REPLY
ANSWERING CRITICS AND SUPPORTERS OF EMPIRICAL DESERT

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Mary Sigler mistakenly assumes that empirical desert's purpose is to provide deontological desert — it is the latter that we "are truly seeking" — then criticizes it for not doing so accurately enough. Sigler may be seeking deontological desert, but empirical desert isn't. It is offered as a distributive principle not because it has transcendent justice value, but because of has instrumentalist crime-control value. The best that can be said about it deontologically is that it may produce something less in conflict with deontological desert than would the more traditional instrumentalist distributive principles, such as general deterrence, incapacitation of the dangerous, or rehabilitation. And given the difficulties with operationalizing deontological desert in the face of so much disagreement about its content, the deontologists might find that empirical desert provides a practical way of moving criminal law in that direction. However, if it does so, it is a collateral benefit of empirical desert, not its reason d'etre.

For much of her comment, Alice Ristroph seems to make the same false assumption. She attacks "The "New Desert," as she calls empirical desert, but with arguments against deontological desert, as if the former is meant to be a stand-in for the latter. But clearly, empirical desert is not deontological desert, as the text makes clear: "People's shared intuitions about justice are not justice in a transcendent sense." I'll leave it to Youngjae Lee and Matt Lister to respond to her general anti-desert attack and just note, again, that the rationale for empirical desert is instrumental not deontological.

Other commentators criticize empirical desert on instrumentalist grounds. Adam Kolber imagines that lay persons have intuitions about all sorts of things other than deserved punishment, such as the societal goals of punishment (or even whether the "attorney-client

1 "[S]ettling for empirical desert because we can readily ascertain it is a bit like searching for our lost wallet under a bright street lamp even though we dropped it in a dark alley. It would be a lot more convenient, but what we are truly seeking cannot be found there." Sigler comment at [?? last para] (emphasis added).

2 Within what she calls "The New Desert," Ristroph includes "desert as a limiting principle." This labelling is somewhat confusing given that desert as a limiting principle is neither new, having blossomed most recently with Norval Morris several decades ago, nor compatible with empirical desert. The latter provides a specific punishment amount, while the former claims that desert can only identify the extremes that mark the outer boundaries of a broad range of punishment. See Paul H. Robinson, Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical, 67 Cambridge Law Journal 145, 160-64 (2008).

3 Core Text at ?. I am comforted by Matt Lister's arguments that my "worry that empirical desert may depart from 'transcendental' notions is misplaced" as long as it is situated within political liberalism. Lister Comment at [?? 3d to last para]. As the he concedes, however, "This doesn't mean we're guaranteed substantial justice." Id at [?? 2d to last para]
He speculates that perhaps "laypeople believe that offenders should receive the punishments they deserve based on a more timeless conception of desert that is meant to square with considered, reflective judgment (i.e., deontological desert)." Id. at [?? 3d para from end].

Intuitional conclusions are importantly different from analytic ones. In the latter, people understand that their conclusions are dependent on argument and analysis, and therefore their view could change as they are given new arguments. (Judgments about what a society's goals or motivation for punishment should be or judgements about the proper scope of the attorney-client privilege are, as far as we can tell, reasoned not intuitional.) Of course, as the liability and punishment issue moves out from the core of wrongdoing, people's judgments become less purely intuitional and more a mix of intuition and reasoning. The blameworthiness of downloading music from the Internet without license, for example, is probably a product of both people's intuitions about taking property without consent and their reasoning about the strength of the analogy between that core wrong and unlicensed music downloading.

In the cartoonish oversimplification that this limited space requires: Deontological desert can't realistically be operationalized. The prerequisites for general deterrence rarely exist. (And even where they do exist, a general deterrence distribution could be preferred only if it provided greater deterrent effect than that already inherent in an empirical desert distribution and that greater effect was not outweighed by whatever crime-control costs there are to conflicting with the community's intuitions of justice.) Rehabilitation may make a useful, even essential, correctional policy but can't realistically function as a principle for determining who should be punished how much. While a distributive principle focusing on incapacitating the dangerous no doubt does have crime-control effectiveness, the same preventive detention function could be achieved more effectively and with fewer crime-control costs if segregated from the criminal justice system. Cahill may well agree with the general conclusion here when he notes as an aside that empirical desert "won't do any worse than any other strategy all things considered, and would probably be cheaper than many."8

One final set of instrumentalist criticisms comes in the last few paragraphs of Ristroph's comment and her reply no Lee and Lister. While perhaps implicitly conceding the crime-control costs that arise for conflicting with the community's intuitions of justice, Ristroph nonetheless discounts the need for empirical desert. To avoid conflict between sentencing polices and the community's intuitions of justice, she suggests, we need simply change people's intuitions. "Beliefs about desert are not fixed independently of sentencing policy."9 She cites the core text examples that law has helped change norms for date rape and drunk driving. But norm changes on these kinds of issues are possible because they are not the core of wrongdoing but rather are seen as analogies to it, and the strength of the analogy, and thereby the condemnabality of the conduct, is something that can indeed be manipulated. For core wrongdoing, in contrast, intuitions of justice are in fact commonly "fixed independently of sentencing policy" and, where this is so, sentencing policy must give way if a conflict is to be avoided.

Perhaps more importantly, the law's power to help in norm changing is dependant upon it having a reputation as a credible moral authority. That is, it must earn its moral credibility chips by embodying people's norms before it can selectively spend the chips in trying to change norms. Ristroph also feels comfortable discounting shared intuitions of justice that conflict with sentencing policy because she thinks it "doubtful that sentencing policies based on the laboratory findings of social scientists will be perceived as more legitimate than policies chosen by the ordinary democratic process."10 The point seems to be: Who is more credible here, some "laboratory" scientist or your democratically-elected government? But empirical desert does not derive its legitimacy from its character as "laboratory findings of social scientists" but rather from the fact that its results match people's intuitions of justice, by definition. The real question is: What is more credible here, the community's shared intuitions of justice or the results of the notoriously-dysfunctional American crime politics? In fact, American crime politics have

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8 Cahill Comment at [?? first para].
9 Id. at [?? 2d to last para]
10 Id. (emphasis in the original).
generated a host of doctrines that laypeople find to seriously conflict with their intuitions of justice.¹¹

In her closing paragraph, Ristroph worries that desert will "provide a cloak of moral authority that can obscure prejudice or disutility."¹² While this might be a concern with difficult-to-define deontological desert, empirical desert, with its empirical basis, has no such problem.¹³ Indeed, empirical desert provides a unique opportunity for developing color-blind principles of justice. If the empirical study subjects are not told the race of the offender during testing, even subconscious biases can have no effect. Thus, sentencing guidelines based upon such principles, for example, can be color-blind. Ristroph properly worries that prejudice may creep back in through the bias of individual sentencers, but, of course, this is a problem for any and every distributive principle, not a special problem for empirical desert.

Some commentators offer support of sorts for empirical desert, but for reasons that sometimes give me pause. In some instances, I worry that empirical desert is being asked to do more than can reasonably be expected of it.

Joseph Kennedy would like empirical desert to help "move the endpoints of contemporary punishment back to a more rational place."¹⁴ Unlike people's intuitions on ordinal ranking, judgments about the punishment continuum endpoint may be culturally dependent. (The good news, on the other hand, is that such judgments are likely more manipulable through social engineering.) I don't think we should assume that a jurisdiction that adopts empirical desert as its distributive principle will automatically reduce its maximum penalty.

On the other hand, I do think that adopting empirical desert as a distributive principle may well have the longer-term tendency to reduce punishments generally, for two reasons. First, a distributive principle of empirical desert requires different punishments for cases of different blameworthiness. Many cases today are packed together at the top of the punishment continuum, at life imprisonment, for example, even though many such cases have distinguishably greater blameworthiness than other such cases. Thus, the effect of introducing empirical desert would be to force many of these cases farther down from the continuum endpoint in order to create the differences in punishment that proper ordinal ranking requires. To put it another way, if more egregious offenses are to receive greater punishment, then only the most egregious case unimaginable can qualify for the endpoint punishment, such as the death penalty, and all less egregious cases must receive lesser punishments to reflect their lesser blameworthiness.

Another reason that predicts lower punishment across the continuum of cases is the reason for the current high sentences. It is not desert that has driven the high sentences in American crime politics. While politicians may commonly use the rhetoric of desert, an analysis

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¹¹ For a detailed empirical study of the issue, see Paul H. Robinson, John M. Darley & Geoff Goodwin, The Disutility of Injustice [before publication insert at least SSRN cite].

¹² Ristroph Comment at [?? last para].

¹³ She seems to concede this when, after her general anti-desert attack, she writes: "Now, most everything I've said about desert here seems belied by the 'empirical desert' described by Robinson." Ristroph Comment at [?? para 11].

¹⁴ Kennedy Comment at [?? last para]
of the rationales driving most modern crime-control programs shows them to be based primarily on theories of general deterrence and incapacitation of the dangerous, as is apparent in such legislation as "three strikes" statutes, reducing the age for adult prosecution, the felony murder rule, high penalties for drug offenses, and narrowing the insanity defense. To explicitly shift the criminal justice system away from its present coercive crime-control mechanisms is to eliminate the reason for many of the current high sentences. As noted, available data suggests that these modern crime-control programs seriously conflict with people's shared intuitions of justice.\(^{15}\)

Both Andrew Taslitz and Adil Ahmad Haque see special value in empirical desert as a distributive principle for reasons beyond its crime-control benefits. Taslitz concludes that "Robinson justifies his approach too narrowly . . . when at least one other justification -- promoting deliberative, populist democracy -- would strengthen his position still more."\(^{16}\) Haque offers a criticism similar in kind: Robinson "is wrong to suggest that deviations from empirical desert can be justified simply by offsetting any resulting decrease in voluntary compliance with the increase in coercive compliance." To his mind, even if a deviation from empirical desert produces greater crime-control benefits, it ought to be resisted because an empirical desert distribution as a compliance mechanism is "intrinsically superior" to a coercive compliance mechanisms (such as, presumably, the traditional mechanisms of deterrence, incapacitation, and rehabilitation).\(^{17}\)

I can appreciate the sentiment, but as an instrumentalist (in this context) I'm unsure how much weight to give to this special intrinsic value. Is it so great as to justify a society suffering substantial additional crime that could be avoided if a crime-control calculation suggested that a deviation from empirical desert might be justified in a special case?\(^{18}\)

Laura Appleman also sees some special value in empirical desert apart from its crime-control potential: its natural consistency with recent Supreme Court sentencing decisions embodying an emerging "jurisprudence grounded in . . . community decisions about blameworthiness" and "an unspoken theory of community-based retribution."\(^{19}\) It seems possible that the gist of the recent decisions might go only to ensuring jury fact-finding, not lay judgments about blameworthiness. The event-reconstruction role and the normative-judgment role of juries are distinct. The Court's opinions might be read to demand the first but not the second. But more informed interpreters may see a broader jurisprudence in the cases than I do.

I take it as a positive sign that some people think I go too far with empirical desert and others that I do not go far enough.

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\(^{15}\) See Robinson et al., The Disutility of Injustice, supra note 10.

\(^{16}\) Taslitz Comment at [?? last para]

\(^{17}\) Haque Comment at [?? para 5].

\(^{18}\) For a full account of when I think deviations from empirical desert might be justified, see Robinson, Distributive Principles, supra note 6, at Ch 12.A.

\(^{19}\) Appleman Comment at [?? first para]