

STATE PUNISHMENT AND MEANING IN LIFE

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Despite popular beliefs about what philosophers do for a living, it is not common for philosophers to opine on the meaning of life. It is even less common to see discussions of the meaning of life in works addressing the philosophy of punishment. Leo Zaibert's *Rethinking Punishment* is unique for this reason.¹ The book displays an unabashed enthusiasm for the question about the meaning in life and shows us why the question matters for criminal law theory.

A central focus of *Rethinking Punishment* is, as Zaibert puts it, “the problem of *meaningful* existence.”² One may ask, what does “the problem of meaningful existence” have to do with criminal law and the institution of punishment? Before answering that question, we should be clear that the question posed here about the relationship between state punishment and meaning in life is my question, not Zaibert's. Zaibert is explicit at the beginning of the book that his primary interest lies in what he calls the “theoretical” question of punishment, as opposed to the “practical” question of punishment.³ And by “practical” questions, Zaibert is referring to the various contemporary issues arising from the state's use of its power to criminalize and punish, such as overcriminalization and overpunishment.⁴ It is not that Zaibert is not interested in the problem of state punishment. And he expresses his hope that “the examination of the theoretical problems surrounding punishment may in fact help us better understand—and eventually even help us solve—some of those practical problems that have hitherto monopolized attention.”⁵ Nonetheless, such “practical” problems are secondary for Zaibert, as his primary interest lies in the “theoretical” problem.⁶

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1. See LEO ZAIBERT, *RETHINKING PUNISHMENT* (2017).
2. *Id.* at 9.
3. *Id.* at 1–2.
4. *Id.*; see also DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 4–5 (2008).
5. ZAIBERT, *supra* note 1, at 2–3.
6. *Id.* at 2.

How does, then, Zaibert consider the theoretical problem of punishment by focusing on the “the problem of meaningful existence”?⁷ A key thought experiment for Zaibert comes from W.D. Ross’s *The Right and the Good*:

If we compare two imaginary states of the universe, alike in the total amounts of virtue and vice and of pleasure and pain present in the two, but in one of which the virtuous were all happy and the vicious miserable, while in the other the virtuous were miserable and the vicious happy, very few people would hesitate to say that the first was a much better state of the universe than the second.⁸

The puzzle in this hypothetical is that the two worlds are identical in terms of the amount of misery and happiness, but one appears to be a better world than the other because of the ways in which misery and happiness are distributed. The question is what exactly makes the difference. According to Zaibert, the reason one world is better than the other is desert. “[D]esert,” Zaibert argues, “gives a certain *order*—a certain *meaning*—to the whole in which it appears.”⁹ How does desert do that? Zaibert explains that desert “convey[s] meaning to a given situation and to our lives in general”¹⁰ by “providing *plots* to the world and to our lives.”¹¹

All of this remains somewhat abstract, and here is a concrete example that may help illustrate Zaibert’s view that desert gives meaning to our lives. Amber Rose Carlson, who was raped repeatedly as a teenager, has written about her feelings about the perpetrator.¹² In the piece, she recounts a question that her therapist once raised: “Imagine your rapist had been found guilty and sentenced in court. What would you want his sentence to be?”¹³ Carlson’s answer to the question was that “[a]nything less than a death or natural life sentence [would be] inadequate.”¹⁴ When her therapist then asks her, “What if . . . your rapist

7. See *id.* at 9 (emphasis omitted).

8. *Id.* at 38–39 (quoting W.D. ROSS, *THE RIGHT AND THE GOOD* 138 (1930)).

9. *Id.* at 43.

10. *Id.* at 45.

11. *Id.* at 44.

12. Amber Rose Carlson, *Is There a “Rational” Punishment for My Rapist?*, N.Y. TIMES (Oct. 23, 2017), <https://www.nytimes.com/2017/10/23/opinion/rape-punishment-rational.html>.

13. *Id.*

14. *Id.*

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had been sentenced to death, but then had been pardoned?”¹⁵ Carlson’s answer is as follows:

I did not have to mull this question over. I knew I would feel exactly as I do now, exactly as I have felt for the past two decades: that the world is a terribly unjust place. It is a place where my life can be irrevocably transformed because a man could exert control, manipulation and violence over me for years without repercussion. It is a place where my rapist and others like him are enabled at both societal and local levels. . . .

A hypothetical pardon would allow him to escape repercussions just as he has escaped them in reality. Nearly 20 years later as I began trauma therapy again, he has a secure job, an accomplished and beautiful wife, and a healthy daughter. He is living a life many dream of, while my life is disrupted as I continue to heal from the wounds he inflicted when I was a child.¹⁶

Carlson’s response is striking for our purposes. Instead of saying that she would be angry or disappointed or upset, she says that she would feel that “the world is a terribly unjust place.”¹⁷ When Zaibert says that desert “conveys meaning” to our lives, it seems that this is the sort of emotional and cognitive state that he is referring to.¹⁸

Here is another illustration, from a movie called *While We’re Young*.¹⁹ The movie is about a friendship between two documentary filmmakers, Josh, who is in his forties, and Jamie, who is in his twenties. Josh is an idealist (“such a purist” as one character describes him), who once made a film called *Power Elite*.²⁰ Josh is devoted to documentary filmmaking as a form and takes extremely seriously his obligation as a documentary filmmaker to tell the unvarnished, authentic truth about his subject matter. Josh has been working for nearly ten years on a project on “the distinctly American relationship between biography and history, theory and method and how that relates to power and class in our country, particularly the political, military and economic elite.”²¹ Josh has trouble finishing the project, however, not only because of the complexity of the

15. *Id.*

16. *Id.*

17. *Id.*

18. ZAIBERT, *supra* note 1, at 43.

19. WHILE WE’RE YOUNG (IAC Films 2014).

20. *Id.*

21. *Id.*

story he is trying to tell, the high bar he has apparently set for himself and no doubt other personal hang-ups, but also because he does not always have the funding to finance the project. At one point in the movie, he tries to get a wealthy money manager (introduced in the movie simply as a “hedge fund” person) to invest in his movie but the attempt does not go anywhere because Josh’s description of the project, apparently, bores the hedge fund manager.²²

Jamie is also a documentary filmmaker, though, unlike Josh, who is mid-career, Jamie is just getting started. Jamie seeks out Josh, and Josh begins to mentor Jamie. As their friendship and mentoring relationship develop, Jamie shares with Josh an idea he has for a documentary project, where Jamie would open a Facebook account and make a documentary about meeting and talking to whichever old acquaintance from his past contacts him first. Josh is initially skeptical about the idea but encourages it. Jamie’s project grows and eventually turns into a film. To Josh’s surprise, Jamie seems to have lucked into a fascinating story of Kent, a military veteran whom Jamie had apparently known in high school. The documentary is a big hit. As Jamie shows the work in progress to his friends and acquaintances, he attracts an investor—the same hedge fund manager whom Josh unsuccessfully tried to court—and a charismatic mentor, Leslie, a legendary documentary filmmaker who is revered in the field and also happens to be Josh’s father-in-law.²³

But here’s the thing about Jamie’s movie: it is fraudulent. The Facebook setup was fake. Kent did not go to high school with Jamie. Kent is an old friend of Jamie’s wife. Jamie, who had learned about Kent through his wife, had already known that Kent would be a good subject for a documentary but decided to frame it as a chance encounter to make it more dramatic and interesting. When Josh learns about all this, he is furious and offended and decides to expose Jamie as a fraud, a fake documentarian who engages in lies that go against everything that the form stands for. Josh finds Jamie at an event to honor Leslie’s career in documentary filmmaking, where Leslie had just given a speech about truth, objectivity, and authenticity. This is the perfect opportunity for Josh to expose Jamie for the fraud he is. Josh breathlessly explains to his onlookers—Leslie, the hedge fund investor, and his film producer wife—that Jamie’s documentary is full of lies, that things did not happen the way the documentary says they did, and that, by implication, Jamie is not fit to be a true documentary filmmaker. Surely everyone would now see the truth about Jamie!²⁴

22. *Id.*

23. *Id.*

24. *Id.*

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To his crushing disappointment, the reaction is not what he expects. The hedge fund investor could not care less. His own wife does not seem as bothered. And, most disturbingly, Leslie, the guru in the group everyone worships, responds as captured in the following exchange:

LESLIE: Is what Josh is saying true?

JAMIE: Well . . . I did know, but I don't think it really matters though, the movie's not about that.

JOSH: Of course it matters. Leslie, explain . . .

LESLIE: I don't know that it totally matters in this case.

JOSH: What?

. . . .

JOSH: . . . Leslie, are you kidding me? You don't care? You just gave a speech about authenticity!

LESLIE: . . . [T]he movie works on so many levels, the happenstance of it, to be honest with you, is the least interesting part.

JOSH: I can't believe it! He's a con artist. Leslie, your generation of sit-ins and protesters and pack rats would be horrified by this demon!²⁵

And when it finally dawns on Josh that he is "going to get no satisfaction" and that Jamie is "going to win no matter what," Josh blankly blurts out: "*This is not how the world works.*"²⁶

Now, it is not clear at this point in the movie whether one should root for Josh. There are things about the character that are cringe-worthy, and he is certainly not flawless. His documentary may not be any good, either, and Leslie's assessment at one point that it is "a six-and-a-half hour film that feels like it's seven hours too long"²⁷ may well be correct. But for our purposes, the important sentiment is the one that Josh expresses: "This is not how the world works."²⁸ Or, as Zaibert puts it, "a world in which vice was commonly rewarded and virtue commonly

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

punished would be problematic . . . because this state of affairs would strike us as existentially *meaningless*,”²⁹ and, on the contrary, “distributions according to *merit* suffuse the world with meaning.”³⁰

All of this is recognizable. The question is what it has to do with law. As a general matter, the state is not in the business of ensuring just deserts. Bad things may happen to good people, just as some people may achieve far more success than they deserve. But it is not the state’s job to intervene and take from those who have more than they deserve and give to those who have less than they deserve. So, we will need something more than just the idea of desert to give an account of state punishment.

To answer that question, consider a couple more illustrations. *The Untouchables*,³¹ a film based on historical events and characters but mostly fictional,³² takes place during the Prohibition Era and is about Eliot Ness, a Bureau of Prohibition agent who leads a small team of agents to go after Al Capone’s bootlegging operation. Ness’ team starts to achieve some success against Capone’s organization, which responds by assassinating members of Ness’ team one by one. The man who carries out these killings of these agents is Frank Nitti. After Nitti kills one of Ness’ closest associates, James Malone, an Irish-American officer, Ness confronts Nitti on a rooftop and corners him. Nitti attempts to escape by climbing down a rope from the rooftop, and Ness, still very much upset from Malone’s death, realizes that he could shoot him right there and kill him as Nitti hangs from the side of the building. After hesitating for a bit, Ness uncocks his gun and puts it away. Nitti, seeing that Ness would not kill him, climbs back up to the rooftop and starts taunting, which begins the following exchange:

NITTI: Come on! Arrest me! What are you waiting for? Don’t just stand there. Arrest me!

NESS: Don’t push me. They’re going to burn you, buddy.

NITTI: Yeah?

NESS: Yeah, I’m going to come see you burn, you son of a bitch, because you killed my friend!

29. ZAIBERT, *supra* note 1, at 9.

30. *Id.* at 10.

31. THE UNTOUCHABLES (Paramount Pictures 1987).

32. MAX ALLAN COLLINS & A. BRAD SCHWARTZ, SCARFACE AND THE UNTOUCHABLE: AL CAPONE, ELIOT NESS, AND THE BATTLE FOR CHICAGO, at xv (2018).

NITTI: He died like a pig.

NESS: What did you say?

NITTI: I said that your friend died screaming like a stuck Irish pig. Now, you think about that when I beat the rap.³³

Ness, at that point, seems to snap. As Nitti starts to walk away with his back turned to Ness, Ness approaches him, puts his hands on Nitti's shoulder, pushes him towards the edge of the rooftop and off the building. Nitti falls screaming to his death, landing on a car.³⁴

Here, Ness goes through two psychological transformations. First, when he first has an opportunity to kill Nitti, he goes from a private individual who is facing a person who has killed his closest colleague to a public official who will arrest Nitti and send him through the legal process. When Nitti then mocks Malone's death and his Irish heritage, Ness is angered and immediately goes through another transformation, from a public official back to a private individual who avenges his friend's death through an act of shocking violence.

Contrast this scene against a scene in the movie *Minority Report*.³⁵ John Anderton is a cop who has lost his son Sean, presumably to a kidnapper, six years ago. One day, Anderton, while following an investigatory lead, stumbles into the empty apartment apparently belonging to a man who has pictures of several children, including that of Sean, strewn throughout the apartment. Once he sees the picture, Anderton is convinced that the person living in that apartment, whose name is Crow, is a criminal who kidnaps children and is responsible for his own son's disappearance. Anderton then says to himself:

Every day for the last six years I've thought about only two things. The first was what my son would look like if he were alive today. If I would even recognize him if I saw him on the street. The second was what I would do to the man who took him . . . I am going to kill this man.³⁶

Crow comes into the apartment at that point, and Anderton grabs him and starts beating him up and trying to extract information about Sean's whereabouts. Crow tells Anderton that he killed Sean, and

33. THE UNTOUCHABLES, *supra* note 31.

34. *Id.*

35. MINORITY REPORT (20th Century Fox, DreamWorks, & Amblin Entertainment 2002).

36. *Id.*

Anderton, overcome with grief and anger, resumes his beating of Crow and pulls out his gun and points it at Crow. Anderton appears to be about to kill Crow, but with remarkable self-restraint, he refrains from pulling the trigger and starts reciting the Miranda rights to Crow instead, thereby initiating the process of arresting Crow.³⁷

Ness and Anderton both are public officials who consider engaging in acts of personal vengeance. One of them gives in to the temptation; the other one does not. Both of them appear to feel the pull of a powerful justificatory reason to kill, but that does not mean things happen the way they are supposed to happen between Ness and Nitti, whereas it appears that Anderton behaves appropriately towards Crow, at least up to this point. One of the reasons Ness himself hesitates at first is because the right thing to do in that situation is for him to arrest him and prosecute him properly through the legal system, and Anderton successfully suppresses the desire for vengeance and lets the legal process take over.

All of this is happening and is comprehensible to us because these two characters are working in the context of a particular institutional setup that we may call the criminal justice system. The scenes resonate with us because they touch on a fundamental tension present in the system. As the exclusive agent of punishment, and because citizens are generally prohibited from retaliating against wrongdoers, the state has an obligation to respond adequately to wrongdoing by condemning it as such. The state cannot preserve its legitimacy as the sole rightful holder of the power to punish unless it proves itself to be an adequate substitute for what it displaces. It seems to follow that for the state to justify its possession and exercise of its enormous power to criminalize and punish, the state should give the people results that approximate what the people on their own would have produced. Otherwise, individuals would be tempted to respond to acts of wrongdoing on their own, the way Ness did and the way Anderton almost did.

However, given the enormous amount of harm that the state can bring about in people's lives through its coercive and judgmental uses of its power to criminalize and punish, the observation that the state is merely giving people *what they want* or satisfying *the people's thirst for revenge* by itself cannot serve as a justification for the institutional setup. What we need is an additional step of justifying the people's demand for punishment in the first place. Without such a justificatory step, the government's use of power becomes merely a version of keeping the people satisfied, no matter how immoral their demands may be.

37. *Id.*

What would such a justificatory step look like? It seems to me that it could look a lot like Zaibert's argument about desert and meaning in life. The state can keep its power to punish people and maintain its authority by keeping the people's demand for punishment reasonably satisfied. And when it does so, the state is not just giving into pressure of an irrational mob to satisfy their thirst for vengeance. When the state seeks to provide adequate responses to acts of wrongdoing, it rather is giving wrongdoers what they deserve. And why is it good to give the wrongdoers what they deserve? Zaibert's answer, as we saw above, is that "desert gives a certain *order*—a certain *meaning*—to the whole in which it appears."³⁸

So, if it turns out to be the case that Ness' treatment of Nitti is morally unjustified aside from its vigilante justice aspect, then the legal system that condemns and stigmatizes Nitti may be unjustified, too. Similarly, if Anderton is not morally justified to kill Crow himself, then to the extent whatever awaits Crow when he is brought to the legal system resembles Anderton's treatment of Crow, then the legal system cannot be justified, either. Such a close relationship between state punishment and private retaliation is affirmed by Zaibert when he says that even though there are "excellent, typically overriding reasons to prevent vigilantism, . . . this is not because what a vigilante does is *completely* valueless—particularly if it is very similar to what an authority would have done."³⁹ In a previous book, Zaibert has similarly argued that "a perfectly virtuous vigilante . . . is surely conceivable,"⁴⁰ and that "it is extremely difficult to distinguish sharply between punishment and revenge"⁴¹ under his account, which he has touted as a point in favor of his account.⁴²

Therefore, even though Zaibert announces at the beginning of his book that he is mainly interested in theoretical problems of punishment generally and not in the problem of state punishment, it turns out that his argument provides an important component of a case for state punishment. Without an argument like Zaibert's, we can end up with a theoretical justification for the institution of punishment that is hollow at its core. State punishment may be justified as a way to replace the system of private vengeance, but if whatever state punishment is replacing is morally unjustified, then to the extent that the state produces outcomes that resemble those that would be arrived at under

38. See ZAIBERT, *supra* note 1, at 43.

39. *Id.* at 48–49.

40. LEO ZAIBERT, PUNISHMENT AND RETRIBUTION 185 (2016).

41. *Id.* at 69.

42. *Id.* at 95.

the system of private vengeance, then state punishment cannot be morally justified, either. All of Zaibert's talk about meaning in life, then, is important because those who seek to justify the institution of punishment may need an account like Zaibert's to offer a complete defense of the system, and this is the way in which Zaibert's book demonstrates why the question of meaning may matter for criminal law theorists. It seems to me that this is an important theoretical contribution of Zaibert's book.

However, I would like to end this comment with a cautionary note. If it is indeed the case that state punishment exists as a way of displacing the system of private vengeance, we should think about the ways in which the legal system is supposed to be an improvement over the system it replaces. The standard story is that the legal system is superior because of its ability to investigate the factual basis for claims of wrongdoing thoroughly and accurately; its provision of basic procedural safeguards for the accused, such as those found in the Bill of Rights; and proportionality limitations on amounts of punishment. I would like to focus on the aspect that is of central importance to Zaibert's theory: suffering.

Zaibert emphasizes the significance of suffering throughout the book. He says, for instance, that there is an "essential conceptual connection between punishment and suffering."⁴³ He elaborates that "[w]hatever specific punishments turn out to be, to the extent that they remain forms of *punishment*, they will necessarily have to (seek to) make the wrongdoer suffer."⁴⁴ He also says that "[t]o punish . . . is to (try to) inflict suffering . . . on someone as a response to her wrongdoing"⁴⁵ and that "punishment is incoherent without it being an attempt to inflict suffering."⁴⁶

Is Zaibert right about this? Since the question here is what the recipient of punishment deserves, perhaps we can start with an analysis of the general concept of desert. As Joel Feinberg explained in his seminal discussion, every desert statement has at least three elements.⁴⁷ In the statement, "S deserves X in virtue of F," S is the deserving person, X is what he deserves, and F is the desert basis—that is, the basis for X.⁴⁸

To understand how it is that a person deserves something, we must understand two relationships: the relationship between the person who

43. ZAIBERT, *supra* note 1, at 3.

44. *Id.* at 7.

45. *Id.*

46. *Id.* at 11.

47. Joel Feinberg, *Justice and Personal Desert*, in *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 55, 61 (1970).

48. *Id.*

is deserving and the desert basis (*S* and *F*), and that between what is deserved and the desert basis (*X* and *F*). The person who is deserving and the desert basis (*S* and *F*) are related in that the desert basis has to be an attribute of the deserving person. In the relationship between what is deserved and the basis for desert (*X* and *F*), the key concept is “fitness” or appropriateness.⁴⁹ So, a response to criminal wrongdoing is “fitting” or “appropriate” only if it takes a form that symbolizes or expresses the society’s condemnatory attitude towards the criminal conduct. This is why it would be inappropriate to reward criminals, whereas infliction of suffering is often seen as an appropriate response. Second, a corollary to this is that not every form of loss is an acceptable form of punishment in every society, depending on the symbolic significance the particular form of loss has in the society.⁵⁰ For instance, the sanction of “community service” may appear inappropriate for certain crimes given the mixed signals—either as a sanction or as evidence of the participant’s generosity and public spiritedness—such service gives.⁵¹

The concept of proportionality in punishment follows from the idea of fitness.⁵² In short, the harshness of the punishment should reflect our level of condemnation or disapproval of the criminal act. A punishment would be excessive, then, if the degree of condemnation symbolized by the amount of punishment were too high relative to the criminal’s blameworthiness. A punishment also would be excessive in situations where it is imposed on a person who has not committed any acts for which the kind of condemnatory expression that accompanies criminal sanction would be appropriate. A corollary to all of this is that the harshness of the punishment should increase as the appropriate level of condemnation or disapproval increases, which in turn should increase as the gravity of the crime increases.⁵³

Fitness in desert has both comparative and noncomparative aspects.⁵⁴ To illustrate, in the punishment context, the noncomparative aspect stands for the view that a person convicted of a given crime should receive a certain amount of punishment, no matter how other people are treated, while the comparative aspect focuses on what the punishment for a given crime is compared to punishments for different crimes of varying degrees of blameworthiness. For example, if a criminal has been sentenced to five years in prison for stealing a car, noncomparative desert

49. *Id.* at 77–78.

50. *Id.* at 114.

51. *Id.*

52. *See id.* at 78.

53. *Id.* at 118.

54. Joel Feinberg, *Noncomparative Justice*, 83 PHIL. REV. 297, 298 (1974).

asks whether his deed is serious enough to warrant such a response by the state, regardless of how the state is treating other car thieves and criminals of more and less serious crimes. Comparative desert, by contrast, is about whether the car thief is being treated the same way as other car thieves and other comparably serious criminals and how his punishment compares to punishments imposed on those who have committed more or less serious crimes.

Why do both aspects—comparative and noncomparative—matter? Noncomparative desert matters in the following way: when we say that it would be clearly disproportionate to punish parking violation with one year in prison, that statement would be true even if every parking violation were treated the same way and more serious crimes were treated more harshly. In other words, even if a sentencing scheme generates a series of sentences that are in perfect comparative desert relationship to one another, it is possible for some or all of those sentences to be too harsh.

The comparative aspect matters, too, as what one deserves is sometimes determined in reference to what others deserve. So when the state punishes, it condemns the behavior it punishes as wrong, and the degree to which the behavior is condemned is expressed by varying the amount of punishment. Therefore, how one's punishment stands in relation to punishments for other crimes supplies a crucial piece of information as to how wrong the behavior punished is viewed by the society. This means that a punishment imposed on a criminal would be "undeserved" if it is more severe than the punishment imposed on those who have committed more serious crimes or crimes of the same seriousness, because the judgment it expresses about the seriousness of the criminal's behavior would be inappropriate. For instance, as the death penalty carries a social meaning as the ultimate punishment for the most serious crimes, each time the state imposes a death sentence it shows that it considers the crime at issue to be not only one of the most serious offenses committed against the society, but also an offense that is as serious as other crimes that the society considers to be the most serious. Those who commit offenses less serious than the most serious offenses and are still sentenced to death would be receiving harsher sentences than they deserve, because part of what it means for them to receive the punishment they deserve is that they are punished less harshly than the worst criminal.

In this way, comparative desert functions the way an audience at a play responds to various performers at the end of the performance.⁵⁵

55. I borrow this example from David Miller. See David Miller, *Comparative and Noncomparative Desert*, in *DESERT AND JUSTICE* 25, 30 (Serena Olsaretti ed., 2003).

Assuming that a given production is good enough to merit applause, the audience members vary the length and intensity of their applause to show their relative levels of appreciation for different members of the cast. There may be noncomparative desert at work here, because if the production as a whole is not worthy of applause, no member of the cast may deserve any showing of appreciation. But barring such a situation, what determines how the audience greets each member of the cast is the principle of comparative desert. That is, other things being equal, generally the cast members with bigger and more difficult parts tend to receive the longer, louder, and more intense applause. The reason this has to be so is that there is a limit as to how long, loud, and intense cheering can get, and the audience has to save their longest applause for the cast member they appreciate the most. If they are too quick to unleash their most enthusiastic showing of appreciation and use it on minor characters, they may not be able to express to the ones with the leading parts how much more they appreciate them than those with lesser roles. And if such a situation unfortunately arises, those who deserve more recognition from the audience would not be receiving what they *deserve*, not just what they *comparatively deserve*. It is in this sense that what one deserves cannot be determined without considering both comparative and noncomparative aspects.

Incidentally, it is important to note here that nothing in this account *requires* suffering as a response to criminal wrongdoing. According to the account presented, the important feature of desert is that of a “fitting” or “appropriate” response. It is true that what is typically considered to be a “fitting” response to criminal wrongdoing is infliction of suffering, but, it seems to me, that is not a requirement of this theory of desert. The right level of condemnation need not be expressed in terms of inflictions of suffering, as, say, a symbolic response can suffice.

Zaibert would disagree with the position that punishment and suffering can be decoupled in the way I am suggesting. Perhaps Zaibert is correct, and let’s grant that he is correct and I am wrong on the issue of the conceptual connection between punishment and suffering. It still seems to me that there are good reasons to attempt to reduce the amount of suffering in our criminal justice system, and to the extent that the state can find a way to devise a fitting and appropriate response to criminal wrongdoing without inflicting suffering, that is a goal worthy of our attention. I worry that Zaibert’s insistence on a “conceptual connection” between punishment and suffering would have the effect of preventing

such efforts from taking off, and would be received as an invitation to complacency and indifference to human suffering inflicted in our name.⁵⁶

Now, to be fair, Zaibert is concerned with reducing suffering as well, as he notes that there is “obvious *value* in diminishing suffering in the world” and there is value in forgiveness, which he defines as “sparing (deserved) suffering.”⁵⁷ Much of this book is devoted to showing that there is a “tension between the value of punishment and the value of forgiveness,” and that in “[m]ost cases, particularly those occurring within the context of modern criminal justice systems . . . we simply cannot punish with clean hands.”⁵⁸ Fully recognizing this point, Zaibert suggests, would make us “approach the prospect of punishing wrongdoers (or of setting up primitive institutions) with more sober circumspection than we have tended to do.”⁵⁹

Zaibert and I are in agreement, then, that punishment ought to trouble us because of its real human costs. However, I worry that his talk of a “conceptual connection between punishment and suffering” would still tend to make us inured to the existence of suffering in our criminal justice system while his talk about the value of forgiveness gets ignored.⁶⁰ My sympathies are rather with approaches that deemphasize suffering in accounts of punishment. Zaibert points out, in response to the view that communication—or expression-focused—theories of punishment are more humane than a view like his, that “[c]ommunication can cause suffering, and sometimes brutally and nastily so.”⁶¹ That is fair enough as a way to contribute to a theoretical dispute. However, how we interpret what we do can push us in different directions in the way we build and design and operate our institutions, and positing that to punish a person is to aim make him or her suffer could push us in one direction whereas positing that one can punish without aiming to make a person suffer could push us in a different direction.

56. See ZAIBERT, *supra* note 1, at 3, 7.

57. *Id.* at 3.

58. *Id.* at 242.

59. *Id.*

60. See *id.* at 3.

61. *Id.* at 122.