

2010

## Realism, Punishment, and Reform

Owen D. Jones

Paul H. Robinson  
*University of Pennsylvania Law School*

Robert Kurzban  
*University of Pennsylvania*

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/faculty-publications>



Part of the [Criminal Law Commons](#), and the [Criminology and Criminal Justice Commons](#)

---

### Recommended Citation

Owen D. Jones, Paul H. Robinson, and Robert Kurzban, *Realism, Punishment, and Reform*, 77 *University of Chicago Law Review*. 1611 (2010)

Available at: <https://scholarship.law.vanderbilt.edu/faculty-publications/1056>

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law School Faculty Publications by an authorized administrator of Scholarship@Vanderbilt Law. For more information, please contact [mark.j.williams@vanderbilt.edu](mailto:mark.j.williams@vanderbilt.edu).



DATE DOWNLOADED: Mon Oct 31 16:06:20 2022

SOURCE: Content Downloaded from [HeinOnline](#)

Citations:

Bluebook 21st ed.

Paul H. Robinson, Owen D. Jones & Robert Kurzban, Realism, Punishment, and Reform, 77 U. CHI. L. REV. 1611 (2010).

ALWD 7th ed.

Paul H. Robinson, Owen D. Jones & Robert Kurzban, Realism, Punishment, and Reform, 77 U. Chi. L. Rev. 1611 (2010).

APA 7th ed.

Robinson, P. H., Jones, O. D., & Kurzban, R. (2010). Realism, Punishment, and Reform. University of Chicago Law Review, 77(4), 1611-1632.

Chicago 17th ed.

Paul H. Robinson; Owen D. Jones; Robert Kurzban, "Realism, Punishment, and Reform," University of Chicago Law Review 77, no. 4 (Fall 2010): 1611-1632

McGill Guide 9th ed.

Paul H. Robinson, Owen D. Jones & Robert Kurzban, "Realism, Punishment, and Reform" (2010) 77:4 U Chi L Rev 1611.

AGLC 4th ed.

Paul H. Robinson, Owen D. Jones and Robert Kurzban, 'Realism, Punishment, and Reform' (2010) 77 University of Chicago Law Review 1611.

MLA 8th ed.

Robinson, Paul H., et al. "Realism, Punishment, and Reform." University of Chicago Law Review, vol. 77, no. 4, Fall 2010, p. 1611-1632. HeinOnline.

OSCOLA 4th ed.

Paul H. Robinson, Owen D. Jones & Robert Kurzban, 'Realism, Punishment, and Reform' (2010) 77 U Chi L Rev 1611

Provided by:

Vanderbilt University Law School

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at

<https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your license, please use:

[Copyright Information](#)

## RESPONSES

### Realism, Punishment, and Reform

Paul H. Robinson,<sup>†</sup> Owen D. Jones,<sup>††</sup> & Robert Kurzban<sup>‡</sup>

#### INTRODUCTION

The discussion here concerns the ideas set out in three articles, each with a different set of coauthors: *Concordance and Conflict in Intuitions of Justice*<sup>1</sup> (“C&C”), *The Origins of Shared Intuitions of Justice*<sup>2</sup> (“Origins”), and *Intuitions of Justice: Implications for Criminal Law and Justice Policy*<sup>3</sup> (“Implications”). Those pieces were an attempt to change the way legal scholars think about intuitions of justice. Professors Donald Braman, Dan Kahan, and David Hoffman (“BKH”) offer some criticisms. Some we do not disagree with. Others we do.<sup>4</sup>

We concede at the start that our past discussions must have been insufficiently careful in their language, as evidenced by the fact that BKH have misread us as they have. We are in BKH’s debt for having revealed the problem. (We also thank them for their true generosity in supporting us in our discussions with the *Law Review* about writing this Response, and thereby giving us the opportunity to make our positions clear.)

The most important exercise here may be to segregate our false disagreements with BKH from our real disagreements. We suspect that we do have some important disagreements. Part I quickly sketches out our line of analysis in the original articles. Part II examines claims that

---

<sup>†</sup> Colin S. Diver Professor of Law, University of Pennsylvania Law School.

<sup>††</sup> New York Alumni Chancellor’s Chair in Law and Professor of Biological Sciences, Vanderbilt University; Director, MacArthur Foundation Law and Neuroscience Project.

<sup>‡</sup> Associate Professor of Psychology, University of Pennsylvania.

We thank Stephanie Wehrenberg for her excellent research assistance.

<sup>1</sup> Paul H. Robinson and Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 Minn L Rev 1829 (2007).

<sup>2</sup> Paul H. Robinson, Robert Kurzban, and Owen D. Jones, *The Origins of Shared Intuitions of Justice*, 60 Vand L Rev 1633 (2007).

<sup>3</sup> Paul H. Robinson and John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S Cal L Rev 1 (2007).

<sup>4</sup> Two of us (Jones and Kurzban) respond separately to BKH’s analysis of the issues in *Origins*. See Owen D. Jones and Robert Kurzban, *Intuitions of Punishment*, 77 U Chi L Rev 1633 (2010).

BKH attribute to us that are not our views. Part III considers possible points of real disagreement with BKH.

### I. A BRIEF OVERVIEW

The common wisdom, at least before the publication of *C&C*, was that there was nothing on which people agreed or ever could agree regarding what was just punishment in specific cases.<sup>5</sup> This would seem to follow from the fact that such judgments seem so subjective, so complex, and so value dependent.

Yet *C&C* shows the common wisdom to be false. There are some points of agreement—indeed agreement that exists across demographics and at a high level. It is not agreement on the absolute amount of punishment that a particular offender deserves, but rather agreement on the relative blameworthiness among different cases. And it is not agreement on cases involving all offenses and all factors, but only a select few—what we label the “core” of wrongdoing because they represent the point of high agreement.<sup>6</sup> As the second half of *C&C*—the disagreement study—shows, as one moves out from this core of agreement by adding other factors or offenses, the extent of agreement among people breaks down.<sup>7</sup> The agreement study in *C&C* finds high agreement only in offenses of theft and violence; the disagreement study shows disagreement in a wide variety of offenses like drunk driving, drug offenses, date rape, prostitution, alcohol use, abortion, and bestiality.<sup>8</sup> The larger point here is that there is not a sea of disagreement on everything, as was thought, but rather a continuum from high agreement to high disagreement, from a small core of issues on which there is almost near unanimity to increasing disagreement as one moves out to the periphery.

The single most interesting, indeed perplexing, finding of the *C&C* research was that a core of agreement exists at all. How could this be so? How could people’s views about relative blameworthiness—which seem so highly subjective and complex—*ever* produce such high agreement *on any issues in any context*? This was indeed a puzzling development, which we sought to explore in *Origins*.

How do humans come to their judgments about relative blameworthiness? Are those judgments in some part the product of a specialized learning system, or just the product of the standard general

---

<sup>5</sup> See, for example, authorities cited in Robinson and Kurzban, 91 Minn L. Rev at 1846–48 (cited in note 1).

<sup>6</sup> Id at 1891 (explaining that “physical injury, taking without consent, and deception in exchanges” fall within the core of wrongdoing).

<sup>7</sup> Id at 1883–87.

<sup>8</sup> Id at 1890–92 & n 230.

learning mechanism? We conclude in *Origins* that, while there are reasons to prefer the former explanation, there is insufficient evidence yet to settle the issue.<sup>9</sup>

For our larger project regarding the relevance of intuitions of justice to law, however, it is irrelevant which of these two mechanisms produces the shared intuitions of justice. As we note at the end of *Origins* and reemphasize in *Implications*, both of the alternative mechanisms lead to the same conclusion on the point that is relevant to criminal law: whatever the source of people's shared intuitions of justice, those shared intuitions are something to which system designers and social reformers would be wise to give special attention.<sup>10</sup> Reformers ought not assume that they can simply educate people out of a core intuition of justice the way they would persuade people to change their views on purely reasoned matters. This is true if core judgments about justice are the result of a specialized mechanism, but it is also true even if they are formed through general social learning. The key fact is not the source of the agreement but rather the high agreement across demographics, for it suggests that whatever the source of the judgments of justice, they are deeply embedded and not easily modified. (The reader may see why we think it somewhat awkward to label us "Punishment Naturalists,"<sup>11</sup> when the source of relative blameworthiness judgments is irrelevant to the main argument.)

Imagine the variety of factors that can influence human judgments about relative blameworthiness. Different demographics— income, education, race, political orientation, marital status, religion, gender—can create profound differences in life experience. The fact that any core of high agreement exists itself suggests that such intuitions are held in such a way as to be insulated from the standard influences of everyday life. If that is true, how are social reformers to significantly change those views? Intuitions at the core are perceived by people not as reasoned conclusions but as facts—and what seem to them to be quite obvious facts. People generally have little access to

---

<sup>9</sup> Robinson, Kurzban, and Jones, 60 Vand L Rev at 1682–87 (cited in note 2) (noting that several factors, such as the similarity of intuitions across cultures and the way in which children appear to develop moral intuitions, make it appear more likely that the judgments are part of a specialized learning system).

<sup>10</sup> See id at 1687–88 (remarking that it may be "unrealistic to expect the population to 'rise above' its desire to punish wrongdoers"); Robinson and Darley, 81 S Cal L Rev at 38 (cited in note 3) (arguing that our shared intuitions of justice are not easily changed and can influence the community's judgments of the law's credibility).

<sup>11</sup> See Donald Braman, Dan M. Kahan, and David A. Hoffman, *Some Realism about Punishment Naturalism*, 77 U Chi L Rev 1531, 1532–33 (2010) (labeling as "Punishment Naturalists" those who believe that "highly nuanced intuitions about most forms of crime and punishment are broadly shared because they are innate").

why they feel the way they do about these matters.<sup>12</sup> While it is certainly possible for rational argument to override even a deeply felt core intuition of justice, we suspect that liberal democracies are not likely to permit the kind of coercive intrusion into the lives of citizens that may be required to change these shared core intuitions—intuitions that have already shown themselves to be immune from even the powerful influence of demographic differences.<sup>13</sup>

As we explain in *Implications*, the reduced malleability of the high-agreement issues at the core has implications for social reformers.<sup>14</sup> Reformers should understand that some views will be easier to change than others and should be smart in the battles they choose to fight and how they fight them. For example, they ought to think carefully before they invest their limited time and energies in a program to persuade the community not to want to punish serious wrongdoing, as some reformers would do,<sup>15</sup> or to persuade the community that serious resulting harm, such as causing death, ought to be insignificant in assessing punishment, as others would do.<sup>16</sup> *Implications* also gives reformers insights on how best to change people's judgments about justice.<sup>17</sup> The greater the level of existing disagreement, the greater the likelihood that people's views on relative blameworthiness can be successfully modified. *Implications* contains a section for reformers, showing how they can use the high agreement on the core issues to help shift people's views on issues out from the core.<sup>18</sup> (In other words, we are not "Punishment Naturalists" but rather "Reform Realists.")

---

<sup>12</sup> Robinson and Darley, 81 S Cal L Rev at 4–8 (cited in note 3).

<sup>13</sup> See Robinson and Kurzban, 91 Minn L Rev at 1855–61 (cited in note 1).

<sup>14</sup> Robinson and Darley, 81 S Cal L Rev at 58–59 (cited in note 3).

<sup>15</sup> See authorities collected in *id* at 11–12 & n 34.

<sup>16</sup> See, for example, Larry Alexander, Kimberly Kessler Ferzan, and Stephen Morse, *Crime and Culpability* 172–96 (Cambridge 2009) (arguing that culpability, not the results of an action, should be considered in determining blameworthiness and appropriate punishment); Stephen J. Schulhofer, *Harm and Punishment*, 122 U Pa L Rev 1497, 1498–1503 (1974) (suggesting that the emphasis on harm in the criminal system can “be understood as a vestige of the criminal law’s early role as an instrument of official vengeance” and advocating “a full-scale rethinking of this aspect of the criminal law”). Indeed, the Model Penal Code drafters would take this approach: they seek to make resulting harm insignificant by grading attempts the same as the completed offense except in cases of murder. See MPC § 5.05(1) (ALI 1962) (stating that, with some exceptions, “attempt, solicitation, and conspiracy are crimes of the same grade and degree as the most serious offense that is attempted or solicited or is an object of the conspiracy”). But most states, even those following the Model Penal Code, reject this approach and grade completed offenses higher than attempt. See authorities collected in Paul H. Robinson, *The Role of Harm and Evil in Criminal Law: A Study in Legislative Deception*, 5 J Contemp Legal Issues 299, 305 n 18 (1994) (listing thirty-seven codes that authorized lower sentences for attempted crimes).

<sup>17</sup> See Robinson and Darley, 81 S Cal L Rev at 51–65 (cited in note 3).

<sup>18</sup> See *id* at 60 (suggesting that some attempts to change intuitions about wrongdoing—such as antismoking campaigns and Mothers Against Drunk Driving—have been successful

One may ask whether there is any reason why one should care about people's judgments of justice, or about changing them. Certainly the history of modern crime control, with its focus on general deterrence and incapacitation, shows considerable indifference to whether the distribution of punishment provided by those programs conflicts with people's shared intuitions of justice.<sup>19</sup> We argue in *Implications*, and studies have since empirically supported us,<sup>20</sup> that it may be very costly for the criminal law to adopt principles for assessing criminal liability and punishment that conflict with the shared intuitions of justice of the community it governs. Gaining a reputation for "getting it wrong"—for regularly and intentionally relying upon rules that do injustice—can promote subversion and resistance to the system, undermine the effective (yet cheap) normative influence of stigmatization, reduce people's willingness to defer to the law in cases of normative ambiguity, and subvert the criminal law's ability to shape community norms and to induce people to internalize the norms expressed in the criminal law.<sup>21</sup>

## II. WHAT IS INCLUDED IN THE "CORE"?

BKH represent us as claiming that:

- (1) the vast majority of wrongful acts are part of the core of agreement,<sup>22</sup>

---

because they "demonstrat[e] that the conduct at issue really does have the condemnable character or effect that people's intuitions abhor").

<sup>19</sup> See Paul H. Robinson, Geoffrey P. Goodwin, and Michael Reisig, *The Disutility of Injustice*, 85 NYU L Rev \*27 (forthcoming 2010), online at <http://ssrn.com/abstract=1470905> (visited Apr 21, 2010); Paul H. Robinson, *Distributive Principles of Criminal Law* chs 4, 6 (Oxford 2008). See also Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U Chi L Rev 1275, 1355 (2004).

<sup>20</sup> See Robinson, Goodwin, and Reisig, 85 NYU L Rev at \*41–61 (cited in note 19) (explaining that "doing injustice and failing to do justice can undermine the criminal justice system's moral credibility" and listing other studies that have reached similar results).

<sup>21</sup> See Robinson and Darley, 81 S Cal L Rev at 18–31 (cited in note 3) (noting that "the criminal justice system's power to stigmatize depends on the legal codes having moral credibility in the community," and that laws have less moral credibility when they do not match the moral intuitions of individuals).

<sup>22</sup> BKH represent us as claiming that people have broadly shared intuitions about "most forms of crime and punishment," Braman, Kahan, and Hoffman, 77 U Chi L Rev at 1532–33 (cited in note 11), and "the vast majority of wrongful acts." *Id.* at 1600. As support for their characterization of our view, BKH cite Robinson and Kurzban, 91 Minn L Rev at 1867 (cited in note 1)—the methodology discussion of the study, not the analysis or implications section. See Braman, Kahan, and Hoffman, 77 U Chi L Rev at 1543–44 (cited in note 11). That passage simply points out that we picked common offenses for the study. The passage makes no claim that there is high agreement regarding all offenses, as BKH represent. It also makes no hint that people agree on *all aspects or instances* of these offenses, as BKH also represent.

- (2) people agree as to all aspects of all offenses that are part of the core,<sup>23</sup> and
- (3) people also agree as to what conduct should be criminal,<sup>24</sup> and what conduct is justified.<sup>25</sup>

Unfortunately, or fortunately, these are not claims that we make. In fact, we do not know any respectable scholar who makes such claims, but if one can be found we would be happy to join BKH in a battle against these claims and to join BKH in the predictable joint victory.

#### A. Regarding (1) and (2)

What is the “core”? BKH suggest that its contours are quite vague and difficult to identify.<sup>26</sup> But what constitutes the “core” is not a matter of speculation or theory, or even of interpretation. It is a matter of empirics. The “core” is, *by definition*, that on which there is high agreement across demographics, like that demonstrated in the C&C agreement study.<sup>27</sup>

What cases are included in the core? Those cases on which there is high agreement across demographics. What kinds of cases are those? The C&C agreement study showed that one could find this level of agreement in cases involving offenses of violence and theft.<sup>28</sup>

<sup>23</sup> BKH explain, as if it were in contradiction of our view, that there are “significant controversies *within* the three categories of core offenses” and “there is substantial disagreement about what constitutes wrongdoing” as related to the core offenses. Braman, Kahan, and Hoffman, 77 U Chi L Rev at 1566 (cited in note 11).

<sup>24</sup> BKH say, for example: “Another reason to be skeptical of the suggestion that we share intuitions about most classes of wrongful acts is that the classes of acts listed also *exclude* acts that a substantial number of Americans believe *should* be crimes, but which are not.” Id at 1554. “[N]aturalists hold that while individuals may disagree about how much to punish bad acts, they agree on what *constitutes* a bad act. As such, on the whole, the population should agree that, in each case, the defendant is either guilty or innocent.” Id at 1590.

<sup>25</sup> For example, BKH begin their article with a justification case on which they note there is disagreement, id at 1532 (describing a moral dilemma over whether it is appropriate to steal a bus ticket from a wealthy passenger to avoid missing a best friend’s wedding), as if this were in contradiction to our view. For our discussion of their hypothetical, see text accompanying notes 41–45. BKH also repeatedly discuss the justification of self-defense. See Braman, Kahan, and Hoffman, 77 U Chi L Rev at 1578–88 (cited in note 11).

<sup>26</sup> BKH say, for example: “We doubt that naturalists will discover some independent way to distinguish the core of harms from the periphery.” Braman, Kahan, and Hoffman, 77 U Chi L Rev at 1566 (cited in note 11), and “One reason to be unsatisfied with the core–periphery distinction is that it fails to tell us what, exactly, distinguishes the important core from the unimportant periphery of crimes.” Id at 1557.

<sup>27</sup> See Robinson and Kurzban, 91 Minn L Rev at 1874–80 (cited in note 1). In *Origins*, we certainly give reasons why we think there is high agreement on the cases at the core, but these theories are not the *definition* of the core and rather are offered as possible *explanations* of the core. See generally Robinson, Kurzban, and Jones, 60 Vand L Rev 1633 (cited in note 2).

<sup>28</sup> Robinson and Kurzban, 91 Minn L Rev at 1867 (cited in note 1) (finding a high level of agreement among participants’ intuitions about short scenarios involving theft and violence).



Could there be other offenses where one might find cases of such high agreement? Possibly. That will require further research. As we explain in the methodology section to the *C&C* agreement study, we focused on the most common offenses.<sup>29</sup> If there are other offenses, they are not likely to be common offenses.

What aspects of these offenses are included in the core? BKH seem to assume that we claim that all aspects, all cases, involving any of these offenses are part of the core,<sup>30</sup> but this could hardly be the situation. Our research used factors upon which we judged there was high agreement.<sup>31</sup> To the extent that one substitutes a factor on which there is disagreement, obviously the level of agreement on the relative seriousness of the case would have to decline. If, instead of stealing a clock radio from the car, as appears in one scenario, the offender steals the ashes of the car-owner's father, obviously the prior high agreement on the relative blameworthiness of the offender will diminish in proportion to the extent of the disagreement on the relative value of a father's ashes, which might vary widely across cultures and even across individuals within a culture.

What cases beyond those in the *C&C* agreement study are included in the "core"? We would feel quite comfortable extrapolating well beyond the specific scenarios used in the study. Most objects have an agreed-upon value, like the clock radio; most do not have the disputed value of a father's ashes. But until the research is done, of course, we cannot know for sure what level of agreement attaches to what facts.<sup>32</sup>

The point of *C&C*'s Appendix B is to show the reader just how we were able to construct the twenty-four scenarios on which our subjects had such high agreement: by relying upon, and only upon, principles that we knew were deeply embedded intuitions of near unanimity. Specifically, there exist a number of general principles of liability and punishment that are widely accepted. For example, damage to person is more blameworthy than damage to property; purposely

---

<sup>29</sup> *Id.* at 1867 n 172.

<sup>30</sup> BKH say:

If individuals have an intuitive sense of the relative wrongfulness of acts, then we would expect people with [different] cultural profiles . . . to agree—perhaps not on precisely how much punishment a person deserves, but at the very least on the relative culpability of [ ] two defendants. For naturalism, dissensus in the core of wrongdoing remains a puzzle.

Braman, Kahan, and Hoffman, 77 *U Chi L Rev* at 1592 (cited in note 11).

<sup>31</sup> See Robinson and Kurzban, 91 *Minn L Rev* at 1871, 1878–80 (cited in note 1).

<sup>32</sup> We are not entirely ignorant about such matters. There is existing research that gives some hints on a wide range of criminal law issues. See, for example, Paul H. Robinson and John M. Darley, *Justice, Liability and Blame* 13–51 (Westview 1995) (exploring factors that contribute to blameworthiness).

causing a harm is more blameworthy than doing so recklessly, which in turn is more blameworthy than doing so negligently; the greater the extent of a personal injury, the greater the blameworthiness; the greater the extent of an expectation of privacy, the greater the blameworthiness of an intrusion; and so on. Our suspicion was that the high agreement on these general principles had practical consequences for the level of agreement in individual cases as well, suggesting that one *could* create high agreement in judging the relative blameworthiness of individual cases, in contradiction of the common wisdom. The *C&C* agreement study confirmed that the high agreement on the general principles does translate into high agreement on individual cases.<sup>33</sup>

As you can imagine, we found the BKH article quite difficult to understand, given its false assumptions about our claims. For example, it has an entire section showing disagreements in cases of deception in exchanges.<sup>34</sup> Whether somebody is deceived in an exchange obviously is a function of one's expectations about the terms of the exchange, and those expectations could be highly culturally dependent or, even within a culture, highly dependent on context. The case we used in the study was one of a store clerk shortchanging a customer. We used it precisely because it seemed to us that such shortchanging offered an example of a violation of a nearly universal expectation of this most common form of exchange, a purchase. People who agree to make an exchange typically believe that they have a shared understanding of the terms of the exchange. Thus, within any culture, there are likely to be shared expectations when an exchange takes place but, obviously, not always.

Even more puzzling is that BKH have a section showing disagreements about sexual offenses,<sup>35</sup> as if this were in contradiction of our claim. Recall that the *C&C* disagreement study itself demonstrates that there is *high* disagreement with respect to many kinds of sexual offenses.<sup>36</sup> It is hard to know why BKH would want to lecture us on disagreement regarding sexual offenses when our study may be the best available empirical evidence in support of that disagreement.

---

<sup>33</sup> Robinson and Kurzban, 91 *Minn L Rev* at 1867–80 (cited in note 1) (describing two studies that predict and demonstrate agreement among subjects who ascribe blameworthiness to specific scenarios).

<sup>34</sup> Braman, Kahan, and Hoffman, 77 *U Chi L Rev* at 1571–73 (cited in note 11).

<sup>35</sup> *Id.* at 1573–77 (noting that law concerning rape “has been a site of intense legal and political conflict for over thirty years”). BKH also discuss disagreement over the criminality of the sexual offenses of prostitution, bestiality, and unwanted sex. *Id.* at 1555–56.

<sup>36</sup> Robinson and Kurzban, 91 *Minn L Rev* at 1885 table 6, 1886 table 7 (cited in note 1).

Generally, BKH have our claim reversed. The point of the *C&C* agreement study is not to show that people agree on everything, or even a lot, but rather to expose as false the common wisdom of the day that, at least in terms of individual cases, people agree on nothing.<sup>37</sup> It is difficult for us to see the value in BKH presenting an exaggerated view of our claims, then criticizing them for being exaggerated.

The important point here is that, simply because one can find or create disagreement by introducing facts on matters in dispute, it does not take away from the fact that there does exist a core of high agreement. And, as discussed further in Part II below, that high agreement has implications for the malleability of people's intuitions of justice.

### B. Regarding (3)

We see the same pattern of misunderstanding when BKH represent us as claiming that there exists high agreement as to what is criminal. A primary theme of the *C&C* disagreement study is to show just the opposite—it shows not just disagreements about relative blameworthiness, but also about whether the conduct should even be criminal. In two of the scenarios, more than 20 percent of the subjects assign no liability. In another, more than 40 percent find no liability.<sup>38</sup> (This is so even though all three scenarios are criminal under current law.)

Indeed, even in our *C&C* agreement study, we specifically demonstrate that people can agree on the relative blameworthiness of different offense cases yet disagree as to where on the continuum of blameworthiness the line should be drawn marking off the minimum point for criminal liability and punishment.<sup>39</sup> We designed one of our scenarios as an intentionally borderline case (taking food away from an “all you can eat” buffet in violation of the buffet rules). It was no surprise that people disagreed about whether the case should trigger criminal liability.<sup>40</sup> The important point to us was to show that, despite this, there was still near consensus on where the case ranked on the continuum of relative blameworthiness. The larger point here is that it is judgments about relative blameworthiness on which people can have high agreement, not necessarily judgments about exactly

---

<sup>37</sup> *Id.* at 1831–32.

<sup>38</sup> See *id.* at 1885 table 6 (showing that 23.4 percent of participants would assign no liability for prostitution, 21.9 percent of participants would assign no liability for marijuana use, and 42.2 percent of participants would assign no liability for bestiality).

<sup>39</sup> *Id.* at 1876, 1900–01.

<sup>40</sup> Robinson and Kurzban, 91 *Minn L Rev* at 1869, 1900 (cited in note 1).

where the line is to be drawn for minimum blameworthiness for criminal liability.

BKH similarly misunderstand our view as claiming that people agree not only on all aspects of what is criminal but also on what is justified.<sup>41</sup> That is, they go beyond what criminal law theorists call “prohibitory norms,” or notions about what should be prohibited as wrongful, to include “justificatory norms,” or notions about what admittedly wrongful conduct might be tolerated under special justifying circumstances. (Indeed, BKH give no indication that they are aware of this distinction or that they have crossed from one to the other.) They begin their article with a hypothetical about a person deciding whether to steal a bus ticket in order to make an important appearance at a wedding. They point out that Americans might think it wrong to take the ticket in this situation but that Indians might not, suggesting that we would claim that everyone would agree about this case.<sup>42</sup>

Contrary to the way in which they present it, the hypothetical is not a simple case about whether people disagree on whether theft is wrongful. Presumably the person in the hypothetical believes that stealing is wrong. The issue presented is a different one: whether the conduct (theft of the ticket), *which all agree is wrongful*, may nonetheless be justified in this instance because of a special competing interest of sufficient importance (the need to get to the wedding) that might justify the otherwise wrongful conduct. The case is not a test of whether people think theft is wrongful, but rather a test of the comparative value of the competing justification interests.

If one compares interests on which people agree (or that are so disparate that people’s minor disagreements are irrelevant), then one will get agreement. On the other hand, if one compares interests on which people disagree—like the value of a father’s ashes or the importance of getting to a wedding—then people will disagree on the comparison. In this instance, the value one places on the importance of one’s wedding responsibilities is culturally dependent. BKH suggest that Indians give it greater value than Americans, and we do not know enough about it to disagree.

Consider, however, what else the hypothetical might illustrate. We suspect that there is high agreement on the general principle that special justifying circumstances can outweigh the prohibition of conduct that is itself wrongful. And, as we have shown in the *C&C* agreement study, that high agreement on a general principle can translate into high

---

<sup>41</sup> See note 25.

<sup>42</sup> Braman, Kahan, and Hoffman, 77 U Chi L Rev at 1531, 1533–34 (cited in note 11) (suggesting that American participants tended to focus on “individualized justice and personal property,” whereas Indian participants focused on “social and relational responsibilities of friends”).

agreement in individual cases, if those cases involve only matters on which there is agreement.<sup>43</sup> Introducing into a case a factor on which there is disagreement obviously reduces the previous agreement.

BKH might ask themselves why it is that both Americans and Indians, and every other group on the planet that recognizes property rights, agree that taking another person's property of value is wrongful *and thus would require some justification*. No doubt there is considerable cultural diversity about what counts as "another's property," as well as considerable diversity on the value that different cultures place on different kinds of property.<sup>44</sup> But how is it that diverse cultures all seem to agree with the basic rule that taking another person's property of value without consent is wrongdoing? Indeed, there is probably further agreement: the greater the value, the greater the wrongdoing.<sup>45</sup> Do the "Punishment Realists" believe that they can find societies, or could create societies, in which people would believe that there was nothing wrong with taking another's property without consent, or that, if people see such taking as wrongful, they could be made to believe that the greater the value of the property taken, the lesser the wrongdoing? More on this below.

### III. POSSIBLE POINTS OF DISAGREEMENT WITH BKH

As one might imagine, we have found it difficult to engage with much of the BKH article, based as it is on a representation of our views that we often do not recognize. The experience has left us with little confidence that we understand BKH's position, and thus we are hesitant to make claims about their views. On the points below, we suspect there may be real disagreement, but we think it prudent simply to identify possible points of disagreement and leave it to BKH to confirm or deny that these are their views.

#### A. There Is No Core of Agreement

It might be that BKH's view is that there are no aspects of any offenses on which there is high agreement regarding an offender's relative blameworthiness. This, of course, was the common wisdom prior to the C&C study.<sup>46</sup> It is hard to see how this could continue to be a

---

<sup>43</sup> Robinson and Kurzban, 91 Minn L Rev at 1880–81 (cited in note 1).

<sup>44</sup> See, for example, Keith Aoki, *Considering Multiple and Overlapping Sovereignities: Liberalism, Libertarianism, National Sovereignty, "Global" Intellectual Property, and the Internet*, 5 Ind J Global Legal Stud 443, 462–63 (1998) (discussing the way that countries' differing views about property and ownership can lead to significant disputes in the intellectual property context).

<sup>45</sup> Robinson and Darley, *Justice, Liability and Blame* at 84–94 (cited in note 32).

<sup>46</sup> Robinson and Kurzban, 91 Minn L Rev at 1847 (cited in note 1) (noting that many writers "have argued that people simply disagree in their notions of justice" in a way that prevents

plausible claim, yet BKH seem to act as if this were the case by continuing to deny that there is a difference between core and noncore cases.<sup>47</sup>

### B. There Is a Core of Agreement but It Is Meaningless

It may be more likely that the BKH position is slightly different. They may concede that we have shown a core of high agreement but may believe that this is in some sense a false appearance of agreement, or at least an appearance of agreement that has no real significance.<sup>48</sup> If that is their view, then presumably BKH are claiming that the kinds of cases in our agreement study, which we identify as part of the “core” of high agreement, are no different in terms of their potential for agreement or disagreement from the kinds of noncore cases in our disagreement study.<sup>49</sup> That is, there is nothing meaningful about the apparent core of agreement that we show, they may be arguing, because people’s agreement or disagreement about relative blameworthiness is something that can be created and dissolved and re-created and redissolved at will. No set of issues relating to blameworthiness is any different from any other set of issues in this respect; all are subject to the same potential for agreement or disagreement. The results of our *C&C* agreement study (and presumably our disagreement study as well), they may argue, show just one of an infinite variety of patterns of agreement and disagreement that a researcher or reformer could create or dissolve at will by manipulating the facts or by giving reasons.

We think that BKH are simply wrong on the empirics. We offer them this challenge: Using the noncore cases in the *C&C* disagreement study, create the same level of agreement across demographics that we did using core cases in the *C&C* agreement study. If core and noncore cases have no meaningful difference, as BKH seem to believe, then they should be able to create the same level of high agreement using the noncore cases that we claim is unique to the core cases. We

---

agreement on blameworthiness). See also, for example, Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy*, 105 Colum L Rev 1233, 1263 (2005) (“How do we know how much censure, or ‘deserved punishment,’ a particular wrongdoer absolutely deserves? ... [A]s countless sentencing exercises have shown, people’s intuitions about individual cases vary widely.”).

<sup>47</sup> See Braman, Kahan, and Hoffman, 77 U Chi L Rev at 1566 (cited in note 11).

<sup>48</sup> BKH say, for example: “None of [the categories that constitute ‘the core of wrongdoing’] is composed of acts free from dissensus, and the nature of *the systematic dissensus that pervades each of these categories is at least as interesting and informative as any agreement that can be found.*” Id at 1568–69 (emphasis altered).

<sup>49</sup> For BKH’s view that no meaningful distinction exists between the core and the noncore cases, see note 26. BKH also argue that there is disagreement both among the core cases and among the noncore cases, so the distinction is not meaningful with regard to disagreement. Braman, Kahan, and Hoffman, 77 U Chi L Rev at 1566 (cited in note 11).

do not believe it can be done.<sup>50</sup> Contrary to BKH's claim, core and noncore cases are importantly different.

C. Even If There Is a Core of Agreement, It Has No Effect on the Malleability of People's Judgments about Justice

We think the core of high agreement has practical significance, because these intuitions will be harder to modify than judgments on other cases and issues. That the high agreement on the core cases can be reduced if one adds factors about which there is disagreement does not make people's intuitions concerning the core cases any more malleable. The issues at the core remain as difficult to modify whether they appear with or without factors on which there is disagreement.

BKH seem to think that all judgments about justice are malleable.<sup>51</sup> They seem to think that social reformers should see all judgments about justice as equally fair game for modification. Again, we believe that BKH are simply wrong on the empirics. As we note above, the existence of a high degree of agreement across demographics shows that the view is sufficiently deeply embedded as to be insulated from the powerful forces of social influence inherent in the wide variety of demographic factors at work in the world.<sup>52</sup> If these core intuitions are immune from the influence of these forces, why would one expect that they nevertheless would be susceptible to easy modification by reformers?

---

<sup>50</sup> Nor do we believe that BKH can construct a set of scenarios on which there is low disagreement as to their proper ranking, then modify the scenarios *by adding information* and thereby create high agreement. If BKH are correct that there is no such thing as a core of agreement, surrounded by factors and offenses of increasing disagreement out from that core, then BKH should be able to create, dissolve, and recreate agreement simply by their manipulation of the facts. We do not believe that it can be done. Once the high agreement of the core is destroyed by adding facts on which there is disagreement, there is no getting it back by adding more facts. The only way to get it back is to drop the disagreement-inspiring facts that were added. There is a core of agreement that is different from other blameworthiness issues and cases.

<sup>51</sup> BKH say, for example: "Punishment Realism is based on the premise that while individuals do hold deep and abiding intuitions regarding wrongdoing and responses to it, these intuitions depend on social constructs that are demonstrably plastic." Braman, Kahan, and Hoffman, 77 U Chi L Rev at 1533 (cited in note 11). "The diversity of positions political communities have adopted on such issues—over place and over time—makes us conscious of the plasticity of social norms." Id at 1535. "Where we see mutability in norms, and hence the inescapability of collective responsibility for their content, the naturalists apprehend their stability and warn of the futility and even perversity of using criminal law as an instrument of norm reform." Id at 1536. BKH want to "learn how our moral intuitions are shaped and develop means of fostering conceptions of justice that are both satisfying to us and compatible with our collective welfare." Id at 1532.

<sup>52</sup> See note 12 and accompanying text.

The most obvious data point here is the shared intuition that serious wrongdoing should be punished.<sup>53</sup> There is an active abolitionist movement, which we discuss and document in *Implications*.<sup>54</sup> But given the strength and near unanimity of the intuition that serious wrongdoing should be punished, it strikes us as unrealistic that this movement will ever gain much support, let alone be implemented by any society. If, as BKH claim, this intuition can be modified, and if, as the abolitionist arguments make clear, there are good reasons to think that punishing wrongdoing might not be the best course for a society, why have no societies (of which we are aware) ever rejected having a punishment system? Given the diversity of societies throughout the world and across time BKH owe us at least an explanation of why this particular intuition of justice has apparently never been overridden.

Indeed, one can read BKH as essentially conceding our point that there are some intuitions of justice so deeply embedded as to make it unrealistic to think that they can be changed. BKH suggest that reformers need not worry about widely shared intuitions about justice because they do not “address any *live* policy debate.”<sup>55</sup> Presumably, they mean that the current debate about the abolition of punishment, for example, is a “dead” debate—which is simply another way of saying that it is unrealistic to expect that the abolitionists could ever prevail. But if BKH think that all intuitions of justice are malleable, without regard to the degree of agreement on an intuition, why should the debate not be a “live” one? How can BKH see the abolitionist debate as not “live” without conceding that there are important and predictable differences in malleability that attach to core intuitions?

In fact, BKH also are wrong in claiming that intuitions of justice that are hard to change are at the heart of “live” debates. As we discuss in *Implications*, the abolitionist debate has taken on a more modern form in the guise of “restorative justice.”<sup>56</sup> There can be little doubt that the founder of that movement, John Braithwaite, has as his principal motivation an antipunishment agenda.<sup>57</sup> There are many different forms

---

<sup>53</sup> As we say above, where to draw the line of demarcation between criminal and noncriminal conduct can be a matter of dispute. See text accompanying note 39. For those cases that are seen as serious wrongdoing, however, there is little dispute that punishment should be imposed. See Robinson and Darley, 81 S Cal L Rev at 9 (cited in note 3).

<sup>54</sup> Robinson and Darley, 81 S Cal L Rev at 11–18 (cited in note 3).

<sup>55</sup> Braman, Kahan, and Hoffman, 77 U Chi L Rev at 1597 (cited in note 11) (emphasis added).

<sup>56</sup> See Robinson and Darley, 81 S Cal L Rev at 12–13 (cited in note 3) (explaining that restorative justice seeks to help the victims of a crime, the offenders, and the communities that were affected).

<sup>57</sup> See John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 UCLA L Rev 1727, 1746 (1999) (characterizing restorative justice “as a competitor to



of restorative processes, some more inclined to defeat deserved punishment than others. The debates over which processes to prefer are in large part debates over the extent to which just punishment can and should be frustrated. Consistent with our prediction, restorative processes are currently typically limited in their application to cases involving juveniles or minor offenses, precisely because broader application to more serious offenses would conflict with people's shared intuitions that serious wrongdoing should be punished. One of us has argued in print that there could be great value in using restorative processes in cases involving serious offenses and that reformers would be better advised to drop their antipunishment agenda in order to promote such broader use.<sup>58</sup>

To go beyond the broad intuition that serious wrongdoing should be punished, consider an example of a specific criminal liability rule. People overwhelmingly have a strong intuition that resulting harm matters—for example, that murder should be punished more than attempted murder and that manslaughter should be punished more than reckless endangerment, even if whether a death results is a matter of bad luck. The strength of this widely held intuition has been repeatedly documented across demographics and cultures.<sup>59</sup>

It is easy enough to see the rational argument against correlating punishment with the resulting harm, as every criminal law professor has used to regale his or her class. Why should an offender's liability and punishment vary because of a factor over which he has no control—the intended target happens to bend down to tie his shoe at the moment the shot is fired; the pedestrian who would have been killed by the reckless driver is running a bit late that day and gets to the crosswalk just after the reckless driver has passed.

No doubt some professors are able to persuade some members of their criminal law classes that rational analysis supports ignoring resulting death. But there is a difference between persuading a student of the irrationality of the rule and getting the students to feel that justice requires that resulting death be ignored. And even if one could persuade a student on the justice point—and some minority of the particularly rational students are indeed persuaded each year—it does not follow that this victory of intellectualization over intuition could be repeated for the general public, and certainly not at the rate that

---

punitive justice"); Paul H. Robinson, *The Virtues of Restorative Processes, the Vices of Restorative Justice*, 2003 Utah L Rev 375, 377–78, 380.

<sup>58</sup> See Robinson, 2003 Utah L Rev at 386–87 (cited in note 57).

<sup>59</sup> See, for example, Robinson and Darley, *Justice, Liability and Blame* at 14–28, 181–89 (cited in note 32); Robinson, 5 J Contemp Legal Issues at 306–07 (cited in note 16) (finding that 97.3 percent of a study's participants believed that an offender who murders his victim should receive a harsher punishment than an offender who attempts to murder his victim).

would change a shared societal view. Anyone who thinks this kind of reform of a core intuition is possible has not spent enough time talking with ordinary people.

If BKH were to begin a broad-based campaign to change people's intuitions about the significance of resulting death, it is likely that the vast majority of people would not take them seriously. Remember, people tend to see such intuitions as analogous to observable facts: there is no need for discussion; the fact is clear and obvious. If it is nearly impossible to persuade more than a minority of one's highly rational criminal law students on the justice point, it seems hard to imagine what it would take to create a consensus, or even strong support, among a broad community. It should give BKH some pause that, no matter how irrational it may seem to give significance to resulting death, we are aware of no societies on earth in which people support a conception of blameworthiness that ignores it.

We think BKH are wrong not only to dismiss the difference between core and noncore issues as relevant to malleability, but also to ignore the difference between intuitional and reasoned judgments. (We suspect that all aspects of the core are intuitional judgments, but matters out from the core also may be intuitional in part.) As we discuss in *Implications*, intuitions about justice have quite different qualities from reasoned judgments about justice.<sup>60</sup> The former are perceived as facts, held with great confidence, and give the holder little access to why she holds them. It would seem obvious that the distinction between intuitive and reasoned judgments about justice would be important to reformers. As to the latter, the reformer can change the judgment simply by presenting a better-reasoned argument. But changing the former—the intuitive judgment—requires something more. To start, the reformer must get the person to think that her strongly held intuition is worth reexamining. And, even if that hurdle is cleared, it does not follow that the intuition can be changed simply by presenting a reasoned argument. Lay people are not going to disavow the significance of resulting harm simply because a law professor can demonstrate its irrationality. When BKH ignore the difference between intuitions of justice, like those at the core of agreement, and reasoned judgments about justice, like those out from the core, they do social reformers a disservice. To be effective, a reform program aimed at changing intuitions would likely be quite different from one aimed at changing reasoned judgments.

---

<sup>60</sup> See Robinson and Darley, 81 S Cal L Rev at 4–8 (cited in note 3).

D. There Is No Value in Having Criminal Liability and Punishment Rules Track the Intuitions of Justice of Those Governed by the Rules

BKH appear to reject the notion that there is a cost to criminal law's reliance upon rules that conflict with people's judgments of justice,<sup>61</sup> our primary claim in *Implications*.<sup>62</sup> (Note that our argument does not depend upon the existence of global agreement on any justice judgments. It simply urges that a criminal-code reformer adopt rules that will maximize the code's moral credibility *within the community that it governs*. That is, it provides a workable guide for law reformers even if their community has different notions of justice than those of other communities with other criminal codes.<sup>63</sup>)

BKH certainly had good company in their view a few decades ago; modern crime-control doctrines have been quite indifferent about producing results that conflict with community views of justice.<sup>64</sup> But we think scholars' views are changing in light of common sense, anecdotal evidence, and empirical studies. On purely anecdotal grounds, most people would probably concede that a criminal justice system perceived as unjust will have little or no normative influence and will instead prompt resistance and subversion rather than acquiescence and assistance. The Soviet criminal justice system, for example, lacked moral credibility, and probably few were surprised that it seemed unable to gain much deference in the absence of direct coercive force.<sup>65</sup> This is simply common sense: why would people defer to a system as a moral authority when it has shown itself to be so regularly indifferent to injustice?

Empirical studies have more clearly shown the connection between a criminal justice system's moral credibility and people's willingness to assist and defer to it. Studies reported in *Implications*,<sup>66</sup> as

---

<sup>61</sup> We claim that the criminal law's intentional conflicts with community views can undermine the law's moral credibility, producing detrimental practical consequences, but BKH refer sarcastically to these consequences as "admittedly terrifying prospects." Braman, Kahan, and Hoffman, 77 U Chi L Rev at 1594 (cited in note 11).

<sup>62</sup> Robinson and Darley, 81 S Cal L Rev at 31 (cited in note 3) (arguing that the effectiveness of the criminal justice system depends, in part, on whether it is "perceived as 'doing justice'").

<sup>63</sup> Id at 25-38.

<sup>64</sup> Robinson, Goodwin, and Reisig, 85 NYU L Rev at \*7-30 (cited in note 19) (demonstrating that punishments for habitual offenses, drug use, juveniles, mentally ill individuals, and strict liability crimes are much harsher than societal intuitions about just punishments).

<sup>65</sup> See Dina Kaminskaya, Book Note, *Final Judgment: My Life as a Soviet Defense Attorney*, 96 Harv L Rev 1762, 1762 (1983) ("[T]he Soviet legal system achieves legitimacy not through the integrity of the judicial process, but through the underlying coercive force of the state.").

<sup>66</sup> Robinson and Darley, 81 S Cal L Rev at 26 (cited in note 3).

well as additional studies since,<sup>67</sup> have shown that by manipulating the former, one can produce a change in the latter. If BKH disagree with this view, what studies showing contrary results have they presented?

#### E. Our Reform Realism Means We Must Be Conservative Antireformers

BKH claim that our views make us conservative antireformers.<sup>68</sup> We find this claim particularly bizarre. BKH have it backward. Our program is designed to give reformers tools for more effective reform. BKH's "Punishment Realism," in contrast, offers damaging advice that can hurt reform efforts and provides excuses for keeping the status quo in the face of glaringly unjust punishment rules that reformers have long wanted to change.

The analysis set out in *Implications* suggests two recommendations to social reformers. First, it may often be unwise to invest limited reform resources on trying to change intuitions of justice that will be difficult to change, at least given the resources and authority available to reformers.<sup>69</sup> In other words, one should be smart and pick one's fights carefully.

Second, when developing a program to change people's intuitions of justice, it will often be a better investment to harness people's core intuitions of justice rather than fight them; such core intuitions are a power reformers can use for their own purposes.<sup>70</sup> If one wants people to take domestic violence more seriously, emphasize the violence part and deemphasize claims that it is somehow exempt because it is domestic. If one wants people to see downloading music as more condemnable, build up the analogy to physical taking that we know to be part of the core of agreement.

It is not just these two recommendations that can help reformers, but a more sophisticated understanding of the complexities of making

<sup>67</sup> See, for example, Robinson, Goodwin, and Reisig, 85 NYU L Rev at \*41–61 (cited in note 19). See also Elizabeth Mullen and Janice Nadler, *Moral Spillovers: The Effect of Moral Violations on Deviant Behavior*, 44 J Exp Soc Psych 1439, 1443 (2008).

<sup>68</sup> BKH say:

We do feel deep concern . . . over what we take to be the politically conservative resonances with which the Punishment Naturalist has been *needlessly* infused. It is, simply put, extremely difficult to take in the corpus of work that the Punishment Naturalists have amassed without sensing a deep commitment on their part to the status quo—to popular retributive sensibilities as they are (or are depicted with a high degree of uniformity to be), and to laws that conform (or are depicted as conforming) to them.

Braman, Kahan, and Hoffman, 77 U Chi L Rev at 1602 (cited in note 11).

<sup>69</sup> See Robinson and Darley, 81 S Cal L Rev at 57–59 (cited in note 3).

<sup>70</sup> *Id.* at 60–66 (noting the success of public education programs that analogize noncore conduct—such as drunk driving or smoking—to core conduct).

strategic choices, including an appreciation for the need of reformers to build and harness the moral credibility of the criminal law in order to use it to help them change norms, as we discuss in *Implications*.<sup>71</sup> We illustrate with an example on which one of us has written: rape reform.<sup>72</sup>

Imagine a rape reformer who is dissatisfied with the way in which young men are routinely indifferent to obtaining a clear expression of consent before having intercourse with a date. In promoting a revised formulation of a rape offense, should the reformer urge strict liability as to lack of consent, or prefer a culpability requirement of at least negligence? The danger of a negligence standard is obvious: the inquiry into what is “reasonable” may incorporate by reference, and thereby perpetuate, the existing norm of indifference to consent to which the reformer objects. Strict liability seems the more attractive option, because it ensures that defendants who continue to be indifferent will be held liable, thereby encouraging a change in conduct.

With the insights offered in *Implications*, however, a reformer might come to a quite different conclusion. Reliance upon a strict liability standard increases the chances that some defendants will be seen as blameless, transforming the offender into a “victim.” Further, and more importantly, the criminal justice system, and in particular the new rape offense, risks being seen as unjust, imposing potentially serious punishment on the most and least blameworthy offenders alike. That can be seriously problematic for the reformer, as *Implications* points out, because the reformer, more than anyone else, needs the criminal law to speak with moral authority if it is going to be able to effectively change people’s norms.<sup>73</sup> By undermining the law’s moral credibility, by having it rely upon a strict liability standard that potentially invites perceived injustices, the reformer risks undermining the very quality of criminal law that the reformer most needs. For reformers, criminal law’s greatest effect is not in punishing the particular offender at hand but rather in shaping the norms of the rest of the society.<sup>74</sup> Changing people’s internalized norms means influencing the conduct of two people in an intimate situation, even if neither of them would dream of reporting their conduct to legal authorities. Reformers interested in changing conduct must have as their ultimate goal changing norms, not simply changing law.

---

<sup>71</sup> See id at 51–52, 60–66.

<sup>72</sup> See Paul H. Robinson, *Criminalization Tensions: Empirical Desert, Changing Norms & Rape Reform*, in Antony Duff, et al, eds, *Criminalization* (Oxford forthcoming 2010), online at <http://ssrn.com/abstract=1584779> (visited Apr 24, 2010).

<sup>73</sup> See Robinson and Darley, 81 S Cal L Rev at 25 (cited in note 3).

<sup>74</sup> See id at 28–29.

The larger point here is that reformers have an interest in generally building up the criminal law's moral authority by adopting rules that will avoid perceptions of injustice and that will enhance the law's reputation for doing justice, so that they then can use the law's moral authority to help shift the community's norms. They have an interest in criminal law earning "moral credibility chips" that can then be "spent" by leading a community to changed norms.<sup>75</sup>

BKH, in contrast, stand as the protectors of the status quo. As we have argued elsewhere, our program challenges the dominant theory of crime control in the United States for the past several decades, one based upon intentionally and regularly doing injustice in the name of general deterrence and incapacitation<sup>76</sup> by its reliance upon doctrines like three strikes, high penalties for drug offenses, adult prosecution of juveniles, abolition or narrowing of the insanity defense, the felony murder rule, and the use of strict liability. We show that, in judgments of relative blameworthiness, these criminal law doctrines dramatically conflict with the community's intuitions of justice, and we argue that even the good utilitarian ought to reject these crime-control doctrines because of the injustice they produce.<sup>77</sup>

BKH's "Punishment Realism" offers a quite different reaction to these injustices. By discounting the significance of perceived injustice and by offering instead the false lure of widespread malleability about justice judgments, BKH protect the status quo of injustice. They suggest, and some scholars in fact have argued,<sup>78</sup> that we ought not worry about these injustices. People's blameworthiness rankings are all malleable. The lesson that BKH teach is that we can keep the injustices and simply change people's views about what constitutes injustice. We should train people to think that justice is really whatever most effectively deters or whatever is necessary to incapacitate dangerous offenders, as if such changes were a realistic possibility. Distributing criminal liability so as to optimize deterrence or incapacitation might be a legitimate goal, but, disconnected as it is from moral blameworthiness,

---

<sup>75</sup> See Robinson, *Criminalization Tensions* at \*4 (cited in note 72) (suggesting that a "sophisticated criminal law" system will take "every opportunity to build its moral credibility" so that it will, when necessary, be able to use that credibility to shift societal norms).

<sup>76</sup> See Robinson, Goodwin, and Reisig, 85 NYU L Rev at \*7-30 (cited in note 19).

<sup>77</sup> Id at \*41-62 (noting that, although some may worry that forgoing these crime control doctrines could "increase avoidable crime," imposing punishments that accord with the community's intuitions might, "in the long run, . . . be the most effective means of fighting crime").

<sup>78</sup> See, for example, Alice Ristroph, *The New Desert*, in Paul H. Robinson, Stephen P. Garvey, and Kimberly Kessler Ferzan, eds, *Criminal Law Conversations* 45, 46 (2009) ("Desert requires external values to give it content. If those values change and produce revised sentencing policies—if we decide to emphasize incapacitation over rehabilitation, for example—the assessment of how much punishment is deserved is likely to change as well.").

it is different from doing justice. More importantly, it is not reasonable to think that one could persuade a community that these goals, rather than moral blameworthiness, are the criteria for doing justice. Yet it is these kinds of injustice-assuring programs that BKH's approach protects, by offering the false hope of malleable community intuitions of justice.

#### CONCLUSION

Our program is to make reformers smart and effective. How BKH have transformed this into a conservative antireformer program is unclear. We think that reformers ought to invest their limited time and energy with due regard for the comparative difficulties and potential effectiveness of alternative strategies. Wasteful or ineffective reform programs are not to be preferred.

By contrast, what is the positive contribution that BKH's "Punishment Realism" provides to enhance the program of social reform? Is the BKH contribution the insight that the world is full of disagreements about the nature of justice? Who would dispute this? In fact, there is no danger that anyone would think otherwise given that, not long ago, the common wisdom was that there existed *only* disagreements about judgments of justice. Or is the BKH contribution the insight that people's views about justice are commonly influenced by socially dependent factors?<sup>79</sup> That point too seems to be well known and long understood. How could it be otherwise? Or is the BKH contribution the insight that reformers should try to understand the socially dependent factors?<sup>80</sup> We suspect that anyone in the social reform business figured this out long ago. On the other hand, there is no harm in repeating it. The same cannot be said, however, about BKH's other advice.

Is it a positive contribution of the "Punishment Realists" to advise reformers that there is no difference between core and noncore issues, so reformers ought give no attention to the existence of high agreement on some issues when they design their reform programs? Is it good advice that reformers should go ahead and invest in eliminating people's demand that serious wrongdoing be punished and invest in convincing people that resulting death should be ignored? Encouraging

---

<sup>79</sup> BKH say: "Realists just want to know what those extralegal influences are and how they manifest themselves so that they can better predict legal outcomes and manipulate policy to enhance whatever social welfare, fairness, or expressive concern they favor." Braman, Kahan, and Hoffman, 77 *U Chi L Rev* at 1566–67 (cited in note 11).

<sup>80</sup> This seems to be the main point of Punishment Realism: that justice judgments commonly are influenced by social factors. "For the most part, these extralegal influences will move legal actors to agree, but sometimes they will move them to disagree." *Id* at 1566.

reformers to invest limited resources in programs likely to be ineffective does not seem like a positive contribution.

Is the positive contribution of “Punishment Realism” to advise reformers that a proposed law’s potential for injustice can be ignored, and that such injustice will have no effect on the long-term success of the reform program? Common sense, history, and now empirical studies show this also to be bad advice. Reformers act at their peril when they promote liability rules that will be perceived as unjust by those governed by them.

Ultimately, it is likely that the primary contribution of BKH’s “Punishment Realism” is to debunk a notion of “Punishment Naturalism” to which none of us subscribes. But now that that straw man is on the ground, one may wonder whether “Punishment Realism” has any continuing value.