EMPIRICAL DESERT AND PREVENTIVE JUSTICE: A COMMENT

*Christopher Slobogin**

This essay is a response to an article by Paul Robinson, Joshua Barton, and Matthew Lister in this issue of New Criminal Law Review *that criticizes an article I authored with Lauren Brinkley-Rubinstein entitled* Putting Desert in Its Place, *which was itself an analysis of several works published by Robinson and various coauthors making the case for "empirical desert." Robinson's suggestion that utility can be optimized by a focus on desert as it is viewed by the average citizen opens up a new line of inquiry that could lead to a better appreciation of the influence desert should have on the criminal law. Where we disagree is how much utility a system founded on empirical desert is likely to have. Robinson appears to hold that failing to subscribe to empirical desert in most cases will result in noticeable disutility, whereas I am inclined to believe, consistent with the studies in* Putting Desert in Its Place, *that only significant, continuous and highly publicized departures from lay views will occasion the loss of compliance and cooperation that Robinson describes. This article also defends the punishment scheme that I have called "preventive justice" against some of the claims made by Robinson, Barton, and Lister.*

Keywords: *preventive justice, individual prevention, empirical desert, risk assessment, criminal law*

*Milton Underwood Professor of Law, Vanderbilt University, 131 21st Ave. S.W., Nashville TN 37203.

New Criminal Law Review, Vol. 17, Number 2, pps 376–403. ISSN 1933-4192, electronic ISSN 1933-4206. DOI: 10.1525/nclr.2014.17.2.376.

INTRODUCTION

In this issue of *New Criminal Law Review*, Paul Robinson, Joshua Barton, and Matthew Lister (RBL) respond to an article I authored with Lauren Brinkley-Rubinstein entitled *Putting Desert in its Place*,[1] which was itself an analysis of several works published by Robinson and various coauthors making the case for "empirical desert."[2] I am grateful for the opportunity to provide this brief analysis of the criticisms that RBL levy at *Putting Desert in Its Place*. Some of those criticisms are well-founded or raise issues that our article could or should have more directly addressed. Other criticisms exaggerate or miss the mark entirely. This article will assume that the reader is familiar with both *Putting Desert in Its Place* and with RBL's article, entitled *Empirical Desert, Individual Prevention, and Limiting Retributivism: A Reply*.[3] Thus, Parts II and III of this article will be devoted to responding directly to RBL's comments, without significant background explanation. However, in this introduction and in Part I two preliminary matters are taken up.

Most importantly, I want to emphasize the most significant points of agreement and disagreement between RBL and myself.[4] One goal of *Putting Desert in Its Place* was to highlight the contribution that Paul Robinson and his coauthors have made to the analysis of criminal justice policy. The conflict between deontological retributivists and utilitarians over the purpose and scope of the substantive criminal law will never end.[5]

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1. Christopher Slobogin & Lauren Brinkley-Rubinstein, *Putting Desert in Its Place*, 65 STANFORD L. REV. 77 (2012).

2. *See, in particular*, PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH? 139–40 (2008); Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829 (2007); Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1 (2007).

3. Paul Robinson, Joshua Barton, & Matthew Lister, *Empirical Desert, Individual Prevention, and Limiting Retributivism: A Reply*, 17, N. CRIM. L. REV. 312–75 (2014).

4. Because Professor Brinkley-Rubinstein's contribution to *Putting Desert in Its Place* was primarily statistical, this response reflects only my views, which are not necessarily hers.

5. RBL state that *Putting Desert in Its Place* grandiosely asserts that this debate has been supplanted by the debate between us and RBL. RBL, *supra* note 3, at 353 (stating that such an assertion would be "a great shock" to moral philosophers). Of course, our article says no such thing; it merely distinguishes between the "old" and "new" debates on criminal justice, the first pitting deontologists against utilitarians, the second pitting utilitarians against one

But Robinson's suggestion that utility can be optimized by a focus on desert as it is viewed by the average citizen opens up a new line on inquiry that could lead to a better appreciation of the influence desert should have on the criminal law. If departure from empirical desert has the criminogenic and de-legitimizing effects Robinson posits, then both utilitarians *and* deontologists should pause before advocating something different—utilitarians for obvious reasons, deontologists because such damaging consequences call into question the logic of their moral stances. If instead the effects of departing from empirical desert are minimal, then desert theorists will have one less nagging doubt about the real-world impact of their philosophizing, and utilitarians can rest easier about implementing more direct crime prevention policies. As someone who distrusts anyone's ability to fathom, through philosophical musings, the morally correct degree of blame that should be attributed to particular offenders, I applaud Robinson for operationalizing desert in a way that is commensurate with consequentialism.

Where we disagree is how much utility a system founded on empirical desert is likely to have. Robinson appears to hold that failing to subscribe to empirical desert in most cases will result in noticeable disutility, whereas I am inclined to believe, in line with the studies reported in *Putting Desert in Its Place*, that only significant, continuous and highly publicized departures from lay views will occasion the loss of compliance, cooperation, and respect that Robinson describes. People get upset about all sorts of things government does—from Obamacare and surveillance to gun control and abortion. Changing the official stance on controversial issues to appease one group is likely to upset another. Whether the focus is criminal matters or something else, most people will not take their disgruntlement out on the system or on others, and those who do will be roughly equal in number regardless of which position government adopts.

I. ON PREVENTIVE JUSTICE

Before looking at RBL's specific critiques of the studies in *Putting Desert in Its Place*, I also want to clear away some underbrush, sown in RBL's article, about "preventive justice," so that the rest of this article can focus on the

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another. *See* Slobogin & Brinkley-Rubinstein, *supra* note 1, at 78–79 ("In the new debate both sides are . . . willing to abandon the deontological view of desert.").

main issues. "Preventive justice" is the term I used in *Putting Desert in Its Place* to describe the position that incapacitation, specific deterrence, and rehabilitation—what I call the individual prevention factors—should play the dominant role in fashioning dispositions in criminal cases, with desert relevant only at the guilt adjudication stage and as a loose limitation on the minimum and maximum terms for sentences.[6] It was not the intent of *Putting Desert in Its Place* to mount a comprehensive defense of this approach to criminal justice, a task I have undertaken elsewhere.[7] Nonetheless, in their article RBL proffer several criticisms of preventive justice to which I want to (very briefly) respond. Their key criticisms, all closely related, are that preventive justice is: (1) an oxymoron;[8] (2) pure preventive detention in disguise[9]; and (3) inadequate as a utilitarian theory, because it fails to take into account general deterrence or the differences among incapacitation, specific deterrence, and rehabilitation as goals of punishment.[10]

Along with deontological retributivists, Robinson and his coauthors think that desert and justice are synonymous, and that utilitarian goals (other than empirical desert) are seeking something other than justice.[11] As I have noted elsewhere, however:

> Justice does not have to be defined solely in terms of blameworthiness and offense gravity. Determinate sentencing is unjust to the victim [who is hurt by someone] who has been released prematurely, as well as to the prematurely released offender who must now suffer avoidable punishment for

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6. *See* Slobogin & Brinkley-Rubinstein, *supra* note 1, at 79.

7. *See, e.g.*, Christopher Slobogin, *Prevention as the Primary Goal of Sentencing*, 48 SAN DIEGO L. REV. 1127 (2011).

8. RBL, *supra* note 3, at 367 ("'individual prevention' . . . allow[s] desert to be violated—injustice can be done, in the name of prevention.").

9. *Id.* at 362 ("'individual prevention' . . . thus simply provides useful window dressing to make it look like something other than preventive detention's pure dangerousness.").

10. *Id.* at 362 ("As utilitarians, one would expect that SBR would be anxious to include general deterrence in their proposed distributive principle") and 364 ("Unlike the other coercive crime-control principles—special deterrence and rehabilitation—general deterrence cannot be made to quietly collapse into dangerousness, so it must be simply dropped.").

11. *See, e.g.*, RBL, *supra* note 3, at 319 ("'[D]oing justice'" involves assigning liability and punishment "in ways that the community perceives as morally just, so-called 'empirical desert.' Conversely, the system's moral credibility, and therefore its crime-control effectiveness, is undermined if it deviates from the community's perceptions of just desert.").

> a crime the offender would not have committed had detention and treatment continued. It is also unjust to the contrite offender who is ready to be law-abiding but must serve out the sentence he or she "deserves."[12]

As James Whitman recently put it, "there are as many kinds of justice as there are offenders."[13] Even if justice is tautologically defined in terms of desert, an individual prevention regime can be "just." For instance, Douglas Husak, a well-known retributivist, has argued that preventive detention is legitimate punishment so long as the factors upon which such detention is based are "under the control" of the person detained, factors that certainly include prior crimes and criminal affiliations, and could include (although Husak would probably not do so) substance abuse and intentional withdrawals from rehabilitative programs, all of which are potent predictors.[14]

Consistent with their first criticism, RBL also advise that dressing up preventive justice as "a sort of limiting retributivism" is an attempt to hide the fact that what is really being proposed is pure preventive detention.[15] Yet, as *Putting Desert in Its Place* indicated,[16] a preventive justice regime would not focus on individual prevention to the exclusion of desert. Rather, sentences would need to fall within desert-based ranges, albeit extremely broad ones. Because those ranges would exist out of concern about the criminogenic effect of paying no attention to desert, the result could also accurately be described as a form of limiting retributivism, albeit not precisely the type envisioned by its progenitors.[17]

It is true that within those ranges, preventive considerations would prevail. However, I would also resist being labeled a fan of prevention

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12. Slobogin, *supra* note 7, at 1160.

13. James Whitman, *The Case for Modern Penalism* (forthcoming, 2014).

14. Douglas Husak, *Lifting the Cloak: Preventive Detention as Punishment*, 48 SAN DIEGO L. REV. 1173, 1195 (2011).

15. RBL, *supra* note 3, at 368 (stating that preventive justice "is not a form of limiting retributivism").

16. Slobogin & Brinkley-Rubinstein, *supra* note 1, at 122 ("[T]he best way to reconcile retributive and preventive goals is probably through some sort of limiting retributivism, or what we are calling preventive justice, which allows utilitarian considerations to have significant impact within a range established by retributive principles.").

17. Slobogin, *supra* note 7, at 1165 (noting that the proposed system would differ from the typical approach to "limiting retributivism" because "no particular minimum sentence would be required, the sentence range would be broader, and most importantly, risk would be determined at the back end by an expert panel rather than at the front end by a judge.")

detention; the more accurate term is preventive *intervention*.[18] As I have laid out in other work, a well-functioning preventive regime would be governed by a number of principles—among them the legality principle, the least-drastic-means principle, and the risk proportionality principle—that would interact to make detention impossible in the absence of a crime, rare in minor criminal cases, a last resort in all cases, and proportional to the risk presented.[19]

Ironically, Robinson, who has proposed a detention system for individuals deemed to be dangerous, appears to be more receptive to pure preventive detention than me.[20] Unlike Robinson, I would not permit such detention separate from the criminal justice system except when it is limited to a very narrowly defined group of "undeterrable" individuals whose autonomy, or whose willingness to exercise their autonomy in the right direction, is seriously compromised.[21] The failure of Robinson's proposal to adopt a similar limitation very likely renders it unconstitutional.[22] More importantly in the context at issue here, if, as Robinson claims (but I dispute), detention inconsistent with empirical desert usually has de-legitimizing effects, I doubt that, as Robinson further claims,[23] relegating it to a separate entity or avoiding attachment of the word "justice" to it will change matters, especially if this separate regime results in confinement of *anyone* thought to meet the dangerousness threshold.

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18. See Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 14 (2003) ("The second essential feature of preventive detention—or what might more aptly be called preventive intervention—is that the nature of the liberty deprivation must bear a reasonable relationship to the harm feared.").

19. Slobogin, *supra* note 7, at 1130–53.

20. Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1454 (2001) (arguing for a system of post-sentence preventive detention that would be "segregated" from the criminal justice system).

21. For my most recent treatment of this issue, see *Preventive Detention in the United States and Europe*, *in* PREVENTING DANGER 137, 149–52 (Michele Caianello & Michael Corrado eds., 2013).

22. See Kansas v. Hendricks, 521 U.S. 346, 360 (1997) (holding that due process requires a "lack of volitional control" as well as dangerousness before post-sentence commitment may take place).

23. *See* RBL, *supra* note 3, at 351 ("a society . . . need not undercut the criminal law's moral credibility . . . if it will simply be honest about what it is doing, that it is doing it as part of a civil preventive detention system, no longer claiming it is doing criminal justice.").

Finally, RBL take me to task for not being sufficiently nuanced in my utilitarianism. They fault me for ignoring general deterrence as a consideration in fashioning sentences and for lumping together incapacitation, specific deterrence, and rehabilitation under the dangerousness rubric.[24] I plead guilty, more or less. Although general deterrence is an important goal of the criminal justice system, it should not drive criminal justice policy, at least where run-of-the-mill street crime is involved. As I have stated in other work (citing Robinson), "research strongly suggests that for most offenders concern about punishment has very little impact on the decision to commit crime."[25] I have also argued that the uncertainty associated with an indeterminate sentencing regime, along with the likelihood that sentences in such a regime would be enhanced for multiple offenses, may well be a superior general deterrent to desert-based sentencing.[26] In short, a regime focused on individual prevention can usually achieve whatever general deterrence effect is possible. But preventive justice also posits that, even when that is not the case, individual prevention goals and, in particular, the risk proportionality principle, should typically govern. Put another way, general deterrence only has independent effect when it results in sentences that are disproportionate to either desert or risk; Robinson resists the first result, I reject the second.

RBL are also correct that, consistent with the principles noted above (to wit, the legality, least-drastic mean, and risk proportionality principles), preventive justice would focus on the best way to prevent an individual from committing another crime, and that this focus would mean that the central concerns are dangerousness and coercive intervention[27] (although, along with most social scientists, I prefer the terms "risk" and "risk management"[28]). It must also be

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24. *See supra* note 10.

25. Slobogin, *supra* note 7, at 1163.

26. *Id. See also* Tom Baker, Alon Harel, & Tamara Kugler, *The Virtues of Uncertainty in Law: An Experimental Approach*, 89 IOWA L. REV. 443, 445–46 (2004); Naomi Harlin Goodno, *Career Criminals Targeted: The Verdict Is In, California's Three Strikes Law Proves Effective*, 37 GOLDEN GATE U. L. REV. 461, 469–71 (2007) (describing studies purporting to find that California's three-strikes law has had a significant deterrent effect).

27. RBL, *supra* note 3, at 360 ("SBR's undisclosed assumption appears to be that all three of the principles—special deterrence, rehabilitation, and incapacitation of the dangerous—in practice collapse into dangerousness because, after all, there is no need for rehabilitation or for special deterrence unless the offender is presently dangerous.").

28. See Christopher Slobogin, *The Civilization of the Criminal Law*, 58 VAND. L. REV. 121, 127–28 (2005) (defining these terms).

recognized, however, that risk can be reduced through numerous mechanisms: detention, treatment, restorative processes, and other options as varied as the individuals who offend, are all viable possibilities. The goal, which contrary to RBL's insinuation I have never tried to hide, is ascertaining the best means of reducing a particular individual's risk, through whatever legitimate means is available. Under such a system, RBL are wrong to call "false" the assumption that "there is no need for rehabilitation or for special deterrence unless the offender is presently dangerous."[29]

None of this is meant to deny that a system based on preventive justice/individual prevention/preventive intervention is controversial. There is a strong and understandable revulsion toward government incarceration of people based on suspect predictions of risk,[30] as evidenced by the largely negative reaction to film dramatizations of preventive notions like prepunishment, detention based on genetic makeup, and behavioral modification programs.[31] However, preventive justice as I envision it would not be the gulag portrayed in *Minority Report*, the movie that RBL reference in discussing an individual prevention regime.[32] As I stated in one of my more recent efforts, a system of preventive justice could be "similar to the original Model Penal Code's scheme, which established wide sentencing ranges for felonies that all began at one year and increased in breadth according to crime severity, with the caveat that even a one-year sentence could be reduced in light of the crime and the history and character of the defendant."[33] Because risk would play the dominant role in disposition, no particular minimum sentence would be required, the sentence range would be much broader than a desert-based system would contemplate, and the actual maximum sentence would be determined at the back end by an expert panel rather than by a judge at the front end.[34] Granted, the recently

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29. RBL, *supra* note 3, at 360.

30. RBL rightly highlight the fact that risk assessment is not an exact science. *Id.* at 30. But neither is culpability assessment. *See* Slobogin, *supra* note 7, at 1154–58 (detailing this and other responses to the inaccuracy criticism).

31. The references are to the movies *Minority Report*, *Gattaca*, and *Clockwork Orange*, respectively.

32. RBL, *supra* note 3, at 364 (in discussing an individual prevention regime, stating, "think of Tom Cruise in *Minority Report*, but without the ability to accurately predict future criminality").

33. Slobogin, *supra* note 7, at 1165.

34. *See also* Daniel Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV. 317, 351 (1992) (describing Japan's criminal justice system of "specific

revised Model Penal Code sentencing provisions, heavily influenced by retributivists, have abandoned this framework.[35] But the fact that an indeterminate scheme of the type I prefer was at one time endorsed by the American Law Institute will hopefully tone down any kneejerk reaction to preventive justice based on Hollywood images.

RBL assert that indeterminate sentencing of the type adopted by the original Code, which was prevalent before the 1970s, is a "failed" policy,[36] noting that in the past few decades a number of states have moved toward determinate sentencing.[37] Of course, a number of states have not,[38] and determinate sentencing has many flaws as well.[39] Furthermore, the data are, at best, unclear about which type of sentencing regime—determinate or indeterminate—is most effective at reducing crime.[40] In short, experience to date does not make the case that, from a utilitarian perspective,

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prevention" as focused on rehabilitation and prevention of recidivism, with the result that it prescribes "very broad sentences" that "can be suspended for all but a very small handful of crimes").

35. *See* Model Penal Code: Sentencing § 1.02(2)(a) (approved July 2007) (requiring that punishment be "within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders").

36. RBL, *supra* note, at 312 (abstract).

37. *See id.*, text accompanying nn.175–76.

38. *See* Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1196–97 (2005) (noting that 18 states plus the federal government have adopted sentencing guidelines that tend in the direction of determinate sentencing, but that a number of states have also rejected the guidelines approach).

39. *See* Joan Petersilia, *California's Correction Paradox of Excess and Deprivation*, *in* 37 CRIME AND JUSTICE 207, 252–53 (Michael Tonry ed., 2008) ("Under California's determinate sentencing regime a large percentage of Californians who are nonviolent criminals are accumulating very extensive criminal records . . . [yet] may not be any more dangerous than offenders in other states who are left 'on the street' and successfully handled through an array of community-based intermediate sanctions. [At the same time], California's sentencing system also released violent offenders who amass lengthy criminal records—individuals who, in a system more carefully tailored to protect public safety, probably should not have been released in the first place.").

40. *See, e.g.*, Yan Zhang, Lening Zhang, & Michael S. Vaughn, *Indeterminate and Determinate Sentencing Models: A State-Specific Analysis of Their Effects on Recidivism*, CRIME & DELINQUENCY 1 (Dec. 8, 2009), http://cad.sagepub.com/content/early/2009/12/08/0011128709354047.full.pdf+html (finding that mandatory parole release—in essence, determinate sentencing—turned out to be worse than discretionary parole release at reducing recidivism in New York and North Carolina, better than discretionary release at reducing reoffending in Maryland and Virginia, and of no apparent effect in Texas and Oregon).

determinate, desert-based sentencing is superior to indeterminate, prevention-based sentencing.

RBL suggest, however, that truly preventive justice must go beyond the indeterminate sentencing practices of the original Model Penal Code because, if reduction of individual risk is the goal, neither a predicate act nor any maximum limits should be imposed; rather, intervention should occur whenever a person is dangerous and should last as long as the danger persists.[41] I have already noted the reasons I resist this *Minority Report* regime. First is the aforementioned legality principle, which, as I construe it, prohibits deprivations of liberty in the absence of harmful conduct that is clearly defined by statute.[42] Second, my intuition, which I admit is merely that, is that doing away with a conduct requirement, basic mens rea requirements, and sentencing ranges loosely based on ordinal desert *would* occasion the harms envisioned by Robinson.[43] This much of a bow to desert is needed to avoid the type of disrespect for decent behavior and government authority that would increase criminal behavior and the ability to prevent it. However, the point of *Putting Desert in Its Place* and this article is that these negative effects are unlikely to occur in a more cabined preventive justice regime.

With this background, we can now turn to the issues that were the focus of *Putting Desert in Its Place*. The research in that article was organized under three inquiries that I take to be crucial to empirical desert theory. First, is there enough agreement among laypeople about the role desert should play in fashioning punishment to make a system of punishment based on their views viable (the consensus inquiry)? Second, will a departure from the consensus view on punishment reduce compliance and cooperation with the

41. RBL, *supra* note 3, text accompanying n.162 and at 364 (asserting that the limitation of preventive justice to sentencing is a "maneuver" designed to "obscure" its true theoretical reach).

42. *See* Slobogin, *supra* note 7, at 1133 ("the practical consequence of the legality principle is that preventive detention may not occur unless the individual has committed a crime—presumably defined at least in part consistent with desert—or has engaged in conduct that poses an imminent risk of crime.").

43. *Cf.* RBL, *supra* note 3, at 365 ("No one would want to live under a system where 'punishment' is imposed upon a mere prediction of future criminality."). RBL state that I have only recently "evolved" to this position, citing an article I wrote in 2005. RBL, *supra* note 3, at n.149. But that article was in the nature of a thought experiment. *See* Slobogin, *supra* note 28, at 130 (stating that the article was "exploratory") and 168 (noting concerns about the proposal related to empirical desert).

system (the compliance inquiry)? Third, will the preventive effects of adherence to desert exceed the preventive effects of a system based on preventive justice (the crime control inquiry)? As *Putting Desert in Its Place* noted, the third question is very difficult to answer, and in fact our research did not even seek to answer it.[44] Instead, the studies described under that rubric investigated the role that lay people think preventive goals should play in fashioning punishment, and thus related more closely to the first inquiry. Accordingly, the discussion below first addresses, in Part II, what our research showed with respect to lay views about the relative importance of desert and prevention, and then examines, in Part III, what our research showed about the effects of failing to adhere to desert.

II. LAY VIEWS ON THE RELEVANCE OF PREVENTIVE GOALS

In *Putting Desert in Its Place*, our first study found that consensus about the ordinal rankings of crimes can sometimes change if subjects are given information not only about the actus reus and mens rea of the crime—the only information Robinson and his coauthors give the subjects in their studies—but also about offender characteristics.[45] More specifically, Study 1 found that provision of information potentially relevant to an offender's risk and treatability (individual prevention factors) led to significant differences in the way subjects ranked four of the six pairs of scenarios we used in the study.[46] RBL state that this finding "has nothing to do with prior claims by Robinson and coauthors."[47] But Robinson has routinely insisted that "[w]hen . . . asked to assign punishment, [lay persons] don't look to the factors that determine dangerousness or deterrence, but rather to the offender's moral blameworthiness."[48] Study 1 suggests, unsurprisingly, that this assertion is wrong. Desert certainly plays a role in lay persons' decisions about punishment (a conclusion that a number of our studies support), but

44. Slobogin & Brinkley-Rubinstein, *supra* note 1, at 120 ("Our research does not directly test [the crime control] hypothesis, which would be hard to do given the difficulty of measuring the extent of crime control and its causes.").

45. *Id.* at 90.

46. *Id.* at 91.

47. RBL, *supra* note 3, at 333.

48. *See, e.g.*, Paul H. Robinson, *Doing Justice as Controlling Crime*, 42 ARIZ. ST. L.J. 1089, 1105 (2011).

it is not the sole consideration. If that is so, creating a criminal justice system that orders punishment solely on the basis of desert may create dissatisfaction with the criminal law, which is something Robinson wants to avoid.

However, RBL also state that the facts that we thought would suggest a greater or lesser need for preventive sanctions—namely, prior crimes, a willingness to undergo treatment, apology and restitution, and a vow to recidivate—are also consistent with desert.[49] Thus, they consider our study a "poor test" of the influence of individual prevention factors.[50] Several responses are in order here. First, although arguments can be made that prior bad acts and (perhaps) apologies are pertinent to desert, most definitions of the latter concept do not include such forward-looking facts as a willingness to undergo treatment or a vow to recidivate.[51] Indeed, RBL's assertion about the relevance of our manipulation factors to desert seems to be in direct conflict with the statement in another of Robinson's articles, reported in *Putting Desert in Its Place*,[52] that "extralegal punishment factors" such as apology, remorse, and one's history of good or bad deeds "go beyond the factors that the criminal law formally recognizes" because they are not "desert-based factors" having to do with the "seriousness of the harm or the evil of the offense and an offender's culpability and mental capacity."[53] Finally, if, contrary to these first two points, all of our manipulation factors are consonant with RBL's definition of desert, then RBL's definition is so capacious that in many cases it would eliminate any meaningful distinction between desert and prevention—rather, empirical desert and individual prevention could happily coexist much of the time, a point to which I'll return below.

RBL do highlight one instance where their conception of desert would conflict with prevention goals: the offender with mental illness.[54] By most accounts, mental illness makes a person less blameworthy; at the same time,

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49. RBL, *supra* note 3, at 335 (stating that Study 1's manipulations included "many elements that prior research has shown affect people's judgment of deserved punishment").

50. *Id.*

51. LEO KATZ ET AL., FOUNDATIONS OF CRIMINAL LAW 63 (1999) ("Retributive desert is based on what the offender has done, and with what culpability.").

52. Slobogin & Brinkley-Rubinstein, *supra* note 1, at 91.

53. Paul H. Robinson et al., *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment*, 65 VAND. L. REV. 737, 739 (2012).

54. RBL, *supra* note 3, at 335.

it can be a significant risk factor.[55] RBL are right that, in our effort to ascertain the importance of desert in lay calculations of punishment, we should have included a scenario involving an individual who clearly had a mitigating mental condition that also strongly suggested dangerousness. It is worth noting on this score, however, that precisely this "double-edge sword" scenario frequently arises in capital cases, and that research routinely finds that juries treat mental illness as an aggravating factor rather than a mitigating one, even when dangerousness is not a statutory aggravator.[56] That result suggests, once again, that desert is not always the overriding consideration in punishment decisions.

Other studies we conducted point in the same direction. Study 6 found that subjects given information about treatment programs and their relative success were quite willing to reduce both the length of a sentence and the extent to which it took place in prison.[57] Studies 7A and 7B found that, when given information about treatability, a sizeable number of subjects (well over 50 percent) were willing to endorse relatively indeterminate sentencing ranges rather that determinate ones except where murder was involved, and that even one-third to two-thirds of those who were *not* given treatment information were willing to endorse relatively broad sentencing ranges, again except for the most serious crimes.[58] Even for serious crimes, a significant percentage of our subjects in Study 7C reduced the sentence when given information that indicated a high degree of treatability (and increased the sentence when given information about enhanced risk).[59]

RBL note, as we did in *Putting Desert in Its Place*,[60] that our subjects' choice of the relatively indeterminate range over the narrow determinate range in Studies 7A and 7B might simply have reflected the fact that their desert-based view of punishment did not fit within the narrow range

55. *See* Welsh S. White, *A Deadly Dilemma: Choices by Attorneys Representing "Innocent" Capital Defendants*, 102 MICH. L. REV. 2001, 2035 (2004) (noting that evidence of mental illness is "double-edged" because whereas it can both "explain where the defendant has come from and how he got to be the way he is, it also has the potential to . . . enhance the danger to society").

56. *See* CHRISTOPHER SLOBOGIN, MINDING JUSTICE: LAWS THAT DEPRIVE PEOPLE WITH MENTAL DISABILITY OF LIFE AND LIBERTY 88–90 (2006) (describing five studies to that effect).

57. Slobogin & Brinkley-Rubinstein, *supra* note 1, at 113–14 (*see in particular* Table 5).

58. *Id.* at 116 (Table 6).

59. *Id.* at 118 (Table 7).

60. *Id.* at 116.

option.[61] However, in both studies the determinate range centered around the average desert-based sentence we had obtained for the same scenarios in an earlier study, and thus should have been comparatively attractive, *if* the subjects were focused solely on desert.[62] More importantly, the indeterminate option made clear that the actual sentence served under that option would depend entirely on an assessment of the offender's risk at the end of the treatment program (i.e., every scenario in this condition stated that the precise sentence would depend on "how well X responds to treatment"), whereas the determinate option made clear that the offender's response to treatment was irrelevant.[63] Those prompts signaled that prevention goals, not desert, were at play in the indeterminate condition, and yet it was the more popular option.

RBL insist, however, that rehabilitation "is not a good substitute for giving people the punishment they deserve."[64] At the same time, they state that if subjects are told that "the offense is something for which the offender can be treated . . . the subjects are less likely to see the offense as strictly the product of the offender's selfishness, greed, or indifference (to others' interest or the law's demands)."[65] Later they state, "the greater the effect of the treatment in altering [an offender's] likelihood of committing another offense, the less he might be seen as accountable for his own conduct in committing the offense."[66] It is hard to know what to make of these seemingly conflicting statements. Again, the latter two assertions express a very expansive view of desert; certainly most sentencing regimes that purport to be based on desert do not permit the sentencer to take into account the possibility that treatment might reduce recidivism.[67] If instead RBL are stating that our subjects might have reasoned the way RBL describe, that seems unlikely. In Study 6, the subjects were simply told that a recidivist was going to undergo a treatment that had been successful

61. RBL, *supra* note 3, at 373.

62. Slobogin & Brinkley-Rubinstein, *supra* note 1, at 115.

63. *Id.* at 129–34 (Appendix C, providing descriptions of the prompts for studies 7A and 7B).

64. RBL, *supra* note 3, at 344 (emphasis removed).

65. *Id.* at 345.

66. *Id.* at 349.

67. *See, e.g.*, 28 U.S.C. § 994(k) ("The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.").

in reducing recidivism; they were given no information about the *subject's* treatability and thus were not likely to draw inferences about the offender's individual blameworthiness from it.[68] In Studies 7A and 7B, the subjects were explicitly told, as noted above, that the actual sentence in the indeterminate condition would depend entirely on how well the offender responded to treatment, which is not something that can be known in a desert-based regime where sentence is imposed upfront.[69]

Assume, however, that all of RBL's assertions about these studies are correct, and that the determination of desert (both as a matter of theory and as made by our subjects) includes an assessment of the extent to which certain types of offenders can be induced to stop committing crime through treatment or some other means. Then, once again, the disagreement I have with RBL is reduced significantly. Under this conception of desert, an offender for whom rehabilitation is possible could receive a sentence much shorter than an offender for whom it is not—a result that is consistent with preventive justice.

Of course, as both *Putting Desert in Its Place* and RBL point out, our research also indicates that complete convergence between desert and preventive goals is not likely, even if RBL's expansive definition of desert is adopted.[70] In Study 6 the subjects given treatment information on average imposed more than two years of confinement over and above what was needed for rehabilitation alone, indicating that desert, general deterrence, or some other factor was influencing their decision.[71] And in Study 7C, where we told our subjects not only that the individual would be subject to a rehabilitation program but also that it was successful, some of our subjects still wanted to keep the individual confined beyond completion of the program, again either on desert or general deterrence grounds.[72]

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68. Slobogin & Brinkley-Rubinstein, *supra* note 1, at 129–34 (Appendix C, describing prompts for Study 6).

69. *Id.* at 129–34.

70. *See, e.g.*, *id.* at 114 (stating that the results of Study 6 suggest "that laypeople are unwilling to abandon desert").

71. *Id.* (noting that whereas the treatment programs only required six months to a year to complete, the subjects given treatment information on average imposed sentences from 2.4 to 3.9 years, depending on the scenario).

72. *Id.* at 118 (Table 7) (showing that the percentage of subjects unwilling to change their sentence from a presumably desert-based disposition to a prevention-based disposition ranged from 15% to 61%, depending on the scenario).

Except in the case involving murder, however, *most* of our subjects in Study 7C were willing to change their original, desert-based sentence. In cases involving a drug addict convicted of robbery (with two prior thefts), a 17-year-old convicted of an armed robbery (with a prior aggravated assault), and an adult convicted of bribery, the proportion of subjects who substantially reduced their original desert-based sentence when given information about successful treatment was 85 percent, 81 percent, and 73 percent, respectively.[73] In the first two cases, most of our subjects were willing to *release* the individual at the completion of the treatment program, and in the third case almost half were willing to do so.[74]

The greater willingness to abandon desert reflected in Study 7C as compared to Study 6 presumably had to do with the fact that, in the latter study, the subjects did not know the outcome of the treatment. When, instead, they were told that the treatment was successful, as occurred in Study 7C, they were more willing to subscribe to a disposition based solely or substantially on a risk assessment.[75] This reliance on a back-end determination of risk is antithetical to a desert-based regime but is precisely how preventive justice would work.

The fact that our subjects were much less willing to consider preventive factors in connection with the most serious crimes cannot be ignored, however. In this setting, as we pointed out in *Putting Desert in Its Place*, desert appeared to play a dominant role with our subjects, at least when the information about risk suggested that the sentence should be reduced rather than enhanced.[76] Perhaps a risk management program for a treatable serious offender could be structured in such a way—say, for instance,

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73. *Id.* (Table 7, col. 4).

74. *Id.* (Table 7, col. 4 parenthetical) (showing the average reduction in sentence in these cases to be 92%, 71%, and 44%, respectively). This column also shows that even in the case involving murder, 39% of the subjects were willing to reduce the sentence by an average of 42% upon learning about a reduction in risk.

75. RBL validly criticize Study 7C because of a possible demand effect (i.e., the possibility that the subjects changed their sentences because they thought we wanted them to do so). RBL, *supra* note 3, at 351. It should be noted, however, that for two of the six scenarios in this study, a substantial percentage (48% and 61%) did not change the sentence.

76. For a scenario depicting a person convicted of grand theft (with priors for grant theft auto and burglary) who did not successfully complete the rehabilitation program, over half the subjects were willing to enhance the sentence (whereas only 16% of the subjects were willing to do so when confronted with a three time-DUI offender who did not complete the program).

a relatively short prison term combined with a long parole supervision process—that it would provide sufficient "punitive bite" and thus avoid conflict with desert, a possibility noted by both RBL and by us in *Putting Desert in Its Place*.[77] But the existing research indicates that, to satisfy lay views of desert, any crime deserving more than a two-year sentence must be served in prison rather than the community.[78] If that is so, then in cases involving serious crime, desert is both a very important consideration and not always reconciliable with prevention goals. The question then becomes whether that inability to reconcile the two approaches to punishment has real-world effects.

III. THE EFFECT OF DIVERGING FROM DESERT (OR PREVENTION) ON ATTITUDES AND BEHAVIOR TOWARD THE SYSTEM

A predicate question in determining whether divergence from desert has negative effects is whether there is any desert-based consensus from which to depart. Study 2 in *Putting Desert in Its Place* examined the extent to which our subjects agreed on the precise punishment that should be meted out.[79] We found that, whether our subjects were provided solely with actus reus/mens rea facts or with those facts plus additional information about the offender, "disagreement . . . about specific punishments . . . was remarkably high."[80] For sixteen out of the twenty-four scenarios we used in the study, the percentage of subjects at the modal value was only between 15 and 25 percent, and the range of punishment within two standard deviations varied enormously in all twenty-four scenarios.[81] Again, this finding is not very surprising. But it suggested to us that using lay views to figure out how much to punish would be a difficult endeavor.

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77. *See* RBL, *supra* note 3, text accompanying nn.134–35; Slobogin & Brinkley-Rubinstein, *supra* note 1, at 112 n.138.

78. Robert E. Harlow, John M. Darley, & Paul H. Robinson, *The Severity of Intermediate Penal Sanctions: A Psychophysical Scaling Approach to Obtaining Community Perceptions*, 11 J. QUANTITATIVE CRIMINOLOGY 71, 86 (1995) (finding that "[n]o intermediate sanctions were seen as equivalent to prison terms of 2 years or more").

79. Slobogin & Brinkley-Rubinstein, *supra* note 1, at 94.

80. *Id.* at 95 (Table 2).

81. *Id.*

RBL's response to this concern is that "[e]ven if community views on an issue were expressed by a bell curve . . . the law's moral credibility could still be improved by moving from a point on the tail of the curve to a point nearer the center, since this would reduce the number of people with whose intuitions the law conflicts and the extent of that conflict."[82] This is a valid point, if the distribution obtained *is* a bell curve. But many of our distributions were nearly bi- or tri-modal (think of a histogram that looks like a mouth with broken teeth) or very widely dispersed with thick tails.[83] Moreover, as the studies already canvassed indicate, what RBL are calling the "moral credibility" of the law may also hinge on the law's allegiance to prevention factors, independently of desert factors. Finally, whatever the factors are that influence lay punishment decisions about desert, they are so numerous—especially under the capacious definition of desert that RBL appear to adopt, which can include treatability and vows to recidivate—that figuring out what the bell curve might be in a given case could be very difficult without numerous additional studies of the type that Robinson conducts. If, to counter that problem, a range is provided for generally defined crimes like assault and theft, with individualized factors determining where within the range a particular punishment falls, the sentence in any given case could well be far removed from the pinnacle of the curve that would be obtained had the public been polled on the issue.

All of this could be beside the point if divergence from the modal punishment assigned by lay people has little or no effect on the moral credibility of the law, or if any such effect it does have does not lead to serious real-world impacts in terms of compliance, cooperation, and related desideratum. Studies 3, 4 and 5 in *Putting Desert in Its Place* tried to ascertain the effect of departing from lay views on deserved punishment. Study 3 found a small correlation between subjects' unwillingness to comply with the law and the extent to which they disagreed with the maximum sentences assigned to crimes in their respective jurisdictions.[84] But whether the reason for that disagreement was based on a perceived failure to

82. RBL, *supra* note 3, at 331.

83. Of the 24 scenarios, only seven had a normal bell-curved distribution (measured via kurtosis and skewness scores).

84. Slobogin & Brinkley-Rubinstein, *supra* note 1, at 102 (finding a "marginally significant correlation of 0.1 between dissatisfaction with the law and noncompliance" with respect to the control group and a "statistically significant" correlation of .22 with respect to the experimental group).

implement desert or on a perceived failure to implement prevention was not clear.[85] Using different samples, Studies 4A and 4B found that exposing subjects to "unjust" scenarios produced virtually no effect in terms of reduced compliance or reduced willingness to cooperate with the authorities, even when the punishment described to the subjects was a very significant departure from the punishment assigned to the identical scenarios by virtually all the subjects in Study 2.[86] Study 5 found a very small noncompliance effect based on newspaper stories about "unjust" sentences, but that this effect dissipated quickly.[87]

RBL aim a number of criticisms at the methodology of these studies. Most of these criticisms are well-taken, although probably none of them is devastating. For Study 3, RBL note that every subject could have been "imagining a different story" about how their jurisdiction's sentencing law works.[88] For instance, a subject might have expressed disagreement with the maximum sentence structure in their jurisdiction but assumed that the maximum sentence is rarely or never imposed, and thus, contrary to our assumption, indicated satisfaction with their jurisdiction's law. Conversely, a subject might have been relatively happy with the maximum sentence structure of their jurisdiction but, again in the belief that those sentences were rarely imposed, indicated displeasure with their jurisdiction's sentencing regime. However, the key question posed to the subjects involved in this study asked whether "you agree with what you think your jurisdiction's punishment is" for the crimes at issue.[89] This language should have (but admittedly may not have) minimized the methodological problem that RBL identify.

In any event, RBL say that if the results of this study are valid, they provide *support* for the proposition that departure from desert undermines stated willingness to comply with the law.[90] There are two problems with this assertion. The first is that the correlation between dissatisfaction and compliance was extremely low: dissatisfaction with a jurisdiction's punishment scheme accounted for only 1 percent of the noncompliance effect in

85. *Id.* at 103.

86. *Id.* at 106 (Table 3).

87. *Id.* at 109 (Table 4).

88. RBL, *supra* note 3, at 339.

89. Survey form on file with author.

90. RBL, *supra* note 3, at 340 ("Even despite the muddled measurers used here, the study showed a moral credibility effect.").

one group and only 4 percent in the other.[91] Second, as we pointed out in *Putting Desert in Its Place*, the reason for this effect was not clear. Study 3 did not attempt to ascertain why any noncompliance effect occurred, only whether it did occur. Because only the results with respect to the second group were statistically significant, and because that group was the one which had been exposed to scenarios that included preventive factors in connection with Studies 1 and 2, we conjectured that the second group may have been more alert to the possibility that the sentencing regime in their jurisdiction "does not provide enough flexibility to take into account these [preventive] types of factors, which in turn increased both dissatisfaction and noncompliance."[92] Admittedly, this hypothesis is speculative, but it was the only explanation that we could come up with for the difference in compliance scores between two groups that were equally diverse and were otherwise exposed to the same prompts.

Using new samples, Studies 4A and 4B tried to determine whether, in fact, lay people are bothered by sentences that are consistent with desert but that depart from preventive factors. In both studies, we provided one experimental group with scenarios describing punishments that were disproportionate to the desert-based terms we obtained in Study 2 (e.g., a very long sentence for stealing a T-shirt, or a very short sentence for an aggravated assault), and another experimental group with scenarios describing enhanced or reduced sentences in a direction contrary to what preventive factors would suggest (e.g., a dangerous offender was given a very light sentence, whereas a nondangerous one was given a very heavy sentence).[93] We were unable to obtain any statistically significant results between either of these two experimental groups and the control group (which read scenarios involving more reasonable sentences) in terms of willingness to comply or cooperate with the law, and concluded that "the relationship between compliance and satisfaction with the substance of the criminal law is complicated and difficult to predict."[94]

RBL's explanation for our null results is different. They suggest that our scenarios were too "bland," because, unlike the analogous study conducted

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91. *See* 1 DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY 225 n.5 (2005) ("The square of the correlation coefficient . . . is sometimes called the proportion of variance 'explained.'").

92. Slobogin & Brinkley-Rubinstein, *supra* note 1, at 103.

93. *Id.* at 104.

94. *Id.* at 108.

by Robinson, Goodwin, and Reisig (reported in an article entitled *The Disutility of Injustice*[95]), we did not take our scenarios from "specific real-world cases that produced dramatically unjust results."[96] As RBL say, "it takes some doing for researchers to create in an hour in a lab even a nudge to the system's moral credibility."[97]

That is our essential point. Unless injustice is dramatic and routine (Robinson, Goodwin, and Reisig gave their subjects seven dramatically unjust real-world scenarios[98]), even a nudge in lost credibility is difficult to obtain. And "nudge" is the right word. On a 9-point Likert scale, the difference that the authors of *The Disutility of Injustice* (hereafter, RGR) obtained after exposure to these unjust scenarios was, on average, just over one point in the direction of less willingness to be compliant and cooperative with the system.[99] Furthermore, this one-point-plus movement represented a shift from the number on the scale indicating mild agreement—as opposed to moderate or strong agreement—with compliant/cooperative attitudes, to the scale number that indicated the subjects were "unsure" about their attitudes toward compliance/cooperation.[100]

Another important observation about these results is that, even if the change in attitude reflected in RGR's study was both genuine and meaningful, that change is not likely to translate into actual noncompliance. As RGR noted, "Considerable research has shown that the extent to which . . . measures of attitude and intention predict behavior varies greatly, depending on whether they specifically capture the context and circumstances in which the relevant behaviors will be enacted."[101] RGR's attitudinal measure commendably asked very specific questions aimed at assessing their subjects "disillusionment" with the system, having to do with the extent to which they would trust the criminal law's judgments

95. Paul H. Robinson, Geoffrey P. Goodwin, & Michael D. Reisig, *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940 (2010).

96. RBL, *supra* note 3, at 342.

97. *Id.* at 342.

98. *See* Robinson, Goodwin, & Reisig, *supra* note 95, at 2031 (describing scenarios).

99. *Id.* at 2007 (Table 7) (displaying differences, in scores on eight questions evaluating subjects' perception of the "moral credibility" of a hypothetical criminal justice system, between a "low disillusionment" group given reasonable sentencing scenarios and a "high disillusionment" group given unreasonable sentencing scenarios).

100. *Id.* at 2001 (describing meaning of points on the scale).

101. *Id.* at 2008–9.

about blameworthiness, report various types of low-level criminal activity, and admit to failing to paying a bill.[102] Research suggests that specificity of this type improves the prediction of the specific behaviors described.[103] Even so, the correlation between an expressed intention and actual behavior is complicated by many factors and is often very low.[104] Moreover, as already noted, the majority of RGR's subjects who received the unjust scenarios at worst tended to be merely "unsure" about whether they would engage in behaviors showing disillusionment with the system. In other words, even if statements on a survey do predict behavior, the behavior being predicted in RGR's survey is ambiguous at best.

Finally, as Study 5 in *Putting Desert in Its Place* suggested, any disillusionment that does occur from hearing about dramatic injustice dissipates quickly.[105] This is not surprising. Events that are salient today become less salient the day after. Distractions intervene. RBL state that this dissipating effect is useful, because it means that the implementation of empirical desert has a good chance of overcoming the disillusionment created by crime control policies.[106] But one could also take from Study 5 the conclusion that attempts to enhance moral credibility through empirical desert are not needed if any disillusionment that such crime control policies create, and any

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102. *Id.* at 1999 (Table 5) (describing questions).

103. Icek Ajzen & Martin Fishbein, *Attitude-Behavior Relations: A Theoretical Review of Empirical Research*, 84 PSYCHOL. BULL. 888, 912 (1977) (after reviewing the available research, finding that "[a] person's attitude has a consistently strong relation with his or her behavior when it is directed at the same target and when it involves the same action.").

104. *See, e.g.*, Allen E. Liska, *A Critical Examination of the Causal Structure of the Fishbein/Ajzen Attitude-Behavior Model*, 47 SOC. PSYCH. Q. 61, 71 (1984) ("It is now clear that [the] conceptual order of [the Ajzen/Fishbein model] was achieved by limiting the subject matter of study to volitional behaviors (those which require no skills and social cooperation), which immediately follow the formation of intentions (short-term planning) and by assuming a simple (chain, additive and recursive) causal structure."); Richard P. Bagozzi, *The Self-Regulation of Attitudes, Intentions and Behavior*, 55 SOC. PSYCH. Q. 178, 178 (1992) ("We argue that attitudes and subjective norms are not sufficient determinants of intentions and that intentions are not a sufficient impetus for action, as maintained by leading theories of attitude.").

105. Slobogin & Brinkley Rubinstein, *supra* note 1, at 109 ("these findings suggest that dissatisfaction with unjust legal rules and dispositions either does not last very long or does not have a long-lasting effect on willingness to flout the law.").

106. RBL, *supra* note 3, at 344 ("the reform agenda of empirical desert and moral credibility is counting on the fact that the effect of earlier injustices and failures of justice will fade with time.").

tendency to misbehave that might follow from it, dissipates on its own. In that case, a system based on individual prevention should be able to pursue crime prevention within relatively broad parameters without worrying about the criminogenic effects of ignoring desert.

CONCLUSION: PREVENTIVE JUSTICE AND "CRIME CONTROL"

Preventive justice is based on the assumption, accepted by a wide range of thinkers,[107] that the primary goal of the criminal justice system is to prevent significant bodily harm and significant harm to property. If that is the goal, then Robinson is right to call attention to the role adherence to empirical desert can play in enhancing compliance with the law and cooperation with the authorities. But his description of that role is exaggerated. Divergence from desert probably does not have significant negative effects unless it is routine, dramatic, and becomes apparent to a large segment of the public. That constellation of factors might exist in a regime that often imposes punishment in the absence of antisocial conduct or consistently metes out long sentences for minor misconduct, or in a criminal justice system that, conversely, routinely fails to impose serious punishments for serious crimes. But outside of these situations, any failure of the criminal justice system to adhere to empirical desert should probably not be a major concern even in the rare circumstances where it becomes general knowledge. First, Robinson's own research suggests as much, given the extent of injustice RGR needed to budge attitudes toward the system.[108] Second, the research we reported in *Putting Desert in Its Place* indicates that, except where very serious crimes are involved, lay subjects are comfortable with substantial departures from desert if the resulting sentences are consistent with individual prevention factors focused on risk.[109] Third, even if negative attitudes toward the criminal justice system are caused by divergence

107. *See, e.g.*, OLIVER WENDELL HOLMES, THE COMMON LAW 46 (1886) (stating that crime prevention is "the chief and only universal purpose of punishment," while also stating that "criminal liability . . . is founded on blameworthiness."); Husak, *supra* note 14, at 1201–2 (the "most plausible" objective of a system of penal justice is "crime prevention.").

108. *See supra* text accompanying notes 95–100.

109. *See supra* text accompanying notes 57–75.

from desert, those attitudes are seldom likely to result in noncompliant or noncooperative *behavior*.[110]

In both *Empirical Desert, Individual Prevention, and Limiting Retributivism: A Reply* and *The Disutility of Injustice*, Robinson and his coauthors rightly express concern about what they call "crime control" policies. They provide six examples of such policies: three-strikes laws, harsh punishment of drug offenses, expansive juvenile transfer practices, the abolition of the insanity defense, strict liability for regulatory offenses, and homicide-level sentences imposed on felony murderers and their accomplices.[111] Robinson and his colleagues assert that "every one of these doctrines" is based on preventive rationales rather than desert.[112] That assumption can be questioned. For instance, heavily enhanced penalties for recidivists have been justified on the ground that a second or third offense is more blameworthy because it demonstrates disrespectful nose-thumbing toward the law.[113] The federal sentencing laws have institutionalized an array of mandatory minimum sentences for drug offenses based, in large part, on retributive considerations.[114] Expansion of adult jurisdiction over juvenile offenders has often been rationalized as a matter of just desert.[115] The states that abolished the insanity defense have replaced it with the lack-of-mens rea alternative, which at least one court has held is consistent with culpability principles.[116] The United States Supreme Court has upheld the imposition

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110. *See supra* text accompanying notes 101–6.

111. RBL, *supra* note 3, at 357; RGR, *supra* note 95, at 1983–94.

112. RBL, *supra* note 3, at 357.

113. *See* JULIAN V. ROBERTS, PUNISHING PERSISTENT OFFENDERS: EXPLORING COMMUNITY AND OFFENDER PERSPECTIVES 68, 163, 171–74, 183–84 (2008) (stating that the "legal discourse surrounding the punishment of repeat offenders is suffused with references to culpability" and describing studies indicating that desert is a significant reason for public endorsement of recidivist statutes, although also noting that public support for such statutes declines "as consideration of previous convictions swamp the seriousness of the crime").

114. *See* Jane L. Froyd, *Safety-Valve Failure: Low Level Drug Offenders and the Federal Sentencing Guidelines*, 94 NW. U. L. REV. 1471, 1488 (2000) (stating that, in the federal context, the "goal of retribution or 'just deserts' was the most commonly voiced reason for instituting mandatory minimum penalties" on drug offenders.).

115. *See* Alfred S. Regnery, *Getting Away with Murder: Why the Juvenile Justice System Needs an Overhaul*, 34 POLICY REV. 65, 66 (2000) (stating that juvenile offenders are "criminals who happen to be young, not children who happen to be criminal.").

116. State v. Herrera, 859 P.2d 359, 369 (Utah, 1995) ("It can be reasonably concluded that those who understand and appreciate the fact that they are killing another are more

of "strict liability" on individuals who violate regulatory prohibitions only if they are not "powerless" to abide by the prohibition, a caveat that resonates with desert.[117] And the felony murder rule has been robustly supported on retributive grounds.[118] I agree with Robinson (and Robinson's subjects[119]) that all of these criminal law doctrines reflect skewed views of desert. But the point here is that desert-based rationales continue to be cited as justification for each.

Even if, however, these doctrines are all based on a prevention rationale, that rationale is either not focused on *individual* prevention factors or is based on a seriously flawed implementation of those factors. The most likely utilitarian rationale for the various doctrines that RBL criticize is general deterrence, not incapacitation, specific deterrence, or rehabilitation. This fact is obvious with respect to harsh drug laws, prosecution of juveniles in adult court, abolition of the insanity defense, strict liability for regulatory crimes, and felony murder. If these doctrines are at all plausible from a utilitarian perspective, it is because they aim to scare particular groups away from committing crime. Virtually by definition, they are not based on individual prevention factors because they are meant to apply to the entire target group, regardless of the specific risk individuals within that group pose.

Only the first type of "crime control" doctrine that RBL identify—three-strikes laws and other enhancement statutes that are based on the specific crimes committed by the offender—might as easily be justified by

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'culpable' than those whose delusions carry them even further away from reality."). In any event, limiting the insanity defense seems an odd way of accomplishing crime control, since insanity acquittees tend to spend as long or longer in (hospital) confinement than those convicted of similar offenses. *See* GARY MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 203–4 (3d ed. 2007).

117. United States v. Park, 421 U.S. 658, 673 (1975) ("The theory upon which responsible corporate agents are held criminally accountable for 'causing' violations of the Act permits a claim that a defendant was 'powerless' to prevent or correct the violation to 'be raised defensively at a trial on the merits.'").

118. David Crump, *Reconsidering the Felony Murder Rule in Light of Modern Criticisms: Doesn't the Conclusion Depend Upon the Particular Rule at Issue?* 32 HARV. J. L. & PUB. POL'Y 1155, 1162 (2009) ("the [felony murder] rule's most important purpose is enhancing the connection between moral blameworthiness and the imposition of criminal liability.").

119. RGR, *supra* note 3, at 1972 (Table 4) (comparing sentences imposed by study subjects and by courts in the actual cases).

incapacitation or specific deterrence as on general deterrence grounds.[120] But if so, just as these laws represent a skewed view of desert, they are based on a skewed view of individual prevention. From a risk management perspective, it is probably justifiable to keep a three-time killer or rapist in prison longer than a person who has committed only one murder or rape. But, as Robinson himself has admitted,[121] an individual prevention regime would not countenance putting someone like William Rummel—the three-time minor fraudster that RBL highlight as an example of the prevention model gone amok[122]—in prison for life (a result the Supreme Court unfortunately upheld).[123] Indeed, even a year-long sentence is probably uncalled for in Rummel's case; a few months in prison as a specific deterrent, combined with restitution, job training, a restorative justice process, and/or cognitive social learning strategies will often be effective preventive techniques for offenders like Rummel.[124]

Similar comments can be made about the irrationality, from a risk management perspective, of drug sentencing laws (most drug offenders do not commit violent crime and probably should be processed through drug court or some other treatment program[125]), transfer laws (which disregard research indicating that even violent juveniles can be successfully rehabilitated in relatively short-term, community-based programs[126]),

120. Ewing v. California, 538 U.S. 11, 26–27 (2003) ("We have long viewed both incapacitation and deterrence as rationales for recidivism statutes.").

121. Robinson, *supra* note 20, at 1456 (stating that a statute explicitly providing for preventive detention for a third minor fraud offense "would be unlikely to find support in any political quarter" and "would be preposterous on its face in a civil preventive detention system.").

122. RBL, *supra* note 3, at 319.

123. *See* Rummel v. Estelle, 445 U.S. 263 (1980).

124. *See generally*, Francis T. Cullen & Cheryl Lero Jonson, *Rehabilitation and Treatment Programs*, *in* CRIME AND PUBLIC POLICY 293–344 (James Q. Wilson & Joan Petersilia eds., 2011) (describing research on the types of rehabilitation programs that are most likely to be effective at reducing recidivism among a wide range of offenders and concluding that "by showing concern for the welfare of offenders—with the exchange being that investing in the wayward advances public safety . . . —rehabilitation provides one of the few rationales for not imposing unnecessary pains on those under correctional supervision").

125. *See generally*, D. Banks & D. Gottfredson, *The Effects of Drug Treatment and Supervision on Time to Rearrest among Drug Treatment Court Participants*, 33 J. DRUG ISSUES 385, 397 (2004) (finding that drug court participation reduced recidivism from 80% to 40%).

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

people found insane (who should be civilly committed based on risk, as in fact happens in virtually every state[127]), accidental or negligent regulatory violators (who are probably sufficiently specifically deterred through compensatory and punitive fines[128]), and felony murderers (who vary widely in terms of risk, especially if, as in RGR's felony murder scenarios, they are unarmed at the time of the felony or the underlying felony is selling the victim a drug that leads to an overdose[129]). Compared to the questionable preventive effect of empirical desert, which in any event is aimed solely at improving compliance among the general population, preventive justice focuses on programs that can be robustly investigated in terms of their effect on recidivism and that are focused directly on offenders.

Nor is there good reason to believe this type of preventive justice would result in greater deprivations of liberty than the empirical desert dispositions that Robinson would prefer. In RGR's *The Disutility of Injustice*, the subjects were asked to impose sentences in scenarios exemplifying the six "crime control" situations described above. Although the sentences they chose were, on average, much more lenient than those imposed in the actual cases on which they were based, they were still quite substantial: 1.1 years and 3 years for scenarios involving a third minor felony; 1.9 years for marijuana possession and 4.2 years for cocaine possession; 19.2 years for a juvenile who accidentally killed a teacher; 16.5 years and 26.3 years for killings committed by individuals who are seriously mentally ill; 9.7 months for an accidental regulatory crime; and 10.7 years for felony murder where the underlying felony was selling cocaine and 17.7 years for complicity during a felony murder.[130] My own sense is that most of these sentences are "harsh"; RGR themselves state that many of these sentences

127. *See* Jones v. United States, 463 U.S. 354 (1983) (upholding preventive confinement of insanity acquittees).

128. Even intentional regulatory violations might best be handled through restitution, delicensing, disbarment, restructuring of the business model, compliance programs, and other means of preventing the perpetrator from obtaining another opportunity to violate the law. *Cf.* Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 323 (2003) (comparing punishment of white collar criminals and street criminals and arguing that a true assessment of the costs of the punitive approach might lead to adoption of more "problem-solving" and "community" courts).

129. RGR, *supra* note 95, at 2030 (describing cocaine overdose and accomplice-during-burglary scenarios).

130. *Id.* at 1972 (Table 4).

"seem[] quite punitive."[131] However, in their article in this journal, RBL state, "Literally *by definition* empirical desert cannot produce 'unusually harsh' sentences," adding that "empirical desert is the one and only among all utilitarian distributive principles that can *never* produce harsh sentences."[132]

That may be so from a retributive perspective (it would be interesting to hear the reaction of deontological theorists to these statements). Whether these sentences are harsh as a matter of desert is not my concern, however. The important point is that these sentences are unusually harsh from an individual prevention perspective.[133] Put another way, these types of sentences, focused solely on desert, are unlikely to be optimal when the objective is crime prevention. If so, they fail to achieve the primary goal of the criminal justice system.

131. *Id.* at 1974 (also noting that the subjects' sentences were "often double or triple the punishment imposed in real-world practice").

132. RBL, *supra* note 3, at 357 (emphasis in original).

133. RBL state that the word harsh "has only a desert meaning," because it is defined as "repugnant or roughly offensive to the feelings; severe, rigorous, cruel, rude, rough, unfeeling." RBL, *supra* note 3, at n.132. Just as I dispute their equation of the word "justice" with desert, I reject their attempt to hijack the word "harsh." I find many of the sentences imposed by RGR's subjects to be repugnant, offensive, severe, rough, and unfeeling because they disregard an offender's ability to get back on track and ignore more effective crime control mechanisms, even if they do achieve "desert."