

## Partial Desert

Tamler Sommers

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### 1. Introduction

Moral luck occurs when agents are morally evaluated for things that are beyond their control (Williams, 1981; Nagel, 1979). A particularly clear kind of moral luck is “resultant luck,” or luck in the way things turn out. Attempted murderers are judged less harshly than successful ones though both intended to kill their victims. Drunk drivers who have an accident resulting in the death of a pedestrian may be convicted for manslaughter or worse; drunk drivers who are caught without incident get nothing more than a suspended driver’s license or compulsory participation in an online seminar. Some philosophers, most notably Aristotle, accepted moral luck as a fact of life. Contemporary philosophers, however, tend to regard moral luck as a serious problem or even a paradox because they employ a Kantian concept of moral desert according to which agents can be justly blamed or praised only for aspects of actions that are within their control.

The ongoing controversy over victim impact statements (VIS) shows that this conception of moral desert is pervasive within criminal justice systems as well, at least in the West. VIS are statements that express the grief and suffering of the victims of crimes as well as their views on what would be a suitable punishment for the offender. In the well known 1987 Supreme Court

case *Booth v. Maryland*, the Justices overturned a lower court's use of a VIS in a capital crime.

Writing for the majority decision, Justice Lewis Powell explains:

The focus of a VIS...is not on the defendant, but on the character and reputation of the victim and the effect on his family. *These factors may be wholly unrelated to the blameworthiness of a particular defendant.* As our cases have shown, the defendant often will not know the victim, and therefore will have no knowledge about the existence or characteristics of the victim's family. Moreover, defendants rarely select their victims based on whether the murder will have an effect on anyone other than the person murdered. *Allowing the jury to rely on a VIS therefore could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill.* This evidence thus could divert the jury's attention away from the defendant's background and record, and the circumstances of the crime. ((*Booth v. Maryland*, 1987, p. 253; my italics)

The worry about VIS noted in the majority decision is precisely that it introduces an unacceptable degree of resultant luck in the sentencing process. According to Powell, punishment should be tied exclusively to the "personal responsibility and moral guilt" of the offender. The VIS contains information that the offender could not possibly have known or foreseen at the time of the crime. The amount of grief a particular family will feel, how vindictive or forgiving their natures happen to be—all of this is beyond the control of the offender. It has nothing to do with the offender's "decision to kill" and, according to Powell, is therefore unrelated to his moral guilt and personal responsibility.

Though the courts may try to minimize its effects in certain cases, it is clear that moral luck pervades our legal system and everyday lives. It seems right that a drunk driver who

accidentally kills a pedestrian deserves more punishment than one who made it home safely, even if it is perhaps unfair for the difference to be so extreme. How can we account for our intuitions in such cases? One alternative would be to claim that although their intentions were the same, the drivers performed two different actions. The first driver is judged for the act of killing a pedestrian while driving drunk, the second for a normal DUI. Another would be to claim that the two drivers are equally deserving of blame, but that judgments about the proper punishment must take harm into account.<sup>1</sup> Finally, one may claim that the drivers deserve the same amount of punishment, but that for various consequentialist reasons we have to punish the second driver more harshly.

In this chapter, I defend a fourth alternative. I argue that we should not understand desert as impartial or ‘blind,’ connected only to the personal culpability of the agent. Rather, we should instead adopt a “partial” account according to which desert judgments are properly sensitive to the feelings, desires, and behavior of those most closely affected by the wrongdoing. Section 2 outlines in a little more detail the conception of moral desert that I wish to challenge. Sections 3 and 4 present several cases and variations that appear to undermine the impartial view and offers a new account of desert that can better account for our judgments in the cases. Section 5 introduces a relevant distinction in penal philosophy about the relationship between desert and proportionality. The final sections defend the partial account against common objections and offers reason to prefer to it alternative accounts.

## **2. The Accepted Framework for Desert Judgments**

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<sup>1</sup> This alternative may just push the problem back a step, however, since it does not explain why it is fair to punish wrongdoers for aspects of their behavior that are beyond their control.

Theories of moral desert—both compatibilist and incompatibilist—devote most of their attention to identifying general conditions or criteria that have to be met in order for agents to be blameworthy for their behavior.<sup>2</sup> The conditions differ depending on the theory, but they all focus exclusively on facts about the agent. This is true for both compatibilist conditions (e.g. reasons-responsiveness, attributability) and incompatibilist conditions (e.g. ultimate responsibility or the ability to do otherwise).<sup>3</sup> Only agents who meet these conditions are eligible to deserve blame and/or punishment for their actions.

Skeptics about desert can stop here since the conditions for moral responsibility in their accounts cannot be met. Non-skeptical theories, however, must also offer a way to determine how *much* blame or punishment an agent deserves. Although this aspect of the debate does not receive as much attention, the formula seems to go as follows. Agent-centered facts determine if the agent is morally responsible and perhaps to what degree.<sup>4</sup> This judgment is then coupled with judgment about the gravity of the offense to determine the amount of blame or punishment the agent deserves. For the purposes of this paper, I will refer to judgments that combine (1) the severity of the wrongdoing and (2) the agent's moral responsibility for performing it as judgments about the agent's *personal culpability*. The accepted framework—or what I will sometimes refer to as the impartial conception of desert—regards personal culpability as determinative of how much blame or punishment the agent deserves.

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<sup>2</sup> This chapter focuses only on desert for morally wrong or bad actions.

<sup>3</sup> See e.g. Fischer and Ravizza (1998), Kane (1996), van Inwagen (1983). Exceptions to this rule, depending on one's interpretation, may include Strawson (1962), Wallace (1994), and Scanlon (2008).

<sup>4</sup> It is surprisingly difficult to find discussions of the *degrees* of moral responsibility in the philosophical literature. Perhaps this is because theories of moral responsibility tend to be framed in terms of necessary and sufficient conditions.

For some, these remarks may seem so obvious as to be hardly worth mentioning. We are, after all, assessing what the agent deserves, so of course we look to facts about agents and their actions. And certainly, when considered in abstract terms this approach to desert is intuitively compelling. It is also consistent with certain intuitions about fairness and our desire to be master of our own fate. When applied to particular cases, however, the framework can produce counterintuitive results and may therefore require revision. The modification I propose accepts that facts about personal culpability are *necessary* for making desert judgments, but denies that they are the whole story. Desert judgments, I argue, must in addition consider certain facts that are independent of the agent and the action. I refer to this as the ‘partial conception’ of desert because it takes into account facts about particular individual victims—their behavior, desires, and attitudes—all of which can be beyond the offender’s control.<sup>5</sup> In my revised framework, the agent’s personal culpability sets a *spectrum* for how much blame and punishment can be deserved. But additional facts are required to make more precise determinations within that spectrum. On my account, then, agents who are equally culpable may deserve different amounts of blame and punishment depending on these facts.

### **3. Partial Desert**

The following two cases offer some support for my proposal. They begin the same way:

*John is a 33 year old graduate student at the University of Utah. He goes to a football game and gets very drunk. He plans to leave his car at the stadium and get a ride home from a friend, but there is miscommunication and his friend leaves without him. In general, John is morally opposed to drunk driving and almost never does. But it is almost impossible to get a*

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<sup>5</sup> As should be clear, I use ‘partial’ here to contrast with ‘impartial’ rather than with ‘wholly’ or ‘fully.’

*cab, so John reluctantly drives home in his intoxicated state. Just before he reaches his house, he has an accident causing him to swerve into a driveway where a young girl was playing. The girl is killed instantly. Panicked, still drunk, not thinking clearly, he leaves the scene and goes home. As he sobers up, he is overcome with remorse. He considers turning himself in but is terrified of going to jail and decides against it.*

Now the story splits into two directions.

### **First Scenario:**

*The police track down John, arrest him, and put him on trial. Perhaps because the death involved a child, as well as a hit and run, the D.A. manages to convict John for homicide and the judge sentences him to the death penalty. Since this takes place in Utah, John dies at the hands of a firing squad.*

**Judgment:** Most, I imagine, would call this an unjust verdict. The killing, after all, was completely unintentional. John showed no ill will whatsoever towards his victim or anyone else. True, he made the decision to drive drunk but there were many people in far worse condition than John who drove home from the game and were lucky enough to avoid this tragedy. It is truly a case of terrible moral luck that his accident resulted in the death of a child. To be sure, John deserves a harsh sentence for his crime, John himself would likely agree with that. But few would say that he deserves to *die* for it.

### **Second Scenario**

*The police are unable to discover who caused the accident. The parents of the child are grief stricken, completely distraught. Their daughter meant everything to them. Since the police are overtaxed and the case has gone cold, they vow to find the culprit*

*themselves. They cash out their retirement funds, sell their house, and hire the best private investigators. Eventually they discover that it was John who caused the death of their daughter. The father goes to John's house, taking his gun. When he sees John, he is overwhelmed with anger and grief. The image of his daughter playing in their driveway flashes through his head. He takes out his gun and shoots John in the heart, killing him.*

**Judgment:** In this scenario, by contrast, it seems far more plausible that John gets what he deserves. At the very least, John seems significantly more deserving of his fate in the second scenario than the first. (If “John gets what he deserves” were on a Likert scale, I imagine people would be much closer to ‘agree’ in the second scenario than the first.) Furthermore, *John himself* would likely feel the same way—I certainly would in his shoes. Facing the firing squad, John might be furious at the injustice and the unlawfulness of the verdict. But looking down the barrel of the father’s gun, he may think: “I ended the life of this man’s child. If he wants to shoot me, that’s his right. I have this coming, it’s what I deserve.”

I should emphasize we are not evaluating the morality of the father’s action, but rather whether John receives what he deserves. These are separate matters. To take a grisly example, imagine that a gang of rapists coincidentally choose as their victim a man who is a serial rapist himself. We might say that gang acted immorally but nevertheless that the serial rapist got precisely what he deserved. My claim, then, is not that the father acted rightly in shooting John. It is that John seems to deserve his fate (being shot in the heart) more when it is the father, rather than state, who carries it out. Yet the accepted framework cannot account for this judgment. In both cases, John’s personal culpability and his punishment (being shot in the heart) are identical.

Our judgments about what John deserves, then, do not seem to be based entirely on facts about the wrongdoing and John's responsibility for performing it.<sup>6</sup>

For readers who lack my intuitions about these cases, my argument will likely not have much force—at least not yet. Those who share my intuitions but still wish to preserve the impartial conception of desert must explain why we come to different judgments in the two cases. One might appeal to consequentialist considerations, but desert—as a backwards-looking concept—is essentially non-consequentialist in nature; it would be surprising if the difference in intuitions were sensitive to such factors. More importantly, it is not clear that the consequences are better in the second case than in the first. Indeed, they may be worse, since the father will likely be imprisoned himself, causing even more suffering for himself and his wife.

One might object that our intuitions in the first case are responding to the *legal injustice* of the verdict. After all, involuntary vehicular manslaughter is not a capital crime. The D.A. would probably have to fudge the evidence or mislead the jury to get the conviction. Perhaps we are feeling more lenient towards John in the first case because of the legally unfounded conviction for homicide. I agree that there seems to be a legal injustice in the first case, but I do not think it can account for the difference in intuitions. After all, the law is not being respected in the second scenario either. Federal or State law does not allow for parents of victims to take the law into their own hands. And if it is unjust in principle to issue a capital sentence when

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<sup>6</sup> We may also imagine an analogous set of cases in which John receives what seems like too lenient a sentence. In the first case, the judge gives him probation and no jail time. In the second, the father finds John, sees that he feels tremendous guilt, that he is horrified by what happened, and decides not to turn him in to the police. Again, I would suggest that John seems more deserving of the lighter sentence in the second case than the first.



there is no *mens rea* on the criminal's part, then it should be equally unjust for the father to carry out the killing himself.

A more promising strategy might appeal to our natural sympathy for the father. We may feel that the father's actions were understandable in a way that the State's was not. We may even believe that the father deserves his vengeance, which then affects our judgment about what *John* deserves. I agree that our judgments may be sensitive to our sympathy for the father, but it is not clear that this is a distorting influence rather than an appropriate one. My claim is that our desert judgments *should* be sensitive to our sympathy for the particular victims of wrongdoing. Again, imagine the case from John's perspective. If I were John, I would feel enormous sympathy for the child's father, and my sympathy might lead me to think it is in large part up to him as an individual to determine what I deserve. Unless we are already committed to the impartial conception, I see no reason why we should regard this sympathy as a distortion of John's judgment. One might try to turn this reply into another objection to the partial conception. Perhaps the difference in judgments can be traced to what happens when we take the agent's perspective. But again, there is no reason to think that this is a distorting influence—why shouldn't we take the agent's perspective into account? The reply: "Because the agents' subjective perspective is irrelevant to objective judgments about what they deserve" begs the question. It is true that agents are likely to be biased in their own favor, or at times feel excessive unwarranted guilt. But this just means we should be careful about how we interpret the agent's perspective, not that we should ignore it entirely.<sup>7</sup>

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<sup>7</sup> As an anonymous referee notes, this case has an additional complication, namely that the victim is dead and her wishes regarding the punishment are unknown. (Or she may be too young to have well-considered feelings about John's punishment.) This raises the question of how desert might be affected if her parents or close relatives had

#### 4. The Complexity of Desert

Two more cases may help to illustrate the relevance of the victims' feelings to the offender's deservingness. Both are variations of the second case in which the father shoots John. The variations focus on the father's feelings after the shooting.<sup>8</sup>

##### **Third Scenario:**

*The father recognizes that he acted in a moment of blind rage and despair, and regrets the shooting immediately. He calls for an ambulance but it arrives too late, John is dead. Although there is a small glimmer of satisfaction that John will not get away unpunished, on balance he feels worse than before. John did not mean to hurt his daughter, people drive drunk all the time. As the father looks down at John's lifeless body, the senselessness of his revenge seems tangible. The only thing he seems to have accomplished is the waste of the another life. The father wishes desperately that he had simply turned John into the police.*

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different wishes regarding the punishment—for example, if the mother felt more retributive and the father more merciful. I agree that this is a difficult and important question, one that my 'partial' view of desert must address. For the purposes of this more programmatic paper, however, it's enough to point out that such factors (agreement or disagreement among the relatives or those closely connected to the victim) actually *matter*, even if we cannot yet specify how much. On the impartial conception of desert, these factors would be irrelevant.

<sup>8</sup> These variations are inspired by Chandra Sripada and his comments on the *Flickers of Freedom* blog. I am grateful for his contributions as well as many others on that post. See:

<http://agencyandresponsibility.typepad.com/flickers-of-freedom/2010/08/can-there-be-partial-as-opposed-to-impartial-desert.html>.

**Judgment.** Before learning about the father's feelings, it seemed that John deserved his fate (or at least that he was more deserving than in the first scenario). But the father's regret seems to undermine this intuition. Now my reaction resembles when John was executed by the state—the punishment seems excessive and undeserved.

#### **Scenario 4**

*The father recognizes that he acted in a moment of blind rage. Still, upon reflection, he feels that justice was done. He recognizes that this act will not bring his daughter back, and that nothing will alleviate the suffering he feels in her absence. But at least he has paid his debt to her and did not allow the person who killed her to get away with it. He feels a strange sense of peace, although his grief is just as acute. The father calls 911 right away and confesses to the crime. He accepts responsibility for his action, and waits for the police to come and arrest him.*

#### **Judgment:**

Now my initial intuitions that John deserved his fate are, if anything, even stronger than in the second case. The father has performed the act, owns up to it, and even feels a small degree of satisfaction. He has risked and sacrificed a great deal to bring about the punishment. He accepts responsibility and will now go to prison. Perhaps if we were in the father's place, we would not feel or act this way. But there is a significant sense in which it is not up to us, because we did not suffer from the offense. Again, if I can inhabit John's perspective (now from beyond the grave), I would accept that I had received what was coming to me.

It may seem that I am edging (or hurtling) towards a *reductio* of my own position. Judgments of *John's* deservingness are supposed to be sensitive to the father's feelings about his act of revenge after performing it? To how much the father risked and sacrificed to make it

happen? To his willingness to accept responsibility and punishment? In the remainder of this chapter I hope to minimize the incredulity that accompanies such questions and argue that the answer to all of them is a simple ‘yes.’

## **5. Cardinal and Ordinal Proportionality**

I mentioned earlier that when considered abstractly, there is a good deal of intuitive plausibility to the impartial conception of desert. This is due in large part to a long-standing (but insufficiently analyzed) idea that the punishment should fit the crime. The proportionality principle is a hallmark of retributive or ‘just-desert’ theories of criminal justice, and indeed one of the main objections to rival utilitarian theories is that it would allow for disproportionate punishments. The criminologist Andrew von Hirsch calls the principle a “basic requirement of fairness” and describes it as follows:

(1) [T]he principle of proportionality concerns how much punishment one deserves; (2) deserved punishment should be commensurate to the degree of blameworthiness of the conduct; and (3) blameworthiness depends both on the harmfulness of the conduct and on the degree of culpability of the actor blameworthiness depends both on the harmfulness of the conduct and on the degree of culpability of the actor.” (Von Hirsch, 1978, p.622).

But the proportionality principle has some well-known difficulties as well. The primary problem concerns our inability to determine what kind of punishment is commensurate with a given crime. What is the deserved punishment for armed robbery? Ten years in prison? Fifteen years? Two years and probation? Flogging? As Von Hirsch recognizes, desert theorists have been notoriously unsuccessful at offering principled answers to these questions. Von Hirsch

presents the problem in the form of a dilemma. If we assume that a particular crime warrants a specific quantum of punishment, then we must presuppose “a heroic kind of intuitionism: that if one only reflects enough, one will “see” the deserved quanta of punishment for various crimes.” (Von Hirsch, 1992, p. 76) Unfortunately, no one seems to have such illuminating intuitions and it is implausible to think that more moral reflection will remedy this. The other option is to employ a ‘range-only’ view of desert according to which a criminal’s personal culpability determines only the upper and lower limits of deserved punishment—a view defended by Norval Morris (Morris, 1982). Morris’s view allows for a wide range of deserved punishments for a particular crime. It is only when punishments fall outside this range that our intuitions give us a clear sense that the punishment is *undeserved*. A heroic form of intuitionism, then, is not required for the range-only view.

According to Von Hirsch, however, Morris’ account is open to what he calls “a fundamental objection”: it would allow two offenders who are equally culpable to receive different punishments. And this is just the sort of unfair outcome the proportionality principle is supposed to rule out. Von Hirsch’s proposed solution to this dilemma employs a distinction between *cardinal* and *ordinal* proportionality. Cardinal proportionality is absolute: it ‘anchors’ the severity of the punishment to the culpability of the criminal (which includes the harmfulness of the crime). Cardinal proportionality must remain ‘range only,’ issuing upper and lower limits where punishments would obviously be either too severe or too light. Ordinal proportionality is relative. It has two aspects. The first is parity: like crimes must be treated alike. If two criminals are equally culpable then they should receive the same punishment. Second, punishments must be proportionate relative to one another. If one crime is twice as serious as another, the punishment should be twice as serious as well. The leeway that cardinal

proportionality allows in deciding the anchoring points of the scale explains why we cannot perceive a single right or fitting penalty for a particular criminal. Once the anchoring points of the scale have been fixed, however, the more restrictive requirements of ordinal proportionality begin to apply.

In practical terms, the idea would be roughly as follows. We do not know precisely what the punishment should be for, say, car theft. There are a range of punishments that might be proportionate for this crime and in absolute terms, proportionality just requires that we stay within this range. We do know, however, that car theft is a less serious crime than armed robbery. So the proportionality principle requires that (a) two equally culpable car thieves receive the same punishment, and (b) armed robbers receive a more severe punishment than car thieves. Von Hirsch offers university grading practices as an analogy. The standards for ‘A’ papers and ‘B’ papers and so forth are real but indeterminate (cardinal proportionality) and may depend on non-merit based factors about the university. But once those standards are set, fairness requires that we give papers of equal merit the same grade (ordinal proportionality).

The initial intuitive resistance to the idea of partial desert is rooted in our commitment to ordinal proportionality. But the depth of this commitment is open to question. In fact, outside of the context of criminal justice, it’s not clear that we are committed to ordinal proportionality at all. Imagine that a woman decides to leave her philandering husband and he replies: “I understand you’re angry, but fairness requires that you don’t leave me. Bill’s wife stayed with him and he’s had several more affairs than I have.” Would the wife be moved by this consideration? Should she be? Everyday life is filled with cases like this—acts of infidelity, betrayals of trust, insulting or offensive remarks, and many others. We do not imagine that there is a correct response or punishment, one that is tied only to the agent’s personal culpability. Nor

do we cry foul when people who are equally culpable do not receive the same amount of blame or punishment. We leave it up to the relevant parties to determine the right response, within certain boundaries.

What does survive outside the context of criminal justice is our commitment to *cardinal* proportionality. We maintain that there is a range of appropriate blame or punishment responses and that responses outside of this range would be undeserved. Whether the betrayed spouse asks for a trial separation, files for divorce, gives the partner another chance is largely up to them. All of these are proportionate responses. But imprisoning the spouse or killing him or even cutting off all access to the children would be disproportionate. The husband (as well as third parties) might legitimately complain that the treatment is undeserved. It is significant that von Hirsch employs the practice of essay grading to illustrate the importance of ordinal proportionality. Certainly, it is a desert-based practice, but when a student writes a bad paper, there is no victim.<sup>9</sup> Offenses or crimes, by contrast, have identifiable victims who have suffered at the hands of the offender. The presence of victims is a morally relevant factor that affects our understanding of proportionality and desert. Exactly how is the topic of the next section.

## **6. The Desert Spectrum**

On my account, whenever a desert-based practices involves victims as well as agents, personal culpability can only set a spectrum for how much blame and punishment the offender deserves. For more precise determinations, we must take facts about particular victims into account. The impartial conception regards the feelings and desires of the offended parties to be irrelevant to desert. By contrast, I see them as *essential* for determining an appropriate response

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<sup>9</sup> Aside from the instructors who have to comment on them.

within the spectrum of deserved responses. How narrow or broad is the desert spectrum set by personal culpability? This is a tough question. It seems to vary depending on the kind of case that we are judging. My hunch is that the spectrum is broadest in cases where the offense is accidental or the result of negligence. This is why there is such a wide range of deserved outcomes in the John cases. At one end of the spectrum is the outcome of the second case—John being shot in the heart. The other end might include outcomes that allow John to go free. Imagine that the parents track John down and confront him. They express their anger and grief and sense of loss. They see that John is consumed with remorse and has been since the accident. The meeting gives the parents a sense of peace and closure. They see that John would not do well in prison, and they decide, after some tortured reflection, not to turn him into the police. Many might call this a just outcome. Others might disagree and claim that the parents were admirable in showing mercy, but that John was clearly getting less than he deserved. There is room for reasonable disagreement on this question. But compare this outcome to one in which John, through a plea bargaining agreement, is offered a suspended sentence—in spite of the protests of the child’s parents. It seems undeniable that John is more deserving of his freedom when the parents bestow it on him. I am not claiming that the parents’ wishes and attitudes determine John’s deservingness entirely. John could not deserve a month long cruise to the Galapagos Islands no matter what the parents’ wanted. Nor could he deserve to be tortured for twenty consecutive years. Again, we may reasonably disagree about the end points of the spectrum. But the accidental nature of the crime does seem to yield a strikingly broad range of deserved punishments. By contrast, if John had deliberately killed the young child in cold blood, the range might be significantly compressed.

## **7. Philosophical Busybodies**



The philosophical temperament may rebel against the looseness of this account. To some, it will appear arbitrary, irrational, unsystematic, perhaps even antithetical to the project of providing a principled basis for desert assignments. Certainly, this has been the reaction of the legal academy to the rapidly growing victim's right movement that involves the victims in the sentencing process. Yet as I have noted, the demand for impartiality and rational consistency is completely at odds with our everyday practices, where victim involvement is expected and welcomed. Indeed, the partial view is probably most intuitive when punishment is not at issue, and the question concerns how much blame to assign to the offender. Should Sarah blame her sister Emma for not remembering her birthday because she was stressed about her job? That is up to Sarah—no theory should tell her the right or rational response. Certainly, impartial considerations should play some role in desert assignments, especially in more severe cases of wrongdoing. But the partial account allows for this by maintaining the commitment to cardinal or range-only proportionality. Why should we aspire to more precision than this? The common assumption that theories should dictate to people exactly how much they should blame the person who wronged them deserves scrutiny.

The increasing popularity of restorative or restitutionary movements in penal philosophy is relevant here. These movements have emerged out of the increasing dissatisfaction with the depersonalized, process-oriented, excessively rationalistic nature of our current criminal justice system.<sup>10</sup> According to Lucia Zedner, the system “has transformed the drama and emotion of social interaction and strife into technical categories which can be subjected to the ordering practices of the criminal process.” (Zedner, 1994, p. 231) Proponents of restorative justice argue that the blend of retributive (desert-based) and utilitarian principles of our current system

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<sup>10</sup> See e.g. Barnett (1977), Strang and Braithwaite (2000), Van Ness (1993), and Zedner (1994)).

is unjustly one-sided in its focus on the criminal. The victim is just a faceless vessel for wrongdoing—like a poor essay that justifies a low grade. This has the effect of alienating the victims and diminishing their self-respect even further.

The criminologist Nils Christie has famously accused the criminal justice system of “stealing conflicts” from their rightful owners. Lawyers, he claims, are particular good at this form of larceny:

Lawyers are...trained into agreement on what is relevant in a case. But that means a trained incapacity in letting the parties decide what they think is relevant. If the offender is well educated, ought he then to suffer more, or maybe less, for his sins? Or if he is black, or if he is young, or if the other party is an insurance company, or if his wife has just left him, or if his factory will break down if he has to go to jail, or if his daughter will lose her fiancé, or if he was drunk, or if he was sad, or if he was mad? There is no end to it. And maybe there ought to be none. (Christie, 1977, p.8)

This extraordinary passage should trouble more than just lawyers. For if we replace ‘lawyers’ with ‘philosophers’ or ‘desert theorists’ in Christie’s remarks, we expose some of the dubious assumptions and aspirations in our current approach to moral desert. Our ever-more refined accounts of blame and punishment—accounts that are supposed to apply across the board, no matter what the relevant parties might think—may have the effect of stealing conflicts from particular individuals. This whole approach exhibits a ‘trained incapacity’ to let individuals decide which factors are relevant and how much. Zedner’s accusation seems apt as well. By focusing entirely on impartial conditions of criminal culpability, our theories transform the

drama and emotion of social interaction and strife into technical (often metaphysical) categories which can be subjected to a systematic ordering process of desert attribution.<sup>11</sup>

Let me conclude this section by describing a real criminal case that occurred recently in Grand Junction, Colorado, one that resembles the hypothetical example I introduced earlier. A woman was driving in the early morning, drunk and high on methamphetamines. On the way, she had an accident and hit a sanitation worker. The worker's legs were shattered, causing him to endure ten surgeries. During her trial, the worker testified and asked the judge to give the woman a lenient sentence. He explained that he could relate to her predicament, that he had been in a dark place once, and he hoped she could eventually get to a better place. The prosecutors and judge took his desires into account, dismissed the most serious charges, and the woman received the minimum sentence allowable—still over five years in jail.

Here we have a clear violation of ordinal proportionality. Many people who are equally culpable in Colorado have been given much higher sentences and many will again. But did the judge and prosecutor violate a “basic requirement of fairness”? Is this case clearly unjust? The victim of the offense is satisfied, more than he would be if his wishes had not been considered. The woman is still receiving a punishment within a reasonable cardinal range. Is it our business as philosophers to complain about the verdict, those of us who have not suffered in any way from this crime? Doing so, in my view, would make us ‘philosophical busybodies’ sticking our collective nose where it doesn’t belong.

## **8. Conclusion**

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<sup>11</sup> One might interpret Strawson (1962) as making a similar point about the moral responsibility skeptic who believes that ‘blame is metaphysical.’ “The metaphysics,” Strawson writes, “is in the eye of the metaphysician.” (p. 24).

For all the insights it provides, there is a crucial difference between the restorative justice critique and my own. Proponents of restorative justice regard it as an alternative to retributivist or desert-based approaches to criminal justice. In my view, we should *incorporate* facts about individual victims into the way we understand desert for wrongdoing, criminal and non-criminal. My account, then, is not an alternative but rather a revised version of desert theory or retributivism. In order to make a judgment about what John deserves in our original case, we have to know more about what John and the parents want and believe. For partial desert judgments, it matters whether the parents are vindictive or forgiving. And it matters what John himself feels when he looks into their eyes.

Defenders of our current criminal justice system like to think that as an enlightened society, we have transcended the revenge feelings and practices of our barbarous past and replaced it with “justice,” which is rational and not subject to emotional bias. But the retributivist project in the West has struggled to develop a coherent notion of ‘just-deserts’ that does not appeal in any way to our natural disposition for vengeance. In my view, the fears of allowing emotions into the equation are way overblown. No one is advocating for a return to the days of endless tribal warfare. There is a middle ground, one that allows individual victims to *influence* our desert judgments under certain defined parameters, but not to determine them.

These remarks lead to what may be the strongest objection to my argument. One might claim that I am conflating two distinct concepts: (1) what the offender deserves and (2) the just outcome of the crime. A critic might concede that to determine the just outcome, we must take other factors besides the deservingness of the offender into account—the costs of the punishment

and perhaps even the victims' interests and facts about what *they* deserve.<sup>12</sup> Our judgments about the John cases, then, reflect our intuitions about the just outcome of the crime rather than intuitions about what John deserves.<sup>13</sup>

In response, let me first distinguish consequentialist factors from other justice-related factors independent of the just-deserts of the offender. I agree that we can distinguish desert judgments from 'all-things-considered' judgments about blame and punishment that take consequentialist considerations into account. Recall, however, that the different desert judgments in the John cases could not be traced to such considerations. I agree as well that judgments about John's *moral responsibility* for the offense are distinct from judgments about what John deserves for having performed it. Moral responsibility on this account is constituted by agent-centered factors in a way that desert is not.<sup>14</sup> The objection, then, must be that we need to distinguish John's deservingness from other justice-related judgments about his case. Interpreted in this manner, however, the objection just begs the question by assuming a conception of desert that is tied only to the personal culpability of the offender. If we do not

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<sup>12</sup> In penal philosophy, this type of account is known as the 'hybrid view' developed by Paul Robinson (1987) among others.

<sup>13</sup> Once again, this objection is inspired by comments on my *Flickers of Freedom* post. A related objection, raised by an anonymous referee, is that I am conflating the notions of what John deserves and those of what "serves him right." In response, let me first say that I'm not sure there is a substantive difference between the notions of desert and those like "serves him right" and "had it coming to him"—although I recognize that many or most philosophers will disagree with me on this point. Second, even if there is an important difference between those notions, it's not clear that the distinctions explain our different intuitions regarding desert in the John cases.

<sup>14</sup> Thanks to Tim Scanlon and Sarah Buss for convincing me on this point.

employ this conception from the outset, then there is no reason to think the justice-related judgments are distinct.

The partial conception has some significant advantages as well. Since it lacks the commitment to generality and objective precision, it is less vulnerable to the endless array of counterexamples and theoretical difficulties that have plagued desert theory to date. The partial conception may also offer a new way of addressing the ‘paradox’ of moral luck that I described at the outset of this chapter. The reason the drunk driver who has an accident involving a pedestrian deserves more blame and punishment than the drunk driver who makes it home without incident is that there are victims in the former case. Although the drivers had the same degree of control over the offense, desert judgments must take the harm and interests of victims into account as well. Since there are no victims for the second driver, he deserves significantly less blame and punishment. One can apply similar strategy to other kinds of moral luck, including the most pervasive—constitutive luck. If our method for settling on a desert concept is reflective equilibrium, the ability of the partial account to address a problem as ancient and intractable as this one should count as a considerable virtue in its favor.<sup>15</sup>

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