

DRAFT

The Methodology of Desert

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I. Introduction

*The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime*¹ brings together material from a series of books and articles in which Paul Robinson (along with various coauthors) builds a case for “empirical desert” as a basis for deciding who should be punished under the criminal law and how much.² In this instance, Robinson canvasses the leading principles for distributing punishment under the Anglo-American criminal law, then argues that desert represents the most promising distributive principle. Ultimately, Robinson distinguishes empirical from deontological desert, concluding that empirical desert—based on a community’s shared intuitions of justice—uniquely offers the potential to reconcile the age-old tension in criminal law between doing justice and controlling crime.

Robinson sets the stage for his discussion of the distributive dimension of punishment by discounting the significance of the scholarly debate about the *justification* for punishment. Although he regards the problem of justification as perhaps the “most fundamental question” for criminal law, Robinson finds the results of that debate

¹ Paul H. Robinson, *The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime*, ARIZ. ST. L.J. _ (2011) [hereinafter *Ongoing Revolution*].

² See, e.g., PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH? (2008); Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 CAMB. L.J. 145 (2008) [hereinafter *Competing Conceptions*]; Paul H. Robinson, *The Role of Moral Philosophers in the Competition Between Deontological and Empirical Desert* [hereinafter *Moral Philosophers*], 48 WM. & MARY L. REV. 1831 (2007); Kevin M. Carlsmith et al., *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. PERS’Y. & SOC. PSYCH. 284 (2002); Paul H. Robinson et al., *The Origins of Shared Intuitions of Justice*, 60 VAND. L. REV. 1633 (2007) [hereinafter *Origins*].

“boring” and “academic.”³ Since the leading alternatives all support the institution of punishment, he suggests, we should not trouble ourselves further about the reasons why.

Instead, Robinson argues, our focus should be the more interesting and practical questions concerning the distribution of punishment. For the results of this important inquiry will determine the nature and scope of guidance we are able to provide sentencing authorities—from legislatures to judges and juries. Indeed, if we choose our distributive principle wisely, we are more likely to reap crime control benefits even as we satisfy the felt need to do justice.

Robinson’s defense of empirical desert as a distributive principle is ultimately unconvincing. As an initial matter, Robinson’s attempt to clear the way for empirical desert by discrediting its leading rival is based on a misconception of the prevailing methodology in deontological ethics. Thus, Robinson imagines moral philosophers engaging in flawed social science—merely surveying their own intuitions—to arrive at “transcendent” judgments of desert and justice. The actual process is normative, not empirical, however, and involves critical reflection on and systematic revision of one’s considered convictions in terms of the values of the relevant political community. The resulting judgments are provisional, not transcendent, aiming at a coherent account of our deepest commitments and their normative implications. Robinson’s breezy rejection of the method of moral philosophy is thus based on a fundamental misunderstanding of the enterprise.

³ Robinson, *Ongoing Revolution*, *supra* note 1 at 1. Also, curiously for so prolific a scholar, Robinson finds the debate unduly wasteful of scarce natural resources. *See id.* (“The moral philosophers have killed many forests answering the [justification] question....”). Presumably, Robinson’s lament for the forests is limited to the dull and useless efforts of moral philosophers.

Additionally, by dismissing as practically irrelevant the grounds for justified punishment, Robinson's analysis fails to take account of the dynamic interplay between social and political values on the one hand and the meaning and justification of punishment on the other. Although what H.L.A. Hart called the "general justifying aim"⁴ of punishment does not entail any particular distributive scheme, the social and political values that underwrite the institution of punishment do and should inform decisions about whom to punish and how much. But because Robinson appears to be interested only in the *perceived* legitimacy of a system of justice, he can settle for a pragmatic conception of desert untethered from our political morality. As a result, whatever his contribution to the revolution in punishment theory, it provides neither the occasion to reflect critically on our punitive institutions and practices nor the normative resources to reform them.

To flesh out these claims, I first consider Robinson's case for empirical desert as the best available distributive principle, then turn to the deontological alternative. I next outline some of the limitations of viewing desert as an empirical phenomenon rather than a moral standard, concluding that empirical desert does not supply an adequate distributive principle for criminal punishment.

II. Distributive Principles

The leading distributive principles for criminal punishment are generally divided into consequentialist and non-consequentialist standards. According to the consequentialist approaches—deterrence, rehabilitation, and incapacitation—punishment should be distributed based on the consequences it is likely to yield. In the case of deterrence and incapacitation, the measure of success is crime control: punishment, or the threat of punishment, is distributed effectively to the extent that it inhibits offenders,

⁴ H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 4 (1968).

or would-be offenders, from engaging in criminal conduct. Rehabilitation also aims at crime control but typically involves more ambitious goals as well, such as behavior or character modification, for the offenders' own benefit.

Desert as a distributive principle traditionally takes a non-consequentialist, or deontological, form. As Robinson notes, desert assigns "criminal liability and punishment according to an offender's blameworthiness, which would take account of the extent of the harm or evil of his conduct, his culpable state of mind at the time of the offense, an assessment of his personal capacities," and so forth.⁵ In this way, desert aims not at any particular consequences, but at justice itself.

Robinson observes that all of the traditional distributive principles are imperfect in one way or another. The consequentialist principles depend on conditions that generally do not obtain and in any case risk unjust outcomes of various sorts. For deterrence to be truly effective, for example, would-be offenders must be aware of the scheme of penalties they face and capable of accurately calculating the costs and benefits of committing an offense, including the likelihood of apprehension, conviction, and punishment.⁶ Incapacitation, which involves disabling an offender from committing future acts of wrongdoing, is generally an effective means of crime control, but amounts to a form of preventive detention. Punishment decisions based on unreliable predictions about a person's future conduct are not only likely to be inaccurate but are almost certainly unjust as well. Finally, desert—at least in its deontological form—though closely associated with justice, lacks the precision to provide operational guidance to sentencing authorities. In particular, Robinson argues, pervasive disagreement among

⁵ Robinson, *Ongoing Revolution*, *supra* note 1 at 10.

⁶ *Id.* at 3-4.

moral philosophers, combined with a dubious methodology, renders deontological desert effectively useless as a distributive principle.

Robinson's solution is empirical desert, which combines the intuitive appeal of traditional desert—the desire to do justice—with the practical benefits of the consequentialist approaches. Like deontological desert, empirical desert “focuses on the blameworthiness of the offender,”⁷ but defines it in terms of the “community's intuitions of justice.”⁸ The relevant intuitions are not derived from abstract philosophical analysis but from “controlled social science studies that determine the factors that influence people's assessment of a violator's blameworthiness.”⁹ However, “it is not the community's view of deserved punishment in a particular case that is relevant”; rather, the process involves asking people “to ‘sentence’ a variety of carefully constructed variations of cases to see what factors influence their punishment judgments.”¹⁰

According to Robinson, the empirical research into people's intuitions of justice reveals a number of useful results. First, people “see punishment as something that is properly imposed according to desert” rather than such factors as dangerousness or deterrence.¹¹ In fact, though the imposition of punishment according to an empirical desert principle may incidentally yield deterrence, incapacitation, or rehabilitation, aiming directly at these goals is likely to produce punishment outcomes at odds with people's intuitions of justice.¹² Finally, “there appears to be an enormous amount of agreement about intuitions of justice across all demographics, at least with regard to the

⁷ Robinson, *Competing Conceptions*, *supra* note _ at 149.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Robinson, *Ongoing Revolution*, *supra* note 1 at 11.

core of wrongdoing—physical aggression, taking property without consent, and deceit in exchanges.”¹³

Empirical desert thus offers several advantages over its rivals. First, because it is an empirical rather than a moral standard, its dimensions can be reliably ascertained. In addition, the convergence of opinion regarding deserved punishment reduces the potential for controversy about whom to punish and how much. Most important, to the extent that punishment matches the community’s shared intuitions about who deserves what, the system of criminal justice will gain moral credibility that can in turn be used to promote law compliance and reform. For if people perceive the criminal law as promoting justice, they are more likely to conform to its requirements, avoid vigilante conduct, and accept novel or progressive extensions of the criminal law.¹⁴ “One may conclude, then, that the crime-control power of the criminal law depends in some significant part upon how well it tracks the community’s shared intuitions of justice.”¹⁵

Robinson recognizes that empirical desert is not without its own limitations. In particular, empirical desert judgments do not constitute “‘true justice’ in a transcendent sense” because they are based only on people’s intuitions of justice, which may themselves be in error.¹⁶ For “[a]t 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.”¹⁷ What is wanted is a standard against which to measure our intuitions of

¹³ *Id.* at 12. Some critics have challenged this empirical claim. See, e.g., Donald Braman et al., *Some Realism About Punishment Naturalism*, 77 U. CHI. L. REV. _ (2010) (arguing that empirical research reveals broad disagreement about deserved punishment for a wide range of criminal wrongdoing). *But see* Paul H. Robinson et al., *Realism, Punishment, and Reform*, 77 U. CHI. L. REV. _ (2010) (arguing that a “core” of agreement regarding desert judgments is indeed narrow but critically important).

¹⁴ Robinson, *Competing Conceptions*, *supra* note _ at 149-50.

¹⁵ Robinson, *Ongoing Revolution*, *supra* note 1 at 12.

¹⁶ Robinson, *Competing Conceptions*, *supra* note _ at 167.

¹⁷ *Id.*

justice. “It is only deontological desert that can give us the truth of what is deserved, insulated from the vicissitudes of human irrationality and emotions.”¹⁸

Despite the initial appeal of deontological desert, Robinson promptly rejects it. In particular, he concludes that the methodology of modern moral philosophy it relies on is hopelessly misguided:

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.”...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.¹⁹

Robinson contends that because deontological desert, as presently conceptualized, depends on the idiosyncratic views of a group of moral philosophers reflecting on their own opinions, it provides neither a transcendent check on empirical desert judgments nor valid empirical evidence of the community’s intuitions about criminal justice.

III. Deontological Desert

Robinson’s account of deontological desert reflects a misapprehension of the method of moral philosophy he purports to discredit. Following Robinson, I will focus primarily on John Rawls’s influential formulation of the coherentist methodology, reflective equilibrium. Contrary to Robinson’s account, reflective equilibrium is a normative (rather than empirical) enterprise that draws on considered convictions (not

¹⁸ *Id.*

¹⁹ *Id.* at 168.

shared intuitions²⁰) of justice with the aim of developing a provisional (not transcendent) conception of justice. Moreover, because the process entails sustained consideration of the values and commitments of the broader political context in which criminal justice operates, it provides a check of sorts on our penal judgments. Understood in this way, the prevailing method in moral philosophy does not provide an infallible roadmap to justice, but it does offer significant resources for generating and maintaining a just system of criminal punishment.

A. *Reflective Equilibrium*

According to Robinson's characterization of reflective equilibrium, moral philosophers attempt to determine the shared intuitions of their community by taking stock of their own reactions to a series of hypothetical scenarios. "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 philosophers' intuitions in new sets of hypotheticals."²¹ Robinson admonishes that because this methodology "violate[s] many rules of reliable empirical testing," the philosophers "should look to a more reliable source, or adopt more reliable methods of social psychology research, and not 'wing it' on their own."²²

The first problem with this account is that moral philosophers, at least those engaged in the process of reflective equilibrium, are not trying to "capture the shared

²⁰ The difference is more than semantic. "Considered convictions" signifies that the process involves critical reflection rather than simply reading off, then aggregating, existing intuitions. *See, e.g.*, Robinson et al., *Realism, Punishment, and Reform*, *supra* note _ at [13] ("[I]ntuitions about justice have quite different qualities than reasoned judgments about justice.").

²¹ *Id.* at 168.

²² Robinson, *Moral Philosophers*, *supra* note _ at 1840. Robinson is certainly not the only social scientist who holds this derisive view of moral philosophy. I once encountered a social psychologist who characterized the enterprise of moral philosophy as "shooting the shit."

intuitions of the community,” at least not in an empirical sense. Community intuitions will figure into the process—since philosophers are themselves community members²³—but the point is not to inventory such judgments or to gauge their popularity. Rather, reflective equilibrium involves the articulation of principles and judgments concerning a moral issue and a process of adjusting both until a provisional balance is reached. “It is an equilibrium because at last our principles and judgments coincide; and it is reflective since we know to what principles our judgments conform and the premises of their derivation.”²⁴

But the relevant method of moral philosophy involves more than the rather weak requirement that our judgments should match our principles. Rawls thus distinguishes between “narrow” and “wide” reflective equilibrium, only the latter of which is suited to the enterprise of moral justification.²⁵ Narrow reflective equilibrium refers merely to “the best fit of principles with judgments.”²⁶ Although such elementary coherence may aid in the clarification of one’s moral views, it amounts to little more than “describing a person’s sense of justice more or less as it is.”²⁷ “[T]o be of interest to moral philosophy,

²³ In the absence of an “Archimedean point”—a place where one could stand apart from what is being analyzed (or leveraged)—philosophers, like everyone else, can only try to account for their embeddedness but never truly transcend it. See JOHN RAWLS, *A THEORY OF JUSTICE* 260 (1971) [hereinafter *THEORY*]. Although Rawls urged that we adopt a view *sub specie aeternitatis*, he maintained that the “perspective of eternity is not a perspective from a certain place beyond the world, nor the point of view of a transcendent being; rather it is a certain form of thought and feeling that rational persons can adopt within the world.” *Id.* at 587. In his later work, Rawls retrenched, explicitly adopting the perspective from within a liberal democracy. See generally JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

²⁴ RAWLS, *THEORY*, *supra* note _ at 20.

²⁵ John Rawls, *The Independence of Moral Theory*, Proceedings of the American Philosophical Association 8 (1974-75).

²⁶ Norman Daniels, *Wide Reflective Equilibrium and Theory Acceptance in Ethics*, 76 *J. PHIL.* 256 (1979).

²⁷ RAWLS, *THEORY*, *supra* note _ at 49. Rawls suggests that narrow reflective equilibrium may itself have a constructive role to play in moral analysis if it reveals an underlying structure—our “moral grammar”—that accounts for our discrete intuitions of justice. RAWLS, *THEORY*, *supra* note _ at 47. Robinson and others have pursued a similar idea, suggesting that evolutionary biology may provide an *a priori* moral structure that yields such intuitions. See Robinson et al., *Origins*, *supra* note _. But as Daniels observes, uncovering such a structure “is a descriptive and not a justificatory task.” Norman Daniels, *Reflective Equilibrium*, *STAN. ENCYCLOPEDIA PHIL.* (Apr. 28, 2003).

a reflective equilibrium should seek what results from challenging existing beliefs by arguments and implications that derive from the panoply of developed positions in moral and political philosophy.”²⁸

Wide reflective equilibrium, which Rawls identifies as the relevant concern of moral philosophy, thus includes “(a) a set of considered moral judgments, (b) a set of moral principles, and (c) a set of relevant background theories.”²⁹ The inclusion of background theories—about the nature of persons, the role of morality, and procedural fairness, for example—ensures that whatever fit is achieved between judgments and principles, it will reflect a set of theories not derived or derivable from the judgments and principles themselves. In this way, “[w]ide reflective equilibrium does not merely systematize some determinate set of judgments. Rather, it permits extensive revision of these moral judgments.”³⁰ Accordingly, “[f]rom the standpoint of moral philosophy, the best account of a person’s sense of justice is not the one which fits his judgments prior to his examining any conception of justice, but rather the one which matches his judgments in reflective equilibrium.”³¹

Since reflective equilibrium in the relevant sense is not an attempt to measure or describe something as it is, Robinson’s charge that philosophers are violating sound methods of empirical testing is simply incoherent. Philosophers may turn out to be bad social scientists, but surely this judgment is premature until we actually catch them *doing* social science. Moreover, as the discussion of wide reflective equilibrium makes clear,

²⁸ Daniels, *Reflective Equilibrium*, *supra* note _; see also T. M. Scanlon, *Rawls on Justification*, in *CAMBRIDGE COMPANION TO RAWLS* 139, 149 (Samuel Freeman ed., 2003) (“[I]t is a process of deciding what to think, not merely one of describing what we do think.”).

²⁹ Daniels, *Wide Reflective Equilibrium*, *supra* note _ at 256.

³⁰ *Id.*

³¹ RAWLS, THEORY, *supra* note _ at 48.

the relevant “data” is not limited to one’s own (or anyone else’s) intuitions, even those resulting from circumstances designed to mitigate the effects of self-regard and other forms of bias.³² Instead, one’s considered convictions are evaluated in terms of a broader set of principles against a backdrop of theoretical considerations not directly related to the issue at hand. In the context of capital punishment, for example, the relevant inquiry would not only include one’s initial intuitions about its applicability in particular cases—or even a collection of many people’s intuitions. Rather, a desert judgment would likely start with such an intuition before identifying a relevant broader principle—about the morality of intentional killing, for example. From there, one might turn to a consideration of the status of persons as responsible moral agents, or to the relevance of social influences or genetic predispositions in determinations of individual blameworthiness. Although the results of this process are indeterminate until equilibrium is reached, in the meantime we will have begun to establish the relevant terms of debate. For these are ultimately moral, not empirical, investigations, and the picture that an empirical desert study provides will be at best two-dimensional, unable to reveal (or invite) the range and depth of considerations that properly bear on a morally responsible judgment about deserved punishment.

B. *Moral Justification*

A final feature of Robinson’s account of reflective equilibrium also requires careful attention. According to Robinson, the virtue of deontological desert—at least

³² Robinson notes that the intuitions relevant to empirical desert are not derived from actual cases with which individuals are likely to be familiar because 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.” Robinson, *Competing Conceptions*, *supra* note _ at 149. Cf. RAWLS, *THEORY*, *supra* note _ at 47 (noting that we should reasonably discard judgments made with hesitation, or when we “are upset or frightened, or when we stand to gain one way or the other”).

before modern moral philosophers got their hands on it—was its capacity to provide a transcendent check on our intuitions of justice. “It is for this check—to assure that a shared intuition of justice does not violate a transcendent principle of justice—that philosophy is given deference. Yet moral philosophers, by their heavy reliance upon intuitions of justice, have become unreliable in performing just this task.”³³ Ideally, to restore their usefulness, philosophers would “adopt a methodology that is more skeptical of reliance upon those intuitions.”³⁴

Robinson is correct that many, perhaps most, moral philosophers are not engaged in the project of identifying transcendent³⁵ truths from which sound public policy could logically be derived. In fact, since at least the eighteenth century,³⁶ that ambitious project has been seriously undermined by the “fact of reasonable pluralism”—the existence of numerous, incompatible religious, philosophical, and moral doctrines—characteristic of modern political communities.³⁷ The foundationalist approach to moral justification that Robinson seems to favor introduces its own set of challenges, however. A brief review

³³Robinson, *Moral Philosophers*, *supra* note _ at 1841.

³⁴*Id.* at 1843.

³⁵Robinson does not specify what he means by “transcendence,” but his various discussions are suggestive. He notes that what distinguishes deontological from empirical desert is that the former “offers a transcendent truth about justice,” Robinson, *Competing Conceptions*, *supra* note _ at 174; that it “transcends any particular case, community or culture,” Robinson, *Moral Philosophers*, *supra* note _ at 1834; that it can “give us a means by which we can tell the truth of what is deserved,” *id.*; that it “goes beyond the empirical to bring to bear some more fundamental, transcendent analysis, relying upon objective principles of right and good,” *id.* at 1841; that it involves assessments “logically derived from principles of right and good.” Robinson, *Ongoing Revolution*, *supra* note _ at 10. Taken together, these characterizations point to a particular conception of the project of moral philosophy, combining a set of robust meta-ethical (and possibly metaphysical) commitments with a foundationalist epistemology. For the reasons discussed in the text, this is unlikely to be a promising alternative in a modern pluralist society.

³⁶ALASDAIR MACINTYRE, *AFTER VIRTUE* 38 (1984) (dating the modern concern for the justification of moral belief to the Enlightenment). Although I have pegged the date to the era of Kant and Hume, it might properly be dated much earlier. Rawls points to “the Reformation and its aftermath.” RAWLS, *POLITICAL LIBERALISM*, *supra* note _ at xxiv-xxvii. Given Aristotle’s rejection of Plato’s supernatural metaphysics, one might plausibly trace the controversy even further back. I owe this suggestion to Jeff Murphy.

³⁷RAWLS, *POLITICAL LIBERALISM*, *supra* note _ at xvii.

of the leading alternative approaches to moral justification highlights the value of a more modest approach.

On the foundationalist view, one begins with certain fixed moral principles from which further, more specific principles are derived. These foundational principles are neither derived nor derivable, but are taken as authoritative pronouncements—the word of God, for example—or as otherwise self-evident. Thus, a foundationalist “justifies a moral belief by showing that it follows deductively from some most general belief that is self-evidently true.”³⁸ Contemporary foundationalists, who can no longer rely on general acceptance of religious truths as self evident, are more likely to begin by offering arguments that support the self-evident nature of certain fixed moral truths.³⁹

The coherence approach does not depend on fixed moral principles as a starting point for moral justification. Rather, “one justifies a moral belief by showing that it both implies, and is implied by, the moral beliefs one provisionally . . . holds to be true.”⁴⁰ On this view, first principles operate in much the same way as in foundationalism—no further justifications are available from which the principles can be derived. However, “[t]o argue for such non-foundational first principles will . . . be to present a broad range of intuitively compelling particular judgments and argue that such judgments are best explained by the general moral truth to be justified.”⁴¹ Thus, “[a] conception of justice cannot be deduced from self-evident premises or conditions or principles; instead its

³⁸ MICHAEL MOORE, *PLACING BLAME* 218 (1997).

³⁹ *See, e.g.*, JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 64-75 (1980) (distinguishing between facts that tend to support, but do not establish, the existence of self-evident truths); Robert P. George, *Recent Criticism of Natural Law Theory*, 55 U. CHI. L. REV. 1371, 1412 (1988) (“[T]he considerable anthropological evidence tending to show that various forms of friendship, knowledge, and religion are to be found in virtually all cultures, while not evidence of the self-evidence of the value of these realities (for there can be no ‘evidence’ of ‘self-evidence’), does show that a practical judgment of their intrinsic worth comports well with the data.”).

⁴⁰ MOORE, *supra* note __, at 218.

⁴¹ *Id.* at 225.

justification is a matter of the mutual support of many considerations, of everything fitting together into one coherent view.”⁴² The aim of the coherence approach, then, is not to “prove” the validity of a moral principle, but to evaluate whether a principle (or a set of them) fits within the broader scheme of principles already taken (provisionally) as fixed.

To be sure, coherence justifications, which “involve a large element of trial and error and muddling through,”⁴³ are not completely satisfying. It is unsettling to think that our deepest moral commitments are not grounded in something more substantial than a further set of commitments that are themselves provisional and subject to revision.⁴⁴ But in the realm of public policy, the kind of moral certainty derived from controversial metaphysical beliefs is simply out of place. For in a pluralistic society, we may have and invoke a range of foundational commitments that account for our own beliefs, but we cannot expect others to treat these as authoritative. What coherence theories, such as

⁴² RAWLS, THEORY, *supra* note _ at 21.

⁴³ Joel Feinberg, *Justice, Fairness and Rationality*, 81 YALE L.J. 1004, 1019 (1972). The process has been likened to the challenges of maintaining a ship at sea: “We are like sailors who on the open sea must reconstruct their ship but are never able to start afresh from the bottom. Where a beam is taken away a new one must at once be put there, and for this the rest of the ship is used as support. In this way, by using the old beams and driftwood the ship can be shaped entirely anew, but only by gradual reconstruction.” Otto Neurath, quoted in Paul Thagard and Craig Beam, *Epistemological Metaphors and the Nature of Philosophy*, 35 METAPHILOSOPHY _ (2004).

⁴⁴ Consider, for example, our commitment to the moral principle that human beings should generally refrain from harming one another. A foundationalist justification might take the form reflected in John Locke’s classic natural law formulation that the prohibition against inflicting harm is derived from the fact that men are creatures of God: “For men being all the Workmanship of one Omnipotent, and infinitely wise Maker . . . they are his Property, whose Workmanship they are, made to last during his, not one another’s Pleasure.” JOHN LOCKE, TWO TREATISES OF GOVERNMENT 271 (Peter Laslett ed., Cambridge Univ. Press 1988 (1690)). For someone who accepts Locke’s premises about God as the ultimate source of human existence and meaning, this conclusion is logically compelling. By contrast, though a coherence approach is likely to yield a similar conclusion—that it is generally wrong to harm other people—it will have to forgo reliance on a metaphysical entity whose existence is controversial. Instead, the coherentist will proceed by situating the no-harm principle within a broader set of commitments—to the equal moral worth of persons, to notions of individual autonomy, to the wrongness of cruelty and the gratuitous infliction of human suffering—with which it seems to cohere. But this result will fall far short of proving that even something as uncontroversial as the no-harm principle is true or right; at most it can establish that we are justified in accepting the principle and acting in accord with it.

reflective equilibrium, offer is a method of identifying and refining our judgments and our principles in light of the best available conceptions of justice. Public deliberation about criminal justice policy is thus an occasion for moral humility, not moral certainty.⁴⁵

C. *Desert in Context*

Perhaps the strongest feature of the method of modern moral philosophy is its explicit reliance on the social and political context that structures the institutions of justice. Recourse to the broader set of values and commitments that constitute our political morality may offer guidance for the resolution of particular policy decisions—in the realm of criminal justice and beyond. Should we retain capital punishment or abolish it? Should it apply to teenage offenders? To those who commit non-fatal rapes of young children? Before we can determine whether someone—or anyone—deserves the death penalty, we will want to consider the reasons why it might, or might not, be justified. In invalidating the death penalty for teens, for example, the Supreme Court relied on evidence suggesting that teenagers lack the requisite mental capacity to warrant the most severe penalty under the criminal law—that they are too immature, with characters and capacities only partially formed, to have the requisite culpability; too impulsive and short-sighted to make the sorts of cost-benefit calculations that deterrence requires.⁴⁶

⁴⁵ In this spirit, the coherence approach does not commit one to any particular view of the meta-ethical status of one's beliefs. See, e.g., Rawls, *Independence*, *supra* note _ at 9 (noting that reflective equilibrium “does not presuppose the existence of objective moral truths”); Daniels, *Wide Reflective Equilibrium*, *supra* note _ at 277 (“[W]ide reflective equilibrium embodies coherence constraints on theory construction, not on truth.”); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 162 (1977) (arguing that reflective equilibrium “does not deny, any more than it affirms, the objective standing” of one's moral convictions).

⁴⁶ See *Roper v. Simmons*, 543 U.S. 551, 561-62 (2005). Although the Court appropriately considered a broader social context in assessing the applicability of the death penalty to teenage offenders, it—regrettably, in my view—conceived of its analysis as an empirical rather than a normative inquiry. First, the Court relied on “objective indicia of society's standards” as a basis for determining whether the death penalty is cruel and unusual, *id.* at 563; second, it treated scientific evidence regarding the maturity of teenagers as dispositive of the moral question of deserved punishment. *Id.* at 571. In these ways, I believe, the Court abdicated its responsibility to assess the suitability of the death penalty for teenage offenders.

In addition to the practical value of situating punishment decisions within a broader theoretical context, a well articulated account of the justification for punishment is essential to political legitimacy. In a liberal democracy, the state exercises power on behalf of the people themselves; it punishes in our name. Such decisions will often be controversial, with vehement disagreement about the correct outcome. Under these circumstances, it not only matters what the state does but why it does it. Where it proceeds without publicly accessible reasons for one policy outcome over another, its conduct is to that extent arbitrary and illegitimate.⁴⁷

Despite Robinson's militant indifference to the justification for punishment and his disdain for the methods of moral philosophy, they represent the closest thing we are likely to get to a transcendent check on our intuitions of justice. Although empirical desert presumably reflects aspects of our (largely deontological) political morality, it provides only a snapshot of our intuitions. It does not reveal the grounds of our judgments or expose them to critical examination; it simply takes them as it finds them. Deontological desert, based on a coherence approach, offers something more dynamic. Systematic reflection on the interplay between our judgments, principles, and values tests and strengthens (where it does not undermine) our commitment to each. The measure of its success is not the convergence of opinion around a single outcome but the quality of justification as measured against our political morality in reflective equilibrium.

IV. Conclusion

⁴⁷ RAWLS, POLITICAL LIBERALISM, *supra* note _ at 217 (contending that in order for the exercise of political power to be legitimate, citizens should "be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason"); DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note _ at 162 ("[A]rticulated consistency, decisions in accordance with a program that can be made public and followed until changed, is essential to any conception of justice.").

Ultimately, Robinson's analysis of the distributive principles for criminal punishment manages to make both too much and too little of the distinction between empirical and deontological desert. First, because neither form of desert purports to supply "transcendent truths" to ensure that we punish exactly the right people in precisely the right amounts, the distinction is less stark than Robinson's account suggests. Deontological desert, like empirical desert, does not aspire to such radical transcendence.⁴⁸ But it is different. In particular, deontological desert does not represent a failed attempt at empirical inquiry. Philosophers (and others) who struggle to fit their discrete judgments into a coherent moral scheme through an ongoing process of critical reflection and revision are not merely mapping their own—or their community's—intuitions. "They want to reflect on their convictions and to satisfy themselves that these convictions are not inconsistent with the more general principles or ideals that they endorse on other occasions."⁴⁹ Although intuition plays an important role in both approaches, it starts rather than ends the analysis of deontological desert.

Empirical desert, taking intuitions as it finds them, achieves equilibrium without the messy work of reflection. But in a liberal democratic polity, public decision making *is* messy, and disagreements inevitable. The prevailing method of moral philosophy neither eliminates such disagreement nor confers moral certainty; instead, it is predicated on the idea that there are better and worse ways to reason about moral controversies.

Deontological desert thus offers the resources for explaining the grounds of disagreement

⁴⁸ I adapt this term from Antony Duff: "Philosophers have sometimes aspired to a radically transcendent theory, one that will establish some set of universal, ahistorical principles whose truth can be demonstrated to any rational being and from which we can derive an a priori account of how political society should be structured—including an account of what kind of penal practices, if any, it should maintain." ANTONY DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* xvi (2001). Like Duff, I am inclined to think that such an undertaking is "doomed to futility." *Id.*

⁴⁹ Ronald Dworkin, *Darwin's New Bulldog*, 111 HARV. L. REV. 1718, 1722 (1998).

in terms that even dissenters can accept. Empirical desert, indifferent to reasons, can only offer a recount.