

# CRIMINAL LAW'S CORE PRINCIPLES

PAUL H. ROBINSON\*

## ABSTRACT

*Modern criminal law scholars and policymakers assume they are free to construct criminal law rules by focusing exclusively on the criminal justice theory of the day. But this “blank slate” conception of criminal lawmaking is dangerously misguided. In fact, lawmakers are writing on a slate on which core principles are already written and realistically they are free only to add detail in the implementation of those principles and to add additional provisions consistent with them. Attempts to do otherwise are destined to produce tragic results from both utilitarian and retributivist views.*

*Many writers dispute that such core principles exist. It is a common view that people’s justice judgments are personal to them or perhaps to their small group. If this were true, it would present an obstacle if not a permanent barrier to the creation of a criminal code that has legitimacy and moral credibility for those it covers. But an investigation of the evidence from a wide variety of sources suggests that there is a set of core principles upon which humans generally agree.*

*This article examines six potential indicators of core principles: principles on which empirical studies suggest a high level of agreement across demographics within society, principles on which empirical studies suggest agreement cross-culturally, principles emerging early in the historical development of formal criminal law, principles reflected in the universal path of child development, principles reflected in the behavior of social animals, and rules and principles regularly appearing in natural experiments of human groups beyond the reach of the law. I identify nine principles with support from most or all of these sources and that properly qualify as near universal core principles.*

*One might speculate about why such core principles exist, and the article does, but whatever the reason—be it an evolutionarily created genetic predisposition or a process of*

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\* Colin S. Diver Professor of Law, University of Pennsylvania. Ehson Kashfipour made substantial contributions to this article, well beyond those of a research assistant. Special thanks also go to Lindsay Holcomb and to Sarah Robinson for their significant and invaluable help. © Paul H. Robinson.

*generalized learning common to all social groups—the existence of such core principles has important and diverse practical implications: in suggesting reduced crime-control effectiveness where the criminal law conflicts with a core principle, in setting limitations on and strategies for social reform, in supporting a broader use of restorative justice, in suggesting a more nuanced application of the legality principle, in supporting the recognition of a general mistake of law defense and a mitigation for partial excuses, in assessing the feasibility of creating an international criminal law or of creating a criminal law for a territory now being created whose population does not yet exist, and even in planning initial contact with extraterrestrial beings.*

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## I. INTRODUCTION

Modern criminal law scholars and policymakers appear to assume that they are free to construct criminal law rules by focusing exclusively on the criminal justice theory of the day. This “blank-slate” conception of criminal law drafting displays itself in a stream of criminal law rules and practices that dramatically break with prior practice but that logically follow from current theory. In the 1970s, policymakers felt comfortable with imposing an automatic life sentence for a minor repeat offense, such as a \$120 air conditioning fraud, as approved by the Supreme Court in the 1980 *Rummel* case, because, under the theory of the day, such treatment of habitual offenders promoted general deterrence and incapacitation of the dangerous.<sup>1</sup> This same blank-slate attitude is reflected in the comfort with which today’s progressive policymakers seek to decriminalize minor thefts and assaults<sup>2</sup> or, indeed, to abolish punishment altogether.<sup>3</sup>

This article shows, however, that this blank-slate conception of criminal lawmaking is false and dangerously misguided. Lawmakers are not writing on a blank slate and ought not feel free to formulate any rule supported by the popular theory of the day. Rather, lawmakers are drafting criminal codes on a slate where the core principles are already written. Realistically, they are free only to add detail in the implementation of those principles and to add additional provisions not inconsistent with them.

But do there even exist such universally shared “core principles” of criminal law? A wide range of writers claim no.<sup>4</sup> Instead, it is a common

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

2. In Suffolk County, Massachusetts, prosecutors are ordered not to bring charges for 15 crimes, including shoplifting, larceny under \$250, and threats. CHARGES TO BE DECLINED, ROLLINS 4 DA, <https://rollins4da.com/policy/charges-to-be-declined/> [https://perma.cc/3PGY-FRWS]. In Philadelphia, retail theft under \$500 is no longer a misdemeanor but a summary offense in the eyes of prosecutors. Maura Ewing, *Philadelphia's New Top Prosecutor Is Rolling Out Wild, Unprecedented Criminal Justice Reforms*, SLATE (Mar. 14, 2018, 5:47 PM), [https://slate.com/news-and-politics/2018/03/phillys-new-top-prosecutor-is-rolling-out-wild-unprecedented-criminal-justice-reforms.html?wpsrc=sh\\_all\\_dt\\_tw\\_ru](https://slate.com/news-and-politics/2018/03/phillys-new-top-prosecutor-is-rolling-out-wild-unprecedented-criminal-justice-reforms.html?wpsrc=sh_all_dt_tw_ru) [https://perma.cc/G46V-YHXC]. In Cook County, Illinois prosecutor Kim Foxx announced she would not prosecute shoplifting as a felony unless the items stolen totaled more than \$1,000 or the person charged had at least 10 prior felony convictions. Steve Schmadeke, *Top Cook County Prosecutor Raising Bar for Charging Shoplifters with Felony*, CHI. TRIB. (Dec. 15, 2016, 6:00 AM), <https://www.chicagotribune.com/news/breaking/ct-kim-foxx-retail-theft-1215-20161214-story.html>. In Dallas, policy reforms “included a decision not to prosecute thefts of personal items under \$750 that are stolen out of necessity.” Catherine Marfin, *Texas Prosecutors Want to Keep Low-level Criminals out of Overcrowded Jails. Top Republicans and Police Aren't Happy*, TEX. TRIB. (May 21, 2019, 12:00 AM), <https://www.texastribune.org/2019/05/21/dallas-district-attorney-john-cruezot-not-prosecuting-minor-crimes/> [https://perma.cc/KRP4-TT5D].

3. “Punishment is never fated to ‘succeed’ to any great degree.” A society that “intends to promote disciplined conduct and social control will concentrate not upon punishing offenders but upon socializing and integrating young citizens – a work of social justice and moral education rather than penal policy.” DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY* 288-89 (1990).

4. See, e.g., Eric Blumenson, *The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court*, 44 COLUM. J. TRANSNAT’L L. 801, 858 n. 179 (2006) (“The complex beliefs that underwrite retributive justice are common to most criminal justice systems, but they are neither universal nor self-evident.”); DAVID CHUTER, *WAR CRIMES:*

view that people’s justice judgments are “deeply culturally contingent”<sup>5</sup> and that there is “enormous variation” in global views about crime and punishment.<sup>6</sup> Others argue that “. . . there is a huge amount of cultural variation in the real-world application of justice intuitions.”<sup>7</sup> Some writers believe that some people may agree on some things, typically in extreme cases, but otherwise see no shared intuitions of justice.<sup>8</sup>

This Article will show that there are indeed universal principles of criminal liability and punishment that ordinary people share and, further, for good utilitarian and retributivist reasons, ought not be violated and, as a practical matter, cannot be altered. Further, recognizing the existence of these core principles provides a wide range of insights concerning the proper formulation and reform of criminal law.

How might one demonstrate the existence of such core principles of criminal liability and punishment? Part II identifies a wide variety of sources, including studies of high agreement levels within a society for certain principles, studies showing high cross-cultural levels of agreement, evidence showing the universal path of child development, animal studies that show precursors to such human justice judgments, historical review of the principles and doctrines that emerged earliest in formal criminal law, and the emergence of common principles regularly adopted by groups caught in “natural experiments” beyond the reach of law. Drawing on these many different sources, and especially on the strong overlap among them, Part III offers and documents a series of core principles suggested by the sources in Part II.

If such core principles exist, one may wonder how this could possibly be so, given that judgments of justice seem so complex and concern such nuanced matters. One might think that people’s views on such issues would be influenced primarily by their life experiences. Cultural, economic, religious, familial, educational, social, political, and emotional forces could be powerful influences on people’s judgments of justice. For core principles to exist, their source must be something more powerful than any of these

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CONFRONTING ATROCITY IN THE MODERN WORLD 94 (2003) (“[I]nternational criminal law’s vocabulary and concepts are not neutral. They are culturally specific, constructed and manipulated by a very small number of countries. . .”); Andrew K. Woods, *Moral Judgments and International Crimes: The Disutility of Desert*, 52 VA. J. INT’L L. 633, 637 (2012) (“ . . . [D]espite some level of uniformity of global views toward crime and punishment, there is also evidence of enormous variation—enough variation to threaten the legitimacy of an institution that claims to enforce universal norms.”).

5. Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 551 (2005).

6. Woods, *supra* note 5.

7. *Id.* at 651

8. “[E]veryone may agree that five years in prison is unjustly harsh desert for shoplifting, or that a five dollar fine is unjustly lenient desert for rape, but beyond such clear cases our intuitions seem to fail us. Is two years, five years, or ten years the proper sanction for a rape? . . . Our sense of just deserts here seems to desert us.” Leo Katz, *Criminal Law, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 80, 80–81 (Dennis Patterson ed., 1996).

combined life experiences and influences. What could that source of common influence possibly be? Part IV hypothesizes a human predisposition toward accepting such core principles, a predisposition that was evolutionarily advantageous because acceptance of the core principles within a human group was a prerequisite for maintaining group cooperation essential to the success of the human species.

Whatever the reason for their existence, the fact that core principles do exist has significant practical implications for a modern society. As Part V explains, the existence of core principles can have an effect in determining the best distributive principles for criminal liability and punishment, in setting strategies for using criminal law to change societal norms, in formulating specific criminal law doctrines, and in assessing the feasibility of having a criminal law that governs many different communities, such as federal criminal law or even international criminal law.

## II. SIX POTENTIAL INDICATORS OF CORE PRINCIPLES

Each of the following categories of sources or indicators can suggest the existence of a core principle. These sources—historical, national, and international empirical surveys, child development, animal studies, and natural real-world experiments—are dramatically different in nature. A principle suggested by most of these sources would seem to suggest some depth of support, perhaps enough to suggest that the principle is shared by humans generally. After the introduction of these six sources here, Part III uses these sources to identify what might be near-universal core principles.

### *A. Principles on Which There is High Agreement within Society*

Empirical evidence of widespread agreement on a principle would seem to be direct support that the principle is near universal. As demonstrated in Part III, the empirical evidence suggests a strong agreement on a wide variety of liability and punishment issues across demographics.

Research conducted by Robert Kurzban demonstrated just how nuanced these shared intuitions of justice are.<sup>9</sup> In one study, participants<sup>10</sup> were given twenty-four short scenarios on separate cards and were asked to rank-order the cards to reflect the amount of punishment deserved in each.<sup>11</sup> The scenarios included such offenses as theft by taking, theft by fraud,

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9. Paul H. Robinson & Robert O. Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829 (2007).

10. *Id.* at 1871-72, n.183 (Here is what the participants looked like as a group – Gender: 36% male, 64% female; Marital status: 23% single, 58% married, 9% divorced, 8% widowed; Have children?: 70% yes, 30% no; Race: 91% white, 9% nonwhite; Education: 5% some college, 2% two-year college degree, 38% four-year college degree, 39% masters degree, 17% doctorate / professional degree).

11. *Id.* at 1867.

property destruction, assault, burglary, robbery, kidnapping, rape, negligent homicide, manslaughter, murder, and torture in a variety of situations, including self-defense, provocation, duress, mistake, and mental illness. The kinds of offenses in the scenarios represent 94.9% of the offenses committed in the United States.<sup>12</sup> The study demonstrated that shared intuitions regarding the relative seriousness of wrongdoing were very strong. The amount of agreement shown in the study—96% of all pairwise judgments, and a Kendall’s W of 0.95—represents an extraordinary result. In a follow-up study conducted online, we again found an extraordinarily high level of agreement, despite the potential for a large increase in the amount of “noise” due to the format of the study.<sup>13</sup>

### *B. Principles on Which There is Agreement Cross-Culturally*

Also useful are studies of agreement on intuitions of justice that extend beyond a single society or nation. There exist vast differences in ecology, history, demographics, social structure, and many other variables from one group or culture to another. These differences are so striking and of such a nature that it seems odd that all groups would adopt the same justice norms. That is, it might seem surprising that dramatic differences in social structure and social resources would have no effect on existing justice judgments.

Consensus on a justice principle despite the significant differences across cultures seems indicative of a principle that stems from some deeper, biologically rooted human intuition.<sup>14</sup> For instance, cross-cultural empirical evidence appears to support the view that people everywhere share some intuitions about the relative blameworthiness of serious wrongdoing. One such study, conducted by Graeme Newman, sampled 2,360 individuals from several different countries—India, Indonesia, Iran, Italy, United States, and Yugoslavia—chosen for their supposed important cultural differences.<sup>15</sup> Subjects were asked to rate certain serious offenses on a 12-point scale.<sup>16</sup> Newman reports that “[a]t the general level of analysis, it is apparent that there was considerable agreement as to the amount of punishment appropriate to each act” and that looking at relative rankings indicates “general agreement in ranks across all countries.”<sup>17</sup>

12. BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2003 STATISTICAL TABLES 14 tbl.1 (2005).

13. Robinson & Kurzban, *supra* note 9, at 1871.

14. *See generally*, RICHARD ALEXANDER, THE BIOLOGY OF MORAL SYSTEMS (1987); ROBERT NOZICK & WILLIAM FITZPATRICK, TELEOLOGY & THE NORMS OF NATURE (2000); KWAME ANTHONY APPIAH, EXPERIMENTS IN ETHICS (2010); DAVID ENOCH, TAKING MORALITY SERIOUSLY (2011); ALLEN BUCHANAN, OUR MORAL FATE, EVOLUTION AND THE ESCAPE FROM TRIBALISM (2020).

15. GRAEME NEWMAN, COMPARATIVE DEVIANCE: PERCEPTION AND LAW IN SIX CULTURES 140 (1976).

16. *Id.* at 116 tbl.4.

17. *Id.* at 140-41. (See tbl.12, pp. 142-43).

*C. Principles Emerging Early in the Historical Development of Formal Criminal Law*

A principle that appears early in the historical record and remains accepted today would seem to be a good candidate for a core principles list: it is telling that, even in a world with little legal sophistication or precedent, long-ago generations felt strongly enough about the principle to articulate it on their own. Also, because it appeared early, its widespread acceptance cannot be attributed to generations of internalization. Take, for example, the right of self-defense. This right was recognized in the earliest criminal laws, including the Code of Hammurabi, dating to about 1754 B.C.E. It was similarly codified in a fourth century C.E. Roman law which stated, “we grant to all persons the unrestricted power to defend themselves” (*liberam resistendi cunctis tribuimus facultatem*).<sup>18</sup> Other early sources of criminal law principles drawn upon in this Article include the laws of ancient Athens and early English law.

*D. Principles Reflected in the Universal Path of Child Development*

All humans develop according to a predetermined universal path that includes not just predictable physiological milestones but also fixed timing and content for the development of moral intuitions.<sup>19</sup> This tends to support the theory that certain principles of criminal law are innate to humans. In the same way that baby teeth grow from gums and adult teeth replace baby teeth, intuitions about morality and justice come online according to a relatively predictable sequence. Furthermore, intuitions about injury, theft, and fairness are among the first principles of justice understood by young children.<sup>20</sup> As suggested by Jerome Kagan, “temporal concordance implies a biologically based preparedness to judge acts as right or wrong, where preparedness is used with the same sense intended by linguists who claim

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18. Codex Justinianus 3.27.1. (Bruce Frier, ed., Cambridge 2016).

19. See, e.g., Steven Pinker, *The Moral Instinct*, N.Y. TIMES (Jan. 13, 2008) <https://www.nytimes.com/2008/01/13/magazine/13Psychology-t.html> (“The stirrings of morality emerge early in childhood . . . . Though no one has identified genes for morality, there is circumstantial evidence they exist. The character traits called ‘conscientiousness’ and ‘agreeableness’ are far more correlated in identical twins separated at birth (who share their genes but not their environment) than in adoptive siblings raised together (who share their environment but not their genes . . . .) The moral sense, then, may be rooted in the design of the normal human brain”).

20. See Judith Smetana, *Preschool Children's Conceptions of Moral and Social Rules*, 52 CHILD DEV. 1333, 1335-36 (1981) (Finding that preschoolers have a sense of the difference between social conventions and moral rules. Pre-schoolers say that it would not be O.K. to hit another child in their class for no reason even if their teacher allowed them to).

that two-year-old children are prepared to speak their language.”<sup>21</sup>

Imagine the reverse case. If there were no specific developmental system for the acquisition of moral intuitions, if intuitions of justice were simply a matter of general social learning, then the developmental route of the acquisition of intuitions of justice would depend on the environment in which a child developed. The things that the child learned to be wrong would include acts the child witnessed, ideas communicated through language, pedagogy from various sources, and so forth. Because these elements are likely to differ widely across civilizations, cultures, and even across family and peer groups within cultures, such a general learning system would yield very different paths and timing in the acquisition of intuitions of justice for different individuals.

Although evidence now suggests that moral reasoning develops relatively early, it is likely that research still does not fully reveal the precociousness of such reasoning. John Darley and Thomas Shultz suggest in their broad review that “children are capable of making moral judgments at a much earlier age than previously thought.”<sup>22</sup> Summarizing recent literature, the authors conclude that “moral capacity is well developed although by no means completely developed in the third year of life.”<sup>23</sup> To the extent that very young children have intuitions, acquire knowledge, and make conceptual distinctions, especially universally, the probability that each child acquires these by general learning processes decreases, and a more innate developmental sequence becomes more likely.

#### *E. Social Behavior and Practices Revealed by Animal Studies*

Part IV describes how humans, as an ultra-social species, may owe much of their success to embracing the core principles discussed in Part III. As a social species, humans benefit when they have established agreed-upon rules around, among other things, harming one another or taking another’s property. If such basic principles were not universally accepted by humans, then humanity would be internally destructive and less capable of advancing as a species. Similarly, one might expect to find in other animals that exhibit social behavior rudimentary forms of humans’ core intuitions about what constitutes wrongdoing and the intuition that wrongdoing should be punished. This is especially so among primates. In fact, several socially cooperative species appear in some circumstances to exhibit these characteristics of “punishing” aggressors and cheaters according to some

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21. JEROME KAGAN, INTRODUCTION, IN *THE EMERGENCE OF MORALITY IN YOUNG CHILDREN* x (Jerome Kagan & Sharon Lamb eds., 1987).

22. John M. Darley & Thomas R. Shultz, *Moral Rules: Their Content and Acquisition*, 41 ANN. REV. PSYCHOL. 525, 552 (1990).

23. *Id.*

basic principles of justice. Individuals that deviate from various group norms and expectations are sometimes ostracized or aggressed upon by the victims, the victim's relatives, or others. And a number of researchers now suggest that such behaviors may reflect a rudimentary moral sense or intuition of justice.

For an example of an animal study that suggests that some animals, especially those that depend on social groups, do have clear intuitions of justice, consider the research of a widely reported experiment with capuchin monkeys.<sup>24</sup> Different combinations of monkeys adjacent to one another regularly returned granite tokens in exchange for slices of cucumber. When the experimenter began to provide one monkey in the dyad with a grape (a more highly valued food) in exchange for the same token that continued to yield mere cucumbers for the other monkey, the monkey receiving cucumbers often manifested considerable distress. It sometimes jumped up and down, throwing the token or the cucumber at the researcher, refusing to eat the cucumber, and the like. This led the authors of the study to conclude that capuchins can compare their own reward to the reward others receive and will accept or reject rewards according to their relative value. An ability to perceive inequities appears to underlie a great deal of social behavior in primates, in whom transgressive acts are most systematically punished. But, as discussed in Part III, these phenomena are not limited to primates or even to mammals.

*F. Rules and Principles Appearing in Natural Experiments of Groups  
Beyond the Reach of Law*

Today, we are surrounded by governmental law, but what would our basic human nature be like without the state's influence? Could we even imagine a life without it? Luckily, the accidents of history and the unpredictability of life give us some enlightening instances in which we can glimpse humans living outside of the influence of law and society—cases where a group is not only out of law's reach but, they assume, will probably remain so. Our world and our history are rife with such natural experiments, most for which no one would volunteer, but survivors of such events can tell us data-rich tales.<sup>25</sup>

A plane crashes on a remote mountain or a shipwreck s on an isolated island. People might still conform out of fear that later they will be called to account by the law. If the group thinks it might soon be rescued, this is

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24. Sarah Brosnan & Frans de Waal, *Monkeys Reject Unequal Pay*, 425 NATURE 297 (2003); Sarah Brosnan & Frans de Waal, *Reply*, 428 NATURE 140 (2004). See also Sarah Brosnan, *Nonhuman Species' Reactions to Inequity and their Implications for Fairness*, 19 SOC. JUST. RSCH. 153 (2006).

25. See generally PAUL H. ROBINSON & SARAH M. ROBINSON, *PIRATES, PRISONERS, AND LEPERS: LESSONS FROM LIFE OUTSIDE THE LAW* (Potomac 2015).

no true test. But what if there is no realistic prospect of rescue; how do the survivors deal with one another? Once they feel completely free of legal constraints, how do isolated individuals behave with each other? Such lawless situations have occurred in a variety of settings beyond plane crashes and shipwrecks. A group may be forced into permanent isolated exile, as with the forced creation of leper colonies in the middle of the nineteenth century. Or a group may choose to isolate itself, as did groups of pirates at the start of the eighteenth century.

Although there are dramatic differences between the situations and the people in these lawless groups, there exist common patterns in the rules and principles they create for themselves to define and punish wrongdoing. That these groups, in such desperate circumstances, would adopt similar behavioral principles to each other suggests that these cases offer another source for identifying core principles that seem to be naturally shared by most humans.

### III. CORE PRINCIPLES

What core principles do these potential indicators suggest? Below are nine principles that have independent support from the many different indicators described in the previous section.

#### *A. The Punishment Principle: Wrongdoing Deserves Punishment*

The first principle suggested by the six indicators is the fundamental shared belief that blameworthy wrongdoing deserves punishment. The nearly universal nature of this principle is strongly supported by a wide variety of the sources discussed in Part II.

Human civilizations as early as ancient Athens viewed wrongdoing as giving rise to anger in the victim that could be assuaged only by punishment. This anger was not, however, just from the personal sense of wrong by the victim but also from the sense of wrong experienced by the community. As Demosthenes argued in a public prosecution in the 360s B.C.E.: “It’s not right that Meidias’ behavior should arouse my indignation alone and slip by, overlooked by the rest of you. Not at all. Really, it’s necessary for everyone to be equally angry!”<sup>26</sup>

The Punishment Principle is well documented by empirical studies, both domestic and cross-cultural. One example is the so-called Ultimatum Game, a study which tests respondents’ willingness to bear the costs to punish perceived unfairness. In the typical version, experimental subjects

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26. Danielle S. Allen, *Demosthenes 21.123*, in PUNISHMENT IN ANCIENT ATHENS, edition of March 23, 2003, available at [http://www.stoa.org/demos/article\\_punishment@page=all&greekEncoding=UnicodeC.html](http://www.stoa.org/demos/article_punishment@page=all&greekEncoding=UnicodeC.html) [<https://perma.cc/C38J-UGMC>].

are brought into the laboratory and randomly assigned to one of two experimental “roles,” either that of the Proposer or that of the Responder. The Proposer is provisionally allocated a sum of money called an “Endowment,” often ten dollars. The Proposer suggests a split of the Endowment with the Responder— for example, six dollars for the Proposer, four dollars for the Responder. The Responder is then given the option of accepting the offer— in which case the money is split as designated by the Proposer— or of rejecting the proposal, in which case the ten dollars is not given to the subjects.

Proposers generally offer between 40% to 50% of the Endowment to Responders,<sup>27</sup> but our interest is in situations in which Proposers offer a very unequal split. Under these conditions, Responders often reject the proposals, costing them the amount offered by the Proposer, and thus depriving the Proposer of her portion of the money. Such rejections are interpreted by researchers as cases in which Responders are punishing Proposers for making unfair offers.<sup>28</sup> This punishment happens under carefully controlled conditions, when the subjects do not physically interact with one another, do not know one another’s identities, and even when the experimenter does not know the Responder’s decision.<sup>29</sup> In short, people punish perceived unfairness at a cost to themselves, even when there are no instrumental consequences or experimenter expectations at work. Even more striking, there is evidence that third-party observers with no stake in the game will pay to punish Proposers they perceive as behaving intentionally unfairly towards Responders.<sup>30</sup>

Another source of empirical evidence in support of the punishment principle is the significant literature on “scenario research.” Where subjects are asked their view on the amount of punishment that would be appropriate for a particular offender, they rarely choose to give the offender no punishment. For example, a study by Craig Boydell and Carl Grindstaff gave participants the opportunity to indicate the penalty they believed should be applied to an offense, as well as the appropriate minimum and maximum penalty.<sup>31</sup> Even for the least serious offense they investigated— assault—a mere four percent of respondents indicated that the minimum penalty they would apply is “no punishment.”<sup>32</sup> For all other crimes, “no

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27. This varies considerably depending on the details of the experimental procedure. See COLIN CAMERER, *BEHAVIORAL GAME THEORY: EXPERIMENTS IN STRATEGIC INTERACTION* 50-52 (2003).

28. *Id.* at 10.

29. See Gary E. Bolton & Rami Zwick, *Anonymity Versus Punishment in Ultimatum Bargaining*, 10 *GAMES & ECON. BEHAV.* 95, 111 (1995) (showing that punishment occurs even when experimenters do not know subjects’ decisions).

30. Daniel Kahneman et al., *Fairness and the Assumptions of Economics*, 59 *J. BUS.* S285, S285-S300 (1986).

31. Craig L. Boydell & Carl F. Grindstaff, *Public Opinion Toward Sanctions for Crimes of Violence*, 65 *J. CRIM. L. & CRIMINOLOGY* 113 (1974).

32. See *id.* at 114. (Note: The penultimate column, labeled “education,” is mislabeled and should

punishment” was chosen as the appropriate penalty by fewer than four percent of the respondents.<sup>33</sup> Indeed, in the majority of cases, “no punishment” was selected by no participants, even as the minimum punishment for the offense.<sup>34</sup>

Similarly, a 1985 study allowed people to indicate “zero” in their magnitude estimation task when questioned about the appropriate punishment for certain offenses.<sup>35</sup> The average value assigned for even the offense judged least serious—“a person under 16 years old plays hooky from school”—was greater than zero.<sup>36</sup> On average, across all regions investigated, even the least serious offense was judged to deserve some punishment.

In many questionnaire studies, “no liability” was not an option given, likely because the experimenters believed that all subjects would find that all acts described in the study deserved at least some punishment.<sup>37</sup> This assumption itself is noteworthy, as it shows that a standard assumption made by social science experts over the course of decades is that subjects would obviously choose to apply at least some punishment. If all these researchers were wrong, there likely would be evidence in the studies of subjects refusing to assign punishment, by responding with only the minimum possible amount of punishment in each case, or by responding randomly. Yet these types of results did not occur, potentially vindicating the researchers’ views.

Cross-cultural data suggest that questionnaire studies yield similar results in all of the cultures that have been studied. While clearly there are important cultural differences, the intuition that those who commit wrongs should be punished seems to be universal. Cultural psychologist Paul Rozin and his colleagues conclude that “[m]oral judgment and the condemnation of others, including fictional others and others who have not harmed the self, is a universal and essential feature of human social life.”<sup>38</sup> Similar sentiments have been expressed by developmental psychologist Jerome

read “execution” (see p. 115 for a confirmation of this error) and should therefore not be interpreted as a preference for “no punishment.”)

33. *Id.* at 113-14.

34. *Id.*

35. MARVIN E. WOLFGANG ET AL., *THE NATIONAL SURVEY OF CRIME SEVERITY*, app. A at 137 (1985) (the instructions read: “If you think something should not be a crime, give it a zero.”) (emphasis in original).

36. *See id.* at 158-61.

37. *See, e.g.*, Don C. Gibbons, *Crime and Punishment: A Study in Social Attitudes*, 47 *SOC. FORCES* 391, 395 (1969) (For each of twenty offenses, there were roughly three hundred respondents. Only four of the twenty offenses yielded more than 10% ‘no penalty’ responses. These were homosexuality, statutory rape (consensual sex between a twenty-year-old and a sixteen-year-old), draft evasion, and marijuana use).

38. Paul Rozin et al. *The CAD Triad Hypothesis: A Mapping Between Three Moral Emotions (Contempt, Anger, Disgust) and Three Moral Codes (Community, Autonomy, Divinity)*, 76 *J. PERSONALITY & SOC. PSYCHOL.* 574 (1999).

Kagan, who includes this intuition as one of a limited number of “universal moral categories that transcend time and locality.”<sup>39</sup> Philosopher Ray Jackendoff observes: “Thus in our culture, the legal system punishes not only physical aggression like assault, but also economic aggression like stealing.”<sup>40</sup> Similar institutions are found in some form in every culture, even in the absence of written legal codes. Anthropologist Donald Brown, in his exhaustive review of the cross-cultural data, includes intuitions surrounding justice and punishing transgressors as a “Human Universal.”<sup>41</sup>

The universal path of child development lends further support to the Punishment Principle. From a young age, children demonstrate a belief that wrongdoing is deserving of punishment. In an early and well-known experiment, Judith Smetana tested very young children’s beliefs about justice to determine if they believed wrongdoing—specifically, physical harm (hitting) and theft (taking someone else’s apple)—should be punished.<sup>42</sup> Smetana used pictures indicating the acts to demonstrate violations. To elicit responses, a pictorial scale (different-size frowns) was used to gauge seriousness.<sup>43</sup> Smetana also used a verbal assessment of how harshly the offender should be punished: not at all, a little, or a lot.<sup>44</sup> Both groups of subjects—consisting of children between two-and-a-half to five years old—indicated that hitting and theft were both serious offenses and deserved punishment.<sup>45</sup> The children indicated that these offenses would be wrong even if “there [were] no rule about it.”<sup>46</sup>

Perhaps even more telling is the great lengths to which children are willing to go in order to ensure that wrongdoers get the punishment they deserve. Research has shown that children, like the adults in the Ultimatum Game, are willing to make personal sacrifices, such as giving up stickers, candies, or time playing on a slide, “to punish a transgressor who had acted unfairly or unkindly.”<sup>47</sup> This result is consistent among children across cultures.<sup>48</sup>

In fact, the Punishment Principle is so fundamental that it extends beyond humans. Many socially cooperative species appear in some

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39. JEROME KAGAN, *THE NATURE OF THE CHILD* 118 (1984).

40. RAY JACKENDOFF, *LANGUAGE, CULTURE, CONSCIOUSNESS: ESSAYS ON MENTAL STRUCTURE* 185-86 (2007).

41. DONALD E. BROWN, *HUMAN UNIVERSALS* 138 (1991).

42. See Smetana, *supra* note 20, at 1333-34 (1981).

43. *Id.*

44. *Id.*

45. *Id.*

46. Judith G. Smetana, *Toddler’s Social Interactions Regarding Moral and Conventional Transgressions*, 55 *CHILD DEV.* 1767 (1984).

47. See Julia Marshall et al. *Children Punish Third Parties to Satisfy Both Consequentialist and Retributive Motives*, 5 *NATURE HUMAN BEHAV.* 361, 361 (2020).

48. Bailey R. House et al., *Social Norms and Cultural Diversity in the Development of Third-Party Punishment*, 287 *PROC. ROYAL SOCIETY B* 287, 20192794 (2020).

circumstances to “punish” aggressors and cheaters.<sup>49</sup> Individuals that deviate from various group norms and expectations are sometimes isolated or aggressed against by the victims, the victim’s relatives, and others.<sup>50</sup>

For example, within the highly social naked –mole-rat communities, queens appear to focus attacks on lazy workers.<sup>51</sup> In one social species of wren, “helpers” assist by providing food when the young are being raised.<sup>52</sup> Helpers experimentally removed from the group during that period are usually attacked and harassed upon their return, while helpers absent at other times of the year are never attacked.<sup>53</sup> Wolves apparently refuse to play with those who violate the social rule against injurious play-fighting, and the latter both leave the group and die at higher rates than average.<sup>54</sup> And young male deer who try to covertly have sexual intercourse with females guarded by adult males are regularly attacked.<sup>55</sup>

Primates in particular exhibit sophisticated cooperation, which ranges from simple reciprocal grooming and food sharing to complex tool-using and coalitional behavior. They, too, regularly punish wrongdoers. In chimpanzee societies, for example, those reluctant to share when they have food are more likely to encounter aggressive responses when they later approach those who have food.<sup>56</sup> Chimpanzees will attack former allies who failed to assist them in conflicts with third parties. Indeed, among chimpanzees (which, along with bonobos, are the closest relatives of humans), retribution is sufficiently common that researchers consider retaliation an integral part of a system of reciprocity.<sup>57</sup>

Even in absent-law situations, group members create systems for punishing wrongdoing amongst themselves. In the early 1840s, thousands of families, motivated by a sluggish American economy and the prospect of free land, traveled west from Missouri along the Oregon Trail.<sup>58</sup> Wagon

49. See, e.g., Marc D. Hauser, *Costs of Deception: Cheaters Are Punished in Rhesus Monkeys*, 89 PROC. NAT’L ACAD. SCIS. U.S. 12137 (1992); Keith Jensen et al., *Chimpanzees are Vengeful But Not Spiteful*, 104 PROC. NAT’L ACAD. SCIS. U.S. 13046 (2007); Nichola J. Raihani et al., *Punishment & Cooperation in Nature*, 27 TRENDS ECOLOGY & EVOLUTION 288 (2012).

50. See generally WORLD HEALTH ORGANIZATION, CHANGING CULTURAL AND SOCIAL NORMS THAT SUPPORT VIOLENCE 6-10 (2009) [https://www.who.int/violence\\_injury\\_prevention/violence/norms.pdf](https://www.who.int/violence_injury_prevention/violence/norms.pdf) [https://perma.cc/C2UG-EZJN].

51. Hudson K. Reeve, *Queen Activation of Lazy Workers in Colonies of the Eusocial Naked Mole-Rat*, 358 NATURE 147, 148 (1992).

52. Peter O. Dunn et al., *Fairy-Wren Helpers Often Care for Young to Which They Are Unrelated* 259 PROCEEDINGS: BIOLOGICAL SCI. 339, 341-42 (1995).

53. Raoul A. Mulder & Naomi E. Langmore, *Dominant Males Punish Helpers for Temporary Defection in Superb Fairy-wrens*, 45 ANIM. BEHAV. 830, 832 (1993).

54. Marc Bekoff, *Wild Justice, Cooperation, and Fair Play*, 19 BIOLOGY & PHIL. 489, 493 (2004).

55. PAUL H. ROBINSON, INTUITIONS OF JUSTICE AND THE UTILITY OF DESERT 42 (2013).

56. FRANS B. M. DE WAAL, GOOD NATURED: THE ORIGINS OF RIGHT AND WRONG IN HUMANS AND OTHER ANIMALS 157–58 (1996).

57. *Id.*

58. ROBINSON & ROBINSON, *supra* note 25, at 68.

trains formed in the winter in Independence, Missouri, where travelers worked out agreements concerning who would lead the train, what supplies would be brought, and how they would support the journey financially.<sup>59</sup> There was no U.S. legal authority present, and the trains were not traveling across U.S. territory during much of their travel. Each train made up its own rules. At a rate of three miles per hour, a wagon train could make the two-thousand-mile journey before the mountain passes were blocked by autumn snowfall.<sup>60</sup> Those trapped on the more rugged sections of the trail could die without food or shelter. Nevertheless, one of the few things that would prompt a train to voluntarily stop was the trial and punishment of serious wrongdoing.<sup>61</sup> Even unrelated trains were known to halt their journey so that members could participate as jurors in another train's trial.<sup>62</sup>

For a different kind of example, consider the prisoners in Nazi concentration camps during World War II. During the War, the Nazis rounded up and transported Jews, as well as homosexuals, Jehovah's Witnesses, communists, and gypsies from all over Europe into camps that had been built expressly for the purpose of annihilating them.<sup>63</sup> Those who were not killed upon arrival fought to survive against disease, brutality, starvation, and overwork.<sup>64</sup>

Prisoners in the camps commonly hid away small scraps of bread among their possessions.<sup>65</sup> The precious bread crusts could mean the difference between life and death. Volunteers, at some significant personal sacrifice, took turns staying up at night to stand guard.<sup>66</sup> But the commitment to catching and punishing those who victimized the weak was thought to outweigh the personal cost.

There were some prisoners who mistreated their fellows or even actively participated in torturing them, sometimes to death. The German SS who controlled the camps were not inclined to punish such acts. In fact, prisoners known to be cruel to their fellow prisoners were protected. Behind the scenes, however, prisoner justice was at work, and the protected

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59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 70.

63. The factual narrative is drawn from these sources: EUGEN KOGON, *THE THEORY AND PRACTICE OF HELL: THE GERMAN CONCENTRATION CAMPS AND THE SYSTEM BEHIND THEM* (Heinz Norden, trans.) (1950); JAMES BACHNER, *MY DARKEST YEARS: MEMOIRS OF A SURVIVOR OF AUSCHWITZ, WARSAW AND DACHAU* (2007); ISRAEL CYMLICH & OSKAR STRAWCZYNSKI, *ESCAPING HELL IN TREBLINKA* (2007); Curt Bondy, *Problems of Internment Camps*, 38 J. ABNORMAL & SOC. PSYCH. 453 (1943); TERRENCE DES PRES, *THE SURVIVOR: AN ANATOMY OF LIFE IN THE DEATH CAMPS* (1980); DAVID A. HACKETT, *THE BUCHENWALD REPORT* (1997); HANS HESSE, *PERSECUTION AND RESISTANCE OF JEHOVAH'S WITNESSES DURING THE NAZI-REGIME* (2001); Norman R. Jackman, *Survival in the Concentration Camp*, HUM. ORG., (Summer 1958), at 23-26.

64. Norman R. Jackman, *Survival in the Concentration Camp*, HUM. ORG. 23-26 (Summer 1958).

65. *Id.*

66. *Id.*

“creatures” were often killed, commonly by prisoners who had not been their victims, had nothing personal to gain, and put themselves at risk in doing so. One of the malevolent prisoners, Gregory Kushnir-Kushnarev, who claimed to be a former Russian general, was protected by the SS.<sup>67</sup> But when he fell ill and went to the camp doctor (a fellow prisoner), the doctor by prearrangement declared him to be infectious and admitted him to the hospital, where other prisoners killed him by lethal injection. This kind of personal sacrifice in order to impose deserved punishment, even by persons unrelated to the victim, appears regularly in law-less situations.<sup>68</sup>

There have been multiple attempts at creating “no-punishment” societies. For instance, during the 1960s social revolution, some established anti-punishment communes in order to prove to the world that people could live together in an open society that maximized autonomy while protecting the rights of others. One of the most famous of these communes was Drop City, established in May 1965 on six acres of scrubland outside of Trinidad, Colorado.<sup>69</sup> The commune became a rich incubator for artistic and social creativity, including the development of geodesic domes made from junk car hoods as living quarters. Open to all, there were no formal enforced rules, but it was entirely appropriate for a member to complain to another about how the person’s conduct hurt others.<sup>70</sup>

Things went well for a while, but when a member named Peter Rabbit (most residents took new names) followed his own mind and dismissed others’ complaints, the group’s inability to enforce its norms undid the project.<sup>71</sup> Peter Rabbit took the absence of enforcement as an opportunity to promote his personal interests at the expense of others.<sup>72</sup> On one occasion, he was found eating a steak at a local restaurant using funds he took from the communal bank account, an account to which he never contributed. As members increasingly resented his open thievery and their helplessness in the face of it, they stopped cooperating and the commune collapsed.

67. EUGEN KOGON, *THE THEORY AND PRACTICE OF HELL: THE GERMAN CONCENTRATION CAMPS AND THE SYSTEM BEHIND THEM* 198 (Heinz Norden, trans.) (1950).

68. Just as wagon trains and Nazi concentration camp prisoners put themselves at risk in order to do justice, California gold miners, most of whom had given up significant private lives in order to search for gold, would rarely stop mining, but, like the wagon trains, would stop to conduct a trial for a serious offense. ROBINSON & ROBINSON, *supra* note 25, at 55.

69. Paul H. Robinson, *Don’t Abolish the Police. It Didn’t Work for 1960s Communes And It Won’t Work for Us*, USA TODAY (June 21, 2020) <https://www.usatoday.com/story/opinion/2020/06/21/abolishing-police-unworkable-1960-s-communes-2020-cities-column/3216029001/> [https://perma.cc/6HRS-RYVR].

70. The factual narrative is drawn from these sources: MARK MATTHEWS, *DROPPERS: AMERICA’S FIRST HIPPIE COMMUNE, DROP CITY* (2010); TIMOTHY MILLER, *THE 60S COMMUNES* (1st ed. 1999); James F. Doyle, *A Radical Critique of Criminal Punishment*, 22 SOC. JUST. 7, 21-22 (1995); DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY* (1990); WILLIAM HEDGEPEETH, *THE ALTERNATIVE: COMMUNAL LIFE IN NEW AMERICA* (1st prtg. 1970); John Curl, *Memories of Drop City* (2007).

71. MATTHEWS, *supra* note 70, at 52-53.

72. CURL, *supra* note 70, at 152.

As Drop City was disbanding, a different group established a no-punishment commune at Black Bear Ranch in Siskiyou County, California.<sup>73</sup> They, too, began with no enforced rules. But after a series of fights, outbreaks of hepatitis, and a growing proportion of freeloaders, formal rules were adopted and enforced by required appearances before the community for open discussion. If the coercion of social stigmatization was ineffective, the offending member was expelled. The Black Bear commune's adoption of a coercive enforcement system saved it, and it continues to exist today. All no-punishment communes, like Drop City, have failed.<sup>74</sup>

### *B. The Meaning of Wrongdoing*

The previous principle lays out the punishment of wrongdoing, but is there agreement on what constitutes wrongdoing? The indicators suggest at least three near-universal aspects of the meaning of wrongdoing: physical aggression, taking the property of another without consent, and deceit in exchanges. As described below, the indicators also point to a near universal acceptance of accomplice liability and a defense for otherwise wrongful conduct necessary to avoid greater harm. As suggested earlier, additional research may suggest other areas of agreement. This principle seems particularly ripe for further development.

#### *1. Wrongdoing Includes Physical Aggression, Taking Property without Consent, and Deceit in Exchanges*

Admittedly, there can be considerable variation in what types of conduct are considered wrong across groups, cultures, and civilizations. However, there does exist a core of conduct in which there is extraordinary agreement on its wrongfulness: physical aggression and taking another's property without consent. These acts were forbidden in criminal laws as early as 2300 B.C.E., when Uruinimkina, the King of the city-states of Lagash and Girsu in Mesopotamia, took measures against murder, theft, and usury among other conduct in the first example of a legal code in recorded history.<sup>75</sup>

In empirical studies, offenses against persons and property are regularly chosen as being among the most egregious. Joseph Jacoby and Francis Cullen surveyed a national sample of 1,920 adults who were read

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73. The factual narrative is drawn from these sources: BENNETT M. BERGER, *THE SURVIVAL OF A COUNTERCULTURE* (1981); DON MONKERUD, *FREE LAND: FREE LOVE* (2000); PETER COYOTE, *SLEEPING WHERE I FALL* (1998).

74. ROBINSON & ROBINSON, *supra* note 25, at 45.

75. Benjamin R. Foster, *Social Reform in Mesopotamia*, in *SOCIAL JUSTICE IN THE ANCIENT WORLD*, at 169, 173-74 (K. Irani & M. Silver eds., 1995)).

eight crime vignettes during thirty-minute telephone interviews.<sup>76</sup> The type of crime in each vignette was taken from a list of twenty-four offenses. On average, respondents agreed on the relative seriousness of each crime. Assaults, rapes, robberies, and larceny (particularly of greater dollar amounts) were all seen as deserving of significant punishment.<sup>77</sup>

The same result can be found in cross-cultural studies. For example, Michael O'Connell and Anthony Whelan's survey of 623 individuals in the greater Dublin area showed that respondents viewed murder, assault, burglary, and mugging as particularly wrongful.<sup>78</sup> The same was found by Marlene Hsu in Taiwan,<sup>79</sup> and by Graeme Newman in India, Indonesia, Iran, Italy, and Yugoslavia.<sup>80</sup>

Nor are these sentiments limited to adults. In Judith Smetana's study of young children's beliefs about justice, discussed above, physical harm (hitting) and theft (taking someone else's apple) were clearly seen as forms of wrongdoing to be punished.<sup>81</sup> In another study, Elliot Turiel found that most children believe the absence of a rule prohibiting stealing would be wrong, and that "it would be wrong to steal even if the rule did not exist."<sup>82</sup> This nonrelativistic view, Turiel concluded, "corresponds to their judgments about the act of stealing."<sup>83</sup>

Physical aggression and theft were also commonly punished even in absent-law situations. For example, residents of San Francisco, which lacked a functioning government while it served as a base camp for the gold rush in the mid-1800s, formed a vigilante court and grand jury for the purpose of indicting and charging a criminal gang, the Hounds, with "conspiracy, to commit murder, [and] robbery."<sup>84</sup> And in the Nazi concentration camps mentioned above, prisoners who physically mistreated or stole bread from their fellows were the recipients of prisoner justice, often being killed for their wrongdoings.<sup>85</sup>

Finally, condemnation of physical aggression and theft can be found even in non-human species. In rhesus macaques, for example, those who discover food and are caught having failed to alert the group to its discovery

76. Joseph E. Jacoby & Francis T. Cullen, *The Structure of Punishment Norms: Applying the Rossi-Berk Model*, 89 J. CRIM. L. & CRIMINOLOGY 245, 263 (1998).

77. *Id.* at 276-77.

78. Michael O'Connell & Anthony Whelan, *Taking Wrongs Seriously: Public Perceptions of Crime Seriousness*, 36 BRIT. J. CRIMINOLOGY 299, 309 (1996).

79. Marlene Hsu, *Cultural and Sexual Differences on the Judgment of Criminal Offenses: A Replication Study of the Measurement of Delinquency*, 64 J. CRIM. L. & CRIMINOLOGY 348 (1973).

80. NEWMAN, *supra* note 15, at 60., 118.

81. Smetana, *supra* note 20, at 1335.

82. ELLIOT TURIEL, *THE DEVELOPMENT OF SOCIAL KNOWLEDGE: MORALITY AND CONVENTION* 91 (1983).

83. *Id.*

84. MARY FLOYD WILLIAMS, *HISTORY OF THE SAN FRANCISCO COMMITTEE OF VIGILANCE OF 1851* at 107 (1921).

85. ROBINSON & ROBINSON, *supra* note 25, at 66-67.

often become targets of significant aggression.<sup>86</sup> Elephant seal pups caught trying to nurse from a female who is not their mother are not just shoed away but often bitten severely and sometimes killed.<sup>87</sup>

In addition to physical harm and the taking of property, deceit in exchanges is also universally understood as a wrong. Take the example of children's inclination towards fairness. Larry Nucci asserts that the crux of early-childhood moral development is the construction of moral action tied to structures of "just reciprocity."<sup>88</sup> Further research shows that while young children (age five or younger) are incapable of connecting effort or work to reward (instead allocating rewards equally), children as young as thirteen begin to allocate rewards with a proportionality (equity) rule, suggesting a developmental trend in issues associated with exchange (effort for reward).<sup>89</sup>

Social behavior in primates demonstrates that humans are not alone in demanding fair exchange. In the capuchin monkey experiment noted earlier, what upset the capuchin was the perception that they were being cheated in their exchange of a granite token for food, given the greater reward that the neighboring capuchin was receiving.<sup>90</sup> Similarly, chimpanzees reportedly often refuse to participate in an exchange once another chimpanzee is receiving a more valued reward for the same amount of effort.<sup>91</sup> Thus, both capuchins and chimpanzees behave in ways suggesting that they can perceive unfairness in exchanges and that it often agitates them.

Absent-law groups similarly show an inclination to punish not only physical aggression and theft but also deceit in exchanges. In the San Francisco gold mining camps mentioned above, for example, one of the offenses prosecuted by residents was deception in a horse sale.<sup>92</sup>

## 2. *Assisting Another Person to Commit a Crime is Wrongful*

Complicity and conspiracy became separate and distinct doctrines in

86. Hauser, *supra* note 49, at 12137.

87. Tom. H. Clutton-Brock & Geoff. A. Parker, *Punishment in Animal Societies*, 373 NATURE 209, 212 (1995) (citing Joanne Reiter et al., *Northern Elephant Seal Development: The Transition from Weaning to Nutritional Independence*, 3 BEHAV. ECOLOGY & SOCIOBIOLOGY 337 (1978)).

88. Larry Nucci, *Because It Is the Right Thing to Do*, 45 HUM. DEV. 125, 128 (2002). Nucci claims that at around age six, "children's moral judgments become regulated by conceptions of just reciprocity."

89. Jay Hook, *The Development of Equity and Logico-Mathematical Thinking*, 49 CHILD DEV. 1035, 1041 (1978); J.G. Hook & Thomas D. Cook, *Equity Theory and the Cognitive Ability of Children*, 86 PSYCH. BULL. 429, 441 (1979).

90. F. Brosnan & B. M. de Waal, *supra* note 24, at 297.; [hereinafter Brosnan & de Waal, *Monkey Reject Unequal Pay*] F. Brosnan & B. M. de Waal, *supra* note 24, at 140. *Fair Refusal by Capuchin Monkeys*.

91. Brosnan & de Waal, *supra* note 24, at 297.

92. ROBINSON & ROBINSON, *supra* note 25, at 88.

criminal law at least by the sixteenth century.<sup>93</sup> The criminalization of unlawful agreements by a group came early in common law but, “[i]t was not until 1611 in the Poulterers’ Case, decided in the Court of Star Chamber, that a mere agreement to commit a crime became a substantive offense.”<sup>94</sup> The Poulterers’ Case is a landmark in the history of criminal conspiracy, for it departed from the doctrine that the conspiracy must actually be carried into effect before a writ of conspiracy would lie. The Court of Star Chamber ruled in that case that the agreement was itself indictable though the offense had not taken place.<sup>95</sup> But legal accountability for the criminal conduct of another was well-established even before there was a formal doctrine in either tort or criminal law. As Francis Sayre explains, “[s]uch a doctrine rests . . . rather upon natural reason and elementary principles of causation than upon any fiction of law.”<sup>96</sup>

Absent-law groups also prosecuted those who were complicit in the commission of wrongdoing. When the residents of the San Francisco gold mining camps formed a committee to try the Hounds for their violence, the Hounds were “indicted, and charged with a conspiracy, to commit murder, robbery, etc.”<sup>97</sup> The committee did not seek to charge each individual Hound with specific crimes, but rather found that each member’s complicity in the group’s activities sufficed to banish the group entirely.<sup>98</sup>

Empirical studies confirm near universal agreement that complicity constitutes wrongdoing. Indeed, people’s judgments on these issues are quite nuanced. People’s liability and punishment judgments alter dramatically according to how much assistance an accomplice provides in the commission of an offense. For example, in one study concerning accomplice liability for a perpetrator’s killing during a store robbery, where the accomplice agrees beforehand to the shooting, his punishment is thirty years to life when the principal shoots the store owner.<sup>99</sup> But if the accomplice thought the principal’s gun would be unloaded, his liability is only 6.6 years for the owner’s death.<sup>100</sup> And if the principal shoots a co-felon rather than the store owner, then the surviving co-felon’s punishment is only twelve months.<sup>101</sup>

93. See, e.g., WILLIAM STAUNFORD, *PLEAS OF THE CROWN* (1557), as discussed in POLLOCK AND MAITLAND, 2 *HISTORY OF ENGLISH LAW* 509 (1898).

94. Albert J. Harno, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624, 625 (1941) (citations omitted).

95. *Id.*

96. Francis Bowes Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 690 (1930).

97. WILLIAMS, *supra* note 84, at 107.

98. ROBINSON & ROBINSON, *supra* note 25, at 58.

99. ROBINSON, *supra* note 55, at 380.

100. *Id.*

101. *Id.*

Another study sought to test the subjects' view of the minimum amount that a person could contribute in encouraging or assisting an offense to be held criminally liable for it. It also sought to test whether the subjects would alter the degree of the liability they imposed according to the person's degree of contribution to the offense.<sup>102</sup> The study presented subjects with a series of scenarios, each of which presented a different degree of contribution to a killing, including scenarios where the person attempted but failed to assist.<sup>103</sup> In order to test whether the subjects' view depended upon the actual occurrence of a resulting harm such as death, several of the scenarios presented instances where the principal actor, the "perpetrator," was not successful in his attempt to kill.<sup>104</sup>

As the involvement of the friend goes from a failed attempt to minimal involvement up through masterminding of the crime, the liability ratings of the respondents increase. The man who helps a woman in planning the killing of her husband by directing her to a gun store is given an average liability of five years, while the man who helps her by giving her his gun so she does not have to go to the store gets an average of life imprisonment.<sup>105</sup> But if he offers her his gun and she says she does not need it because she already has one, then eighty-five percent say no punishment.<sup>106</sup> That is, the liability assignments to the friend increase as his contribution to the offense increases.

### 3. *Conduct Necessary to Avoid Greater Harm is Not Wrongful*

What today might be called justification defenses, especially defensive force justifications, were recognized early in the development of criminal law. A right of self-defense against an unlawful aggressor is probably the earliest recognized exception to the general prohibition against injuring or killing another. The defense was recognized in the earliest criminal laws, including the Code of Hammurabi.<sup>107</sup>

Roman law similarly codified the defense. Roman law was protective of the individual's right to defend himself and his property, whether from a thief on a darkened highway or a soldier in search of plunder. A provision attributed to late fourth century C.E. reads:

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102. *Id.* at 263.

103. *Id.* The core of these scenarios involves an unhappily married woman who "longs for her husband's death, which would make her a rich widow." A friend of the wife is aware of her feelings and assists or tries to assist her in various ways to bring about her husband's death. These various ways form the variation in the scenarios. The wife eventually kills her husband or attempts to do so and fails.

104. ROBINSON, *supra* note 55, at 263.

105. *Id.*

106. *Id.*

107. A. H. Godbey, *The Place of the Code of Hammurabi*, 15 THE MONIST 199, 204 (1905).

We grant to all persons the unrestricted power to defend themselves . . . , so that it is proper to subject anyone, whether a private person or a soldier, who trespasses upon fields at night in search of plunder, or lays by busy roads plotting to assault passers-by, to immediate punishment in accordance with the authority granted to all. Let him suffer the death which he threatened and incur that which he intended.<sup>108</sup>

The offered rationale for the provision states, “[f]or it is better to meet the danger at the time, than to obtain legal redress . . . after one’s death.”<sup>109</sup>

Empirical studies also demonstrate a common intuition that necessary defensive force ought not to be punished. The control scenario in one study involves a case in which a person is attacked with a deadly weapon and responds by killing the attacker.<sup>110</sup> Participants’ liability assignments in this study were strikingly low, on average assigning well below one day in jail.<sup>111</sup> Of the respondents, seventy-one percent gave no liability; ninety-seven percent gave no liability or no punishment.<sup>112</sup> This result confirms that subjects give a defense to a person who kills under conditions that satisfy today’s legal requirements for self-defense.

The right of self-defense was also recognized by absent-law groups in determining liability and punishment. Recall the wagon train communities discussed previously, who made and enforced their own rules. They dealt with serious wrongdoing according to the group’s own shared intuitions of justice. Abigail Jane Scott recorded a case in which her train delayed for a day to participate in the trial of a man from a train ahead of them. The facts presented at the trial revealed that Dunmore followed Olmsted, jumped him, and began kicking him in the face. Olmsted called upon the bystanders to pull him off. When no one intervened, he pulled a knife and stabbed the attacker, killing him. The group judged Olmstead to be blameless and as having acted in proper self-defense, and no liability was imposed.<sup>113</sup>

Children similarly view necessary harm as morally distinguishable from malevolent aggression. In one study, Marc Jambon and Judith Smetana sought to examine five- to eleven-year-olds’ judgments as to the justifiability of causing intentional harm to prevent greater injury.<sup>114</sup> The subjects were shown a series of colored drawings depicting a story where

108. Code Just., *supra* note 18.

109. Will Tysse, *The Roman Legal Treatment of Self Defense and the Private Possession of Weapons in the Codex Justinianus*, 16 J. ON FIREARMS & PUB. POL’Y 163, 165 (2004).

110. ROBINSON, *supra* note 55, at 279.

111. *Id.*

112. *Id.*

113. ROBINSON & ROBINSON, *supra* note 25, at 70 (citation omitted).

114. Marc Jambon & Judith Smetana, *Moral Complexity in Middle Childhood: Children’s Evaluations of Necessary Harm*, 50 DEV. PSYCH. 22 (2014).

an actor intentionally hurt his or her friend to stop the friend from performing an act that would likely cause serious harm.<sup>115</sup> The researchers concluded that “with age participants offered increasingly more forgiving evaluations of necessary harm.”<sup>116</sup>

*C. The Blameworthiness Principle: Blameless Conduct Should Be Protected from Criminal Liability*

The indicators suggest that there is near universal agreement that criminal liability and punishment ought to be imposed only where there is some degree of blameworthiness for the wrongdoing. In modern terms, this principle insists on some minimum level of criminal culpability (intention, knowledge, recklessness, or negligence) as to the elements of the offense, as well as a minimum level of cognitive and control capacity by the offender at the time of the offense, which is typically provided through recognition of a range of excuse defenses.

*1. An Actor with No Culpable State of Mind as to the Offense is Not Blameworthy*

Even if an actor's conduct is wrongful (the actor violates a criminal law conduct rule), there is strong agreement that he ought not be criminally liable and subject to punishment unless the violation was done with some culpable state of mind. The distinction between willful and accidental conduct was the earliest recognized distinction to a determination of culpability.<sup>117</sup> Early evidence of recognition of this distinction appears in the *Laws of Alfred* over one thousand years ago:

Let the man who slayeth another wilfully perish by death. Let him who slayeth another ... unwillingly or unartfully, as God may have sent unto his hands, and for whom he has not lain in wait, be worthy of his life, and of lawful 'bot,' if he seek asylum. If, however, anyone presumptuously and wilfully slay his neighbor through guile, pluck thou him from my altar, to the end that he may perish by death.<sup>118</sup>

Empirical studies confirm the continuing strength of this shared intuition. In a culpability requirements study, subjects were given scenarios containing instances of non-consensual intercourse, statutory rape, and property damage offenses involving damage to a dwelling or to unimproved

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115. *Id.* at 24.

116. *Id.* at 30.

117. For a comprehensive review of the history of this distinction, see Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L. J. 815, 821-30 (1980).

118. ANCIENT LAWS AND INSTITUTES OF ENGLAND 47-49 (B. Thorpe ed. 1840) (quoting *Laws of Alfred*).

property.<sup>119</sup> In each scenario, the level of culpability of the person's mistake as to committing the offense varied. Where the offender was faultless in the commission of the offense, the majority of subjects most frequently imposed no liability or no punishment.<sup>120</sup>

Children as young as five or six years of age similarly view wrongdoing as inherently different when committed unintentionally. In reviewing several studies on the intent-accident distinction, Rachel Karniol concludes that "children do evaluate actors who engage in intentional negative acts as naughtier than those who enact accidental ones that result in damage," even where the children are "unable to explain the reasons for their choice of which character is naughtier."<sup>121</sup>

The absent-law cases also demonstrate a concern for imposing liability and punishment only where there is culpability and cognitive capacity of the offender. In the 1972 Andes plane crash, for example, a man named Harley was discovered to have a private stash of toothpaste, which normally was part of the group's food stores (since it was coveted as a tasty dessert).<sup>122</sup> At his hearing, the group determined that Harley was misled by another man, Delgado, who had told him that the toothpaste was not part of the group stores and thus was fair game to trade.<sup>123</sup> Harley's plea, essentially one of an honest mistake, was accepted by his peers and he was not sanctioned.<sup>124</sup>

Or take the example of the crew aboard the pirate ship the Charles II (rechristened the Fancy).<sup>125</sup> After departing the Spanish port of *A Coruña* and flying a newly fashioned flag bearing skull and crossbones, the mutineers made up their own laws.<sup>126</sup> These outlaws deemed an offender's culpable state of mind relevant to deserved punishment.<sup>127</sup> In one case, three officers were found to have taken high quality clothing from the common

119. ROBINSON, *supra* note 55, at 305.

120. *Id.*

121. Rachel Karniol, *Children's Use of Intention Cues in Evaluating Behavior*, 85 PSYCH. BULL. 76, 78-80 (1978).

122. PIERS PAUL READ, *ALIVE: SIXTEEN MEN, SEVENTY-TWO DAYS, AND INSURMOUNTABLE ODDS—THE CLASSIC ADVENTURE OF SURVIVAL IN THE ANDES* 216 (2005).

123. ROBINSON & ROBINSON, *supra* note 25, at 83.

124. *Id.*

125. The factual narrative is drawn from these sources: TERRY BREVERTON, *BLACK BART ROBERTS: THE GREATEST PIRATE OF THEM ALL* (2004); PETER LEESON, *THE INVISIBLE HOOK: THE HIDDEN ECONOMICS OF PIRATES* (2009); ANGUS KONSTAM, *THE HISTORY OF PIRATES* (1999); CLARENCE H.C. HARING, *THE BUCCANEERS IN THE WEST INDIES IN THE XVII CENTURY* (2009); ALEXANDRE O. EXQUEMELIN & WILLIAM S. SONNENSCHIN, *THE BUCCANEERS OF AMERICA* (1684); CHARLES JOHNSON, *A GENERAL HISTORY OF THE ROBBERIES & MURDERS OF THE MOST NOTORIOUS PIRATES* (1999); WOODS ROGERS, *A CRUISING VOYAGE ROUND THE WORLD* (1712); COLIN WOODARD, *THE REPUBLIC OF PIRATES: BEING THE TRUE AND SURPRISING STORY OF THE CARIBBEAN PIRATES AND THE MAN WHO BROUGHT THEM DOWN* (2007).

126. ROBINSON & ROBINSON, *supra* note 25, at 96.

127. *Id.* at 97.

loot storage area in order to better seduce the women in town.<sup>128</sup> Stealing from the common loot was a serious offense normally warranting punishment of death.<sup>129</sup> Once they returned to the ship, the officers were put on trial before the rest of the crew to answer for the theft charges.<sup>130</sup> When the officers explained that their intention had been to borrow the clothing for the night and not to keep it, they were discharged with only a warning.<sup>131</sup>

The provision for a mistake defense appears to apply not only to a mistake as to offense elements but also to a mistake as to the conditions that would provide a justification defense. In the study of justification defenses discussed previously,<sup>132</sup> most people impose no punishment if the defensive force seems unavoidable to the actor. On the other hand, if the person could have safely retreated before using deadly force, subjects impose an average punishment of 9.6 months.<sup>133</sup> In comparison to 9.6 months, if the person mistakenly believes that he cannot retreat, then he gets no punishment or negligible punishment.<sup>134</sup> In other words, not only do subjects almost universally recognize the use of defensive force as not wrongful, but they also tend to be quite sympathetic and forgiving when a defender makes a mistake in the use of such force.

The sense of justice held by young children also incorporates the question of whether an offender has made a mistake. When children aged five and seven make judgments regarding blame, they consider the fact that others might have beliefs different from their own.<sup>135</sup> Their judgments are quite nuanced. If a person's belief is different than the child's on matters of fact—that is, beliefs concerning what is true (as opposed to what is morally right)—then mitigation often is permitted. However, if the different belief relates to what is right and wrong (for example, a teacher who thinks it is acceptable to discriminate against someone based on gender), then the person's mistake does not exculpate him.<sup>136</sup> This implies that children have a sophisticated understanding of others' beliefs and the role they play in the commission of moral offenses.<sup>137</sup>

## 2. An Actor Who Lacks the Capacity to Know His Conduct is Wrong or

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128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. Section III.C., *supra*.

133. ROBINSON, *supra* note 55, at 280.

134. *Id.*

135. See Cecilia Wainryb & Sherrie Ford, *Young Children's Evaluations of Acts Based on Beliefs Different from Their Own*, 44 MERRILL-PALMER Q. 484 (1998).

136. *Id.*

137. See, e.g., Larry Nucci & Elsa K. Weber, *Social Interactions in the Home and the Development of Young Children's Conception of the Personal*, 66 CHILD DEV. 1438, 1445 (1995).

*to Avoid Committing it is Not Blameworthy*

The second but related circumstance where blameworthiness is agreed to be lacking despite the commission of a wrongful act is where the offender through no fault of their own lacks sufficient capacity to understand the wrongfulness of or to control their conduct. While the law and the community commonly assume sanity, maturity, sobriety, and absence of coercion, in the unusual case, a person may suffer a disability and its effects may be such that he or she cannot reasonably be expected to have avoided the violation.

The insanity and immaturity defenses were recognized as early as the laws of Athens.<sup>138</sup> As explained in Book IX of Plato's *Laws* in 360 B.C.E., crimes may be committed

in a state of madness or when affected by disease, or under the influence of extreme old age, or in a fit of childish [wantonness], himself no better than a child. And if this be made evident to the judges elected to try the cause, on the appeal of the criminal or his advocate, and he be judged to have been in this state when he committed the offense, he shall simply pay for the hurt which he may have done to another; but he shall be exempt from other penalties . . .

. . .<sup>139</sup>

General agreement on the propriety of providing such excuse defenses is confirmed in many of the absent-law cases. Take the example of Michael Privitera, a.k.a. "Crazy Mike," an inmate in the Attica prison known to be unpredictably violent.<sup>140</sup> Privitera had been hostile towards the captured guards since the start of the Attica uprising, and he was brought before the committee for attacking one of the hostages and assaulting an inmate in the process, in violation of the group's rules that would normally result in the

138. DANIEL N. ROBINSON, *WILD BEASTS & IDLE HUMOURS: THE INSANITY DEFENSE FROM ANTIQUITY TO THE PRESENT* 21 (1996).

139. BENJAMIN JOWETT, *PLATO'S LAWS BOOK IX* (360 B.C.E.), available at <http://classics.mit.edu/Plato/laws.9.ix.html> [https://perma.cc/5URF-59QA].

140. The factual narrative is drawn from these sources: MALCOLM BELL, *THE TURKEY SHOOT: TRACKING THE ATTICA COVER-UP* (1985); BERT USEEM & PETER KIMBALL, *STATES OF SIEGE: U.S. PRISON Riots 1971-1986* (1989); Anonymous, *Episodes from the Attica Massacre*, 4 *BLACK SCHOLAR* 43, 34 (1972); TOM WICKER, *A TIME TO DIE* (1978); Attica Revisited, *TALKING HISTORY ATTICA REVISITED*, [www.talkinghistory.org/attica/](http://www.talkinghistory.org/attica/) (last visited Jan. 13, 2021) [https://perma.cc/P57Z-A36A]; Justin Brooks, *How Can We Sleep While the Beds Are Burning—The Tumultuous Prison Culture of Attica Flourishes in American Prisons Twenty-Five Years Later*, 47 *SYRACUSE L. REV.* 159, 159 (1996); Michael Deutsch, Dennis Cunningham & Elizabeth Fink, *Twenty Years Later—Attica Civil Rights Case Finally Cleared for Trial*, 18 *SOC. JUST.* 13, 13 (1991); RICHARD FEATHERSTONE & STEPHEN PASCHEN, *NARRATIVES FROM THE 1971 ATTICA PRISON RIOT: TOWARD A NEW THEORY OF CORRECTIONAL DISTURBANCES* (2005); Bruce Jackson, *Attica: An Anniversary of Death*, *ARTVOICE* (Sept. 9, 1999), <http://www.acsu.buffalo.edu/~bjackson/attica.htm>; THERESA LYNCH, *ATTICA: A MONSTROUS CREDIBILITY GAP* (2006).

death penalty.<sup>141</sup> The inmate committee found that because he was mentally ill, he would instead be sent to temporary preventive detention.<sup>142</sup>

It may seem puzzling that in the midst of the Attica uprising chaos, the committee's judgments were not about punishment alone but rather about just punishment. But empirical studies confirm that extrinsic forces as well as the offender's characteristics influence liability judgments that provide excuse defenses. In one study, an individual who is characterized using many keywords suggesting insanity picks up a dangerous object—such as a baseball bat—and hits another person with it, killing him.<sup>143</sup> The results indicate that perpetrators who are judged to be suffering from a high degree of dysfunction, whether of the cognitive or conduct control sort, are normally not assigned criminal liability.

Beyond an offender's individual dysfunctions, external pressures on an offender can also be seen as a defense for punishable conduct. The bank manager who lets burglars into the bank vault after hours because the burglars have kidnapped his family is acting under a coercive force that will reduce or extinguish his perceived blameworthiness. One study presented subjects with scenarios of duress in which the level of coercion was varied.<sup>144</sup> Subjects generally refused to impose criminal liability or punishment in those scenarios in which they judged the offender as blameless for the offense because of the coercion.<sup>145</sup>

As the empirical studies show, all of these sources of dysfunction—mental illness, involuntary intoxication, immaturity, and duress—can undercut the blameworthiness required for criminal liability. Even in cases where a complete excuse is not provided, the greater the dysfunction, the greater the degree of mitigation (as we shall see in discussion of the Proportionality Principle immediately below.)

Excuse defenses are also commonly recognized in situations where there is no established law present. In 1822, one of the officers on a whaling ship, Samuel Comstock, devised a plan to seize the ship, sail off to a Pacific Island, and declare himself to be a pirate king.<sup>146</sup> Comstock recruited several other sailors on the ship, who joined him at a specified time to kill several of the other officers as they slept. One officer, Gilbert Smith, was not with the others, and before Comstock could kill him, he pledged allegiance to Comstock on the condition that Comstock spare his life.<sup>147</sup> Smith thereafter managed the sailing of the ship and did not protest when another sailor was

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141. *Id.* at 102.

142. *Id.* at 93.

143. ROBINSON, *supra* note 55, at 336-46.

144. *Id.* at 353-60.

145. *Id.*

146. WILLIAM COMSTOCK, *THE LIFE OF SAMUEL COMSTOCK, THE TERRIBLE WHALEMAN* 87-93 (1840).

147. *Id.*; ROBINSON & ROBINSON, *supra* note 25, at 88-89.

hung for a crime that Smith knew the man had not committed.<sup>148</sup> Still, months later, when the non-mutineers in the crew took back control of the ship from Comstock, Smith was not punished, apparently on the theory that he had been coerced to participate.<sup>149</sup>

*D. The Proportionality Principle: The Extent of Liability and Punishment Should Be Proportionate to the Extent of Wrongdoing and Blameworthiness*

Another principle that emerges from the six types of evidence is that the extent of liability and punishment should be proportionate to the offender's wrongdoing and blameworthiness.<sup>150</sup> This requires an assessment of the seriousness of the offense as well as the culpable state of mind and capacity of the offender. The indicators point to several specific ideas demonstrating application of the Proportionality Principle: (1) greater harm deserves greater punishment; (2) harm to persons is generally more wrongful than harm to property; and (3) criminal liability should increase with increased culpability levels and decrease with the reduced blameworthiness of partial excuses.

*1. Greater Harm Deserves Greater Punishment*

One of the foundations of the Proportionality Principle is that relatively more serious offenses are deserving of relatively greater punishment. Support for this contention is vast.

Some of the most convincing evidence of the Principle's near-universal acceptance comes from empirical studies, both in the United States and cross-culturally. A substantial body of research indicates a broad consensus regarding the relative seriousness of different wrongdoings and the appropriate relative amount of punishment. While some people may give generally harsher punishment and others generally less harsh punishment, people tend to agree on the relative degree of blameworthiness among a set of cases. These studies confirm the existence of shared intuitions as to relative seriousness of different variations on wrongdoing. The Robinson and Kurzban study showing almost complete agreement in the rank ordering of twenty-four crime scenarios across all demographics, for instance, has already been discussed in Section II.A.<sup>151</sup>

148. *Id.*

149. *Id.*

150. While different terminological conventions exist, we take the term "blameworthiness" to include both the wrongfulness of the conduct and the culpability or cognitive dysfunction of the actor. In this usage, it might be called the "blameworthiness proportionality principle," but we have written the text in a way that we hope will avoid confusion no matter what terminological convention the reader starts with.

151. *See* Section II.A., *supra*.

One of the most well-known studies is that of Thorsten Sellin and Marvin Wolfgang, who in the 1960s surveyed 575 individuals across Pennsylvania about the seriousness of fifty-one offenses.<sup>152</sup> The subjects were asked to both place offenses on a scale ranging from one to eleven and to assign each offense a number, without any predetermined range, to indicate the offense's seriousness relative to bicycle theft, which was arbitrarily assigned a value of ten.<sup>153</sup> The results show broad agreement.<sup>154</sup> The researchers conclude that "[t]he most strongly supported conclusion . . . is that all the raters . . . tended to so assign the magnitude estimations that the seriousness of the crimes is evaluated in a similar way, without significant differences, by all the groups" and, further, that a "pervasive social agreement about what is serious and what is not appears to emerge . . ."<sup>155</sup>

Since Sellin and Wolfgang's work, there have been many other studies using a variety of methods, all reaching similar conclusions. Alfred Blumstein and Jacqueline Cohen surveyed 603 residents of Allegheny County, Pennsylvania.<sup>156</sup> Subjects were asked to assign the length of a prison sentence that "best fits the seriousness of the offense" for twenty-three offenses that researchers presented in the form of brief crime scenarios.<sup>157</sup> The researchers found no strong effects of demographics—including gender, race, religious affiliation, or level of education—on the ordering of sentences.<sup>158</sup> That is, different groups tended to agree on which crimes should be punished more than other crimes. They concluded that there was "considerable agreement across various demographic groups on the relative severity of the sentences to be imposed for different offenses."<sup>159</sup>

Lee Hamilton and Steve Rytina conducted face-to-face interviews with 391 subjects in the Boston area in which they asked subjects to rank each of seventeen offenses in terms of severity using a task similar to the one described above.<sup>160</sup> A comparison of the individuals' judgments of seriousness and desired punishments with the sample's average judgments gave high correlations—0.71 and 0.73, respectively—suggesting "a high level of consensus."<sup>161</sup> An analysis of the demographic

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152. THORSTEN SELLIN & MARVIN E. WOLFGANG, *THE MEASUREMENT OF DELINQUENCY* 236-273 (1964).

153. *Id.*

154. *Id.*

155. *Id.*

156. Alfred Blumstein & Jacqueline Cohen, *Sentencing of Convicted Offenders: An Analysis of the Public's View*, 14 L. & SOC'Y REV. 223, 227-230 (1980).

157. *Id.* at 228-29.

158. *Id.* at 249.

159. *Id.* at 223. They also noted, however, that there was "disagreement over the absolute magnitude of these sentences."

160. V. Lee Hamilton & Steve Rytina, *Social Consensus on Norms of Justice: Should the Punishment Fit the Crime?*, 85 AM. J. SOCIO. 1117, 1124 (1980).

161. *Id.* at 1132.

differences among the subjects—age, race, income, and sex—showed no strong effects.<sup>162</sup>

Similarly, Peter Rossi, Emily Waite, Christine Bose, and Richard Berk interviewed 125 whites and 75 Blacks in Baltimore, Maryland with a roughly equal number of males and females, asking people to categorize 80 offenses each into nine categories according to how serious the offense was perceived to be.<sup>163</sup> The correlations between ratings of Black and whites people, males and females, and more and less educated groups were 0.89, 0.94, and 0.89 respectively, indicating a substantial amount of agreement.<sup>164</sup>

Charles Thomas, Robin Cage, and Samuel Foster surveyed 3334 households, asking subjects what they felt would be a “fair sentence” for each of seventeen offenses.<sup>165</sup> They reported finding “evidence of a remarkable level of consensus, even after separating the sample on the basis of their sex, race, age, income, occupational prestige, and educational attainment.”<sup>166</sup> They concluded that the findings, “regardless of the type or category of offense examined, are not supportive of any prediction that suggests variations between different categories of the population in either perceptions of relative seriousness of these offenses, or the level of sanctions that are viewed as appropriate.”<sup>167</sup>

In sum, in their review of the literature through 1997, Peter Rossi and Richard Berk suggest that the studies converge on the view that people share intuitions about the relative seriousness of wrongdoing.<sup>168</sup> “[A] [f]airly strong consensus exists on the seriousness ordering of crimes, with those involving actual or threatened physical harm to victims generally considered to be the most serious . . . .”<sup>169</sup> In fact, their summary of previous studies suggests that “there is very little, if any evidence that there exist subgroups within the American population with radically different views about sentencing norms,” and that “[t]here is no evidence for a normative order that is an alternative to what the overwhelming majority of the American population believe.”<sup>170</sup>

But these results are far from limited to the American population. Cross-cultural evidence supports the view that people everywhere share

162. *Id.* at 1134.

163. Peter H. Rossi, et al., *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 AM. SOCIO. REV. 224 (1974).

164. *Id.* at 227.

165. Charles W. Thomas et al., *Public Opinion on Criminal Law and Legal Sanctions: An Examination of Two Conceptual Models*, 67 J. CRIM. L. & CRIMINOLOGY 110, 112 (1976).

166. *Id.* at 116.

167. *Id.*

168. PETER H. ROSSI & RICHARD A. BERK, NATIONAL SAMPLE SURVEY: PUBLIC OPINION ON SENTENCING FEDERAL CRIMES 193 (1995).

169. PETER H. ROSSI & RICHARD A. BERK, JUST PUNISHMENTS: FEDERAL GUIDELINES AND PUBLIC VIEWS COMPARED 12 (1997).

170. ROSSI & BERK, *supra* note 169.

some intuitions about the relative seriousness of core wrongdoing. Included here are three studies that are representative of the large body of literature.

A comparison of O'Connell and Whelan's data on Irish subjects with a British sample from a decade earlier found that, "Irish perceptions of crime . . . have much in common with those in other jurisdictions," especially with regard to more serious crimes.<sup>171</sup>

Marlene Hsu administered a survey to 600 persons in Taiwan asking for seriousness judgments of 14 offenses, which were the 14 index offenses of Sellin and Wolfgang translated into Chinese, on an 11-point scale.<sup>172</sup> Hsu found similar ordinal judgments in the relative ranking of the 14 offenses between the Taiwanese and American samples, with a coefficient of .84 (.95 among male subjects).<sup>173</sup>

Newman's study of 2,360 individuals from a number of different cultures—India (512), Indonesia (500), Iran (479), Italy (200), United States (169), Yugoslavia (500)—revealed that, "[i]f one were to order the acts according to the proportions of each country sample criminalizing them, one would find a general consensus across all countries as to the extent that all acts should be tolerated."<sup>174</sup> Newman also reports that "[a]t the general level of analysis, it is apparent that there was considerable agreement as to the amount of official punishment appropriate to each act" and that looking at relative rankings indicates "general agreement in ranks across all countries."<sup>175</sup>

Studies suggest that even young children intuitively appreciate the relative seriousness of different kinds of wrongful conduct, distinguishing between more serious and less serious offenses. Marie Tisak and Elliot Turiel gave children (average ages of the groups were roughly seven, nine, and eleven) stories about acts that violated either moral rules (regarding theft or pushing) or prudential rules (regarding running and falling).<sup>176</sup> Subjects reported that the violation of the moral rule was more serious and that it would be less acceptable to change moral rules.<sup>177</sup> The comparison between moral rules and prudential rules indicates judgments that go beyond consideration of consequences of rule-violating actions.

Substantial research demonstrates that the developmental sequence for moral reasoning is not unique to the Western world. Larry Nucci suggests

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171. *Id.* at 316.

172. Marlene Hsu, *Cultural and Sexual Differences on the Judgement of Criminal Offenses: A Replication Study of the Measurement of Delinquency*, 64 J. CRIM. L. & CRIMINOLOGY 348, 349-50 (1973).

173. *Id.* at 350.

174. NEWMAN, *supra* note 15, at 115

175. *See id.* at 142-43 tbl. 12.

176. Marie S. Tisak & Elliot Turiel, *Children's Conceptions of Moral and Prudential Rules*, 55 CHILD DEV. 1030, 1031 (1984).

177. *Id.* at 1031-32.

that “there is considerable cross-cultural evidence that children and adults across a wide range of the world’s cultures conceptualize prototypical moral issues pertaining to fairness and others’ welfare in ways very similar to children and adults in Western contexts, and differentiate such issues from prototypical matters of convention.”<sup>178</sup> In a recent review, Jenny Yau and Judith Smetana concluded that despite cultural differences, “[c]hildren as young as 3½ to 4 years of age have been found to treat moral transgressions as very serious, generalizably wrong, and wrong independent of rules and authority sanctions. In contrast, they treat conventional transgressions as less serious, contextually relative, and contingent on rules and authorities.”<sup>179</sup>

The absent-law groups also commonly assessed punishment according to the relative seriousness of the violation. The rules adopted by the pirates aboard the boat, the *Revenge* follow this pattern of having punishment track the seriousness of the offense.<sup>180</sup> A pirate who did not keep his weapons in working order or “neglect[ed] his [b]usiness” would be “cut off from his share.”<sup>181</sup> A man who endangered the ship by smoking in bed would receive “Moses law” (forty lashes).<sup>182</sup> Because the pirates continued in their present dangerous and burdensome occupation for the purpose of gaining wealth, one of the most serious offenses was stealing from the group, which was punished by marooning on an uninhabited island—essentially, a death sentence.<sup>183</sup>

In addition to demonstrating the need for just punishment, absent-law situations also shed light on human abhorrence of injustice—or of imposing greater punishment than is deserved. In 1629, the sailing ship *Batavia* wrecked on a coral reef off the coast of wild and unknown western Australia on its journey from Amsterdam to the spice ports of Java.<sup>184</sup> The roughly five-hundred-yard-long strip of coral rubble on which the almost three hundred people aboard were caught was home only to seabirds and sea lions. The captain and crew took stock of the situation, and it became clear to everyone that no help would be coming.

In keeping with the policy of the Dutch East India Company, as ranking

178. LARRY P. NUCCI, *EDUCATION IN THE MORAL DOMAIN* 95-96 (2001).

179. Jenny Yau & Judith G. Smetana, *Conceptions of Moral, Social-Conventional, and Personal Events among Chinese Preschoolers in Hong Kong*, 74 *CHILD DEV.* 647, 647 (2003) (internal citations omitted).

180. Captain John Phillips, *Captain John Phillips’ Articles 1724*, PIRATE DOCUMENTS, <https://www.piratedocuments.com/john-phillips-articles-1724/> (last visited Sep. 2, 2021) [<https://perma.cc/QG55-XDF5>].

181. *Id.*

182. *Id.*

183. *Id.*

184. The factual narrative is drawn from these sources: SIMON LEYS, *THE WRECK OF THE BATAVIA: A TRUE STORY* (2005); MIKE DASH, *BATAVIA’S GRAVEYARD: THE TRUE STORY OF THE MAD HERETIC WHO LED HISTORY’S BLOODIEST MUTINY* (2002); HENRIETTA DRAKE-BROCKMAN, *VOYAGE TO DISASTER* (1996).

officer, Jeronimus Cornelisz was elected head of a committee, called the Raad, that ran the affairs of the sudden community. His exercise of authority brought order to the group, as tasks were assigned, and resources rationed. But his autocratic style was perceived as producing unjust rules and punishment. In one of the first disciplinary cases to come before the Raad, a man had stolen food from the common stores and shared it with another man. He was convicted before the Raad, and Cornelisz insisted that both men be killed. The committee objected that the punishment was too severe, especially regarding the man who had only shared in the food. The harsh sentences may well have provided the intimidation that Cornelisz sought, but they also hurt his reputation and added to the population's increasing doubts about his fairness and judgment.

If people were indifferent to notions of fairness and justice, the smart move would have been to sign on at the start as an enthusiastic supporter of Cornelisz, who had a monopoly on the existing resources and power. But even then, most of the few hundred people on the island were put off by the injustice of Cornelisz's punishments and his unfairness in dealing with some situations. Most refused to join his governing group, even though by doing so they could have made their lives more tolerable and their long-term survival more likely. Indeed, the majority of the survivors eventually abandoned Cornelisz and his resources to take up a bleaker existence on a nearby island where the primary draw was the group's promise of just rules and punishments.

## *2. Harm to Persons is Generally More Wrongful than Harm to Property*

Empirical studies have consistently demonstrated that people view harm to persons to be more serious, and deserving of greater punishment, than harm to property. In his review of the four decades of literature on perceptions of seriousness following Sellin and Wolfgang, Stelios Stylianou concluded that "relative consensus seems to exist cross-culturally with respect to behaviors that are generally ranked high on the seriousness scale. ... [T]hese" and that "[t] offenses are typically those involving bodily injury, followed by those causing property damage or loss."<sup>185</sup>

In the Rossi, Waite, Bose, and Berk study in Baltimore discussed previously, the researchers concluded that "[c]rimes against persons, especially murder, receive very high seriousness ratings. Crimes against property in which no action is taken against people are rated significantly lower," but still greater than "offenses often classified as misdemeanors,

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185. Stelios Stylianou, *Measuring Crime Seriousness Perceptions: What Have We Learned and What Else do We Want to Know*, 31 J. CRIM. JUST. 37, 45 (2003).

e.g. ‘disturbing the peace,’ or ‘being drunk in public places.’”<sup>186</sup>

This intuition is not limited to adult populations. In a study performed by David Elkind and Ruth Dabek, children were divided into groups based on age (average ages of the groups were roughly five-and-a-half, seven-and-a-half, and nine).<sup>187</sup> The children listened to stories about different crimes which varied in terms of whether the harm was to a person or to property. The children then assessed blame and were asked about punishment. On average, the children viewed damage to a person as more serious.<sup>188</sup> These results are mirrored in later work that suggests that while very young children focus on either intention or harm, older children (age four and five) use both harm and intention when making decisions about punishment.<sup>189</sup> Such conclusions strongly imply that by age seven children have sophisticated views on desert and possess the ability to weigh multiple factors.<sup>190</sup>

Findings also indicate that “children consider moral transgressions resulting in physical harm to be more wrong than moral transgressions resulting in property violations.”<sup>191</sup> This suggests that children have complex intuitions across different domains. Additional evidence comes from studies in which children are asked to give examples of moral transgressions. Children give physical acts of harm as the most common examples. Acts of physical aggression are “prototypical” moral violations to children.

The principle that harm to persons is more wrongful than harm to property can also be ascertained by studying the degrees of punishment doled out by absent-law groups. For instance, the San Francisco Vigilance Committee, which, as discussed previously, sought to achieve *just* punishment, would hang murderers but only banish robbers.<sup>192</sup>

### 3. *Criminal Liability Should Increase with Increased Culpability Level and Decrease with the Reduced Blameworthiness of Partial Excuses*

186. Rossi et al., *supra* note 163, at 227.

187. David Elkind & Ruth F. Dabek, *Personal Injury and Property Damage in the Moral Judgments of Children*, 48 CHILD DEV. 518 (1977).

188. *Id.* at 520.

189. Phillip David Zelazo et al., *Intention, Act, and Outcome in Behavioral Prediction and Moral Judgment*, 67 CHILD DEV. 2478 (1996).

190. See Charles C. Helwig & Urszula Jasiobedzka, *The Relation Between Law and Morality: Children’s Reasoning About Socially Beneficial and Unjust Laws*, 72 CHILD DEV. 1382 (2001) (concluding that children apply moral concepts of harm, rights, and justice to evaluate laws and these findings imply that children develop textured views of legal issues by around age six).

191. Marie S. Tisak et al., *Preschool Children’s Social Interactions Involving Moral and Prudential Transgressions: An Observational Study*, 7 EARLY EDUC. & DEV. 137, 139 (1996).

192. ROBINSON & ROBINSON, *supra* note 25, at 64-65.

The third dimension of the Proportionality Principle involves taking account of an offender's culpability and capacity when determining criminal liability. Culpability elements of offenses serve two distinct functions: defining the minimum requirements for liability and distinguishing different grades of a single offense. Where an offender commits an offense with relatively greater culpability—say, purposefully or knowingly—they deserve greater punishment. Where an offender acts with lesser culpability, such as when acting recklessly or negligently, they are less blameworthy and deserve correspondingly less punishment (or none at all).

The idea that an offender's liability and punishment ought to reflect the offender's degree of culpability is an old one. Plato, Aristotle, and other ancient Greek philosophers and jurists distinguished between *hekousios* (intentional) and *akousios* (unintentional) offenses.<sup>193</sup> The modern theory of *mens rea* itself can be traced as far back as Roman and Anglo-Saxon law from the fifth century.<sup>194</sup>

Empirical studies confirm ordinary people tend to vary liability and punishment with the level of culpability. In one study, John Darley and I sought to determine the community's views of the appropriate level of culpability that should be required for various kinds of elements of different kinds of offenses.<sup>195</sup> Subjects were given six base scenarios - mistake as to causing damage to a house, mistake as to causing damage to unimproved property, mistake as to ownership of the house damaged, mistake as to ownership of the unimproved property damaged, mistake as to lack of consent to intercourse, and mistake as to age of the underage partner. In each scenario, the level of culpability of the person's mistake varied -among knowledge, recklessness, negligence, and faultlessness. Subjects perceived the four variations of each scenario as presenting distinguishable cases, where liability and punishment increase as the manipulated level of culpability increases.<sup>196</sup>

Cross-cultural studies confirm the view that people see offenses as more serious when done intentionally rather than accidentally.<sup>197</sup>

Studies also show that children similarly view offenses differently when committed with mitigating circumstances. In one study, John Darley, Ellen Klosson, and Mark Zanna presented subjects, including first graders and fourth graders, vignettes in which one child harmed another.<sup>198</sup> Half the

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193. L.A. Zaibert, *Intentionality, Voluntariness, and Culpability: A Historical-Philosophical Analysis*, 1 BUFF. CRIM. L. REV. 459, 463-66 (1998).

194. Albert Lévit, *Origin of the Doctrine of Mens Rea*, 17 ILL. L. R. 117, 123-28 (1922).

195. ROBINSON, *supra* note 55, at 302-10.

196. *Id.* at 304.

197. *Id.* at 27.

198. John M. Darley et al., *Intentions and Their Contexts in the Moral Judgments of Children and Adults*, 49 CHILD DEV. 66, 68 (1978).

subjects also received information depicting either necessity, public duty, or provocation, whereas the other half were presented with no such mitigating circumstances.<sup>199</sup> The researchers found that across the entire age range, “each mitigating circumstance led to less recommended punishment for the harm-doing act.”<sup>200</sup>

In another study, David Bersoff and Joan Miller presented third graders, seventh graders, and college-age adults vignettes depicting offenses such as harm to persons or damage to another’s property together with potentially extenuating circumstances: absence of control, emotional duress, or immaturity.<sup>201</sup> Across age groups, the subjects tended to treat actors as not accountable for accidental behaviors, and frequently absolved them of accountability in cases involving absence of control and emotional duress.<sup>202</sup> The researchers concluded that “it appears likely that the common developmental trend observed in the case of the anger duress breaches reflects certain early features of young children’s conceptions of anger-based revenge as well as certain shared cultural views concerning the disruptive interpersonal consequences of such action.”<sup>203</sup>

The principle of blameworthiness proportionality applies not only to varying punishment according to level of culpability but also to varying punishment according to level of cognitive or control incapacity. Thus, even where an offender may not get a complete excuse defense for immaturity, involuntary intoxication, insanity, duress or any other excusing condition, subjects typically would provide reduced liability and punishment to the extent that such incapacity reduces the offender’s blameworthiness for the offense.

For example, to examine community views on an immaturity defense, study subjects were given scenarios where the offender’s age varied, from ten to fourteen to eighteen years, compared against a control case of an adult perpetrator.<sup>204</sup> The results showed that the younger the perpetrator, the lesser the punishment.<sup>205</sup> An adult gets on average a split between life imprisonment and the death penalty for intentionally setting a boy on fire to kill him while he sleeps. In contrast, an eighteen-year-old gets an average punishment of 25.5 years for the same offense; a fourteen-year-old 6.2 years; and a ten-year-old 11 months. Rossi, Simpson, and Miller similarly found that punishments varied according to not only the

199. *Id.* at 69.

200. *Id.* at 73.

201. David M. Bersoff & Joan G. Miller, *Culture, Context, and the Development of Moral Accountability Judgments*, 29 DEVELOPMENTAL PSYCH. 664, 665 (1993).

202. *Id.* at 673.

203. *Id.*

204. ROBINSON, *supra* note 55, at 347-48.

205. *Id.*

consequences of the crime, but also features of the victims and offenders.<sup>206</sup>

To examine community views on the effect of involuntary intoxication, one study gave subjects five homicide scenarios where the offender suffered from the following dysfunctions: high cognitive only, low cognitive only, high control only, low control only, and low cognitive plus low control.<sup>207</sup> Respondents were told that the cause of the involuntary intoxication was an unexpected interaction between two medications that the person was taking: a medication to control long-term pain and a medication described as an over-the-counter drug for treatment of a cold. The prescribing physician had not mentioned the possibility of drug interaction side effects, and the person had not thought to ask about them. The results show that people do assess cases of involuntary intoxication in terms of the degree of dysfunction that they bring about, and those perceptions of the dysfunctions cause them to reduce the liability they assign to the person.<sup>208</sup> However, involuntary intoxication only mitigates liabilities; the liabilities assigned are still significant.<sup>209</sup>

Another study gave subjects duress scenarios with varying levels of coercion.<sup>210</sup> The core scenario involved an individual who agrees to transport eight ounces of cocaine for another. The respondents were asked to indicate the amount of coercion they saw exercised on the person; whether a person of reasonable firmness would be coerced or induced to commit the offense; and the degree of impropriety of the inducements that are held out to the person in committing the crime, as well as an assessment of the punishment that the person deserves, if any. In the control case in which the person commits the crime—transporting cocaine—with no degree of duress or inducement, the liability imposed is approximately two years. In the high coercion case, an individual with no prior record transports the cocaine for an individual who threatens to kill his family if he does not do so. The high coercion caused liability results that are much lower than the control case, a sentence of just 3.8 weeks on average, suggesting that the respondents see a considerable mitigation. Also, 50% of the subjects assigned no punishment to the offender at all. As the degree of coercion decreases, the subjects produce a liability result that is between that of the high coercion and no coercion cases.

The blameworthiness proportionality principle also appears in natural experiments of groups caught in situations of lawlessness. For example, in the California mining camps claims were marked by leaving tools as

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206. Peter H. Rossi et al., *Beyond Crime Seriousness: Fitting the Punishment to the Crime*, 1 J. QUANTITATIVE CRIMINOLOGY. 59, 60–61 (1985).

207. ROBINSON, *supra* note 55, at 347–50.

208. *Id.* at 349.

209. *Id.* at 352.

210. *Id.* at 353–60.

markers.<sup>211</sup> The standard penalty for taking the tools and thereby subverting the claim was death. In one instance, however, an Irishman and a Dutchman took some old tools thinking that they were in such bad shape that they were probably abandoned.<sup>212</sup> Their lack of care and attention that led them to make this mistake—the tools were not abandoned and really were marking a claim—let them escape the death penalty but their culpability for the mistake justified some lesser punishment, so they were expelled from the camp, thereby losing their own claim.<sup>213</sup>

### *E. Constructing a Criminal Code*

Here, then, are nine core principles that the evidence suggests have near universal appeal across demographics, cultures, and history, and whose expression we see in the universal path of child development, behavior revealed by animal studies, and a wide range of natural experiments of groups caught beyond the reach of law and society. The nine principles do not necessarily provide an exhaustive list. One could argue for the recognition of other core principles that would further fill out the meaning of wrongdoing,<sup>214</sup> the reach of the blameworthiness core principle,<sup>215</sup> or the demands of the proportionality principle.<sup>216</sup> I will leave it to others to determine what additional core principles might exist. Nor are the core principles provided here stated in as detailed a form as might be possible. Future research and analysis by others may well allow for greater specificity.

These principles are not themselves a criminal code but rather provide the foundation for drafting the core of a criminal code. Thus, for example, the obvious principle that “wrongdoing includes physical aggression” calls for the criminalization of the use of force. In codifying that criminalization, the principle that “greater harm deserves greater punishment” suggests codifying different offenses of increasing seriousness (“offense grades” in modern codes) as the harm increases—distinguishing assault, aggravated assault, and homicide, for example. And societies may come to recognize other aspects of physical aggression that they conceive of as additional

211. ROBINSON & ROBINSON, *supra* note 25, at 54.

212. *Id.*

213. *Id.*

214. For example, some might argue that there is general agreement that the meaning of criminal wrongdoing includes some kind of exclusion of de minimis infractions. Early human groups might, for example, set the bar as criminalizing conduct that were serious enough to undermine cooperative action within the group.

215. For example, some might argue that the blameworthiness core principle probably requires recognition of an excuse from liability for persons who make reasonable mistakes about whether their conduct constitutes wrongdoing.

216. For example, some might argue that the proportionality core principle provides that attempts be punished less severely than the completed offense.

harms, such as whether a gun was used (thereby creating greater risks). The principle that “an actor with no culpable state of mind as to the offense is not blameworthy” calls for a minimum culpability of negligence or recklessness, for example, to impose criminal liability for any of these assault offenses. The principle that “criminal liability should increase with increased culpability level” suggests that each assault offense be graded more seriously when done intentionally than when done recklessly. A similar analytic process would guide the creation of other offenses suggested by the core principles.

Of course, the core principles do not provide a complete criminal code for a modern society. Every criminal code should embody the offenses and defenses suggested by these core principles. However, depending on the society, additional provisions, especially relating to the definition of wrongdoing, will be required to deal with wrongdoing that exists further out from the core. A society with a well-developed commercial and governmental structure will want to add offenses such as bribery and corruption, for example. Technologically developed societies will want to add cybercrime offenses. Societies with migration patterns that leave citizens living among nonfamily members may want to create privacy offenses.

Some of these non-core offenses might well be affected by the extent to which they are seen as analogous to core harms—some corruption offenses may seem very much like the core wrongdoing of theft, for example—but each society will need to decide for itself on the proper formulation and punishment of non-core offenses. But whatever norms it recognizes, many of the core principles will influence the criminal code formulation, such as those principles concerning minimum culpability requirements, minimum cognitive and control and control functioning (excuse defenses), and blameworthiness proportionality requirements relating to culpability requirements greater than the minimum and to instances of partial excuse.

#### IV. SPECULATIONS ON THE REASONS FOR THE EXISTENCE OF THE CORE

The strong support for the existence of near universal principles of criminal liability and punishment, even across demographics, cultures, and eras, presents an intriguing puzzle: How can it be that people with such varied situations and backgrounds agree on issues that seem so subjective and complex?

As discussed in depth in *The Origins of Shared Intuitions of Justice*,<sup>217</sup> the theory of evolution offers one possible explanation. Human success as

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217. Paul H. Robinson et al., *The Origins of Shared Intuitions of Justice*, 60 VAND. L. REV. 1633 (2007).

a species came in large part from their sociability—their ability to work together in a group.<sup>218</sup> This success was possible only with group cohesion and cooperation. And this group cooperation depended upon the group accepting a set of rules that protected the group members, which probably meant agreed-upon prohibitions against physical violence, taking property without consent, and deceit in exchanges. But enforcement of these rules could only be undertaken by physical violence or taking property of the offender (or denying him property to which he would normally be entitled).<sup>219</sup> Thus, to enforce the rules required to maintain group cooperation, the group had to not only agree on some basic conduct rules but also to agree on what constituted an appropriate amount of punishment for particular violations. Dramatic over- or under-punishing would tend to undermine the conditions required for continued cooperative action.

To summarize, if enforcement of the essential norms was not to trigger further violations and set off a downward spiral into chaos, humans had to share some common understanding of what kind of punishment was appropriate for what kind of violation and to mark out this violation not as itself a violation of the group norms, but rather as vindication and reinforcement of them. In other words, there was an enormous evolutionary advantage—indeed, a necessity for survival—to humans sharing a view that punishing serious wrongdoing was necessary and not itself a new violation, and as well as a general sense of the relative seriousness of different wrongs to guide the amount of appropriate punishment.

It has been shown both theoretically and empirically that cooperation can evolve through several independent but overlapping processes.<sup>220</sup> The one most relevant for the immediate purpose concerns the mutually beneficial effects of reciprocity: if you share with me today in exchange for my sharing with you yesterday, we are both better off than if neither of us share. In social animals, reciprocity can involve such things as alerting other group members when food has been discovered, sharing food over time, and supporting a comrade in action against others.

But underlying this rosy picture is a darker shadow. While it is evident that reciprocators can outperform loners, a cheater—or a free-rider—could theoretically outperform both if he were able to regularly take benefits without repaying them. Consequently, an evolutionary arms race ensues in

218. *Id.* at 1646–47.

219. See FRANS B.M. DEWAAL, GOOD NATURED: THE ORIGINS OF RIGHT AND WRONG IN HUMANS AND OTHER ANIMALS 39 (1996); see also RICHARD JOYCE, THE EVOLUTION OF MORALITY 140–42 (2006) (explaining the evolution of fairness).

220. See, e.g., ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984); LEE ALAN DUGATKIN, COOPERATION AMONG ANIMALS: AN EVOLUTIONARY PERSPECTIVE (1997); CHRISTOPHER BOEHM, HIERARCHY IN THE FOREST: THE EVOLUTION OF EGALITARIAN BEHAVIOR 197, 197–99, 213 (1999); Herbert Gintis, *Strong Reciprocity and Human Sociality*, 206 J. THEORETICAL BIOLOGY 169 (2000).

social animals between various predispositions toward cooperation and exploitation. In the end, the most successful cooperators are not those who always cooperate, but rather those who cooperate selectively with other cooperators, thus discriminating (passively or aggressively) against those who are not reliable partners in cooperative endeavors. Put another way, effective cooperation requires rewarding good behavior and punishing (or at least failing to reward) bad behavior.

Humans have a universal and uniquely nuanced propensity for engaging in social exchange. Indeed, gains from social exchange form the basis of the modern economy and infiltrate nearly every aspect of life, both in formal markets and in personal relationships. The psychology that underpins exchange requires deep intuitions and complex computational capacities to operate.

In particular, one critical capacity for successful social exchange is the intuition that one should punish individuals who injure others or cheat in an exchange. If one is engaged in transactions with the same person over time, then allowing another individual to injure or to cheat without punishment is an invitation to exploitation without end. Therefore, to be most successful in social exchange, one must have the capacity not only to detect but also to punish such persons.

This implies that there might have been selection in humans for the cognitive mechanisms designed to detect inequities and, similarly, for the cognitive mechanisms that yield intuitions that motivate the punishment of people who violate the most ancient and fundamentally necessary principles of social exchange. In other words, the evolutionary history of social exchange has likely led to the development of a reliable psychological system that is able to compute when someone has injured or cheated, as well as to a motivation to punish them.

This hypothesis, that shared intuitions of justice derive in large measure from the relentless effects of evolutionary processes on human brains and consequent sentiments and behavioral predispositions, connects at a deep level with modern developments in biology and psychology. It also appears to explain why these intuitions appear to be so stunningly consistent across our species, so subtle in their complexities, and so non-randomly focused on the harms to which their attention is particularly keen. Three different areas of research provide data that are consistent with this hypothesis: animal studies,<sup>221</sup> brain science,<sup>222</sup> and child development.<sup>223</sup>

While no single study or field of research conclusively proves the evolutionary hypothesis for the origins of shared intuitions of justice, the triangulation of the theoretical foundations from biology and psychology

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221. Robinson et al., *infra* note 235, at 1654–59.

222. *Id.* at 1659–64.

223. *Id.* at 1664–73.

generally, alongside behavioral data in humans and other species, recent studies of human brain operations, and broad research into the characteristically human development of moral psychology, presents a strong case.

## V. IMPLICATIONS OF THE EXISTENCE OF CORE PRINCIPLES

Whether one finds the speculation of the previous Part persuasive, it ought not affect one's conclusions about the existence of the core principles or of their importance. One might be tempted to consider the core principles described in Part III as an interesting academic exercise. But as this Part makes clear, their existence has a wide variety of important real-world implications. Below are ten examples of significant implications of the principles' existence, implications on a wide variety of fronts, including increasing effective crime-control, limitations and strategies for effective social reform, the use of restorative justice, doctrinal reform proposals involving the legality principle, mistake of law excuses, and the recognition of partial excuses as a mitigation, as well as implications for such diverse big issue topics as the feasibility of having an international criminal law, creating a criminal code for an as yet nonexistent population, and even setting a strategy for meeting extraterrestrials.

### A. *Credibility Costs in Conflicting with the Core*

Existing research suggests that a criminal justice system derives practical value by distributing criminal liability and punishment according to principles that track societal intuitions of justice.<sup>224</sup> Specifically, perceptions of substantive justice—resulting in perceptions of the system's "moral credibility"—promote compliance, cooperation, deference, and internalization of the law's norms. By contrast, a criminal justice system perceived to be substantively unjust can provoke resistance and subversion and may lose its capacity to harness powerful social and normative influence. Subversion and resistance may take the form of either an impulse toward apathy or an impulse toward self-help. That is, people may turn to vigilantism in reaction to a perceived failure of justice. More commonly, people may resist or subvert the system in less dramatic ways. Citizens may fail to report crimes in the first instance. Witnesses may lose an incentive to offer their information or testimony. Jurors may disregard their jury instructions. Police officers, prosecutors, and judges may make up their own rules. And offenders may resist adjudication processes and punishments rather than participate in them.

Studies confirm that laypeople think of criminal liability and

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224. See generally ROBINSON, *supra* note 55, at ch. 8–9.

punishment in terms of desert—the moral blameworthiness of the offender—and not in terms of other principles, such as general deterrence and incapacitation,<sup>225</sup> which have been so popular with system designers during the past several decades. Thus, people naturally expect that a criminal justice system will distribute criminal liability and punishment so as to do justice. If the criminal law earns a reputation as a reliable statement of what the community perceives as condemnable, people are more likely to defer to its commands as morally authoritative in those borderline cases in which the propriety of certain conduct is unsettled or ambiguous in the mind of the actor. Such deference will be facilitated if citizens are disposed to believe that the law is an accurate guide to what society sees as appropriate prudential and moral behavior.

Recent research has shown that even minor changes in moral credibility incrementally affect people's willingness to acquiesce, assist, and defer to the criminal law.<sup>226</sup> One technique used in social science research on such issues is an experiment in which subjects are told of injustices in the current criminal justice system that they did not previously know about and are then tested to see whether the new information changes their view of the system and their willingness to assist and defer to it.

These studies have shown that subjects exposed to unjust cases are less willing to assist and defer.<sup>227</sup> Subjects “who perceived failures in the criminal justice system were significantly less likely to say they would defer to the system's rules in the future.”<sup>228</sup> Their willingness to obey correlated with the degree to which they judged that law to be morally valid.<sup>229</sup> And exposure to outcomes that are inconsistent with their shared intuitions of justice increased the likelihood of future noncompliance.<sup>230</sup>

Unfortunately, studies have shown that current liability and punishment rules commonly undermine the criminal law's reputation for doing justice. One recent study showed that a wide range of modern crime-control doctrines treat cases in ways that dramatically conflict with laypeople's intuitions of justice.<sup>231</sup> The conflict exists for such standard doctrines as “three strikes” and other habitual offender statutes, high penalties for drug

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225. John M. Darley, Kevin M. Carlsmith & Paul H. Robinson, *Incapacitation and Just Deserts as Motives for Punishment*, 24 L. & HUM. BEHAV. 659 (2000); Kevin M. Carlsmith, John M. Darley & Paul H. Robinson, *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. PERSONALITY & SOC. PSYCHOL. 284 (2002).

226. Paul H. Robinson et al., *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940, 1997–16 (2010).

227. *Id.* at 2016–17.

228. *Id.* at 2023.

229. *Id.* at 2011.

230. *Id.* at 2003. This conclusion is consistent with previous studies including Elizabeth Mullen & Janice Nadler, *Moral Spillovers: The Effect of Moral Violations on Deviant Behavior*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1239 (2008); Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399 (2005).

231. Robinson et. al., *infra* note 235, at 1969–75.

offenses, adult prosecution of juveniles, abolition or narrowing of the insanity defense, strict liability, felony murder, and criminalization of regulatory violations. The conflicts were shown to undermine the criminal law's moral credibility with the subjects.<sup>232</sup> Previous and subsequent studies had results consistent with those results.<sup>233</sup> What the above arguments suggest is that the criminal law's long-term crime-control effectiveness will be hurt by rules that conflict with the community's intuitions of justice. Yet, empirical studies make clear that current criminal law regularly deviates from the community's justice judgments on a wide range of criminal law subjects.<sup>234</sup>

Importantly, the moral credibility crime-control project for its part does not actually demand that substantive rules produce "just" results, in a transcendent sense, only that they reflect people's shared moral intuitions. The larger point here is not that shared intuitions of justice must always be followed, but rather that, where they are not followed and where the criminal law's moral credibility suffers, there can be a cost to crime-control effectiveness that ought to be taken into account. A system should not distribute liability or punishment in ways inconsistent with empirical desert unless there is a clear justification for doing so. Empirical desert ought to be the distributive default; it ought not be ignored, as it commonly is today.<sup>235</sup>

The risks to criminal law's moral credibility with the community are likely to be especially high where the criminal law conflicts with the core principles outlined in Part III. Given that the nine core principles are near universal in their appeal and foundational in status, a criminal law that breaches them is likely to suffer the consequences: resistance and subversion, vigilante action where the system fails to do justice, disrupting the criminal law's power of stigmatization, losing compliance in borderline cases, and undermining a social consensus on what is and is not condemnable.

### *B. Social Reform Limitations: Immutability and the Abolitionist Movement*

Whatever one concludes from the analysis in Part IV—whether the striking existence of widely shared intuitions of justice is the result of evolutionary pressures or is the result of some other phenomena such as

232. *Id.* at 1997.

233. *Id.* at 1975–78.

234. ROBINSON, *supra* note 55, at Part III (2013). The summary at the end of each study describes the conflict points. For a general discussion of the code-community conflict, see PAUL H. ROBINSON & MICHAEL T. CAHILL, *LAW WITHOUT JUSTICE: WHY CRIMINAL LAW DOESN'T GIVE PEOPLE WHAT THEY DESERVE* (2006).

235. See generally Paul H. Robinson & Lindsay Holcomb, *Indoctrination and Social Influence as a Defense to Crime: Are We Responsible for Who We Are?*, 85 MO. L. REV. 739 (2020).

universal social learning—it is clear that such intuitions about the core of wrongdoing are so deeply ingrained in humans that they are immune from the powerful forces of life experience and demographics. If this were not the case, one would not find the high degree of agreement across demographics demonstrated in the studies or the other indicia of universality.

Thus, the existence of core principles has important implications for social reformers. Given the deep-seated nature of core principles, it seems unlikely that social reformers can successfully “educate” people out of them, at least not by methods that a liberal democracy would tolerate. One might speculate that extreme coercive indoctrination might have at least a temporary effect,<sup>236</sup> but only highly dictatorial nations with little regard for individual rights would tolerate such practices. For example, it would be difficult, if not impossible, to bring persons to intuit acts that do direct harm to others in their community as not being fundamentally – in the innate, evolutionary sense – morally wrong. As the studies referenced above show, the closer an intuitive justice judgment is to a core principle, the more likely it is to be resistant to change.

Modern abolitionist movements provide another insightful example. Much of the focus today is on reforming the type of punishment imposed by the criminal justice system—doing away with the death penalty<sup>237</sup> and prisons.<sup>238</sup> However, some go further and promote the abolition of punishment altogether. David Garland argues a society that “intends to promote disciplined conduct and social control will concentrate not upon punishing offenders but upon socializing and integrating young citizens—a work of social justice and moral education rather than penal policy.”<sup>239</sup>

At its core, this proposal argues that we should look for reparation, restoration, and reconciliation, not for retribution and punishment (“pain-delivery”); instead of inflicting penal pain on wrongdoers, we should seek negotiated reparations for those who have been harmed, the restoration of relationships between the parties to conflicts, and their reconciliation with each other and with the community.<sup>240</sup>

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236. *Id.*

237. For an examination of the stages and progress of the anti-death penalty movement, see John D. Bessler, *The Abolitionist Movement Comes of Age: From Capital Punishment as a Lawful Sanction to a Peremptory, International Law Norm Barring Executions*, 79 MONT. L. REV. 7 (2018).

238. See, e.g., ANGELA Y. DAVIS, ABOLITION DEMOCRACY BEYOND EMPIRE, PRISONS, AND TORTURE (2005); ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003).

239. DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 288–89 (1990).

240. Bill Keller, *What Do Abolitionists Really Want?*, THE MARSHALL PROJECT (June 13, 2019, 6:00 AM) <https://www.themarshallproject.org/2019/06/13/what-do-abolitionists-really-want> [<https://perma.cc/FB8Q-WRQK>]; Jonathan Ben-Menachem, *Policing Can't End Violence in the U.S. But Reparations Might*, CURRENT AFFAIRS (Jul. 28, 2020) <https://www.currentaffairs.org/2020/07/policing-cant-end-violence-in-the-us-but-reparations-might> [<https://perma.cc/86YM-DWT2>]; Patrice Cullors, *Abolition and Reparations: Histories of Resistance*,

This is not a proposal that societies will or should adopt, for two reasons. First, as shown, a large majority of individuals in society would strenuously resist the abolition of punishment because the impulse to punish serious wrongdoing is deeply ingrained.<sup>241</sup> Second, having punishment available to administer to norm violators greatly reduces the frequency of norm violations that occur.<sup>242</sup> This Article does not assert that the lengthy prison terms that the criminal justice system currently imposes on offenders, coupled with the “prisonization” that is inflicted on offenders in prisons, is necessary to reduce the frequency of criminal violations that exist in our society. But it does argue that the absence of *any* punishment mechanisms in a society would lead to a set of violations sufficient to threaten the existence of the society.

Here, it is worth recalling the “no-punishment” experiments described previously.<sup>243</sup> Drop City was a commune in 1960s Colorado which opposed external authority, power, and coercion in favor of voluntary cooperation and self-imposed restraints. Any action designed to collectively coerce individual behavior, including punishment, violated the commune’s philosophy of permitting “unrestricted individuality.”<sup>244</sup> However, once the commune members had enough of free-riding members like Peter Rabbit taking advantage and were left without recourse, the founders abandoned Drop City and the commune collapsed.<sup>245</sup>

Black Bear Ranch in Siskiyou County, California was another no-punishment commune that seemed headed for a similar fate.<sup>246</sup> But after a series of fights, outbreaks of hepatitis, and a growing proportion of freeloaders, formal rules were adopted and enforced by required appearances before the community for open discussion. If the coercion of social stigmatization was ineffective, the offending member was expelled. Black Bear commune’s adoption of a coercive enforcement system saved it, and it continues to exist today.<sup>247</sup> All no-punishment communes, like Drop City, have failed.

To conclude, even if one were convinced intellectually that abolition of punishment was a desirable ideal, it is a reform that could never be successfully implemented, and it would be folly to try to do so. We must face the reality that human beings will demand justice for serious wrongdoing, and that the absence of a system that allows for the imposition

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*Transformative Justice, and Accountability*, 132 Harv. L. Rev. 1648, 1686-87 (2019); FAYE HONEY KNOPP, *INSTEAD OF PRISONS: A HANDBOOK FOR ABOLITIONISTS* 7-8 (1977).

241. See Section II *supra*.

242. ROBINSON & ROBINSON., *supra* note 25.

243. See Section III.A *supra*.

244. *Id.*

245. ROBINSON & ROBINSON, *supra* note 25, at 37–38.

246. *Id.* at 41.

247. *Id.* at 257.

of deserved punishment would produce intolerable consequences, such as people undertaking to do justice themselves.

*C. Social Reform Strategies: Manipulating the Strength of the Analogy to the Core*

The previous section introduced why efforts directed towards changing people's views on matters that are immutable are destined to fail. Nevertheless, as one moves out from the core, society's views on an issue may be more malleable. If a judgment of justice is of a sort that can be meaningfully altered, a potentially effective method of bringing about such change could be by manipulating the analogy to a core principle. In other words, the existence of non-malleable core principles may make them beyond the reach of most social reformers; but in the hands of social reformers who appreciate their intractability, reforms appealing to core principles could be powerful tools for change.

It is possible through public education both to inform people about negative effects of conduct that had not previously been fully appreciated and to analogize the conduct sought to be condemned with conduct that is already seen<sup>as</sup> condemnable. This approach changes judgments of what constitutes wrongdoing not by fighting the existing intuition but by harnessing it, by demonstrating that the conduct at issue really does have the condemnable character or effect that people's intuitions abhor. The stronger the analogy that can be made to a core principle, the more pronounced the effect of education will be.

Some recent examples illustrate how justice judgments can be successfully changed by such a public education campaign. For both drunk driving and cigarette smoking in banned areas (such as in restaurants or on airplanes), which have been either criminalized or given more severe penalties in recent years, criminalization was "successful" in that the community came to think of the actions as appropriately condemnable and deserving of punishment.<sup>248</sup>

With respect to drunk driving specifically, criminalization involved changing the identity of the "victim" of drunk driving from the driver himself to the innocent bystander put at risk by the driver's actions.<sup>249</sup> In other words, the social reformers built up the strength of the analogy between drunk driving and the core principle that seriously punishes physical violence. Groups such as Mothers Against Drunk Driving (MADD), formed of mothers who had children killed or injured by drunk drivers, who were tragically motivated to make drunk driving criminal, educated the public as to why it was that these actions fit the "moral wrong"

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248. ROBINSON, *supra* note 55, at 77.

249. *Id.*

prototype.<sup>250</sup> Holding up childhood or graduation pictures of their dead children, or photographs of the horrible results of car accidents caused by drunk drivers, they provided a persuasive message that drunk driving was indeed conduct highly dangerous to others.

Cigarette smoking was a bit of a more complicated case, but similar in that it worked by building an analogy to condemnable physical aggression. Initially, as evidence began to accumulate that cigarettes had remarkably harmful effects on smokers and that they were for, at least some people, highly addictive, cigarette sales were prohibited to minors. This was justified on the basis that smoking was seen as creating risks for the smoker, but conventional wisdom coded these as risks that adults could not be stopped from *choosing* to take, since they were risks only to themselves.<sup>251</sup>

As the public learned of the potential harm caused by “secondhand smoke”—smoke inhaled by (innocent) bystanders who were in rooms filled with smoke—people started to believe that smokers were inflicting real harm on other, nonconsenting people.<sup>252</sup> That is when laws were passed to prohibit the infliction of these harms by banning smoking outright in public and private spaces where smokers and nonsmokers congregated.<sup>253</sup> The rate at which the “immoralization” of smoking has spread through society is remarkable—fueled by the ability of antismoking advocates to demonstrate the harmful effects of smoking on discreet categories of nonsmokers.<sup>254</sup>

The ability to replicate the results of these two public education campaigns in order to change judgments on other actions relies on the ability to analogize a given action to a clearly condemnable harm suffered by another person or group of people. The easier it is to analogize a desired attitude to one of the core principles, the easier it will be to gain society’s acceptance. The more we see downloading music without a license as akin to taking the property of another without consent, the more condemnable such conduct becomes.

The current effort to change judgments concerning “insider trading” is an example of both the possibilities of and the limitations on changing intuitions. Insider trading—buying and selling stocks or bonds based on information that a person has that is not yet known to the public—has been criminalized. However, despite high-profile prosecutions for violations, public judgments of the criminality of insider trading remain somewhat complex.

250. In 1985, MADD’s stated mission was “To mobilize victims and their allies to establish the public conviction that impaired driving is unacceptable and criminal, in order to promote corresponding public policies, programs and personal responsibility.” *History*, MADD, <https://www.madd.org/history/> [<https://perma.cc/C8R7-SRKL>].

251. ROBINSON, *supra* note 55, at 78.

252. *Id.*

253. *Id.*

254. *Id.*

As predicted by the preceding argument, when the action of insider trading results in the selling of a stock shortly prior to the price of the stock falling, it is easier for the public to view this as intuitively criminal. This occurs because a “victim” can be established in the subsequent purchasers who suffer personal or institutional economic harm. Hence, in the case of the collapse of Enron, a great deal of attention was paid to the fact that many employees had their retirement savings invested in the company.<sup>255</sup>

In the opposite situation, buying stock on insider information prior to it gaining value, it is more difficult to identify a victim class and thus more difficult to change judgments on whether such an action should be condemned. This form of insider trading is some distance away from what is generally considered a core prohibition, in which one person harms another. The action harms all other, later buyers of the stock, because the buying actions of those who bought on insider information slightly raised the price of the stock at which the later buyers bought in. These later buyers constitute a dispersed and non-personified class of actors who are harmed in some fairly abstract ways. Given this, it could be predicted that having people see this version of insider trading as truly condemnable would be somewhat more difficult than with selling a stock just before its price falling.

#### *D. An Argument for the Broader Use of Restorative Justice*

The existence of these core principles of criminal law also suggests that legal communities should be more receptive to the use of restorative justice processes in addressing wrongdoing, so long as such processes are actually used in ways consistent with doing justice. Some of the most common practices of restorative justice are victim-offender mediation, sentencing circles, and family-group conferences. As long as the group is large enough to avoid idiosyncratic decisions, there are good reasons to rely on restorative processes more than we do today.

Restorative processes have many virtues. They can advance several crime control mechanisms at the same time—rehabilitation, deterrence, and norm reinforcement—while also providing restitution to the victim and putting a human face on the offender, thereby reducing the victim's generalized fear of victimization and perhaps giving the victim some appreciation of how the circumstances may have brought the offender to commit the offense.

Empirical studies have shown that these virtues of restorative processes are not merely theoretical. After reviewing the studies, William Nugent and

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255. Richard A. Oppel Jr., *Employees' Retirement Plan Is a Victim as Enron Tumbles*, N.Y. TIMES (Nov. 22, 2001), <https://www.nytimes.com/2001/11/22/business/employees-retirement-plan-is-a-victim-as-enron-tumbles.html> [ <https://perma.cc/WVP9-UCCE>].

his colleagues have reported a nine percent reduction in recidivism for offenders thirty months after their initial court involvement.<sup>256</sup> Barton Poulson found that restorative processes also make people feel better about the adjudication system—feeling that it is more fair and more likely to give an appropriate sanction.<sup>257</sup> Ultimately, the ability of restorative processes to build the criminal law’s moral credibility and legitimacy can bolster the law’s ability to gain compliance.

Some opponents have criticized restorative justice as being anti-punishment and suitable only for use with juvenile offenders and petty offenses by adults. This view may be understandable given the anti-punishment goals of those like John Braithwaite, who originally pressed restorative justice.<sup>258</sup> Braithwaite and others make clear that they conceive of restorative processes not simply as a potentially useful piece of, or complement to, the criminal justice system, but as a substitute for it.<sup>259</sup> Further, their version of restorative justice would ban all “punishment,” by which is meant, apparently, banning all punishment based on just deserts and instead embracing forgiveness and reintegration.

But the existence of the core principles, intuitively shared by the vast majority of humans, ought to give us greater confidence in restorative processes, at least those that involve “sentencing circles” or other group decision-making systems large enough to embody community views. In other words, we can reasonably expect that restorative justice dispositions will reflect the justice intuitions of the larger community and if the process is properly constructed, need not worry about unjust outcomes.

As discussed earlier, the method of punishment is not a core principle. One could impose the deserved punishment through any variety of alternative methods without undercutting justice—fine, community service, house arrest, curfew, regular reporting, diary keeping, or even good-faith participation in the restorative meetings itself—as long as the total punitive “bite” of the disposition satisfies the total punishment the offender deserves, no more, no less. Furthermore, it is perfectly consistent with assessing an offender’s blameworthiness to factor in genuine remorse, public acknowledgement of wrongdoing, and sincere apology, and, thereby, determine the amount of punishment deserved.

Still, restorative processes can be problematic where the decision-

256. William Nugent et al., *Participation in Victim-Offender Mediation and the Prevalence and Severity of Subsequent Delinquent Behavior: A Meta-Analysis*, 2003 UTAH L. REV. 137, 163 (2003).

257. Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167, 178 (2003).

258. Paul H. Robinson, *The Virtues of Restorative Processes, the Vices of “Restorative Justice”*, 2003 UTAH L. REV. 375, 377-78 (2003) (noting that some restorative justice proponents do not see “doing justice” as an appropriate goal).

259. John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1746 (1999) (classifying restorative justice as competing with punitive justice).

making group is too small or too unrepresentative to embody the views of the community, or where the victim is compelled to agree to an unjust result because of an improper process. In such circumstances, these processes may systematically conflict with doing justice by giving more punishment, or less punishment, than an offender's wrongdoing deserves.

Consider the 1998 New Zealand case of Patrick Clotworthy, who inflicted six stab wounds upon an attempted robbery victim, collapsing the victim's lung and diaphragm and leaving him badly disfigured.<sup>260</sup> At a restorative conference organized by Justice Alternatives, it was agreed that Clotworthy would not go to prison; instead, he would work to earn money to pay the \$15,000 needed for the surgical operation to diminish the victim's disfigurement.<sup>261</sup>

Requiring the offender to pay the victim \$15,000 for the needed surgery seems entirely appropriate, but such a sanction hardly reflects the extent of the punishment the offender deserves for so vicious an attack. In fact, it does not resemble punishment for a criminal act at all, but rather resembles restitution under civil law. Indeed, many would likely see the restorative conference as a second victimization—a desperate victim must agree to forgo justice in order to rid himself of the disfiguring scar the offender caused.

But how we deal with offenders like Clotworthy is not merely a private affair between the immediate victims and offenders. There are important societal interests at stake, which is why we treat criminal cases as state prosecutions and not civil trials. The opposition of Braithwaite and others to doing justice is unfortunate because it inevitably produces both political and public resistance.

Restorative processes, such as victim-offender mediation and sentencing circles, are wonderful procedures that should be used much more widely than they are today. First, a good many restorative inflictions, such as hours of service to the victim, have punitive elements. Second, there is no barrier to sincere attempts to restore comity between offender and victim and between offender and society taking place in criminal proceedings. For offenses in which intuitions of justice demand retributive impositions, however, people will see justice as demanding those impositions. Through proper and representative processes, we can put to work the many virtues of restorative justice practices while also meeting the demands of society.

#### *E. Doctrinal Reform: More Nuanced Application of the Legality Principle*

The extent of its commitment to the legality principle sets the United States apart from much of the rest of the world, although the larger arc of

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260. R. v. Clotworthy, [1998] 15 CRNZ 651 (C.A.).

261. *Id.*

history shows most countries moving in the direction of greater legality.

The “legality principle” is really an umbrella concept for a collection of doctrines, some constitutional, some statutory, and some judge made. In its original Latin dress, the legality principle was expressed as “*nullum crimen sine lege, nulla poena sine lege*,” meaning roughly “no crime without law, nor punishment without law.”<sup>262</sup> In its modern form it means that criminal liability and punishment can be based only upon a prior legislative enactment of a prohibition that is expressed with adequate precision and clarity.<sup>263</sup> The legality principle is embodied in a series of legal doctrines, including the abolition of common law penal doctrines,<sup>264</sup> the prohibition of judicial creation of penal rules,<sup>265</sup> special rules for the interpretation of penal statutes,<sup>266</sup> the constitutional prohibition of ex post facto penal laws,<sup>267</sup> the bar to retroactive application of judicial interpretations altering penal rules,<sup>268</sup> and the due process vagueness

262. LEGAL INFORMATION INSTITUTE CORNELL LAW SCHOOL, [https://www.law.cornell.edu/wex/nullum\\_crimen\\_sine\\_lege](https://www.law.cornell.edu/wex/nullum_crimen_sine_lege) [https://perma.cc/LFS8-A7KG].

263. See Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L. J. 119 (2008); Franz von Liszt, *The Rationale for the Nullum Crimen Principle*, 5 J. INT’L CRIM. JUSTICE 1009 (2007).

264. The elasticity of the common law is regarded as its great advantage but is also its fatal flaw in undermining the virtues of legality. Common law crimes allow courts to punish conduct that injures the public, even in the absence of an explicit statutory prohibition. Under current law, most states abolish common law crimes, or provide that no act or omission is a crime unless made so by the code or applicable statute. As for federal law, “[i]t has long been settled that there are no federal common law crimes; if Congress has not by statute made certain conduct criminal, it is not a federal crime.” WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 2.1(c), at 92 (1986). See, e.g., *Liparota v. United States*, 471 U.S. 419, 424 (1985) (“The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.”).

265. As offenses created by judges in the past through the common law process are abolished, it logically follows that the power of present courts to create new offenses ought to be similarly restricted. Today, most state criminal codes expressly prohibit judicial creation of offenses, and even when they do not, the courts themselves recognize that the period of such broad judicial authority has ended. John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 195, 202 (1985).

266. See *State v. Carter*, 570 P.2d 1218, 1220 (1977) (explaining that criminal statutes are “strictly construed so that only that conduct which is clearly and manifestly within the statutory terms is subject to punitive sanctions.” The rule of strict construction directs that judicial resolution of residual uncertainties “be resolved in favor of lenity.” *Rewis v. United States*, 401 U.S. 808, 812 (1971).

267. The United States Constitution forbids both the federal government and the states from enacting any ex post facto law. U.S. CONST. art. I, § 10. An ex post facto law is one which “makes that criminal or penal which was not so at the time the action was performed; or which increases the punishment; or in short, which, in relation to the offense, or its consequences, alters the situation of the party to his disadvantage.” *United States v. Hall*, 26 F. Cas. 84, 86 (C.C.D. Pa. 1809) (No. 15,285), *aff’d*, 10 U.S. (6 Cranch) 171 (1810); see also *Dobbert v. Florida*, 432 U.S. 282, 292-97 (1977) (discussing the characteristics of an ex post facto law).

268. Just as the legality principle can be offended by legislative adoption of a criminal law rule ex post, so too can it be offended by ex post judicial action altering a penal rule retrospectively. In *Bouie v. City of Columbia*, the Supreme Court reasoned that judicial construction, while “valid for the future, ... may not be applied retroactively, any more than a legislative enactment may be, to impose criminal penalties for conduct committed at a time when it was not fairly stated to be criminal.” *Bouie v. City of Columbia*, 378 U.S. 347, 362 (1964).

prohibition.<sup>269</sup> The benefits of the legality principle are clear. Together, these doctrines further the societal interests in providing fair notice; increasing compliance, such as through deterrent effect; reserving criminalization decisions to the legislature; increasing uniformity in the treatment of similar cases; and reducing the potential for the abuse of discretion.

As I have argued before,<sup>270</sup> there are two kinds of legality: When applied to the criminal law rules that announce *ex ante* rules of conduct, the principle promotes the virtues of fair notice and gaining compliance. When applied to the criminal law rules that serve to adjudicate *ex post* violations of the rules of conduct, the principle promotes the virtues of uniformity in application and restraint on the potential for abuse of discretion.

Yet these aspects of the legality principle play out somewhat differently when applied to the core principles than when applied to rules well outside the core. There is little need for special education regarding core principles in order to provide fair notice. Everyone understands the prohibition of the core without being told. However, as one moves out from the core, people are increasingly less likely to know about a rule or its specific demands.<sup>271</sup> In other words, the doctrines of the legality principle ought to be applied much more strictly and with a heavier hand as one moves out from the core.

The underlying justification for the legality principle also plays out differently regarding the principle's second function: *ex post* adjudication of violations of the rules of conduct. Because humans tend to share a belief in the core principles, there is less danger of disparate application. Different decision-makers are likely to share the same intuitions of justice on core principles. Again, however, as criminal law rules move out from the core, the potential for disparity among decision-makers increases and the law is in greater need of a guiding hand to increase uniformity of application.

To give a practical example of how the core principles might affect application of the legality principle, consider the post-World War II Nuremberg trials of the Nazi leadership. The Tribunal found itself in a somewhat awkward situation when it came to charging the leadership with "crimes against peace."<sup>272</sup> In many ways this charge was foundational, for by starting the war through a series of unprovoked aggressions, the Nazis

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269. The Due Process Clauses of the Fifth Amendment and the Fourteenth Amendment require a criminal statute to be declared void when it is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). This void-for-vagueness doctrine requires that crime definition be precise such that ordinary people can understand what conduct is prohibited.

270. Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 377 (2005).

271. 1 ROSCOE POUND, *LECTURES ON JURISPRUDENCE* 4 (1917).

272. *International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT'L L. 172 (1947).

brought upon the world all of the death and misery that followed. Unfortunately, at the time, aggressive warmaking was not a recognized offense under international law.<sup>273</sup> By ignoring this inconvenient fact, in apparent violation of the legality principle, is the Tribunal simply engaging in victor's justice? Perhaps not. The fact that the leadership's aggressive warmaking was so obviously in violation of the core principles—whatever the letter of the law at the moment, all humans understood that their repeated aggressive warmaking is a gross wrongdoing—means that their convictions were indeed legitimate and consistent with the underlying rationales of the legality principle taken in the light of criminal law's core principles.

#### *F. Doctrinal Reform: Recognition of a Mistake of Law Defense*

A mistake as to a matter of fact can provide a defense where the mistake negates an offense's required culpability. Common law commonly limited the defense to cases of mistake of fact, but the Model Penal Code sought to allow a mistake of law as a defense if it negated an offense element. Even the Model Code, however, continues to otherwise refuse a defense for even a reasonable mistake of law.<sup>274</sup> Model Code Section 2.02(9) expressly provides that culpability as to the criminality of one's conduct is never to be "read in" or assumed to be an offense element; it must be explicitly provided by the offense definition.<sup>275</sup> And rarely is culpability as to the unlawfulness of one's conduct actually an element of an offense.

This traditional view is captured by the well-known maxim that "ignorance of the law is no excuse," and it may make sense when applied to the core principles of criminal liability. As shown earlier in this Article, ordinary people do not need to have these principles explained to them. They understand them intuitively and even at an early stage in their development. And it may well be that when this maxim was first formed under common law,<sup>276</sup> let alone under Roman Law where it originated,<sup>277</sup> the criminal law was fairly bare bones, extending not too far beyond the core principles themselves.<sup>278</sup>

273. See ROZA PATI, *DUE PROCESS AND INTERNATIONAL TERRORISM: AN INTERNATIONAL LEGAL ANALYSIS* 132 (2009) (explaining that Associate Justice William O. Douglas described the Nuremberg trials as using law that "was created ex post facto to suit the passion and clamor of the time."

274. PAUL H. ROBINSON & MICHAEL T. CAHILL, *CRIMINAL LAW* §4.4 (2d ed. 2012).

275. PAUL H. ROBINSON ET AL., *CRIMINAL LAW: CASE STUDIES & CONTROVERSIES* 220 (2016).

276. THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 442-62 (5th ed. 1956) (discussing the crimes at common law).

277. Ronald A. Cass, *Ignorance of the Law: A Maxim Reexamined*, 17 WM. & MARY L. REV. 671, 685 (1976); Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75, 77-81 (1908) ("[I]t is universally accepted that the doctrine is of Roman origin.").

278. Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 733-34 (2012) (noting that "[t]he contemporary penal code . . . is vastly different from what existed at common law" when offenses mirrored the moral code which "was called by some 'the rules of natural justice,' which would have been known to all . . . being charged with one

But clearly today's criminal law is dramatically different.<sup>279</sup> Today's rules extend far beyond the core. One criminal law scholar has estimated, for example, that there are now more than 300,000 federal regulations that can be criminally enforced.<sup>280</sup> And, as we have demonstrated in a variety of ways above, rules embodying the core principles and rules out from the core stand in very different positions. One might take a different view about whether the mistake-of-law-is-no-defense maxim ought to be applied equally to the flood of new criminal law provisions that extend beyond the core principles.

There certainly has been considerable debate about whether a reasonable mistake or ignorance of law ought to be an excuse. Opponents of a mistake of law excuse argue that (1) everyone is presumed to know the law;<sup>281</sup> (2) those who do not know the law are blameworthy for failing to educate themselves;<sup>282</sup> (3) the ignorance-is-no-excuse rule has deterrent effect and allows criminal law to change social behaviors by encouraging members of society to acquaint themselves with the laws;<sup>283</sup> and (4) a mistake of law excuse would force courts to answer difficult questions, specifically whether a defendant was actually ignorant of the law, and whether this ignorance was reasonable.<sup>284</sup>

The arguments in support of a reasonable mistake of law defense include the central principle of fairness and due process, as discussed above. Furthermore, proponents of a reasonable mistake of law defense refute many of the contentions of the opponents. For instance, Justice Oliver Wendell Holmes argued that the difficulty of administering justice is “no ground for refusing to try... unless we are justified in sacrificing individuals to public convenience.”<sup>285</sup>

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of the few crimes then known would have surprised no offender”).

279. Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L. J. 633, 638 (2004) (noting that criminal codes have become “overstuffed” with redundant offenses “mak[ing] it more difficult for the average citizen to understand what the criminal code commands.”).

280. John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 216 (1991).

281. Ronald A. Cass, *Ignorance of the Law: A Maxim Reexamined*, 17 WM. & MARY L. REV. 671, 689-95 (1976).

282. *Id.* at 692-93.

283. *Barlow v. United States*, 32 U.S. 404, 411 (1833) (“[I]t results from...the extreme danger of allowing such excuses to be set up for illegal acts, to the detriment of the public. There is scarcely any law which does not admit of some ingenious doubt, and there would be perpetual temptations to violations of the laws, if men were not put-upon extreme vigilance to avoid them.”); OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 48-49 (1881).

284. 1 JOHN AUSTIN, *LECTURES ON JURISPRUDENCE* 483 (5th ed. 1885).

285. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 45 (Harv. Univ. Press, 2009) Proponents also have offered that the mistake of law defense need not be overly broad so as to dive into tedious subjective determinations of ignorance and can be restrained by only accepting reasonable ignorance. This approach would guard against making “the administration of justice . . . arrested” while also preventing one person being singled out for enforcement of a law that no reasonable person would have known.

There is no obvious winner in this dispute because both sides have some legitimate points to make. But this is the case primarily because the debate has been framed as one that treats all of criminal law as the same. If instead one were to separate the core principles and those provisions closely tied to them from the criminal law rules reaching well beyond the core principles, the nature of the debate changes. The arguments for a reasonable mistake of law excuse become more compelling for provisions well beyond the core principles, although those arguments may fall flat when applied to the core principles (and their analogs) themselves. Claiming ignorance that taking property of another without consent is a crime is not believable. But it may be entirely reasonable, depending on the circumstances, that somebody mistakenly concludes that downloading music without a license or any one of the thousands of new regulatory offenses is not a crime.

This argues for recognizing a mistake of law defense in a case where the offender has made an honest mistake and a “reasonable person” could have made the same mistake. The existence of the core principles, indicating near universal appreciation for the wrongfulness of core conduct, allows us to comfortably recognize such a defense because it assures us that in applying the “reasonable person” standard jurors are not all adrift and in danger of regularly producing objectionable results. A jury of ordinary people will naturally find it unconvincing that a defendant was unaware that a core wrongdoing, such as physical aggression or theft, was unlawful, but will find it increasingly believable as the alleged crime grows farther from the core.

#### *G. Doctrinal Reform: Formal Recognition of a Mitigation for Partial Excuses*

Current law typically provides a complete excuse defense for offenders who’s cognitive or control dysfunctions at the time of the offense are sufficiently severe as to render them blameless for their conduct. Insanity, duress, involuntary intoxication, immaturity, and various forms of involuntary conduct are commonly recognized as a basis for a complete defense in modern criminal codes.<sup>286</sup> But the core principle of blameworthiness proportionality suggests that the criminal law ought to do more if it is to embody the criminal law’s universal principles.

Where the effect of an offender’s mental illness falls just short of the cognitive dysfunction required for a complete insanity defense or where the extent of coercion to commit the offense falls just short of the amount that would give a complete duress excuse, there can be little dispute that the offender stands in an importantly different position than one who has

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286. See, e.g., MODEL PENAL CODE §§ 4.01, 2.09, 2.08(4), and 2.01.

committed the offense with no mental illness or coercion. The core principle of blameworthiness proportionality, then, would require the recognition of some formal doctrine that acknowledges such cases of partial excuse and provides reduced punishment.

The criminal law has historically recognized the weight of these arguments but has implemented them in only one instance: recognizing a provocation defense to mitigate murder to manslaughter, a mitigation that has been somewhat expanded in some modern criminal codes to provide a homicide mitigation for a killing committed under “extreme mental or emotional disturbance.”<sup>287</sup> However, the core principle of blameworthiness proportionality requires formal recognition of partial excuses in the full range of excusing conditions.

In practice, a mitigation for a partial excuse might be taken into account by the sentencing judge, or might not. Some judges may have the discretion to make such adjustments, but others may not because of mandatory minimum sentences or even the terms of some sentencing guidelines. Reliance solely upon judicial discretion is also unattractive because it excludes jury participation in the decision-making. Judging whether an offender has sufficiently reduced blameworthiness due to a partial excuse that justifies a mitigation is the kind of classic justice judgment for which juries, not judges, are best suited.<sup>288</sup>

Further, as I have demonstrated in a recent law review article, it is entirely feasible to construct a general mitigation provision that can guide such jury decision-making, signaling to jurors the factors they should think about, and increasing uniformity in the application of the general mitigation.<sup>289</sup> Such a system would both provide desirable jury involvement and reduce the disparity that is inevitable under the current system under which individual sentencing judges exercise their unbridled discretion without even a legislative hint as to whether they should even consider a mitigation in cases of partial excuse.

#### *H. The Feasibility of Creating an International Criminal Law*

As previously discussed, a criminal justice system gains many benefits from reflecting its society's shared intuitions of justice, including greater legitimacy and compliance with its rules.<sup>290</sup> In contrast, a regime that deviates from society's principles of justice is viewed as lacking credibility and undeserving of deference. This has led some scholars to conclude that

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287. MODEL PENAL CODE § 210.3(1)(b).

288. Paul H. Robinson & Barbara A. Spellman, *Sentencing Decisions: Matching the Decisionmaker to the Decision Nature*, 105 COLUM. L. REV. 1124, 1146-47 (2005).

289. Paul H. Robinson, *Mitigations: The Forgotten Side of the Proportionality Principle*, 57 HARV. J. ON LEGIS. 219, 263-64 (2020).

290. See Section V.A. *supra*.

creating a desert-based international criminal law is, practically speaking, infeasible. That, they argue, is because people's justice judgments are "deeply culturally contingent" and there is "enormous variation" in global views towards crime and punishment.<sup>291</sup>

If it were true that there are no universal principles of justice, then indeed a desert-based international system would be impracticable. Every international criminal law rule would violate some communities' judgments of what is just. Accordingly, any legal regime would have to be local, or at most national, in scope.

Other scholars have recognized that widely shared moral intuitions about justice and punishment do exist. However, they conclude that such consensus exists across cultures only at a "very high level of abstraction,"<sup>292</sup> such that it cannot be operationalized in real-world cases. But these concerns about the feasibility of an international criminal law are warranted only if agreed-upon principles were exclusively local. The existence of core principles, which are universally accepted across demographics and cultures, provides a foundation upon which an international criminal law can be built. As shown in Part III, there is broad agreement as to the core of wrongdoing and the relative blameworthiness of offenders. Across time, cultures, and even civilizations, humans have had similar intuitions on these issues. This includes factoring in an offender's mitigating circumstances, including acting in self-defense, lacking a culpable state of mind, or lacking sufficient capacity to understand or control one's conduct.

Focusing specifically on the idea of an international criminal law, Eric Blumenson argues that:

The complex beliefs that underwrite retributive justice are common to most criminal justice systems, but they are neither universal nor self-evident. For example, the retributive imperative of punishment is suspect or worse in many faiths, senseless according to many utilitarians, and unduly focused on the defendant and the past according to some restorative justice advocates.<sup>293</sup>

It may well be that Jesus Christ might turn the other cheek, but there is little evidence that communities of any faith— be they Christian, Islamic, Hindu, or other— disagree with the core principles, calling for punishment of blameworthy wrongdoing. The evidence presented in Parts II and III makes this clear. Similarly, it may well be that some academic crime-control utilitarians argue for different principles, but again, the evidence is

291. See Section II.A. *supra*.

292. Andrew K. Woods, *Moral Judgments & International Crimes: The Disutility of Desert*, 52 VA. J. INT'L L. 633, 651 (2012).

293. Eric Blumenson, *The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court*, 44 COLUM. J. TRANSNAT'L L. 801, 858 n.179 (2006).

overwhelming that they are arguing for a position on which most of humanity has a contrary view.

Blumenson also appears to confound the degree of punishment with its form. As mentioned in Part V.D, where we urge the greater use of restorative processes, the appropriate form of punishment is not part of core principles. Punishment can take various forms that can be entirely consistent with restorative processes or other ideals. And allocating punishment according to core principles of justice can further the utilitarians' goals by building the criminal law's moral credibility.

The existence of the core principles suggests that it is indeed feasible to construct an international criminal law that will have broad support. It may well be that, to maintain its moral credibility, international criminal law will need to limit itself to those areas close to the core principles, and at least for the time being to forgo legislation out from the core on which there is disagreement. On the other hand, it is also true that in our increasingly interconnected world, once an international criminal code is established, if it earns broad moral credibility by initially sticking to core principles, it may be able to help bring about greater agreement out from the core.

#### *I. Creating a Criminal Code for an As Yet Nonexistent Population: The NEOM Project*

Saudi Arabia is in the process of creating from scratch a mega city in the northwestern region of its territory to serve as a global hub for trade, innovation, and knowledge.<sup>294</sup> Announced in October 2017, the project is part of Saudi Arabia's Vision 2030, a framework for the Kingdom to diversify its economy and reduce dependence on oil. NEOM, a combination of the Greek word for "new" and the Arabic word for "future"—as the zone is called—will encourage Saudis to spend domestically by housing its own auto factories, hospitals, tech companies, and resorts. More generally, the 10,230 square mile zone will focus on industries including entertainment, energy, biotechnology, and advanced manufacturing. According to leaked documents, a huge artificial moon, glow-in-the-dark beaches, flying drone-powered taxis, robotic maids to clean homes, and a Jurassic Park-style attraction featuring animatronic dinosaurs are among the many futuristic features planned for the project.<sup>295</sup> Its location bordering the Red Sea and the Suez Canal positions the independent economic zone on one of the most

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294. *About, NEOM*, <https://www.neom.com/en-us> (last accessed Feb. 10, 2021) [<https://perma.cc/55FM-XLQ9>].

295. Justin Scheck et al., *A Prince's \$500 Billion Desert Dream: Flying Cars, Robot Dinosaurs and a Giant Artificial Moon*, WALL ST. J. (July 25, 2019), <https://www.wsj.com/articles/a-princes-500-billion-desert-dream-flying-cars-robot-dinosaurs-and-a-giant-artificial-moon-11564097568> [<https://perma.cc/F2W8-2DT8>].

important trade routes.

The Saudi government, the Public Investment Fund of Saudi Arabia, and local and international investors are expected to put more than \$500 billion into NEOM, with the expected completion of phase one in 2025.<sup>296</sup> Once completed, NEOM is expected to serve as the home and workplace for over a million citizens from around the globe and a wide variety of religions, homelands, and backgrounds.<sup>297</sup>

The territory the size of Massachusetts will function largely as a separate country. This includes having its own “[i]ndependent systems and regulations... [to] ensure the availability of best services without social limitations,” such as its own laws, taxes, regulations, and an “autonomous judicial system,” separate from the existing governmental framework in the Kingdom.<sup>298</sup> NEOM officials have said its law “will be based on best practices in the areas of economic and business law, as well as feedback from potential investors and residents.”<sup>299</sup> According to its website, NEOM will support an “international ethos” with a “progressive law compatible with international norms.”<sup>300</sup> The idea behind adopting international legal best practices is that NEOM must provide legal assurances for conflict resolution and enforcement that will attract foreign investors. The city’s civil and criminal law must also be such that citizens from around the world will feel comfortable making NEOM their home.

But if the new territory is to have a legal system that will seem attractive to persons from all over the globe, is that even possible? If so, what would such a criminal law look like? There is not even an existing population that one could test to determine shared judgments of justice.

The previous parts of this Article suggest that drafting such a criminal code—for an as yet nonexistent population—is indeed feasible. First, the criminal code drafters ought to commit themselves to a criminal code that has as its foundations the core principles of criminal liability shown in Part III to reflect what are essentially universally shared principles of justice. To fill in additional details of a code, the drafters will need to extrapolate from these general principles and to add value judgments held by the larger global

296. *HRH the Crown Prince Mohammed bin Salman Announces: Neom – The Destination for the Future*, PUBLIC INVESTMENT FUND (Oct. 23, 2017), <https://www.pif.gov.sa/en/MediaCenter/Pages/NewsDetails.aspx?NewsID=31> [<https://perma.cc/FFN7-CUDK>].

297. *Id.*

298. *Saudi Arabia Gets Serious About the NEOM Investment Zone*, DW (Oct. 24, 2017), <https://www.dw.com/en/saudi-arabia-gets-serious-about-neom-investment-zone/a-41092402> [<https://perma.cc/893J-UVM5>].

299. Justin Scheck, Rory Jones & Summer Said, *A Prince’s \$500 Billion Desert Dream: Flying Cars, Robot Dinosaurs and a Giant Artificial Moon*, WALL ST. J. (July 25, 2019), <https://www.wsj.com/articles/a-princes-500-billion-desert-dream-flying-cars-robot-dinosaurs-and-a-giant-artificial-moon-11564097568> [<https://perma.cc/GCQ7-2SJH>].

300. *HRH Prince Mohammed bin Salman Announces THE LINE at NEOM*, NEOM (Sept. 17, 2021, 11:17:00), <https://www.neom.com/en-us/whatistheline> [<https://perma.cc/Z43A-5KKL>].

community, which may or may not track those of the current residents of Saudi Arabia.

As demonstrated, the universal acceptance of the core principles marks them out as different from other criminal law rules. This has important implications for the drafters of the NEOM criminal code. If the code were to incorporate doctrines that significantly stray from the core, the risk of disapproval from some portion of NEOM's future residents increases. To succeed in its unique goal of appeasing persons from all walks of life, NEOM's criminal law drafters should stay as close to the core principles as possible. And as they add detail beyond the core principles, they ought to consult current global views on the strength of the analogy to the core. Do most people globally see insider trading as analogous to the core wrongs of taking without consent and deceit in exchanges? If so, then the drafters are probably on firm ground in producing a criminal code that has legitimacy and moral credibility with the community even though they still have no idea who that community will be.

### *J. Intergalactic Rules of War*

Many who have studied the topic have concluded that it is highly likely that there is intelligent life somewhere in the galaxy, and nearly certain within the vastness of the universe. Recent discoveries of the conditions in which life has been found to thrive on our own planet show the wide range of habitats that can support life. Scientists in the emerging field of astrobiology now believe that life can evolve in any environment where there are enough flows of matter or energy to power chemical reactions. Critics may point out that life on Earth follows one predominate pattern subject to tolerances of pressure, temperature, radiation, and atmospheric content, but such arguments speak more to our own biases regarding the development of life and ignore both the co-development of life and atmospheric conditions within our biological system and instances of organisms living in extreme conditions in our own backyard.<sup>301</sup> Our "planet became *inhabited* as soon as it was *habitable*. Once the sterilizing impacts died down, Earth sprang to life—in less than a couple hundred million years, and maybe much faster."<sup>302</sup> This too leads to the conclusion that where life can begin, it will begin. The universe is teeming with life, and the very same forces driving organisms to explore and adapt into intelligent life virtually

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301. From an ex-ante perspective, the oxygenation of our own atmosphere would seem apocalyptic to life on this planet since oxygen is toxic to the simple organisms from which we evolved. We know from hindsight that such hypotheses are rash at best. Substances toxic to one organism have a knack of becoming sustenance for others.

302. DAVID GRINSPOON, *LONELY PLANETS: THE NATURAL PHILOSOPHY OF ALIEN LIFE* 131 (2003).

guarantees our inevitable contact with extraterrestrial beings.

If contact with extraterrestrial beings is inevitable, this begs the question of what our encounter with them might look like. They may be in search of resources that we have. Or they may see us as a resource. Perhaps they may wish to exchange resources or knowledge, or simply be curious about who we are. Either way, the uncertainty around the encounter means that our first contact with extraterrestrial beings will have some tension inherent in it. This is particularly so for a species that is intelligent and advanced enough to make contact with us. Without knowing their motivations, the risk for a confrontation can only be assumed to be high. And if they have the capability to harm the human species as a whole, it would be rational for us to be prepared to attack first, if that appears to be the only sure way of preserving our species.

But without additional evidence about the characteristics of any such extraterrestrial being, our best guess may actually be that they would share some of our interests in peace and against unjustified aggression. If a mutual interest in harmony could be persuasively signaled and understood, the tension in the interaction may be alleviated. Preventing a violent conflict would require that we deal with them in a manner that they will perceive as fair and just, and avoid conduct that they would see as wrongful.

Given that we are referring to an extraterrestrial species, it might be expected that they will be so different from humans that it would be hopeless to try to guess what their rules of conduct might be. But to become advanced enough to make contact with us, we should actually expect that they are a species that has similar sociality and cooperation among themselves as we have. We could deduce from that shared character some predictable values that they and we would share, and notions of wrongful conduct may well be one of them.

If it is true that human intuitions of fairness and justice are a predictable product of our social nature, whether through evolutionary effect as discussed in Part IV, or the effect of the common socialization that comes with living in a social existence, then one might speculate that similar evolutionary effects or socialization experiences may guide the development of other species that live a similarly social life. As noted previously, there are significant advantages that come with social organization. One example is the mutually beneficial effects of reciprocity: if you share with me today in exchange for my sharing with you yesterday, we are both better off than if neither of us share. In social species, reciprocity can involve such things as alerting other group members when food has been discovered, sharing food over time, or supporting a comrade in action against others. While social cooperation is better overall than selfishness, a cheater could theoretically outperform the others if he were able to regularly take benefits without repaying them. Ultimately, the most successful cooperators are not those who cooperate all the time, but rather

those who cooperate *selectively* with other cooperators, discriminating against those who are not reliable partners.<sup>303</sup> Put another way, effective cooperation requires rewarding good behavior and punishing bad behavior.

For an extraterrestrial species advanced enough to come in contact with humans, it would not be surprising that their process of developing a cooperative society required the development of core principles similar to those underlying our cooperative existence. Thus, in judging how best to engage with extraterrestrials and to signal our interest in a cooperative relationship, it might be best to assume that they too share the core principles that we accept.

## VI. CONCLUSION

This article has challenged the standard view that criminal law scholars and policymakers are free to construct criminal law rules by focusing exclusively on the criminal justice theory of the day. It shows that this “blank slate” conception of criminal lawmaking is dangerously misguided. In truth, lawmakers are writing on a slate on which core principles are already indelibly written and realistically they are free only to add detail in the implementation of those principles and to add additional provisions not inconsistent with them. Attempts to do otherwise are destined to produce tragic results from both utilitarian and retributivist perspectives.

The article has also challenged the common view that no such core principles of criminal law exist, that criminal law is something on which everyone necessarily disagrees because justice judgments are so dependent on personal and cultural perspectives. However, by examining a wide variety of sources—including issues on which there is high agreement across demographics within a society, issues on which there is agreement cross culturally, issues emerging early in the historical development of formal criminal law, issues reflected in the universal path of child development, issues revealed by animal studies, and rules and principles commonly appearing in natural experiments of groups beyond the reach of law—the article has isolated nine core principles on which there appears to be near universal agreement.

One might speculate about why such core principles exist, and the article does, but whatever the reason—be it an evolutionarily created genetic predisposition or a process of generalized learning common to all social groups—the existence of such core principles has important and diverse practical implications: in suggesting reduced crime-control effectiveness where the criminal law conflicts with a core principle, in setting limitations and strategies for social reform, in supporting a broader

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303. Paul Robinson, Robert Kurzban & Owen Jones, *The Origins of Shared Intuitions of Justice* 60 VAND. L. REV. 1633, 1647 (2007).

use of restorative justice, in suggesting a more nuanced application of the legality principle, in supporting the recognition of a general mistake of law defense and a mitigation for partial excuses, in assessing the feasibility of creating an international criminal law or of creating a criminal law for a territory whose population does not yet exist, and even in planning strategies for dealing with initial contact with extraterrestrial beings.

The implications of core principles do not play ideological favorites. On the one hand, they suggest significant limitations on some favorite progressive goals, such as the abolition of punishment. On the other hand, they also suggest the recognition of a general mistake of law defense and formal mitigation for partial excuses, as well as the increased use of restorative justice. The ultimate goal here is not to promote one political agenda or another but rather to understand the reality of human nature and the significant implications it has for the formulation of criminal law.