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CRIMINAL LAW

INTRODUCTORY REMARKS: CRIMINAL LAW PANEL

CYNTHIA V. WARD*

INTRODUCTION

The topic of Law and Morality is a capacious one, and the essays on this Panel approach it from different corners of a very large tent. In *The Role of Moral Philosophers in the Competition Between Deontological and Empirical Desert*, Paul Robinson wonders not so much about the role of morality, but about the role of moral *philosophy*, in resolving some of the long-contested issues that beset the law of crime. Acknowledging the importance of desert as a justification for criminal punishment, Professor Robinson envisions a competition between two subconceptions: deontological desert, according to which blameworthiness is assessed by reference to acontextual principles of right and good; and empirical desert, which grounds judgments about blameworthiness in the actual intuitions of citizens, as collected and evaluated using the methods of social science.¹ Robinson argues that contemporary moral philosophy focuses heavily on the investigation and analysis of existing moral intuitions, and that this focus, although useful in some ways, threatens to inhibit or destroy the important deontological role that moral philosophy should play in the criminal arena.² That role, he

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1. Paul H. Robinson, *The Role of Moral Philosophers in the Competition Between Deontological and Empirical Desert*, 48 WM. & MARY L. REV. 1831, 1832-33 (2007).

2. See *id.* at 1838-43.

argues, is to provide a “transcendent check” on our existing intuitions about justice to ensure that those intuitions are not wrong according to the acontextual principles of right and wrong that deontological conceptions of desert take as central.³

Professor Robinson’s thesis invites a host of interesting questions, only a few of which can even be named in this brief introductory essay. Is there really a strong and analytically defensible distinction between deontological and empirical desert? If so, are these two subconcepts really in “competition” with each other in a way that should matter to the enterprise of moral philosophy? As either an analytical or an empirical matter, how should one distinguish between a “transcendent” principle of right and wrong and a principle that becomes the basis for philosophical interrogation because it reflects a widely shared and empirically verifiable intuition about justice? Are the two varieties of principle innately different in kind; in origin; in application; in result? If so, at what conceptual levels; and must the criminal law take note of them at those levels?

In his essay *The Jurisprudence of Punishment*, Kyron Huigens wonders about the relationship between punishment theories—theories that justify the infliction of criminal punishment—and theories of legality, which attempt to identify and describe the bases for valid legal rules. In Robinsonian terms, Professor Huigens begins in the manner of the contemporary moral philosopher—by naming what he takes to be the widely shared intuition that certain theories of punishment “match” with certain theories of legal validity.⁴ Specifically he wants to test out, and ultimately challenge, the belief that virtue-based punishment theories “belong” to, or “match” with, natural law theory.⁵ In fact, Huigens argues, punishment theory and jurisprudence do not match up in this way. Instead, Huigens makes the provocative, if somewhat enigmatical, claim that punishment theory is “orthogonal to” theories of legality.⁶ Although making moral desert the basis for legal desert in a theory

3. *Id.* at 1841.

4. Kyron Huigens, *The Jurisprudence of Punishment*, 48 WM. & MARY L. REV. 1793, 1793-94 (2007).

5. *Id.* at 1795.

6. *Id.*

of punishment is not incorrect, Huigens argues that it is also possible to construct a purely legal theory of desert, one that is not innately moral in character and that may nonetheless form the basis for an Aristotelian, virtue-based theory of punishment.⁷

7. *See id.* at 1822-28.