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### Justice: 1850s San Francisco and the California Gold Rush

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# **PIRATES, PRISONERS, AND LEPERS**

LESSONS FROM LIFE OUTSIDE THE LAW

*Paul H. Robinson and Sarah M. Robinson*

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## CHAPTER 4

# JUSTICE:

### 1850s SAN FRANCISCO AND THE CALIFORNIA GOLD RUSH

**P**unishment is not the evil that some academic elites would paint it, but rather is the linchpin to the benefits of social cooperation that are the root of human success. To follow the lead of the antipunishment fantasizers is to invite collapse like that we see in every antipunishment community in chapter 3.

But that is only the starting point of punishment's interesting story. Giving violators more punishment than they deserve also can undermine the benefits of cooperative action. Overpunishment converts the noble imposition of justice into an unprincipled mugging. Chapter 5 will illustrate and explore this dynamic.

At the same time, imposing markedly less punishment than what a violator deserves creates disaffection and acrimony that also can subvert cooperation. In other words, it is not punishment that is needed to maintain social cooperation, but justice. That is the subject of the present chapter.

Punishment requires only the imposition of suffering for a rule violation, but justice requires much more: that the sanction reflect the extent of the offender's moral blameworthiness for his violation, taking account of both the seriousness of his offense and his culpability and capacities in committing it. It requires an assessment of what reasonably could have been expected from this person in this situation. Could he, should he, have avoided committing the offense?

While the nuance required by such an inquiry may be possible in the quiet and safety of a modern courtroom, is it realistic to think that those caught in the often impossible circumstances of absent-law situations could be expected to show such subtlety in judgment? Perhaps justice is a luxury that an absent-law group cannot afford; perhaps punishment is the best they can do. That is, perhaps the nicety of tying the amount of punishment to the degree of the offender's blameworthiness must await the civilizing influence of governmental law?

Or perhaps the reality is just the reverse: Left to their own devices, human groups naturally insist not only on punishment but on just punishment. And it is modern governmental law that has lost its way and disconnected punishment and justice—in the name of efficient crime control or some other utilitarian interest—in order to impose punishment that is not deserved, and to forgo punishment that is.

**T**he 1800s were a politically turbulent time for the California region.<sup>1</sup> It had been a Spanish colony but was now a state in the Mexican Republic. Seeing an opportunity to gain control of much of the North American continent, President James Polk in 1846 sent a small

force to claim the West for the United States. Fearing British retaliation, Polk needed the action to seem the will of the locals, so on June 14, his force arrived at the home of California's leading citizen, Don Mariano Vallejo. Vallejo, a Mexican general currently out of favor with the Mexican government and in command of no troops, remained the nominal military authority in this northern frontier. (What troops there were in the region were elsewhere and under the command of a rival general.) The party informed the general that he was a prisoner. Vallejo, who had been asleep, "had difficulty understanding what war he was a prisoner of." The group sat in Vallejo's home, drank local brandy, and wrote a formal statement of terms, and "by its third paragraph, the product of good native liquor, the California Republic was born."<sup>2</sup>

While President Polk had put the takeover in motion, the region could not be admitted into the United States without congressional action, and this was a touchy issue. California was against slavery. An additional free state would numerically put the slaveholding states at a disadvantage. The result was an awkward limbo. Congress would not vote California into the Union, but it was thought too vital to American interests to let others control the area.

Soon after, in 1848, the discovery of gold brought 300,000 men to California from all over the world. Yet this sudden mass of humanity lived without a functioning legal system. And if there had been a legal enforcement system, it was unclear what law it would enforce. Richard Mason, who had been appointed governor of the few permanent inhabitants, wrote to an alcalde (a type of local magistrate):

Having only been two days in office as governor, I am not at this time prepared to say what are the extent of your powers and jurisdiction as alcalde; you must, for the time being, be governed by the customs of laws of the country as far as you can ascertain them, and by your own good sense and sound discretion.<sup>3</sup>

Without a functional government, there were no licensing procedures, fees, or taxes to regulate gold prospecting. No miner worked land that he owned. Any prospector could join any mining camp at any time.

Camp populations were heterogeneous: "Puritans and drunkards, clergymen and convict, honest and dishonest, rich and poor."<sup>4</sup> There was no common language, culture, or legal experience. The system of law an individual miner lived under prior to the camps was now only a private memory. Previous life credentials, whether social, educational, moral, or economic standing, were now irrelevant. No one worked for anyone else, and no one needed anyone else's permission to mine a location.

The men shared a common set of needs, however. Each miner needed to be able to leave whatever he owned unguarded each day while he worked his claim. A miner who found gold needed to protect his find until he could convert it into cash or goods. Mary Floyd Williams, who was born in California to a father who worked the mines, described the common scene:

Thousands of gold seekers, constantly keyed to the highest pitch of excitement, gather in mountain camps far from the nearest office of government, generally unacquainted with the customs prevailing in the older settlements, and perfectly aware that there was no executive strong enough to enforce order, no police empowered to make arrest, and no jails where the lawless could be confined.<sup>5</sup>

As the camps sprang up in the hills of the Sierra Nevada, a set of community norms commonly emerged, much as occurred among Bob Ellickson's farmers and ranchers of Shasta County (chapter 1), but here they did so without the cocoon of a functioning criminal justice system. There was no one beyond themselves to deal with violators of those norms, even if the conflict escalated into violence.

In one camp, for example, it was agreed that each person was entitled to a ten-foot-square claim upon which to work. One miner accused another of encroachment and "appeal[ed] to the crowd." The group measured off the claim and agreed that there had been encroachment. It was determined that the encroachment was accidental, hence no punishment was given.

Tools left at a site stood as notice that the claim was active. In one instance, an Irishman and a Dutchman were accused of stealing an old shovel and pick that they thought abandoned. As it happened, the tools were marking a claim and by taking them, the two were effectively depriving the miners of their claim. As with the encroachment case, however, the group judged that intent mattered: The offenders honestly believed that no claim had been marked. The two were expelled from the camp rather than killed—the usual penalty for tampering with another's claim—and the owners of the claim were advised to leave better tools to mark their claim in the future.

The evolved norms included rules of property ownership over even complex issues. Howard Shinn, a reporter whose beat was the mining camps of the region, explained:<sup>6</sup>

Labor serves as the title of ownership in the gold mines. If men combine their labor to turning the course of a river, and "their intentions are made known, and the improvement staked out, no person intrudes upon the ground. . . . The adventurers, therefore, hold their rights as securely as if they were protected by a charter from the Government."<sup>7</sup>

Justice by necessity operated quickly, with "no lawyers to delay—no petty technicalities to obstruct the course."<sup>8</sup> Prompt adjudication of criminal cases was important for several reasons: There were no jails or guards; thus, suspects could not be detained, and any camp might disappear overnight if gold was located elsewhere. Trials often occurred within moments of the discovery of a crime. The accused was guarded by men with revolvers or was tied to a tree. Sentences were executed immediately. "If it was considered safe to give the guilty man another chance, he was punished, usually by whipping, and driven from the camp with the warning that reappearance would mean death."<sup>9</sup>

The seriousness of the offense determined the size of the group that would hear the case. The members of a camp adjudicated small crimes by themselves: "The case was submitted to the assemblage without argument, and irrevocably decided *viva voce*."<sup>10</sup> But "in matters of greater moment the halloo was sounded from ridge to ridge, and a general gathering from a larger district was summoned for careful discussion and deliberation."<sup>11</sup> With a problem that could not be easily resolved, a "presiding officer and a judge impaneled a jury of six or twelve persons, summoned witnesses, and proceeded to a trial forthwith."<sup>12</sup>

With time, life in the mining camps became more formalized. The camps often elected alcaldes—borrowing the word from the old Mexican system—who served as a first resource in settling disputes. In one instance, a man named Sim ejected Sprenger, his mining partner, from their claim when an injury left Sprenger temporarily unable to work the claim. Sim did not

compensate Sprenger for his half of the claim, his half of the tools, or the work he had done. When Sprenger objected, Sim took the case to Rogers, the local alcalde, paying him a bribe to decide the case in his favor.

Upon hearing of the unfair verdict, Sprenger appealed to the group for justice. Despite the cost to them in taking time away from their mining, the camp sent word out across the hills calling other miners to their camp. The miners gathered and demanded that the alcalde hold a jury trial for Sprenger. When he refused, saying his ruling was final, the miners asked: "Who but the people made this damned scoundrel alcalde anyhow? We can organize our own court of appeals." Word was spread over a greater area that "a great wrong had been done, and that it was desired to examine the entire subject with all fairness and deliberation, sustaining or reversing the former judgement as the evidence should warrant."<sup>13</sup> Shinn reports,

Every man of them all suffered a loss, by his day's idleness, of whatever his work that day would have earned—perhaps five dollars, perhaps fifty dollars; but the miners of Jackson Creek were willing to suffer the loss if justice, as between man and man, could thereby be established.<sup>14</sup>

The group elected a miner named Hayden to the position of chief judge. Hayden asked that a clerk and a sheriff be elected. When alcalde Rogers refused to provide the court records of the case, it was decided that the case would simply be heard again—this time before a jury. The judge instructed the jury that "they must strip the case of technicalities, regarding no law but right and wrong, no test but common-sense."<sup>15</sup> The jury decided the case for Sprenger. Sim was required to pay the costs of Sprenger's illness, restore Sprenger as a full partner, and let him move back into their cabin. Sim was convicted of bribery. A mob formed around alcalde Rogers's cabin. Judge Hayden convinced the miners to spare his life, but the corrupt alcalde lost his job and several tools, which the court seized.

Richard J. Oglesby, who worked in several mining camps, later recalled:

There was very little law, but a large amount of good order; no churches, but a great deal of religion; no politics, but a great deal of politicians; no offices, and, strange to say for my countrymen, no office-seekers. Crime was rare, for punishment was certain . . . . I now remember Charley Williams whack three of our fellow-citizens over the bare back, twenty-one to forty strokes, for stealing a neighbor's money. The multitude of disinterested spectators had conducted the court. My recollection is that there were no attorney's fees or court charges. I think I never saw justice administered with so little loss of time or at less expense. There was no more stealing in Nevada County until society became more settled and better regulated.<sup>16</sup>

When the men of the mining camps faced a world without governmental law, they made their own. They had little choice. They could not proceed with their daily lives without some cooperative system of agreed-upon rules and a mechanism to enforce them. Yet what they invented was not just a system of punishment for violations but one that sought, within the terms of their situation, to do justice. While they had all given up their former lives to come to the mining camps to search for gold and become rich, at the exclusion of nearly all else in the lives,



they nonetheless made time to do justice, even if the case were one that had nothing to do with them, or even their own camp.

As the miners labored in the hills, the residents of San Francisco, back at the point of entry for most of the miners, were having to deal with a similar but slightly different problem.

San Francisco was the base camp for the gold rush. More than 150,000 men passed through San Francisco on their way to the mountain mines. The dynamic, chaotic population was beyond the control of the few existing officials. In 1846 the town had had a population of 200.<sup>17</sup> The people of San Francisco had neither law nor the capacity to enforce it.

Understanding the city's vulnerable situation, a criminal gang calling themselves the Hounds began raiding stores and restaurants, who were "forced to supply their demands and 'charge it to the Hounds.'"<sup>18</sup> One Sunday in July 1849, the Hounds were especially violent in their activities, beating everyone they robbed and shooting one victim. Several townspeople called for a meeting to deal with the violence. Within days, a self-formed committee of citizens took most of the Hounds into custody. A second meeting was called to decide their fate. During this meeting, a court and a grand jury were formed, and the Hounds were "indicted, and charged with a conspiracy to commit murder, robbery, etc."<sup>19</sup> The court, consisting of a judge, a jury, and attorneys to prosecute and defend the Hounds, ultimately convicted the men, sentenced them to exile, and threatened with execution any who returned.

Such mass meetings and popular tribunals became the accepted means of criminal justice in San Francisco. The citizens appointed an alcalde, as the miners did in their camps. As in the camps, justice was swift. In a common sort of case in 1850, a "burglary occurred at four o'clock on an April morning. The alcalde issued warrants for the thieves. They were pursued, arrested, indicted by a grand jury, convicted by a petit jury, sentenced, whipped, and turned out of town within twelve hours."<sup>20</sup> No doubt errors were made under such procedures, but with no effective alternative, the system seemed to the citizens better than either rampant lawlessness or outraged lynch mobs.

On October 18, 1850, California was officially admitted to the United States. In consequence, a number of political offices were created. Those who ran for office in the first election commonly had little interest in staying in the West, as was true of many if not most people there. Many sought to use the "position solely as a means of obtaining money for a speedy return to the East."<sup>21</sup>

Before these governmental officials, the "courts of the people" were rough justice but difficult to manipulate on a large scale because judges and attorneys appointed by the group changed from case to case. The new courts, however, filled with men of dubious histories, without oversight and with little motivation to serve the community, became "notorious for their failure to convict and punish criminals, especially those who [could] pay for skillful defense. . . . This immunity [was] almost universally attributed to flagrant corruption within professional circles."<sup>22</sup>

Before statehood, a trial would have been held by interested neighbors soon after a crime had occurred. The new system transferred the responsibility for doing justice to a physically and emotionally remote authority, usually long delayed from the offense. By 1851, the crime rate had skyrocketed. In response, citizens returned to what they knew worked, forming a Vigilance Committee. Every man in the city was invited to join. The group elected officers, kept records,

placed police on the streets and patrol boats in the harbor. Members also acted as detectives, jailers, lawyers, judges, and juries.

The Vigilance Committee heard hundreds of cases. They hung four men, all of whom were convicted of, at minimum, murder and robbery. Persons convicted of robbery, and some lesser crimes, were transported on ships out of the area or simply banished. The Committee confronted innkeepers who were known to aid criminals and warned them to stop giving quarter to such persons or they would be shut down. One man convicted of possession of stolen property was whipped.

In openly working against what they saw as corrupt authorities, the committee soon found its own members on trial by those authorities. Several were convicted by the official courts, but the enormous public uproar that followed caused the authorities to back down, and the convicted men were never sentenced. Their convictions served only to draw hundreds of new members to the Vigilance Committee and its work.

With the Committee back in action, the crime rate again dropped. When new elections were held, with the election of men who were more invested in the long-term good of the community, the Vigilance Committee disbanded itself.

The experience of the gold miners and the San Francisco residents nicely illustrates what we have seen in earlier chapters: In the absence of governmental law, people naturally organize themselves, creating their own group norms and mechanisms to enforce them. The shared norms can include even complex and nuanced matters—recall the group’s rules governing the rights of miners who join to move a stream in order to mine its bottom, or governing the proper treatment of a mining partner temporarily unable to work because of an injury.

But these natural experiments also illustrate some new principles, such as the importance that people place on doing justice. Everything else in a gold miner’s life was set aside—family, friends, romance, career, education, leisure—yet it was understood within the camp that all mining would be set aside to do justice, even when the wrongdoing did not involve the entire group and even if it involved another group entirely. Miners from a large surrounding area would lay down their tools to join in an assembly adjudicating a serious case. The same devotion to doing justice is apparent in the San Francisco experience. In the pre-statehood absence of governmental law and in the face of post-statehood ineffective or corrupt government, the people joined to form vigilance committees to do justice even though this exposed them to a risk of physical harm and legal prosecution. And they did this even when they were not the victims of the crimes or even likely to be.

In other words, doing justice is not just another mild preference that people have. And failures of justice are not just another point on the long list of minor disappointments that people have about their lives—which is the way many intellectual elites seek to trivialize it. For laypersons, failures of justice can cause deep disappointment and even dramatic upset. The woman outraged by the light sentence for her husband’s killer reported it made her physically ill, “sick to my stomach.”<sup>23</sup> People shocked by a justice failure have complained that it is “absolutely unconscionable,”<sup>24</sup> it “keeps me up at night,”<sup>25</sup> “it’s a travesty,”<sup>26</sup> “it’s unbelievable. . . . We’re devastated,”<sup>27</sup> “it’s insanity.”<sup>28</sup> The upset over a justice failure may be even more exaggerated for a victim: “I will forever live with this shadow.”<sup>29</sup> “There’s a sea of emotions I’ve had since this happened. . . . I find [the sentence] very insulting.”<sup>30</sup> A rape victim explained she will “be forever marked” by the crime and the case’s “embittering conclusion.”<sup>31</sup>

To laypeople, justice is not just one more policy preference but rather a necessary prerequisite for having their world right.

**T**his inherent human valuing of having justice done can be seen in the social science laboratory, even where the testing involves only the mildest of norm violations. In a type of experiment called the “ultimatum game,” participants are paired and one person is given a sum of money. The person must give some portion of the money to the other but has complete discretion as to how much. But if the amount offered is rejected by the receiver, then neither person gets to keep any of the money. If the amount is accepted, then both people get to keep their respective agreed-upon amounts.

A purely efficient calculation presumably would lead the “recipient” to accept any amount offered—something is better than nothing. But this is not the typical pattern of response. The recipient is making a fairness judgment. Offers of less than 20 percent of the total are typically rejected,<sup>32</sup> and even offers of a third of the total are rejected by a majority of receivers,<sup>33</sup> even if large sums of money are involved.

The attitude may be that there is no reason why the first person should get any more than the second—it was just by chance that the first person was selected to be the giver rather than the receiver—so the proper and fair division should be equal, but perhaps with some adjustment to acknowledge the “luck” of the person picked to be the giver. However, an attempt by the giver to “take advantage of the situation” by offering an unfair share too far from an equal division is seen as wrong.

And people do not just feel that small offers are wrong in some intellectual sense. They feel strongly enough about it that they are willing to sacrifice their own money to deprive the wrongdoer of his. That is, they are personally willing to sacrifice to have the wrongdoer suffer for his wrongdoing.<sup>34</sup>

Even more remarkable is the conduct of third-party observers of these interactions. Third-party observers—who have nothing at stake in the transaction—are inclined to punish those who they think are acting unfairly. Even more striking, the third-party observers are willing to punish the wrongdoers even if it means that they, the observer, must bear the cost of the punishment!

This dynamic is shown in a variation of the game in which both persons are given an initial allotment and both can give any portion of it to the other. In this variation, each person can keep any portion that they do not give away, but each gets three times any amount they are given by the other person. Thus, they can each maximize their take by giving their full allotment to the other person, in which case each will get to keep three times their initial allotment.<sup>35</sup> But the players must make the allocation decision without knowing whether the other person will reciprocate. Can they trust the other person to contribute their full allotment? A person might give the other nothing, thereby keeping their full allotment and also collecting three times the allotment the other person gives them. The safe course is to give nothing, which lets the person at least keep what he or she has. In the studies, however, people are in fact more likely to contribute than not, as our prior discussions on cooperation would predict. They choose trust and cooperation over pure self-interest.<sup>36</sup>

But our current interest in this experiment is in the reaction of a third-party observer. The observer is given her own allocation of money, which she can keep for herself or can use to punish one of the two people after she sees how they deal with the other. Every dollar she spends to punish a player causes the punished person to lose three dollars.

A purely self-interested third-party observer would just keep her full allocation. She gains no tangible benefit from imposing punishment and suffers a clear tangible loss by imposing it. And the observer has no personal stake in the interaction between the two people she is observing.

Yet when third-party observers see one person taking advantage of another, they commonly pay to punish that person. When one person transfers his allotment to the other while the other keeps his for himself (thus getting to keep his own and three times what the other person gave him), almost half of the third-party observers pay to punish that selfish person. On average, the third-party observers pay more than a third of their money to punish wrongdoers.<sup>37</sup> The results illustrate in a tangible way the common desire to punish what is perceived as wrongdoing, even if the person is not the victim and even if the punishment is personally costly and provides no present or future tangible benefit.<sup>38</sup>

**T**he larger point is that human nature is to give deserved punishment. People commonly act as if doing justice provides them a benefit in itself, or as if seeing wrongdoing go unpunished imposes an intangible cost on them. And the science suggests that in a sense it does impose a cost.

The human desire to give wrongdoers the punishment they deserve is more than just a social preference; it seems to have a biological component.<sup>39</sup> In an experiment similar to the “ultimatum game” variations described above, researchers used brain scan technology to see what areas of the brain were at work when participants in the experiments were making their decisions during the game.<sup>40</sup> They found that when people imposed punishment on those who were perceived as having acted badly, an area of the brain called the caudate nucleus was activated. The area is associated with reward sensations and is also activated, for example, when processing visual beauty, experiencing romantic love, and during periods of cocaine or nicotine consumption.<sup>41</sup>

With brain scans we can witness the biological rewards from doing justice. Is it any surprise that we seek it out in plays, films, books, and all manner of entertainment? Clint Eastwood’s *Dirty Harry* movies and Charles Bronson’s *Death Wish* series, both wildly successful, are built around the protagonist personally correcting the justice failures of an ineffective legal system. And the delayed-justice-finally-done theme is seen in classics such as Shakespeare’s *Hamlet*, Alexander Dumas’s *Count of Monte Cristo*, F. Scott Fitzgerald’s *The Great Gatsby*, and in modern books by many of today’s most popular writers, including Tom Clancy (*Without Remorse*), Lee Child (*Die Trying*), John Grisham (*A Time to Kill*), and Stephen King (*Carrie*).

**T**he saga of the gold miners and the citizens of 1850s San Francisco holds another important lesson about human nature: It is not the simple punishment of wrongdoing to which humans seem devoted, but rather the *just* punishment of wrongdoing. It would have been easy enough to authorize some strongman to punish all violators, but we see instead the groups willingly incurring the costs of group adjudication to assure that the punishment reflects their shared norms. In the camps, recall that the more serious the charge, and thus the more serious the potential penalty, the larger the group called for to adjudicate the case—that is, the greater the costs willingly incurred to assure proper liability and punishment.

And the adjudications commonly demonstrate a sensitivity to differences in an offender's degree of blameworthiness. Recall the mining claim encroachment that was judged not intentional. The encroachment was corrected but not punished. Similarly, the Vigilance Committee did not blindly punish all rule breakers but rather shaped its punishments to match the relative seriousness of the offense: Murderers were hanged, robbers were permanently banished, and those who received stolen property were whipped but allowed to remain. It was not a desire for suffering of all rule breakers that drove the adjudications but the desire to impose what the community saw as just punishment.

Modern studies confirm that it is moral blameworthiness—the relative amount of punishment an offender *deserves* for his wrongdoing—that people use in assessing the proper amount of punishment, not something else, such as deterring future crime or keeping dangerous people off the streets. Certainly people want to be safe, but that preference does not negate our innate desire that punishment be just. People's intuitive human rules call for wrongdoers to be punished according to their blameworthiness, not based on sterile crime control calculations.

In one set of studies, for example, subjects were asked to assess punishment for a variety of different cases, with no indication of what principle they should look to in doing so. They were then asked to again “sentence” the same cases but in this instance to use specific principles: one principle based punishment on the offender's moral blameworthiness for the past offense (his “desert”), another based it on what would best deter others in the future (“general deterrence”), and another based it on an offender's dangerousness and what was needed to best protect society from him in the future (“incapacitation”). The subjects' undirected assessment of punishment matched their “desert” assessment and conflicted with their “general deterrence” and “incapacitation” assessments. That is, left to their own devices, people look to deserved punishment for the past crime, not to efficiency in future crime control.

Other studies have looked at the kind of information subjects ask for or rely upon in making punishment judgments. As above, the studies find that people seek and rely upon information relevant to desert, not information relevant only to deterrence and dangerousness. The seriousness of the offense is central to people's assessment of the punishment deserved, along with a wide range of other factors relating to an offender's culpable state of mind, mental capacities, and other mitigating circumstances under which they acted. People do not normally look to factors such as the perpetrator's prior record or likelihood of future violence (which are used to predict future dangerousness) or the detection rate for the offense, the frequency of the crime, or the degree of publicity for the case (which are used in setting sanctions that will more efficiently deter). Instead, the subjects rely on specific information related to how “blameworthy” an offender is.<sup>42</sup>

The human tendency to want justice done, apparent in the gold rush era of 1840s–1850s California, can be seen in how people handle themselves in a wide range of absent-law situations in different eras and different places.

**D**uring World War II, the Nazis transported Jews from all over Europe into camps that had been built expressly for the purpose of annihilating them. Also taken to the camps were homosexuals, Jehovah's Witnesses, communists, and gypsies. Those who were not killed upon arrival fought to survive against disease, brutality, starvation, and overwork.<sup>43</sup>

Prisoners in the camps commonly hid away small scraps of bread among their possessions. The precious bread crusts could mean the difference between life and death if

untoward events brought a person to the brink of starvation. A crust thief was seen by the inmates as equivalent to a murderer and would be killed if caught.

Knowing the risks, bread thieves would target not the strong but the weak, who would be less likely to fight back or take revenge, or ideally a person who might die that day, leaving the theft undiscovered. Yet the entire group was sufficiently outraged by such theft that they would take turns staying up at night to stand guard. Such lookout duty had a serious cost, for it meant that the person would be in poorer condition for the coming day's grueling work, and poor performance might mean execution, but the commitment to catching and punishing those who victimized the weak was thought to outweigh the personal cost.

There were some prisoners who for whatever reason mistreated their fellows or even actively participated in torturing them, sometimes to death. The German SS who controlled the camps had no inclination 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 "creatures" were often killed, commonly by prisoners who had not been their victims, had nothing personal to gain, and who 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, 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.

Why should these prisoners, typically the strongest with the best chances of survival, endanger themselves to punish wrongdoing to others?

In 1719, Captain William Snelgrave was in charge of a merchant ship that was captured by a band of pirates.<sup>44</sup> The quartermaster of the pirates interviewed Snelgrave's crew to determine whether Snelgrave had been a just captain, with plans to kill him if he was not. By evening the crew had been interviewed and Snelgrave was found to be an excellent captain and was to be spared. The pirates' boatswain did not agree with the decision and during the night tried to kill Snelgrave. When the attack was reported, the pirate crew, all of whom liked the boatswain, "voted for his being whip'd."<sup>45</sup>

Captain Snelgrave, as their prisoner, was nothing to the pirates, someone they would never see again. The boatswain was a well-liked colleague, whom they would continue to live with. Yet the group chose to punish the latter because of his mistreatment of the former. He deserved it for his violation, and his punishment was the only way to set things right.

In the early 1840s, the tantalizing prospect of free land, together with a stagnant American economy, induced thousands of families to travel across the continent along the Oregon Trail to California, Utah, and Oregon. Wagon trains formed in Independence, Missouri, during the winter, where they worked out agreements concerning leadership, supplies, and finances. The pioneers could not begin their trek until the grass that would feed the animals along the way began to sprout. At a rate of three miles per hour and with no delays, a train could make the 2,000-mile journey before the autumn snows blocked the mountain passes. But falling behind schedule could mean disaster. People trapped in the mountains could die without food or shelter, or be forced to retreat back across the prairie in hopes of reaching an army post where they could survive the winter.

In the early weeks of the trip, some trains would try resting on the Sabbath, but the practice rarely lasted. Sunday travel was not optional if the schedule was to be kept. When people died on the trail, the bodies would roll along with the train until a long-enough stop gave time to dig a grave. When a person was too ill to travel, the group was forced to choose between abandoning the sick or delaying travel. Being separated from the train was a serious risk because it meant the loss of group contributions to everyday tasks, help with emergencies, and protection from attack. Yet the importance of moving was such that the sick were commonly left behind with only their family to stay with them, with hopes that another train might come along soon. Sidney Smith, for example, was seriously wounded when he accidentally shot himself. “We were on the hunting ground of the Caws, the Pawnees were daily expected and the Cumanches were prowling around the neighborhood. To remain, therefore, in our present encampment, until Smith could travel without pain and danger, was deemed certain death to all.” The train kept moving. Smith survived the first day of travel, but keeping him alive slowed the progress. The group finally decided to split up, with only a smaller group traveling at Smith’s slower pace. (The slower group eventually gave up and returned east.)

With this understanding of the dramatic costs of delay, it is striking that one of the few things that would prompt a train to voluntarily stop was for the trial and punishment of serious wrongdoing. Each train made up its own rules. There was no U.S. legal authority present, and indeed the trains were not on U.S. territory during much of their travel. They dealt with serious wrongdoing according to the group’s own shared intuitions of justice.<sup>46</sup> Perhaps most striking, it was not uncommon for a different train to stop to participate as the jury for a defendant who had nothing to do with them. 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 [Olmstead] and jumping upon him commenced beating him and endeavored to kick him in the face with his boots; Olmsted called upon the bystanders to take him off saying at the same time that he had a k[n]ife; As no one interfered he stabbed him in the lower part of the chest; Upon this Dunmore started back and exclaimed that he was stabbed. He fell and in twenty minutes was a corpse.<sup>47</sup>

The group judged Olmstead to be blameless, as having acted in proper self-defense, and no liability was imposed.

When James Reed, later to be a member of the infamous Donner Party (which resorted to cannibalism), beat another man over the head with a bullwhip, the leaders of the train convened a court and found him guilty of assault. Their choices for a sanction were limited. Rather than killing Reed, the makeshift court agreed to banish him. They decreed that he must travel alone and without firearms. Killing him outright seemed too severe to them, but sending him off with no weapon certainly put him at risk. While the company punished Reed, they agreed to take responsibility for the welfare of Reed’s family.

**A**gain, we see people undertaking at the cost of serious risk—be it delaying the train, or incurring the wrath of the concentration camp guards—to do justice in cases where they were not a victim, and perhaps not even part of the victim’s family or associates. Yet the people seem

more than willing to make the sacrifice or to suffer the risk. Why would humans have such an inclination?

The evolutionary story of humans suggests an explanation. Recall the discussion of the serious hurdles that faced early human groups. At minimum, maintaining the all-important social cooperation required some check on such conduct as physical aggression and taking of possessions without consent. A member who was regularly victimized would hardly be likely to be an enthusiastic contributor to the group's goals, which typically required not just cohesion but cooperation, be it in hunting or agriculture. And that high level of cooperation had to be maintained if the comparatively small and weak humans were to survive their larger predators and nature's other hardships.

Some shared understandings among the members would have had to exist as to the basic rules of conduct. But even if a group came to agreement on rules of conduct, the real challenge would come when the group had to deal with a member who violated those rules. Where social pressures were insufficient to gain compliance, the most readily available means of punishing the improper physical violence or unconsented-to taking was, well, physical violence or unconsented-to taking.<sup>48</sup>

One can see the problem: How is a group to distinguish the "bad" beating or taking (of a rule violation) from the "good" beating or taking (of deserved punishment)? An effective enforcement system required not only a shared understanding of the prohibitions but also of the circumstances under which the prohibitions could be set aside in order to punish.

And even that was not enough. Cooperation was not likely to be maintained if trivial violations were punished brutally or particularly harmful violations were punished lightly. The punishment of any member held a potential cost for the group (for example, the violator who is beaten may for a time be a less effective hunter), thus there was value in punishing no more than was necessary. Yet it was also important to signal the relative seriousness of different sorts of violations. It was an important message, for example, to understand that the improper killing of another was even worse than the improper beating of the person. Thus, there had to be a shared understanding of both a continuum of seriousness among the violations and a corresponding continuum of seriousness of punishments, which then allowed the two to be matched.<sup>49</sup>

Although it is prehistory, we can guess that early human groups must have sorted out some such understandings, for we know that they flourished. Perhaps these shared understandings sharpened as their level of cooperative action heightened. It is hard to imagine a story by which such high cooperation could have developed and been maintained if there had been arbitrary punishment disconnected from the seriousness of the violation.

**A**s we have seen previously, it is usually not the case that human traits pop out of nowhere. They commonly are built upon more rudimentary forms of the trait in animals further down the evolutionary tree. This was true with regard to the use of punishment for harmful conduct, as we saw in chapter 3. And it is perhaps no surprise, then, to learn that many animals, especially the more social ones, also display rudimentary forms of a sense of fairness and justice. This is especially true of animals that live in cooperative groups.<sup>50</sup> Treatment perceived as unfair tends to provoke an unhappy response, one that one can easily imagine would undermine the animal's cooperative spirit within the group.

In an experiment with capuchin monkeys, for example, monkeys within sight of one another were regularly given cucumber slices in exchange for granite tokens. When the



experimenter began to provide one monkey 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 cucumber monkey often manifested considerable distress. It sometimes jumped up and down, even throwing the token or the cucumber at the researcher.<sup>51</sup> The capuchin could see the disparity of value in its reward and was sufficiently upset by it to reject the “unfair” reward.<sup>52</sup> Similarly, chimpanzees often refuse to participate in an exchange once another chimpanzee is receiving a more valued reward for the same amount of effort.<sup>53</sup> Thus, both capuchins and chimpanzees behave in ways suggesting that they can perceive unfairness and that it often physically stresses them.

Behavior suggesting an ability to perceive fairness and unfairness underlies a great deal of social behavior in primates. Many primates regularly engage in sophisticated cooperation schemes, ranging from simple reciprocal grooming and food sharing to complex tool using and coalitional behavior, and an individual’s participation in the activity is commonly dependent upon being perceived as making a fair contribution. In olive baboons, for example, there is a strong correlation between the support a baboon has given to another in an earlier conflict and the willingness of that other baboon to return the favor by giving support in a present conflict.<sup>54</sup> In macaques, similarly, individuals often support others unrelated to them if such others have previously supported them in a conflict.<sup>55</sup> Vervet monkeys tend to prefer to groom individuals who have groomed them in the past.<sup>56</sup> When a chimpanzee grooms another early in the day, the other is more likely to share food with the groomer later in the day.<sup>57</sup> And chimpanzees engaged in tasks that require collaboration quickly determine which among different potential partners is the best collaborator and will recruit that individual for subsequent collaborative tasks.<sup>58</sup> Primatologists report that, because sharing and other cooperative behavior exists in a “multi-faceted matrix of relationships, social pressures, delayed rewards, and mutual obligations,”<sup>59</sup> successful individuals are those who best distinguish good colleagues from bad, and deal with each accordingly.

Echoing the evolutionary speculation above, a failure to make a fair contribution to the group cannot just produce less help from others but also risks the imposition of punishment by the group, a fact that alcalde Rogers in the mining camp might have been wise to consider before taking Sim’s bribe. Rhesus macaques who discover food and are caught having failed to alert the group to the discovery, for example, often become targets of significant aggression.<sup>60</sup> In chimpanzee societies, those reluctant to share their food are more likely to encounter aggressive responses when they later approach those who have food.<sup>61</sup> Chimpanzees will attack former allies who failed to assist them in conflicts with third parties.<sup>62</sup> And many primates, including chimpanzees, tend to intervene most often against those who have most often intervened against them.<sup>63</sup>

Among chimpanzees (who, along with bonobos, are the closest relatives of humans) such retribution is common enough that researchers consider it “an integral part of [a] system of reciprocity.”<sup>64</sup> Frans de Waal, a prominent primatologist, describes the chimpanzee community as “a ‘market’ of reward and punishment,”<sup>65</sup> with “balance sheets” kept on social interactions.<sup>66</sup> The group’s rules consist not only of “one good turn deserves another” but also “an eye for an eye, a tooth for a tooth.”<sup>67</sup> “Not only are beneficial actions rewarded,” de Waal reports, but “there seems to be a tendency to teach a lesson to those who act negatively.”<sup>68</sup> Reward good deeds and punish bad. And not only do cooperative animals punish, but the intensity of the

punishment often increases with the severity of harm caused by the transgressor,<sup>69</sup> again echoing the evolutionary analysis above.

To summarize, the leading animal researchers believe that evolution has supplied the “building blocks” of human morality.<sup>70</sup> The question is not whether biology has influenced the development of the human moral system, but rather to what degree.<sup>71</sup> “Evolution,” they believe, “has produced the requisites for morality: a tendency to develop social norms and enforce them.”<sup>72</sup>

**T**he larger point here is that humans’ judgments about justice are not just modern social preferences but an innate part of human nature. One of the most compelling demonstrations of this is found in scientific studies of child development. Children around the world in every culture, and in every demographic within a culture, follow a common path in the development of moral reasoning and an appreciation for basic principles of justice. And much of this occurs at an extremely early age, even before children have the tools to learn social norms (let alone to learn governmental legal rules). Much of our intuitions of justice are the preprogrammed product of a process of development that largely transcends a human’s environment.

There is a great deal of evidence,<sup>73</sup> for example, in support of Lawrence Kohlberg’s classic scheme describing a predictable sequence of stages in the development of moral thinking.<sup>74</sup> He suggests three discrete stages of development, each stage with two levels.<sup>75</sup> It is “the most widely researched description of moral development available,”<sup>76</sup> but it does not matter whether one accepts exactly his phase descriptions or even divides up the development process as he does. The important point for our purposes is that there is general agreement across the entire field of child development that children everywhere progress through the same stages and at roughly the same ages.<sup>77</sup> And this developmental flowering exists across all cultures, not just Western ones, including across cultures in which the existing legal regimes are dramatically different.<sup>78</sup>

Interestingly, while even the early research suggested that children were precocious in their development of moral reasoning, in fact we now know that those studies vastly underestimated the sophistication of even very young children. Indeed, many authorities suggest it is likely that research still has not fully revealed the precociousness of moral reasoning.<sup>79</sup> According to the recent literature, “moral capacity is well developed, although by no means completely developed, in the third year of life,”<sup>80</sup> when most children are barely verbal.

In one early experiment, for example, very young children’s beliefs about justice were tested to determine if they make distinctions between violations of moral rules—acts that are wrong and deserve punishment (for example, one child hitting another)—and violations of conventional rules—acts that deviate from a convention (for example, failing to say grace before a snack).<sup>81</sup> Using pictures of offending conduct and a pictorial scale of punishment (different-size frowns), the researchers showed that even children between two-and-a-half and three-and-a-half years old make such distinctions and would punish a moral offense more seriously than the violation of a convention, even if “there was no rule about [the moral offense].”<sup>82</sup>

In another study, four-year-olds, both middle-class European-Americans and lower-socioeconomic African-Americans, judged moral transgressions relating to physical or psychological harm and fairness as very serious, as deserving of punishment, and as generalizably wrong, and saw this as so regardless of whether they had ever been told of a rule that the conduct was prohibited.<sup>83</sup> In short, even young children seem to have textured and

specific views about deserved punishment, and those views are not simply derived from the dictates of authority.

The importance of these results should not be underestimated. The fact that such young children believe immoral acts are wrong even in the absence of rules indicates a precocious, universalist view of morality.<sup>84</sup> Further, given that such conceptual distinctions are made by very young children, especially universally, it is not likely that they are acquired by social learning processes, but more likely that they are the product of an innate human developmental sequence.<sup>85</sup>

Another striking illustration of how much human judgments of justice can transcend a person's situation and upbringing is found in social psychology studies showing people's shared judgments of justice. There is an enormous range in human conditions and experience around the world. There is also an enormous range of governmental law and an enormous difference in the ability of different populations (with dramatically different educational levels, for example) to understand that law, and enormous difference in the willingness of different peoples to give deference and to internalize governmental law (note, for example, that different governments have very different reputations with their people). Yet despite this wide range in human conditions and experiences and the wide range of governments and governmental law, the studies show that people across cultures and demographics share strong common judgments on many aspects of justice.

Cross-cultural studies have shown great similarity in ranking offense seriousness, for example. At the end of a particularly large cross-cultural study, one researcher concluded, "If 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>86</sup> And "it is apparent that there was considerable agreement as to the amount of punishment appropriate to each act"<sup>87</sup> and that looking at relative rankings indicates "general agreement in ranks across all countries."<sup>88</sup>

Indeed, the studies suggest that people are not simply looking to governmental law to form their judgments of justice, but in many instances are not reasoning out their judgments at all. The studies suggest that they commonly rely on their intuitions rather than on conscious reasoning.<sup>89</sup> That is, they are not calculating out the relative blameworthiness of the offender but rather are experiencing his relative blameworthiness as if it were a fact. (The studies show these shared intuitions can be quite nuanced, taking account of a wide range of factors and even their interactive effect.) And these intuitions of justice are widely shared across demographics especially in relation to the core of wrongdoing—judgments involving physical aggression and takings without consent.<sup>90</sup>

The claim is not that people agree on the precise amount of punishment that is appropriate for a particular crime, but rather on the relative seriousness of one crime compared to another. In one study (by one of the present authors), the researchers gave participants twenty-four short scenarios, each describing a different criminal episode. The participants were then asked to rank the scenarios—which included crimes such as theft, assault, burglary, robbery, kidnapping, rape, manslaughter, murder, and torture—in order of how much punishment was deserved for each.<sup>91</sup> Not only did the participants agree that serious wrongdoing should be punished and that minor infractions should not, but they showed almost unanimous agreement on the relative ranking of the blameworthiness shown in the twenty-four different scenarios.

And this high level of agreement existed across all demographic differences among the study's participants. The level of agreement was strongest for crimes involving physical aggression, theft, and deception, which are the crimes most commonly committed. Unanimity is lost and the level of agreement decreases as the nature of the offense moves out from the core offenses toward a periphery of more culturally-dependent offenses, such as those concerning religion, family, and some sexual practices.

The high agreement of intuitions across cultures and demographics for many aspects of core offenses makes it clear that people's intuitions of justice transcend governmental law. Even though laws vary across countries, people's intuitions of justice on many issues do not.

That many aspects of humans' judgments of justice transcend culture and situation helps explain much of what we see in the absent-law cases. It should be no surprise that the California gold miners, the seventeenth-century Caribbean pirates, the Nazi concentration camp prisoners, wagon train members on the Oregon Trail, and the residents of San Francisco in the 1850s all demonstrate a commitment to doing justice, even if at personal cost to themselves, even when they are far beyond the reach of governmental law. Their commitment to doing justice is in large part what comes in the package of being human.

**B**ut some people will argue that what we see in absent-law situations is not a product of human nature but just the residual effects of what governmental law has taught. While the law itself may no longer have a direct effect, the people in the absent-law situations are still carried forward by its momentum and, as if out of habit, act upon the norms that governmental law has taught and that they have internalized.

But this view runs up against the scientifically confirmed reality just reviewed: the cross-cultural studies showing agreement on many aspects of justice judgments even though different cultures' legal rules vary widely; the child development studies showing a common path of moral development impervious to all environmental factors, let alone governmental law; animal studies showing the precursors to human notions of justice and fairness; and the evolutionary analysis showing the necessity for such shared intuitions for group success long before government or law was a thought in the human mind. How could one find such shared intuitions of justice around the world, a common path in the development of a child's moral views, and the precursors to justice judgments in our evolutionary predecessors, if our punishment judgments are simply the product of what we have learned from governmental law?

Even the absent-law stories themselves refute the claim of governmental law's dominant role. Some of the absent-law groups, such as the Netsilik people, which we will discuss in chapter 6, had no prior governmental law that could be learned and internalized, yet they show the classic patterns of cooperation and just punishment. Other absent-law groups adopt norms dramatically different from those that their prior governmental law provided. The legal rules that governed British sailors, for example, were dramatically different from those that the pirates created for themselves—and, interestingly, the pirates rules were much like the rules constructed by other absent-law groups in other centuries and in other parts of the world. Further, there is reason to doubt that some of the absent-law groups had ever internalized the prior governmental rules. Certainly this is an open question with regard to such groups as those who chose to become pirates or the felons of Attica prison, to be discussed in the next chapter.

But perhaps the most compelling reason to reject the argument that the absent-law groups are simply carrying forward norms previously instantiated by governmental law is seen in the

enormous diversity of the situations from which the groups are drawn. They are from many different centuries across many parts of the world and drawn from demographics of every sort. The prior formal law for the different groups could not be more different, yet we see common patterns of social cooperation and just punishment. If it was governmental law's prior normative influence at work, we would expect to see that same diversity in how the groups conduct themselves.<sup>92</sup>

A more parsimonious explanation, which fits the evidence, both scientific and anecdotal, is that the deep desire for doing justice is a basic human trait that is shared across demographics and cultures, as are many of the specific principles of justice that people use in assessing deserved punishment.

The nature of our judgments of justice is not just an academic question, but rather is at the crux of many of today's penal policy debates. If our interest in doing justice were just socially learned, then reformers need only reeducate us. Social reformers could make humans into any sort of creatures that they wished; they can create a population that does not care about doing justice and that is happy to give up the institution of punishment. Good luck with that.

What the evidence suggests is that our interest in doing justice is an innate part of our character that has, over the course of 125,000 generations, become a fundamental part of what it is to be human. Attempts at "reeducation" would be difficult and costly, if not hopeless. Our basic instincts of justice are likely so deep that they cannot be altered, at least not without using coercive indoctrination processes that no liberal democracy would tolerate.

Of course, understanding that the human inclination toward just punishment has an innate biological component does not in itself mean that we ought to follow that human urge wherever it leads. Things have changed for humans since our time on the Serengeti Plain. Its innateness does not make it right, or even good for us as a society. While we cannot change it, perhaps we will want to keep it within newly defined bounds. But as part II of the book shows, it turns out 125,000 human generations of evolution have given us some precious wisdom, and there is a serious cost to be paid by ignoring the importance of our shared intuitions of justice.

## NOTES

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10. Shinn, *Mining Camps*, 125.

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party punishment involving police, judges and jailers. . . . We suggest that strong reciprocity based on third-party punishment is not a human universal, i.e. it is less common among egalitarian foragers than among stratified agricultural societies. Third-party punishment increases in agricultural societies because solving collective-action problems becomes more important as populations grow larger and more complex.”).

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42. See, e.g., Mark Warr, Robert F. Meier, and Maynard L. Erickson, “Norms, Theories of Punishment, and Publicly Preferred Penalties for Crimes,” *Sociological Quarterly* 24 (1983): 75, 90 (“[O]ur findings indicate that the perceived seriousness of offenses is the central (and perhaps only) criterion for fixing punishments. . . . [T]he fact that respondents rely on perceived seriousness *to the exclusion* of perceived frequency surely places the burden of proof on the utilitarian theorists.”); Kevin M. Carlsmith, John M. Darley, and Paul H. Robinson, “Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment,” *Journal of Personality and Social Psychology* 83 (2002): 284; John M. Darley, Kevin M. Carlsmith, and Paul H. Robinson, “Incapacitation and Just Deserts as Motives for Punishment,” *Law and Human Behavior* 24 (2000): 659; Kevin M. Carlsmith, “The Roles of Retribution and Utility in Determining Punishment,” *Journal of Experimental Social Psychology* 42 (2006): 437; Paul H. Robinson, *Intuitions of Justice and the Utility of Desert* (Oxford 2013), Part III.

43. The factual narrative is drawn from these sources: Eugen Kogan, *The Theory and Practice of Hell: The German Concentration Camps and the System behind Them* (Farrar, Straus and Giroux, 2006); James Bachner, *My Darkest Years: Memoirs of a Survivor of Auschwitz, Warsaw and Dachau* (McFarland, 2007); Israel Cymlich and Oscar Strawczynski, *Escaping Hell in Treblinka* (Yad Vashem and The Holocaust Survivors’ Memoirs Project, 2007); Curt Bondy, “Problems of Internment Camps,” *Journal of Abnormal and Social Psychology* 38 (1943): 453; Terrence Des Pres, *Survivor: An Anatomy of Life in the Death Camps* (Oxford University Press, 1975); David A. Hackett, *The Buchenwald Report* (Westview, 1997); Hans Hesse, *Persecution and Resistance of Jehovah’s Witnesses during Nazi-Regime* (Edition Temmen, 2001); Norman Jackman, “Survival in the Concentration Camps,” *Human Organization* 17 (1958): 23.

44. The factual narrative is drawn from these sources: Terry Breverton, *Black Bart Roberts: The Greatest Pirate of Them All* (Pelican Publishing, 2004); Peter T. Leeson, *The Invisible Hook: The Hidden Economics of Pirates* (Princeton University Press, 2009); Angus Konstam, *History of Pirates* (Lyons Press, 1999); Angus Konstam, *Privateers and Pirates: 1730-1830* (Oxford: Osprey, 2001); Clarence Henry Haring, *The Buccaneers in the West Indies in the XVII Century* (BiblioBazaar, 2009); Alexandre Olivier Exquemelin and William Swan Sonnenschein, *The Buccaneers of America* (Allen and Unwin, 1684); Charles Johnson and David Cordingly, *A General History of the Robberies and Murders of the Most Notorious Pirates* (Globe Pequot Press, 2002); Woodes Rogers, *Cruising Voyage Round the World* (A. Bell and B.



Lintot, 1712); Colin Woodard, *The Republic of Pirates: Being the True and Surprising Story of the Caribbean Pirates and the Man Who Brought them Down* (Houghton Mifflin Harcourt, 2007).

45. Breverton, *Black Bart*, 29.

46. The journal of a pioneer of 1862 recounted: “Yesterday passed the grave of a man murdered on the 6th inst., by a person who up to that time was his traveling companion. To-day we passed the tomb of his murderer. He was caught, tried and shot the next day.” Randall Hewitt, *Notes by the Way: Memoranda of a Journey across the Plains from Dundee, Ill., to Olympia, W. T., May 7 to November 3, 1862* (The Office of the Washington Standard, 1863), 19.

47. Kenneth L. Holmes and David C. Duniway, eds., *Covered Wagon Women: Diaries and Letters from the Western Trails, 1852: Journal of Abigail Jane Scott* (Bison Books, 1997).

48. Killing or expelling the violator is possible, but given that it would weaken the group’s overall strength, it may well be seen as a sanction of last resort.

49. Paul H. Robinson, Robert Kurzban, and Owen D. Jones, “The Origins of Shared Intuitions of Justice,” *Vanderbilt Law Review* 60 (2007): 1633, 1636.

50. Sarah F. Brosnan, “Nonhuman Species’ Reactions to Inequity and Their Implications for Fairness,” *Social Justice Research* 19 (2006): 153, 181.

51. Sarah F. Brosnan and Frans B. M. de Waal, “Monkeys Reject Unequal Pay,” *Nature* 425 (2003): 297, 298; Sarah Brosnan and Frans de Waal, “Reply: *Animal Behavior: Fair Refusal by Capuchin Monkeys*,” *Nature* 428 (2004): 140.

52. Bosnan and de Waal, “Reply.”

53. Brosnan, “Nonhuman Species’ Reactions,” 177; Sarah F. Brosnan, Hillary C. Schiff, and Frans B. M. de Waal, “Tolerance for Inequity May Increase with Social Closeness in Chimpanzees,” *Proceedings of the Royal Society B: Biological Sciences* 272 (2005): 253, 255.

54. C. Packer, “Reciprocal Altruism in Papio Anubis,” *Nature* 265 (1977): 441, 442.

55. Jessica C. Flack and Frans B. M. de Waal, “‘Any Animal Whatever’: Darwinian Building Blocks of Morality in Monkeys and Apes,” in *Evolutionary Origins of Morality: Cross-Disciplinary Perspectives*, ed. Leonard D. Katz (Imprint Academic, 2000) 1, 12; Frans B. M. de Waal and Lesleigh M. Luttrell, “The Similarity Principle Underlying Social Bonding among Female Rhesus Monkeys,” *Folia Primatologica* 46 (1986): 215.

56. See Robert M. Seyfarth and Dorothy L. Cheney, “Grooming, Alliances and Reciprocal Altruism in Vervet Monkeys,” *Nature* 308 (1984): 541, 542.

57. Frans B. M. de Waal, “Food Sharing and Reciprocal Obligations among Chimpanzees,” *Journal of Human Evolution* 18 (1989): 433.

58. Alicia P. Melis, Brian Hare, and Michael Tomasello, “Chimpanzees Recruit the Best Collaborators,” *Science* 311 (2006): 1297, 1299.

59. Frans B. M. de Waal, “Food Sharing and Reciprocal Obligations among Chimpanzees,” *Journal of Human Evolution* 18 (1989): 433, 452.

60. Marc D. Hauser, “Costs of Deception: Cheaters Are Punished in Rhesus Monkeys (*Macaca mulatta*),” *Proceedings of the National Academy of Sciences* 89 (1992): 1237; Marc D. Hauser and Peter Marler, “Food-Associated Calls in Rhesus Macaques (*Macaca mulatta*): II. Costs and Benefits of Call Production and Suppression,” *Behavioral Ecology* 4 (1993): 206.

61. de Waal, “Food Sharing,” 456; see also Frans B. M. de Waal, *Good Natured: The Origins of Right and Wrong in Humans and Other Animals* (Harvard University Press, 1997), 160 (concluding such behavior “suggests a sense of justice and fairness”).

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62. Frans de Waal, *Chimpanzee Politics: Power and Sex among Apes* (Johns Hopkins University Press, 1998), 207.

63. Flack and de Waal, “Any Animal Whatever,” 8; Joan B. Silk, “The Patterning of Intervention among Male Bonnet Macaques: Reciprocity, Revenge, and Loyalty,” *Current Anthropology* 33 (1992): 318.

64. de Waal, *Good Natured*, 157–158.

65. Ibid.

66. Ibid., 157–159.

67. de Waal, *Chimpanzee Politics*; see also Flack and de Waal, “Any Animal Whatever,” 9 (“Monkeys and apes appear capable of holding received services in mind, selectively repaying those individuals who performed the favours. They seem to hold negative acts in mind as well, leading to retribution and revenge.”).

68. de Waal, *Good Natured*, 159; see also Flack and de Waal, “Any Animal Whatever,” 9 (describing similar behavior among monkeys and apes).

69. T. H. Clutton-Brock and G.A. Parker, “Punishment in Animal Societies,” *Nature* 373 (1995): 209, 211.

70. Flack and de Waal, “Any Animal Whatever,” 19–24; Hauser, “Costs of Deception,” 108–109 (“We can safely assume that these intuitions evolved prior to or during our life as hunter-gatherers. . . . In such small-scale societies, fairness was most likely an effective proxy for judging punishable acts.”); de Waal, *Good Natured*, 218 (“The fact that the human moral sense goes so far back in evolutionary history that other species show signs of it plants morality firmly near the center of our . . . nature.”).

71. Flack and de Waal, “Any Animal Whatever,” 3.

72. de Waal, *Good Natured*, 39; see also Richard Joyce, *The Evolution of Morality* (MIT Press, 2006), 140–142 (explaining the evolution of fairness); Sarah F. Brosnan, “Fairness in Monkeys,” in *Encyclopedia of Animal Behavior*, ed. Marc Bekoff (Greenwood, 2004), 288–289; Brosnan, “Nonhuman Species’ Reactions,” 160–161; Brosnan and de Waal, “Reply”; Frans B. M. de Waal, “The Chimpanzee’s Sense of Social Regularity and Its Relation to the Human Sense of Justice,” *American Behavioral Scientist* 34 (1991): 335, 345–349.

73. See, e.g., Lawrence Kohlberg, *Essays on Moral Development*, vol. 2, *The Psychology of Moral Development* (Harper and Row, 1984); Lawrence Kohlberg, “From Is to Ought: How to Commit the Naturalistic Fallacy and Get Away with It in the Study of Moral Development,” in *Cognitive Development and Epistemology*, ed. Theodore Mischel (Academic Press, 1971); see also Anne Colby and Lawrence Kohlberg, *The Measurement of Moral Judgment*, vol. 1 (Cambridge University Press, 1987); Anne Colby and Lawrence Kohlberg, *The Measurement of Moral Judgment*, vol. 2 (Cambridge University Press, 1987).

74. This view parallels Piaget’s views on development. See generally Lawrence Kohlberg, *The Philosophy of Moral Development*, vol. 1, *Essays on Moral Development* (Harper and Row, 1981) (linking cognitive and moral development).

75. His view might be summarized as:

Level (age range)	Stage	Description of Moral Behavior
Preconventional (5–10)	Obedience/ Punishment	Conform to norms because of potential for punishment by authority figures.
	Individualism/ Exchange	Do what is “good” (i.e., feels good) for the self. This includes beneficial exchanges with others.
Conventional (10–14)	Good/Bad	Behave so as to elicit approval from others.
	Law and Order	Behave so as to discharge one’s duty as part of the social order.
Postconventional (14–adult)	Social Contract	Acting in a way that benefits others because of rationally based laws/norms in a society. Individual rights and utilitarianism.
	“Universal ethical principle orientation”	“Right is defined by the decision of conscience in accord with self-chosen ethical principles appealing to logical comprehensiveness, universality, and consistency.”

(Quotations from Lawrence Kohlberg, *The Philosophy of Moral Development*, vol. 1, 165, are used for the stage name and description because it is difficult to gloss these ideas. Emphasis in the description original.) Kohlberg argued that people universally progressed from lower to higher stages of moral development. He did not argue that everyone reached the highest stage, “universal ethical principle orientation.” The early stages, the “preconventional” stages, commonly from ages five through ten, are essentially about self-interest. The intermediate “conventional” levels, commonly ages ten through fourteen, in contrast, reflect an awareness of the benefits of having a positive reputation as a moral agent and of fulfilling one’s duties in the context of social exchange. The highest level, the “postconventional” stages, commonly from ages fourteen onward, includes a genuine interest in others’ welfare, a respect for others’ rights, and a recognition of universal moral principles. More recent approaches to Kohlberg’s model maintain the idea that stages are reached in sequence, but instead of one stage “replacing”

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another, each stage is seen as supplementing the logic of previous stages. Dennis L. Krebs and Kathy Denton, "Toward a More Pragmatic Approach to Morality: A Critical Evaluation of Kohlberg's Model," *Psychological Review* 112 (2005): 629, 633. On this view, a person who has reached Stage 4 will still use Stage 3 reasoning in circumstances where doing so is useful or desirable.

76. Larry P. Nucci, *Education in the Moral Domain* (Cambridge University Press, 2001), 81.

77. The first evolutionary perspective on Kohlberg's work of which we are aware appears in Richard D. Alexander, *The Biology of Moral Systems* (Aldine Transaction, 1987), 131–139.

78. "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." Nucci, *Education*, 95–96.

79. See Lawrence Kohlberg, "Current Statement on Some Theoretical Issues," in *Lawrence Kohlberg: Consensus and Controversy*, eds. Sohan Modgil and Celia Modgil (Routledge, 1986), 491. See also John M. Darley and Thomas R. Shultz, "Moral Rules: Their Content and Acquisition," *Annual Review of Psychology* 41 (1990): 525, 537.

80. Darley and Shultz, "Moral Rules," 552.

81. See Judith Smetana, "Preschool Children's Conceptions of Moral and Social Rules," *Child Development* 52 (1981): 1333–1334.

82. Judith G. Smetana, "Toddlers' Social Interactions Regarding Moral and Conventional Transgressions," *Child Development* 55 (1984): 1767.

83. Judith G. Smetana et al., "Preschool Children's Judgments about Hypothetical and Actual Transgressions," *Child Development* 64 (1993): 202, 210 (internal citations omitted).

84. Smetana et al., "Preschool Children's Judgments."

85. We take "innate" ideas to be those ideas that develop reliably in each member of the species given the broad range of plausible environments in which the organism develops. That is, an idea is innate if it does not rely on very general processes such as induction or social transmission for its acquisition.

86. Graeme Newman, *Comparative Deviance: Perception and Law in Six Cultures* (Elsevier, 1976), 115.

87. *Ibid.*, 140.

88. *Ibid.*, 141. (See Table 12, pp. 142–143). See also *ibid.* at 135–148 (discussing variability deriving from differences in views regarding how particular acts should be controlled or punished). People from different cultures might share the intuition that an act is wrong, and even acts' relative seriousness, but differ in how punishment should be imposed, whether by the state, family, or some other source. This discussion highlights the importance of assessing intuitions regarding seriousness as distinct from preferred punishments meted out by the state. While the former might be correlated strongly with the latter in some contexts, it will be less so in others.

89. Paul H. Robinson and John M. Darley, "Intuitions of Justice: Implications for Criminal Law and Justice Policy," *Southern California Law Review* 81 (2007): 1; see also Paul H. Robinson, Robert Kurzban, and Owen D. Jones, "The Origins of Shared Intuitions of Justice," *Vanderbilt Law Review* 60 (2007): 1633.

90. Robinson and Darley, "Intuitions of Justice," 3–4.

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91. Paul H. Robinson and Robert Kurzban, “Concordance and Conflict in Intuitions of Justice,” *Minnesota Law Review* 91 (2007): 1829.

92. Another complication for this kind of argument—that the groups’ conduct is simply an expression of norms previously instantiated by governmental law—is what we know about the limits of laypersons’ knowledge of governmental law. It is more likely intuitions of justice shared by humans across cultures, rather than governmental law that is accountable for the shared norm of justice, for example. Indeed, in the context of doing criminal law, people appear to assume that the law is as they think it should be. Paul H. Robinson, *Distributive Principles of Criminal Law: Who Should Be Punished and How Much* (Oxford University Press, 2008), 26. A related complication is found in the fact that we know governmental law has a limited ability on its own to create internalized norms. The U.S. Prohibition experience is an obvious illustration. Governmental law may play a role in the larger public conversation by which community norms are shaped, but they have a limited ability to create them simply by legal enactment. Paul H. Robinson, “Criminalization Tensions: Empirical Desert, Changing Norms, and Rape Reform,” in *The Structures of the Criminal Law*, eds. R. A. Duff et al. (Oxford University Press, 2011).

# LIVING BEYOND THE LAW: A SUMMARY

## *Narrative Line*

The daily carnage and conflict we see in the world around us suggest that humans are by nature at best self-interested and at worst predators. It is the civilizing influence of government and law, the common wisdom tells us, that provides the limited stability that we do enjoy. But recent science suggests a different view of human nature and, thereby, may suggest a different effect of governmental law.

What is our human nature? If we could see human groups operating outside the influence of civilized society, its government, and its laws, we might know. And luckily, the diversity and unpredictability of human history and experience give us a collection of naturally-occurring experiments by which we can answer the question. As it turns out, the answers have dramatic implications for shaping civilization's modern institutions.

## **PART I. HUMAN RULES**

Contrary to common wisdom, humans are not purely self-interested, but rather are naturally inclined toward cooperation—as long as they are not being taken advantage of by others. And it is this natural inclination toward cooperation that accounts for the extraordinary success of the human species against great odds.

But the critical benefits of cooperative action are available only with the adoption of rules and a system for punishing violations of those rules. Rather than an evil system anathema to right-thinking people, punishment is the linchpin for the benefits of cooperative action that have created human success.

## *Chapters and Primary Stories*

### **1. What Is Our Nature? What Does Government Do for Us, and to Us?**

Illustrative stories include a Los Angeles preschool-graduation parents' brawl and a Miami T-ball game parents' melee.

### **2. Cooperation: Lepers and Pirates**

Illustrative stories include the 1867 forcible exile of lepers to a permanent colony on Molokai island, Hawaii; the 1972 plane crash in the Andes Mountains that led to cannibalism; and self-regulation among the pirates of the Caribbean in the 1700s.

### **3. Punishment: Drop City and the Utopian Communes**

Illustrative stories include the utopian anti-punishment hippie communes of the late 1960s.

It is part of human nature to see doing justice as a value in itself—in people’s minds not dependent for justification on the practical benefits it brings. Doing justice is so important to people that they willingly suffer enormous costs to obtain it, even when they were neither hurt by the wrong nor stand to directly benefit from punishing the wrongdoer.

However, it is not punishment itself that people demand and that promotes and sustains cooperative action, but rather *just* punishment. The same human desire to have justice done includes a natural distaste for injustice.

On the other hand, while doing justice and avoiding injustice are important, they are not everything. Emergency conditions, especially the need to survive, can subvert them. But even when subverted, the desire to do justice and avoid injustice is not lost. It commonly spontaneously returns when conditions permit.

How can it be, then, that we see a world full of conflict and injustice that seems to contradict any notion of a human inclination toward cooperation and justice? Again, the absent-law natural experiments reveal much about how things can go wrong. Most prominently, the exercise of authority seen as illegitimate, as not acting in the group’s interests, can alienate and subvert cooperative action rather than build it.

As part II explains, these and other lessons about human nature have serious implications for shaping modern institutions, especially the criminal justice system by which we seek to control wrongdoing among people.

#### **4. Justice: 1850s San Francisco and the California Gold Rush**

Illustrative stories include California gold miners in 1848–1851; San Francisco vigilante committees of 1851; Nazi concentration camps of the 1940s; and wagon trains for westward migration in America beginning in the 1840s.

#### **5. Injustice: The Attica Uprising and the *Batavia* Shipwreck**

Illustrative stories include the 1971 prisoner takeover of Attica Prison in New York and the 1628 wreck of the *Batavia* on islands off Australia.

#### **6. Survival: The Inuits of King William Land and the Mutineers on Pitcairn Island**

Illustrative stories include the Netsilik Inuits living in the extreme conditions of far northern Canada in the 1900s; the mutineers from the *HMS Bounty* who settled on isolated Pitcairn Island in 1790; and the escaped slaves on Jamaica who, in the 1700s, formed themselves into hidden communities known as the Maroons.

#### **7. Subversion: Prison Camps and Hellships**

Illustrative stories include World War II Japanese prisoner camps in the Philippines; subsequent transport of prisoners to the main islands in the “Hellships”; and the 1864 wreck of two ships—*Grafton* and *Invercauld*—on the same Auckland island, with the two groups, unknown to one another, handling the crisis very differently.

## PART II. MODERN LESSONS

Given the human nature revealed in part I, it is no surprise to find that social science confirms that people across demographics and cultures broadly share certain intuitions of justice and that a criminal law that adopts rules and practices that conflict with those shared intuitions is one that loses moral credibility with the community it governs. The research also shows that that loss is disastrous for effective crime control, because it undermines the law's potentially powerful influence in gaining deference as a moral authority and in shaping and internalizing norms. Without credibility, the system prompts resistance and subversion rather than support and acquiescence.

Is modern criminal law in danger of losing moral credibility with the community it governs? Clearly yes. It routinely adopts criminal law rules and practices that regularly produce results so unjust as to seriously conflict with the community's intuitions of justice. While these doctrines are commonly promoted by politicians as good for fighting crime, they in fact hurt effective crime control by undermining the system's moral credibility and thereby its social influence with the community.

At the same time, the criminal justice system regularly adopts criminal law rules and practices that predictably produce failures of justice that similarly seriously conflict with community views. These are commonly promoted as needed to protect personal rights, but they do so without an appreciation for how the system's resulting loss of credibility damages crime control. Doing justice may at times have to be compromised to protect rights, but it ought to be done only when and to the extent necessary—a dramatic change from current practice.

### **8. Credibility: America's Prohibition**

Illustrative stories include 1920s American Prohibition; and lawless northern Pakistan in 1990.

### **9. Excess: Committing Felony Murder While Asleep in Bed and Life in Prison for an Air-Conditioning Fraud**

Illustrative stories include a Florida case in which twenty-year-old Ryan Holle is given life without parole for lending his car to a roommate who uses it to help commit a robbery while Ryan is home asleep; and a Texas case in which William Rummel gets a life sentence for a minor \$130 fraud.

### **10. Failure: Getting Away with Murder Beyond a Reasonable Doubt**

Illustrative stories include an Illinois case in which Larry Eyler, a serial torturer-murderer of young gay men, is released to kill despite overwhelming evidence of his guilt because a police officer held him for questioning for too long; and a Kentucky case in which Melvin Ignatow's hidden photos of himself committing torture-murder are discovered, but he can't be prosecuted even though he had earlier perjured his way to an acquittal.



A loss of moral credibility is disastrous not only because it undermines effective crime control but also because of where that loss can lead. Once enforcement falls below a critical point that allows criminal elements to corrupt or threaten the process itself, there is no easy way back to stability and governmental control without infringing on liberties in the most serious way, dramatically more than would have been required to avoid the problem in the first place.

The criminal justice system need not be stuck with its current sketchy reputation. It can change the way it does business by committing itself *above all else* to doing justice and avoiding injustice.

As part I makes clear, that change is not just another in a long line of modern innovations, but rather a return to what human groups did before the advent of government and law. It is not a modern reform at all but rather returning us closer to the way humans dealt with one another before modern reforms disconnected us from one another and from our human nature.

Five specific proposals are offered, which logically follow from the analyses in part II.

### **11. Collapse: Escobar's Colombia**

Illustrative stories include drug-trafficker kingpin Pablo Escobar's taking control of the Colombian government in the 1980s, and what was required to regain governmental control.

### **12. Taking Justice Seriously: Five Proposals**

1. Purge the criminal justice system of rules and practices that give offenders more punishment than they deserve.
2. Purge the criminal justice system of rules and practices that subvert having justice done.
3. See the big picture: Set punishment according to an offender's blameworthiness as compared to other offenses and offenders.
4. Create or designate a public body—a justice commission—to both promote justice and fight injustice.
5. Regularly ask whether the present community's judgment might be wrong.

### **Epilogue: What Are They Doing Now?**

Picks up each of the book's stories where it left off and tells what has happened to the people since.