



This work was originally published as: Christopher Slobogin, Some Hypotheses About Empirical Desert - 42 Arizona State Law Journal 1188 (2011).

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Citation: 42 Ariz. St. L.J. 1188 2010-2011



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# SOME HYPOTHESES ABOUT EMPIRICAL DESERT

Christopher Slobogin\*

Elsewhere in this issue, Paul Robinson lays out his argument for basing criminal law doctrine on “empirical desert.”<sup>1</sup> His central contention is that adherence to societal views of “justice”—defined in terms of moral blameworthiness—will not only satisfy retributive urges but will also often be as efficacious at controlling crime as a system that revolves around other utilitarian purposes of punishment. Constructing criminal laws that implement empirical desert has the latter effect, Robinson argues, because it enhances the moral credibility of the law, thus minimizing citizens’ desire to engage in vigilantism and other forms of non-compliance and increasing their willingness to accept controversial government decisions to criminalize or de-criminalize. Compared to general deterrence, incapacitation, and rehabilitation, Robinson states, recognition of empirical desert as the organizing principle of criminal justice will usually pay superior long-term, crime-reducing dividends.

Robinson’s short treatment of this idea in the pages of this journal summarizes a huge amount of his earlier, highly innovative work spelling it out in detail. Like Robinson, I will resist canvassing all of this work here. Instead, in keeping with the utilitarian spirit of Robinson’s agenda, the main goal of this paper is to propose hypotheses that test possible vulnerabilities of his argument. Robinson’s work on empirical desert is provocative, but could use further empirical support.

## I. CAN VIEWS ON DESERT BE ASCERTAINED EMPIRICALLY?

The starting predicate for Robinson’s argument is that societal views about desert can be measured accurately and that many of those views are widely shared. Robinson concludes, based on his own and others’ empirical work, that “there appears to be an enormous amount of agreement about intuitions of justice across all demographics, at least with regard to the core of wrongdoing—physical aggression, taking property without consent, and

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1. Paul H. Robinson, *The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime*, 42 ARIZ. ST. L.J. 1089, 1104–07 (2011).

deceit in exchanges.”<sup>2</sup> More specifically, people not only rank order the key general offenses—murder, rape, robbery—the same, but rank order fairly nuanced scenarios within those offenses in identical fashion. For instance, Robinson and Rob Kurzban report a very high degree of consistency among over 300 demographically-diverse participants in ordering twenty-four relatively detailed scenarios, seven having to do with homicide, six with serious assault, seven with theft, and four with various types of defenses.<sup>3</sup>

The questions still nag: How robust are these findings? Will rankings of the core crimes hold up across populations and on different sets of facts? What is the role of empirical desert outside the core?

*Hypothesis 1: Rank orderings of core crimes will vary not only with perceived desert, but also with the perceived dangerousness (treatability) of the defendant, the perceived need to deter the particular crime, and other factors unrelated to desert.* For instance, in one scenario in Robinson and Kurzban’s study the defendant is offended by a woman’s mocking remark and decides to stab her with a letter opener from his desk, causing her death (Scenario 1). In another scenario, almost uniformly ranked by study participants as meriting more punishment than Scenario 1, the defendant is highly offended by a woman, waits at her apartment for her to return from work and, when she appears, shoots her to death (Scenario 2).<sup>4</sup> One wonders whether the same rank ordering would occur if these scenarios were modified to include additional information about the offenders. Assume, for instance, that the offender in Scenario 1 is said to have enjoyed killing the woman and wants to kill others who have offended him, while the defendant in Scenario 2 is said to be remorseful and willing to undergo therapy. Would the ordinal ranking of these two scenarios switch in light of this additional information about risk?

In a study conducted with John Darley, Robinson purports to find that in making these sorts of punishment rankings subjects rely solely on desert, untainted by perceptions of offender dangerousness.<sup>5</sup> But that study defined dangerousness solely in terms of criminal history and asked how “severe” the “punishment” should be, language that sounds in desert rather than in risk<sup>6</sup> (the latter a concern that might be better plumbed with a query about the “disposition” the offender should receive). If research finds that

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2. *Id.* at 1106.

3. Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1876–80 (2007) (reporting two studies).

4. *Id.* at 1897.

5. John M. Darley, Kevin M. Carlsmith & Paul H. Robinson, *Incapacitation and Just Deserts as Motives for Punishment*, 24 LAW & HUM. BEHAV. 659, 659 (2000).

6. *Id.* at 663. The authors also note that the study’s within-subject design “could have created a demand to react to [the] cases with different sentence assignments.” *Id.* at 676–77.

perceived dangerousness or treatability, or the perceived need to deter certain crimes, influences ordinal determinations, then criminal laws based solely on empirical desert may depart from societal views on punishment. One reason to think such findings might be forthcoming is the fairly consistent research conclusion that, when asked in the abstract about the primary goal of criminal justice, protection of the public is often listed first.<sup>7</sup>

Empirical desert could also vary due to factors that are not considered legitimate punishment goals. For instance, if the defendant in Scenario 1 is described as African-American and the defendant in Scenario 2 is described as white, would the rank ordering change? If the victim in the first scenario remains a woman, but the victim in the second scenario is described as a man, would the rank ordering change? One would hope the answer to both questions would be no, and that might well be the finding. But if results vary based on demographic modifications like these, or on any other modification that might trigger idiosyncratic emotional or unconscious reactions, can empirical desert provide consistent enough results to inform policymakers?

*Hypothesis 2: There will be significant disagreement about the precise punishment for core crimes.* For instance, people may agree that the defendant in Scenario 2 deserves harsher punishment than the defendant in Scenario 1, but disagree vehemently about the precise amount of punishment each should receive. This hypothesis has already been borne out in several studies, including some conducted by Robinson and Darley. Their initial path-breaking research, providing participants with a number of scenarios in eighteen different criminal law domains, indicates that in at least 20% of the cases people's views vary widely when assigning the

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7. BELDEN RUSSONELLO & STEWART, OPTIMISM, PESSIMISM, AND JAILHOUSE REDEMPTION: AMERICAN ATTITUDES ON CRIME, PUNISHMENT, AND OVER-INCARCERATION 3 (2001), available at [http://www.prisonpolicy.org/scans/overincarceration\\_survey.pdf](http://www.prisonpolicy.org/scans/overincarceration_survey.pdf) (indicating that the main purpose of prison should be "to rehabilitate" (40%), "to punish" (21%), and "to protect society" (21%)); VINCENT SCHIRALDI & JUDITH GREENE, JUST. POL'Y INST., CUTTING CORRECTLY: NEW PRISON POLICIES FOR TIMES OF FISCAL CRISIS 5-8 (2002), available at [http://www.justicepolicy.org/images/upload/02-02\\_REP\\_CuttingCorrectly\\_AC.pdf](http://www.justicepolicy.org/images/upload/02-02_REP_CuttingCorrectly_AC.pdf) (poll finding that rehabilitation should be the primary goal of criminal justice); Francis T. Cullen et al., *Public Opinion about Punishment and Corrections*, 27 CRIME & JUST. 1, 34 (2000) (finding that while "offense seriousness . . . explained the largest amount of variation in sentencing preferences," when asked to describe the purpose of the sentence assigned, "the goal of just deserts ranked fourth behind special deterrence, boundary setting, and rehabilitation as a 'very important' reason for choosing the sentence"); Julian V. Roberts, *Public Opinion, Criminal Record, and the Sentencing Process*, 39 AM. BEHAV. SCI. 488, 494 (1996) (finding that with respect to mild and moderate crimes, people are willing to abandon the retributive principle that punishment should be proportional to the gravity of the crime).

degree of punishment.<sup>8</sup> Of course, as Robinson points out, “once a society commits itself to a punishment continuum endpoint, as every society must do (whether it is the death penalty or life imprisonment or 20 years), the large number of cases of distinguishable blameworthiness must be fit on this limited punishment continuum.”<sup>9</sup> But for people who are repulsed by the death penalty (or, at the other end of the spectrum, by a maximum twenty-year sentence for murder), a contrary punishment continuum is not likely to correspond with their sense of desert, leaving policy makers who want to adhere to empirical desert in a quandary.

*Hypothesis 3: Both the rank orderings and the punishment for crimes that are outside the core crimes will vary significantly.* Robinson does not contest this hypothesis, and indeed provides data to back it up.<sup>10</sup> Many crimes on the books, ranging from pollution laws, insider trading, and tax fraud to drug and gun possession, various forms of sexual intercourse, and third-trimester abortion, are probably outside the “core.” Disagreement as to the relative blameworthiness of these crimes and similar crimes may well be very high. For instance, a majority of African-Americans and Latinos might support the passage of hate crimes, a majority of whites may not. A majority of men might prefer subjective liability for rape, while a majority of women might want strict liability for that crime.<sup>11</sup> A majority of suburbanites may want tough sentences for drug dealing, a majority of inner-city dwellers may not.

In these situations, Robinson suggests, empirical desert’s role is to advise policymakers to cast whatever decision they make in terms of the values manifested by the core crimes. Thus, for instance, he and Darley argue that the campaign to criminalize drunk driving was successful in large part because Mothers Against Drunk Driving (MADD) were able to change the public’s view of the drunk driver from a foolish individual who harms only himself to one who harms others, including children (thus associating drunk driving with the core crime of physical aggression).<sup>12</sup> There is reason to

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8. PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* 226 (1995) (noting that for about 20% of the scenarios the standard deviation exceeded 3.50).

9. Robinson, *supra* note 1, at 1107.

10. Robinson & Kurzban, *supra* note 3, at 1880–91 (finding “considerably less agreement” with respect to the ranking of crimes such as marijuana and cocaine use and dealing, prostitution, underage drinking, abortion, and several other crimes).

11. Or more likely, certain types of women and men might prefer these options. See Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729, 729 (2010).

12. Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 60 (2007).

question this particular story, for reasons suggested below. But even if it is an accurate portrayal of the dynamic that led to making drunk driving a crime, the suggestion here is that, for many other controversial criminal law topics, no general agreement is possible, in which case empirical desert is not much help to policymakers.<sup>13</sup>

## II. DO PEOPLE KNOW OR CARE WHEN THE LAW DIVERGES FROM THEIR VIEWS ON DESERT?

Assume now that research can tell us fairly accurately when most people in society agree on the proper ordinal rank of a large core of crimes and that this view is desert-based. Assume further that societal differences on the proper absolute punishment based on desert are either not significant or can be taken into account through sentencing ranges that encompass the most significant variances in punishment preferences—as occurs under “limiting retributivism” provisions such as those recommended by the current version of the Model Penal Code.<sup>14</sup> Finally, assume that, for various reasons, policymakers do not adhere to the consensus views on desert in a substantial number of instances, by either failing to punish adequately those who deserve it or by punishing those who do not. Robinson suggests that under these conditions the public will often become contemptuous, scornful and disdainful toward the legal system and, in the latter situation (punishment of undeserving individuals), perhaps also fearful of and angry toward it.<sup>15</sup> There are reasons to doubt these assumptions as well.

*Hypothesis 4: Most departures from empirical desert will not be noticed by the public.* Robinson provides support for this hypothesis himself, perhaps inadvertently, with his attempts to debunk general deterrence as an efficient means of preventing crime. As he puts it, “what we know from studies is that even criminals commonly have no idea what the [criminal law’s] rule is and, even if they think they know, they often have it wrong.”<sup>16</sup> Other research indicates that most people are surprised to learn the law of their jurisdiction, and usually assume that it comports with their view of

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13. See generally Donald Braman, Dan M. Kahan & David Hoffman, *Some Realism About Punishment Naturalism*, 77 U. CHI. L. REV. \_\_\_\_ (forthcoming) (arguing that disagreement about what and how much to punish crimes outside the core is intense, and thus that work showing high agreement about core crimes “lacks sufficient connection to live controversies” to have any useful impact).

14. See Robinson, *supra* note 1, at 1109–10.

15. Robinson & Darley, *supra* note 12, at 22.

16. Robinson, *supra* note 1, at 1093.



what the law should be.<sup>17</sup> If all of this is true, then the disrespect for the law that Robinson hypothesizes will arise from public perceptions of its divergence from their views cannot occur.

*Hypothesis 5: Departures from empirical desert that are noticed will often not occasion negative reaction because they achieve other legitimate goals.* Of course, many members of the public are aware of at least some criminal justice policies, especially after a well-publicized case occurs. But the fact that a particular policy departs from empirical desert may not bother them if it achieves other objectives they consider worthwhile. Consider, for instance, three strikes laws which impose a very long sentence on offenders who have committed a third felony, often even if the third felony is only a minor one. To the extent that we have evidence from empirical desert studies, these statutes are out of line with public views on desert.<sup>18</sup> And, as Robinson has pointed out, three strikes laws also make little sense from a deontological desert perspective because these laws are disproportionate not only in relation to the most recent crime, but also in relation to the typical recidivist's combined criminal history, even if one adopts a nose-thumbing theory that repeated criminality warrants greater punishment.<sup>19</sup> Yet three strikes laws are very popular.<sup>20</sup> Presumably that is because where recidivist offenders are concerned the public is at least as worried about its own safety as it is about desert.<sup>21</sup>

From an empirical desert perspective, should legislators nonetheless repeal such laws? Robinson suggests that concerns about dangerousness should be dealt with through post-sentence civil commitment statutes, so that the criminal justice system can remain untainted by incapacitative agendas. But these commitment statutes might not only fail to assuage the community to the extent they fail to identify the dangerous (witness the

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17. John M. Darley et al., *The Ex Ante Function of the Criminal Law*, 35 LAW & SOC'Y REV. 165, 181 (2001).

18. Norman J. Finkel et al., *Recidivism, Proportionalism, and Individualized Punishment*, 39 AM. BEHAV. SCI. 474, 481-82 (1996).

19. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 493 (1997) (“[N]either the first-offense discount nor the nose-thumbing penalty . . . support the kinds of dramatic increases for apparent dangerousness that we see in current practice.”).

20. See Franklin E. Zimring, *Populism, Democratic Government, and the Decline of Expert Authority: Some Reflections on “Three Strikes” in California*, 28 PAC. L.J. 243, 255 (1996) (describing Three Strikes as “an extreme, but by no means isolated, example of the kind of law produced when very little mediates anti-offender sentiments”).

21. Robinson has acknowledged as much. Robinson & Darley, *supra* note 12, at 42 (“[D]eterrence and incapacitation . . . have had the greatest influence in recent criminal justice reforms.”).

furor over crimes committed by released insanity acquittees<sup>22</sup>), they may well be unconstitutional if applied to “ordinary recidivists.”<sup>23</sup>

*Hypothesis 6: Conversely, when segments of the public do react negatively to a criminal law or a case, the reaction will often be based on something other than divergence from their views on desert, at least when these views are defined as (a) reasoned concerns about (b) ordinal desert in connection with (c) core crimes.* As illustrations of the subcomponents of this hypothesis, consider three criminal law issues that routinely receive significant media attention: juveniles who commit serious crimes; driving while drunk; and drug-related crimes.

One possible desert-based reaction to the first type of case is that application of the traditional rehabilitative juvenile justice approach to violent adolescent offenders is insufficiently punitive; after all, one might reason, killers should receive the same penalty whether they are adults or adolescents. In fact, this type of reaction appears to have led to the proliferation of statutes that either transfer juveniles as young as twelve to adult court if they commit serious crimes or end juvenile court jurisdiction entirely at age fifteen or sixteen.<sup>24</sup> But these desert-based views may be more visceral than reflective. For instance, in one of their initial studies, Robinson and Darley report that a large percentage of survey participants responding to laboratory scenarios rather than actual cases believe that juveniles below eighteen should receive lesser penalties than adults, even for serious crime.<sup>25</sup> In other words, “calm” empirical desert might be quite different from anecdote-driven “reactive” empirical desert.<sup>26</sup> When that is true, what is the counsel of empirical desert? Enact laws in response to heat-

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22. See generally James W. Ellis, *The Consequences of the Insanity Defense: Proposals to Reform Post-Acquittal Commitment Laws*, 35 CATH. U. L. REV. 961, 963 (1986) (recognizing that public dissatisfaction with the insanity defense is fueled by the concern that too many defendants are “getting off” or “going free”).

23. See *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) (limiting post-sentence commitment to individuals who have a mental disorder “that makes it difficult, if not impossible, for the person to control [their] dangerous behavior”).

24. Richard E. Redding & Barbara Mrozoksi, *Adjudicatory and Dispositional Decision Making in Juvenile Justice*, in JUVENILE DELINQUENCY: PREVENTION, ASSESSMENT AND INTERVENTION 232, 238 (Kirk Heilbrun et al. eds., 2005).

25. ROBINSON & DARLEY, *supra* note 8, at 141 (table showing average liability assignments for murder by adult to be 10.42; by 18-year-old 8.70; by 14-year-old 6.66; and by 10-year-old 4.84).

26. See Adam J. Kolber, *How to Improve Empirical Desert*, 75 BROOK. L. REV. 433, 441–42 (2009) (making this point, and noting that people who are angry tend to be more “punitive”). Along the same lines is research suggesting that people are more “hardline” in the abstract than when they have responsibility for deciding about a criminal justice issue. Loretta J. Stalans & Shari Seidman Diamond, *Formation and Change in Lay Evaluations of Criminal Sentencing: Misperception and Discontent*, 14 LAW & HUM. BEHAV. 199, 206–07 (1990).

of-the-moment desert determinations in order to avoid conflict? Or enact laws that reflect calmer views on desert but that will lead to community ire?

The reaction to the second type of case has been the criminalization of drunk driving. As recounted earlier, Robinson and Darley suggest that this development was desert-based because of advocates' ability to analogize drunk driving to core crimes. But perhaps the success of MADD was not based on desert at all, but rather was an instantiation of "empirical risk" rather than empirical desert. As Robinson states, MADD advocates holding up pictures showing "the horrible results of car accidents caused by drunk drivers[] provided a powerfully persuasive message that drunk driving was indeed conduct highly *dangerous* to others."<sup>27</sup> Had legislators not criminalized drunk driving and public outrage ensued, would that outrage have been based on a failure to give these drivers what they deserve, or instead would it have stemmed from the perceived failure to protect the public? The more general point, parallel to Hypothesis 1, is that if people are bothered by a particular case or criminal law, their scorn toward the system may often be based on something other than a failure to follow ordinal desert. Failure to protect its citizens might be the most potent reason government loses citizen trust.

The third type of case has resulted in a wide array of harsh laws for drug sale and possession.<sup>28</sup> But it has also given rise to drug courts, which in some jurisdictions divert persons charged with drug-related crimes, including felonies, out of the criminal justice system entirely.<sup>29</sup> The problem here is that drug-related crimes are beyond the core of agreement about desert. Thus, while a sizeable portion of the public apparently supports harsh drug laws (perhaps because, like MADD, advocates for these laws have been able to associate drug crimes with ruined families and children), much of the public does not, for all sorts of reasons. Most dramatically, as Robinson himself notes, in "some inner-city communities, in which very high proportions of young African-American males have done prison time for actions that the community does not regard as criminal, it may be that being an 'ex-convict' no longer stigmatizes the individual in that community."<sup>30</sup> When there is serious disagreement about desert

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27. Robinson & Darley, *supra* note 12, at 60 (emphasis added).

28. See Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 859 (2001) (noting that all of New York's possession laws require a minimum of one year in prison and eleven provide for a maximum sentence of life imprisonment).

29. See Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 832 (2000).

30. Robinson & Darley, *supra* note 12, at 21.

rankings, which could exist for any crime outside the core, legislators trying to follow empirical desert are between a rock and a hard place.

### III.            WHAT IS THE EFFECT OF KNOWLEDGE THAT THE LAW DIVERGES                      FROM SOCIETAL VALUES?

Let us now assume that consensus views on desert have been reliably ascertained, that the law routinely fails to adhere to these views, and that the public notices and is bothered by the divergence. This narrow set of circumstances, Robinson believes, is likely to occasion noticeably less compliance with the law, even if the failure to adhere to empirical desert is based on general deterrence, incapacitative or rehabilitative goals. Along with Kurzban and Owen Jones, he argues that “[g]aining a reputation for ‘getting it wrong’—for regularly and intentionally relying upon rules that do injustice—can promote subversion and resistance to the system, can undermine the effective, yet cheap normative influence of stigmatization, can reduce people’s willingness to defer to the law in cases of normative ambiguity, and can subvert the criminal law’s ability to shape community norms and to induce people to internalize the norms expressed in the criminal law.”<sup>31</sup> Thus, he quotes a commentator to the effect that “society is weakened every time a law is passed that large numbers of reasonable, responsible citizens think is stupid.”<sup>32</sup> In the following hypotheticals, the word “stupid” is a stand-in for laws that bother the public because they do not reflect consensus empirical desert.

*Hypothesis 7: Stupid criminal laws will not have a significant impact on compliance with the law.* This hypothesis challenges the crux of Robinson’s argument. Robinson relies heavily on the work of Tom Tyler for the proposition that, as Tyler put it in his seminal work, *Why People Obey the Law*, “[t]he most important normative influence on compliance with the law is the person’s assessment that following the law accords with his or her sense of right and wrong.”<sup>33</sup> While Tyler’s work does suggest that people are less likely to obey laws they think are wrong-headed (e.g., some types of traffic laws and laws that criminalize possession of small amounts of drugs), much of his research proves a different proposition: that people’s willingness to comply with the law *in general* is strongly affected by

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31. Paul H. Robinson, Robert Kurzban & Owen D. Jones, *Realism, Punishment & Reform*, 77 U. CHI. L. REV. \_\_\_\_ (forthcoming 2010) (manuscript at 4), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1590463](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1590463).

32. Robinson & Darley, *supra* note 12, at 28 (quoting John Coffee).

33. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 64 (1990) (quoted in Robinson & Darley, *supra* note 12, at 25).

whether people believe the law is “legitimate,” which in turn is determined in large part by whether they perceive that authorities are adhering to tenets of “procedural justice.” As Tyler more recently expressed his thesis, the framework adopted in *Why People Obey the Law* “is not linked to either the favorability or fairness of the decisions made or policies pursued by legal authorities. Rather, legitimacy is linked to the justice of the procedures by which the police and courts implement the law.”<sup>34</sup> Indeed, even in his original work, Tyler stated that “[p]eople generally feel that law breaking is morally wrong, and that they have a strong obligation to obey laws even if they disagree with them.”<sup>35</sup>

Thus, Tyler’s views as to why people obey the law are more complex than Robinson suggests. The extent to which the law reflects the public’s moral views is not unimportant, but equally if not more important is the public’s perception of whether the law has considered those views, is transparent, and fairly adjudicates disputes when contested moral values are at issue.<sup>36</sup> Robinson’s principal example of vigilante justice—where townspeople killed a man after the authorities had allowed him to terrorize them for years—appears to fall into the latter category.<sup>37</sup>

If the criminal law stopped holding murderers, rapists, and robbers accountable, or the criminal adjudication system routinely let people who committed such core crimes go, rebellion would undoubtedly be in the offing. But unless a fundamental shift in criminal justice occurs, the divergence between the law and lay views with respect to core crimes—which, again, is the only arena where empirical desert laws makes sense—is likely to be small, with the likely result that the contempt generated by such a difference will also be small, and the likelihood of non-compliance even smaller. For instance, in Robinson and Darley’s original research, participants disagreed with the positions taken by the Model Penal Code on over half of the eighteen issues studied, all having to do with the mens rea

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34. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 273 (2d ed. 2006).

35. TYLER, *supra* note 33, at 64.

36. See also Jaime L. Napier & Tom R. Tyler, *Does Moral Conviction Really Override Concerns about Procedural Justice? A Reexamination of the Value Protection Model*, 21 SOC. JUST. RES. 509 (2008) (contesting the conclusions of Skitka et al. that procedural justice concerns are trumped by “moral mandates” by re-analyzing Skitka et al.’s data and concluding that “the justice of decision-making procedures is found to significantly influence people’s reactions to decisions by authorities and institutions even when their moral mandates are threatened”).

37. Robinson & Darley, *supra* note 12, at 21–22. Polls showing a loss of respect for the legal system in the wake of the O.J. Simpson acquittal and the acquittals of the officers who beat Rodney King also appear to be based on a sense of procedural injustice rather than substantive injustice. Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1426 (2005).

or grading of aggression and theft crimes (i.e., core crimes).<sup>38</sup> A number of jurisdictions have adopted many of these Model Penal Code provisions.<sup>39</sup> Yet it is highly unlikely willingness to comply with the criminal law has decreased in these jurisdictions, either because members of the public are not aware of the divergence (Hypothesis 4), do not care about it (Hypothesis 5) or, consistent with the current hypothesis, are more prone to obey than disobey the law even when they are disgruntled by it.

Providing a possible counter to this assertion is a very interesting study carried out by Professor Janice Nadler.<sup>40</sup> Nadler exposed her subjects to the facts of an actual case, in which a young man named Cash witnessed his friend molest a child and soon thereafter learned the friend had also killed the child, but did not report the incident to the authorities either at that time or later (even though he could easily have done so), and bragged about the incident to acquaintances. Under the law of complicity and omission liability in the relevant jurisdiction, Cash was not criminally liable. But Nadler's subjects thought he should have been. More relevant to Robinson's thesis, those who were told the actual disposition of the case were subsequently much more likely to act in a non-compliant fashion than those who were (falsely) told Cash received a year in prison. Specifically, when acting as mock jurors, those who were told that Cash was not prosecuted for his failure to seek out the authorities were more likely than the second group to refuse to apply a law, requiring life in prison for a third conviction, to a homeless individual with two prior offenses who clearly stole a shopping cart.<sup>41</sup>

Of course, as Nadler notes, a willingness to nullify a draconian law in a mock setting is not the same as a willingness to violate substantive criminal prohibitions in real life.<sup>42</sup> Furthermore, the chance to nullify the law occurred immediately after learning of the "injustice" done in Cash's case. Thus, to the extent anger over an unjust law occasions misconduct, it may have to occur within a short time span. Nonetheless, Nadler's study does tend to disprove this hypothesis.

*Hypothesis 8: Stupid criminal laws that cause non-compliance will have a relatively narrow impact.* Most research that tries to tie non-compliance to disagreement with the law indicates that the non-compliance is aimed at the

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38. For a summary of the studies and the extent to which their results conflict with Model Penal Code provisions, see Christopher Slobogin, *Is Justice Just Us? Using Social Science to Inform Substantive Criminal Law*, 87 J. CRIM. L. & CRIMINOLOGY 315, 316–21 (1996).

39. See Gerard E. Lynch, *Towards a Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 BUFF. CRIM. L. REV. 297, 297–98 (1998).

40. Nadler, *supra* note 37, at 1410–26.

41. *Id.* at 1423–26.

42. *Id.* at 1438.

triggering law—the specific law that goes against the moral grain—rather than law writ large. Studies show that laws that criminalize popular activity—underage drinking, marijuana use or gambling—have been ignored by large segments of the populace who want to engage in those behaviors, but do not show that these individuals become scofflaws more generally.<sup>43</sup> And if laws that mete out *less* punishment than empirical desert requires cause people to be non-compliant, one might again reasonably assume that the failure to abide by the law would be crime-specific, as well as primarily the result of a failure of deterrence rather than a failure to abide by empirical desert. For instance, if the criminal law suddenly relaxed punishment of rapists or robbers contrary to the demands of empirical desert, any increase in criminal activity that did occur would probably be limited to those crimes and be attributable to a lessened fear of harsh punishment than the product of disrespect for the law.

Again, Nadler’s study suggests otherwise. As she puts it, her results indicate that “specific instances of perceived injustice in the legal system can lead to diminished deference to the law generally.”<sup>44</sup> But given the artificial nature of her study, much more empirical work needs to be done on this score, ideally testing that proposition in the real world. Although ethical constraints inhibit researcher attempts to produce non-compliance with the criminal law, many situations—such as the adoption of an empirically “unjust” MPC provision—provide opportunities for natural experiments along these lines.

*Hypothesis 9: The non-compliance resulting from stupid laws will not be as great as the non-compliance resulting from laws that are not stupid, but that fail to achieve other goals such as deterrence or incapacitation.* In other words, this hypothesis states, implementation of empirical desert will not be as effective at preventing crime as more explicit efforts at achieving utilitarian goals. This hypothesis again directly challenges the crux of Robinson’s argument. If the aim of empirical desert is controlling crime, then a regime based solely on empirical desert must be superior to all competing regimes in terms of that goal. Consider, for instance, a sentencing system the sole objective of which is to prevent recidivism within very broadly-defined retributive limits,<sup>45</sup> or a system that focuses on

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43. See description of studies in ROBINSON & DARLEY, *supra* note 8, at 202–03; GEORGE KLOSKO, POLITICAL OBLIGATIONS 195 (2005) (arguing, based on empirical work, that while people may ignore speed limits, legal drinking ages, and the prohibition against downloading music without paying for it, they feel that it would be wrong to disobey “weightier” laws they do not like, such as the requirement to pay annual income taxes).

44. Nadler, *supra* note 37, at 1439.

45. See Christopher Slobogin & Mark R. Fondacaro, *Juvenile Justice: The Fourth Option*, 95 IOWA L. REV. 1, 3–4 (2009) (proposing such a regime for juvenile offenders).

restorative justice.<sup>46</sup> While these latter regimes might run afoul of empirical desert, both might also be more effective at reducing crime. To date, no empirical work has directly explored these propositions.

#### IV. CONCLUSION

All of the hypotheses laid out above are, by design, hostile to the idea that empirical desert should drive the definition of crimes and sentencing rules. It may well be that many or all of these hypotheses will be disproven. But they need to be tested more rigorously than they have been, a point with which Professor Robinson surely agrees.

Many of these hypotheses also suggest that the tensions between desert and other purposes of sentencing cannot be as easily eradicated as Robinson suggests. However, a different form of empirical desert—focused on the type of disposition, rather than its ranking or length—might be more successful at doing so, as suggested by one last hypothesis. *Hypothesis 10: The dispositions dictated by other goals of criminal justice satisfy empirical desert in a large number of cases.* As Robinson has noted, many types of intermediate sanctions designed primarily to achieve rehabilitative goals might have just as much “punitive bite” as prison, which is the normal punishment for blameworthy conduct.<sup>47</sup> For instance, a study conducted by Harlow, Darley and Robinson, using a small sample in New Jersey, found that participants equated three years of an intensive supervision program or three years of weekend sentences with a year in prison in terms of punishment units.<sup>48</sup>

This latter type of research might help resolve the apparent conflict between retributive and utilitarian punishment goals. For instance, one of the more exciting developments in criminal risk management over the past ten years is multi-systemic therapy, which appears to be able to reduce drastically the recidivism of violent juveniles much more cheaply than traditional dispositions, in part because it takes place entirely in the

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46. See John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1743 (1999).

47. Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 996 (2003).

48. Robert E. Harlow, John M. Darley & Paul H. Robinson, *The Severity of Intermediate Penal Sanctions: A Psychophysical Scaling Approach for Obtaining Community Perceptions*, 11 J. QUANTITATIVE CRIMINOLOGY 71, 85 (1995). Also of possible relevance to this hypothesis are studies showing that offenders “judge certain types of community-type punishments as more severe than prison.” Joan Petersilia, *Alternative Sanctions*, in MINIMIZING HARM: A NEW CRIME POLICY FOR MODERN AMERICA 115, 142 (1999).



community over a four to six-month period.<sup>49</sup> If the public views intensive and demanding in-house rehabilitative efforts over a half-year time span to have sufficient punitive bite in the case of violent juvenile offenders, then this type of intervention could achieve both specific deterrence and empirical desert goals simultaneously. Of course, if instead the public believes that multi-systemic therapy is not sufficiently punitive, even in the juvenile context, reconciliation of empirical desert with individual prevention goals will be more difficult, and will directly raise the issues addressed in Hypotheses 7 and 9: Do rehabilitative dispositions for violent acts occasion significant non-compliance among the general populace, and if so, does the resulting increase in crime exceed the crime reduction capabilities of multi-systemic therapy?

The bottom line: before empirical desert can be advanced as the lodestar of criminal law doctrine, much more empirical work must be conducted.

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49. See SCOTT W. HENGGELER ET AL., *MULTISYSTEMIC TREATMENT OF ANTISOCIAL BEHAVIOR IN CHILDREN AND ADOLESCENTS* 252-54 (1998).