls' "reflective equilibrium."⁸⁶ The differences in their judgments about the intuitively proper resolution of different hypotheticals are used as data points, as it were, from which philosophers derive a moral principle, which can in turn be tested and refined by testing that moral principle against the philosophers' intuitions in new sets of hypotheticals.⁸⁷

But the methodological reliance on intuitions of justice creates a bias in favor of moral principles that are consistent with intuitions. Moral principles with principled, reasoned support might nonetheless fail to gain currency among philosophers or might be discarded, simply because philosophers as a group think their results inconsistent with intuitions – a practical veto by philosophers' shared intuitions.⁸⁸

H. Impractical to Implement?

It is common for writers to think it impractical to construct a working criminal justice system based upon desert principles. For example, in the internal debates among commissioners during the drafting of the United States Sentencing Commission guidelines, it was argued that "just desert" could not be used as a basis for drafting sentencing guidelines because of "its impracticability," and because of "its incompatibility with administrative and procedural requirements of sentencing."⁸⁹ Yet, as noted previously, the American Law Institute recently adopted desert as the distributive principle for the Model Penal Code.⁹⁰ Is it, or is it not, possible to implement a distributive

⁸⁶ J. Rawls, *A Theory of Justice* (Cambridge 1971), p.48.

⁸⁷ *Ibid.*: L. Katz, "Incommensurable Choices and the Problem of Moral Ignorance" (1998) 146 U. Pa. L. Rev. 1465, 1482–83.

⁸⁸ Robinson, "Moral Philosophers", note 38 above.

⁸⁹ I.H. Nagel, "Supreme Court Review: Foreword: Structuring Sentencing Discretion: The New Federal Sentencing Guidelines New Federal (1990) 80 J. Crim. L. and Criminology 883, 920.

⁹⁰ See MPC Amendment, above note 6. Desert here is set as an absolute: other principles can be relied upon only if they are effective and are not inconsistent with desert.

principle based upon desert? Again, the answer depends upon which conception of desert one has in mind.

It follows from what has been said above that it would be difficult to produce a system of criminal liability and punishment based upon vengeful desert. Vengeful desert fails to provide enough specificity as to the exact criterion for distributing liability and punishment. What exactly is meant by the requirement that the punishment be “proportionate” to the harm caused by the offense?⁹¹ If proportionality were taken to mean ordinal ranking along a fixed continuum, as in deontological and empirical desert, it could be translated into specific sentences, but, by itself, connected only to a concept of extent of victim suffering, it can give only general guidance.⁹² Part of the problem is the potentially subjective nature of the criterion. If the offender’s punishment is to match the victim’s suffering,⁹³ a determination of the punishment deserved cannot be made upon the objective facts of the offense but requires an examination of how much this particular victim suffered from the offense. These are not unsurmountable barriers, but coming as they do in the context of the serious disagreements over just what vengeful desert requires,⁹⁴ and in the absence of any authoritative mechanism by which these disagreements can be resolved, it does seem impractical to think that vengeful desert could be used as the distributive principle for the creation and operation of a working criminal justice system.

Nor is it clear that deontological desert can provide the basis for a working distributive principle. Deontological desert may work in principle to provide a specific sentence for each case, but it may not be realistic to rely upon it in practice. The substantial disagreements among moral philosophers about many, if not most, issues concerning the principles of justice, and the lack of an effective means by which people, non-philosophers especially, can reliably choose between these conflicting views, means that while any single moral philosopher might be able to produce a system for distributing punishment, it may be difficult to produce an authoritative deontological-desert-based system.

Can empirical desert be the practical basis for a working criminal justice system? The common wisdom is no, because of concerns about lack of nuance and agreement discussed earlier. For example, Justice Breyer cites lack of nuance to explain his opposition to basing the United States Sentencing Commission sentencing guidelines on desert: “Considering the inherent subjectivity ... only a crude ranking of

⁹¹ See notes 16–18. above.

⁹² See text accompanying notes 56–59. above.

⁹³ See notes 16–18. above.

⁹⁴ See Part III.E. above.

behavior in terms of just deserts ... could be developed. Although guidelines motivated by a just deserts rationale would be cloaked in language and form that evoke rationality, using terms such as ‘rank order of seriousness,’ the rankings would not, in substantive terms, be wholly objective.”⁹⁵ He similarly argues that desert lacks the needed level of agreement: “The difficulty that arises in applying [a desert approach] is that different Commissioners have different views about the correct rank order of the seriousness of different crimes.”⁹⁶

The average state criminal code distinguishes a dozen grades of offences.⁹⁷ Modern sentencing guidelines make even more distinctions.⁹⁸ Presumably, sentencing judges would like to make even more nuanced distinctions. Are the intuitions of laypersons that support empirical desert nuanced enough to provide this level of specificity? The discussion in Parts III.D. and E. makes clear that lay intuitions of justice are both nuanced and the subject of much agreement, especially with regard to the core wrongs that make up the majority of crimes in practice.⁹⁹ From the point of view of empirical desert, it is of no significance that individual sentencing commissioners may disagree. It is the community’s shared intuitions of justice that should control, not the intuitions of the commissioners.

And where disagreements do exist, and there will be such instances (especially outside the core of wrongdoing), the logic of the empirical desert suggests an obvious mechanism for resolving those disagreements: adopting the position that would least undermine the criminal justice system’s moral credibility with the community, perhaps following the majority view in many cases but also taking account of arguments on the justness of its position as would come out in public debate.¹⁰⁰ Indeed, existing empirical studies tell us not only that people agree about the relative blameworthiness of different cases, but also do much to map for us the contours of people’s agreement and disagreement. And they map not only the relative seriousness of different wrongdoing but also the factors that increase and decrease a violator’s blameworthiness. One collection of studies reports community views on the liability rules that govern such widely-ranging topics as the objective requirements for attempt, liability for creating a prohibited risk, the objective requirements for complicity, the

⁹⁵ S. Breyer, “The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest” (1988) 17 *Hofstra L. Rev.* 1, 15–17 (1988) (footnotes omitted).

⁹⁶ Breyer, note 95 above, at 15–16.

⁹⁷ See, for example, *Ariz. Rev. Stat. § 13–601* (2006); *Colo. Rev. Stat. § 18–1–104* (1999); *Kan. Stat. Ann. § 21–4704 et seq.* (1995); *Neb. Rev. Stat. 28–105, 106* (1995).

⁹⁸ The United States Sentencing Guidelines represent the far end of this spectrum, with 43 offense levels. *US Sentencing Guidelines Manual § 5A* (Nov. 2004) available at <http://www.ussc.gov/2004guid/gl2004.pdf>.

⁹⁹ See text accompanying note 92, above.

¹⁰⁰ See Robinson and Kurzban, “Concordance and Conflict” note 29 above.

requirements for omission liability, the use of force in self-defence, the use of force in defence of property, citizens' law enforcement authority, offence culpability requirements, the culpability requirements for complicity, the liability rules that should govern voluntary intoxication, insanity, immaturity, involuntary intoxication, duress, entrapment, the requirements of sexual offences, the significance of a person's causal connection with the prohibited result (causation requirements), the felony-murder rule, and the rules that should govern the punishment of multiple related offences.¹⁰¹

It is also true, however, that more research is needed. As much ground as the existing studies cover, they each touch only the basics in their specific subject. More importantly, while there is a literature describing the intuitions of laypersons as a group and there is a literature documenting the existence of many areas of high agreement, these two literatures need to be combined. That is, we need to understand better not only the details of the community's shared intuitions on a wide variety of issues, but also to understand the contours and demographics of disagreement.¹⁰²

But one might argue that there are any number of instances in which one would want the system's principles of justice to deviate from people's intuitions of justice. Thus, it might be argued, deviations from empirical desert and the concomitant undermining of the system's moral credibility are inevitable and, therefore, a system based upon empirical desert is necessarily doomed to failure. Every perceived deviation from desert would undermine the system's moral credibility and thereby its crime-control effectiveness.

It is true that one would want to deviate from people's intuitions of justice, even intuitions on which there is broad agreement, for any number of reasons. First, people's intuitions of justice may prove to be immoral, in a transcendent deontological sense, as discussed in Part III.G. Further, it is clear that there exist a variety of societal interests that are sufficiently important to outweigh the crime-control benefits of an empirical desert distribution, such as fair notice, procedural fairness, and the need to control police and to limit governmental intrusion in private lives.¹⁰³ Still further, a society may wish to use criminal law to change people's intuitions of justice, toward a view seen as more compatible with the societal values to which the

¹⁰¹ Robinson and Darley, *Justice, Liability and Blame*, note 28 above; L. D. Maxfield, W. Martin and C. Kitchens, "Just Punishment: Public Perceptions and the Federal Sentencing Guidelines. Research Bulletin for the United States Sentencing Commission" (1997) available at <http://www.ussc.gov/research.htm>; Memorandum from R. A. Conaboy to the United States Sentencing Commission, "Public Opinion on Sentencing Federal Crimes" (1997) available at <http://www.ussc.gov/research.htm>.

¹⁰² See Robinson and Kurzban, "Concordance and Conflict", note 29 above, at Part IV.

¹⁰³ See, e.g., P. H. Robinson and M. T. Cahill, *Law Without Justice* (New York 2006) pp.90, 137, 186.

community aspires. For example, the community may decide that it wishes actively to change people's existing intuitions about the relative seriousness of drunk driving, domestic violence, same-sex intercourse, insider-trading, or internet-facilitated copyright piracy.

So it is true that in any real world criminal justice system, it will be inevitable that the system will in some instances deviate from people's intuitions of justice. But the fact that some deviation occurs does not mean that the goal of building law's moral credibility necessarily fails. That is, there is little reason to believe that any and every deviation from a person's intuitions of justice will completely destroy the criminal justice system's moral credibility in that person's eyes. Rather, it seems more likely that the process is one of incremental effect.¹⁰⁴ The better the system does at regularly tracking people's intuitions of justice, the stronger its moral credibility with them. The more it deviates from empirical desert, the lower its moral credibility. The conclusion, then, is not that there is no value in adopting empirical desert as a distributive principle but rather just the opposite: Given that some deviation is inevitable, the system ought not deviate where it can avoid doing so, in order to advance its moral credibility whenever it has the opportunity to do so. Thus, the system ought not to deviate from empirical desert unless the benefits from that deviation are clear and substantial enough to outweigh the cost in undermining its moral credibility.

Another claim of impracticability is of this sort: Each offender feels punishment differently, therefore it is impossible as a practical matter to construct a punishment system that gives each offender the punishment he deserves.¹⁰⁵ In other words, it would be impossible to construct a punishment "equivalency table," as discussed previously,¹⁰⁶ because the unique way in which each offender experiences punishment means that the "equivalency table" would have to be different for each offender. While this may be true with regard to deontological desert, which concerns itself with giving each offender the punishment that he personally deserves, the objection is inapplicable to empirical desert. Empirical desert concerns itself with giving not the punishment that each individual offender actually deserves but rather with the amount of punishment called for under the principles that track the community's intuitions of justice – it is the community's

¹⁰⁴ See, for example, J. S. Hall, "Note: Guided to Injustice?: The Effect of Sentencing Guidelines on Indigent Defendants and Public Defense" (1999) 36 *Am. Crim. L. Rev.* 1331–1364–65.

¹⁰⁵ Tonry, "Obsolescence and Immanence", note 74 above, at 1264. Andrew von Hirsch offers a different response to this kind of objection. He argues that, under deontological desert, the onerousness of punishment should reflect the degree to which the penalty intrudes on punished persons' rights, not their subjective preferences. The subjective-preference view holds only for deterrence theories. A. von Hirsch, *Censure and Sanctions* (Oxford 1993), pp. 33–35.

¹⁰⁶ See text accompanying note 55.

perception of the criminal justice system's moral authority that counts, not the transcendent truth of the punishment the offender deserves. Empirical desert calls not for an equivalency table set according to the extent of each offender's reaction to each kind of punishment, but rather for an equivalency table set according to the community's collective judgment of the relative punitive bite among different punishment methods.

IV. SUMMARY: A MORE DETAILED ACCOUNT OF THREE CONCEPTIONS OF DESERT

In the course of Part III a good deal of detail has been added to the picture of the three conceptions of desert presented in Part II. It may be useful to pull these points together in a way that summarises the strength and weakness of each as a distributive principle for criminal liability and punishment.

Vengeful desert focuses upon the offense harm and, in its strictest form, sets the deserved punishment to match this amount of harm, preferably imposed through the same or a related method as the offence conduct. In a less literal view, an exact equivalency of method and amount is not necessary for deserved punishment; generally proportionality is enough. Typically, this will mean that serious offences will require prison, or something more serious. The exact amount of punishment deserved is not clear; only a general range of punishment, proportionate to the harm caused, is necessary, and people tend to disagree about just how much punishment is enough in any given case, which tends to undercut the practicality of translating this conception of desert into a workable criminal justice system. Even if it were practical, such a conception of desert would produce common and significant deviations from what moral philosophers and the community would perceive to be just. Such a distribution therefore would suffer the crime control costs of such deviations, but without the crime-control benefits that might derive from the traditional utilitarian mechanisms for fighting crime, such as general deterrence, incapacitation of the dangerous, or rehabilitation as distributive principles.

Deontological desert and empirical desert differ from vengeful desert in a number of important ways. Their primary concern is setting punishment that puts the offender in his proper ordinal rank according to his moral blameworthiness, rather than a concern for the absolute amount of punishment imposed or for the exact severity of the punishment continuum endpoint. Once that endpoint is set, which all societies must do, the demands of deontological and empirical desert are quite specific. These conceptions of desert also

differ from vengeful desert in that their focus is almost exclusively on the amount of punishment, not the method by which it is imposed, thus, they have no preference for prison. (These conceptions of desert can play a role in setting the general severity of punishment, in determining the punishment continuum endpoint, but only to suggest a range of punishment severity beyond which the endpoint should not be set. In other words, “limiting retributivism” may well make sense in this context, even if it is inappropriate as a distributive principle for punishment.)

Deontological desert differs from empirical desert in that the former offers a transcendent truth about justice, while the latter offers only the community’s intuitions of justice. In that regard, deontological desert would seem to provide an advantage over empirical desert because the latter suffers from the fact that people’s intuitions of justice may be unjust, in a transcendent moral sense. In contrast, deontological desert suffers a number of difficulties as a distributive principle that empirical desert does not. There is significant disagreement among moral philosophers about the principles of justice, which makes it difficult use it as the basis for constructing a working criminal justice system. It also may be criticised as failing to avoid avoidable crime. One might be tempted to use it nonetheless, perhaps in conjunction with empirical desert, to provide a transcendent check on the principles of justice derived from the community’s shared intuitions of justice, but because of modern moral philosophy’s heavy reliance upon intuitions of justice, there is some question as to whether it can effectively perform even this role.

Empirical desert distributes punishment according to the principles of justice derived from the community’s shared intuitions. There is a good deal of agreement on these intuitions, at least regarding those core wrongs that make up the central part of criminal law, and it is practicable to construct a criminal justice system based upon this conception. Its primary focus is assuring that an offender receives the punishment that will place him at his appropriate ordinal rank according to his blameworthiness (although empirical desert can also have some influence in a society’s setting the endpoint of its punishment continuum, but in this role, it operates only by identifying extremes beyond which the endpoint should not be set). Empirical desert does not suffer the standard disutility objection leveled against deontological desert because it is designed to advance the interests of effective crime control: by building system’s moral credibility with the community, it harnesses the enormous power of social influence. But it is subject to the valid criticism that it may produce results that, while they reflect the community’s shared intuitions of justice, nonetheless may be unjust in the sense of a transcendent truth of justice.

CONCLUSION

It has been argued here that the failure to appreciate the existence of three quite distinct conceptions of desert - vengeful, deontological, and empirical - commonly leads to confusion in the critique of desert as a principle for the distribution of criminal liability and punishment. Criticisms of desert are commonly offered without appreciating that a criticism may be valid with regard to one conception of desert but not another, thus leading writers to reject “desert” generally while in fact their criticisms only suggest rejecting one specific conception of desert. And where desert is adopted as a distributive principle, the failure to appreciate the different conceptions creates confusion in its application. Arguments based on one conception of desert are used as the basis for an application based upon a different conception. It is not uncommon to see writers switch between different conceptions of desert during their analysis without acknowledging, or perhaps even realising, that they are doing so.

Distinguishing the three modern conceptions of desert may clarify the terms of the debate, but it might not. Consider this: In speculating about the cause of the confusions reviewed in Part III, it may strike one as an odd coincidence that the modern scholars who make use of the vengeful conception of desert commonly are those who oppose it.¹⁰⁷ It is hard to know whether this is cause or effect. Do they oppose a desert distributive principle because they conceive of desert in the terms described here as vengeful desert? Or, do they treat “desert” in their writings as having the characteristics of vengeful desert because they oppose a desert distribution, and vengeful desert provides the ugliest straw man available to help them rally the opposition they seek? But even if some misunderstandings in the current debate are not accidental, an account of the important distinctions among modern conceptions of desert can at least make it more difficult to mislead.

Whatever the cause of the confusion, it seems clear that the usefulness of the ongoing debate over desert as a distributive principle can only be enhanced by distinguishing these three conceptions of it. Given the recently increasing popularity of desert, clarification of the debate has not only academic but practical importance.

¹⁰⁷ See for example A. J. Hosmanek, “Cutting the Cord: Ho’oponopono and Hawaiian Restorative Justice in the Criminal Law Context” (2005) 5 Pepp. Disp. Resol. L.J. 359, 370; C. Slobogin, “The Civilization of the Criminal Law” (2005) 58 Vand. L. Rev. 121, 147; R. Shafer-Landau, “The Failure of Retributivism” (1996) 82 Phil. Studies 289, 299; Tonry, note 40 above; Rubin, note 40 above; Dolinko, note 42 above; Lacey, note 19 above; Dressler, note 78 above; Luna, note 78 above; Murphy, note 83 above.