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Donald Braman

George Washington University

Dan M. Kahan

Yale Law School

David A. Hoffman

University of Pennsylvania Carey Law School

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REPLY

A Core of Agreement

Donald Braman,[†] Dan M. Kahan,^{††} & David A. Hoffman[‡]

We are deeply gratified by this exchange with Professors John Darley, Paul Robinson, Owen Jones, and Robert Kurzban. We have benefited a great deal from their research, and this encounter only adds to our appreciation. Their work has always been exceptional in its devotion to empirical exploration and experimentation. We are grateful to them for taking the time to share their thoughts with us and with the readers of this journal. In responding, we are unsurprised to find that we are in agreement with quite a bit of what they have to say.

Indeed, there is very little that we can find in the nuanced and learned account that John Darley individually presents that is inconsistent with our conception of Punishment Realism. As we understand him, he also rejects most of what we found most objectionable in the accounts of Punishment Naturalism that we criticize. What one perceives to be right or wrong—and precisely how right or wrong one perceives it to be—will depend in large part on socialization, which can vary culturally.¹ Through this socialization process, individuals develop very speedy moral evaluations that are consistent with norms in their culture.² These rapid intuitions can, as he notes, be countered through conscious reflection and reasoning,³ but this type of critical reflection is difficult to prompt, and our intuitions can be quite difficult to revise. The cognitive mechanisms on which people draw to make moral assessments are highly uniform across individuals; but the content of those assessments varies across groups and within them over time as a result of local social influences.⁴ Darley's is an account that we embrace as entirely consistent with Punishment Realism as we

[†] Associate Professor of Law, The George Washington University Law School.

^{††} Elizabeth K. Dollard Professor of Law, Yale Law School.

[‡] Associate Professor of Law, Temple University Beasley School of Law.

¹ John Darley, *Realism on Change in Moral Intuitions*, 77 U Chi L Rev 1643, 1652 (2010).

² Id at 1643 (quoting our original article with approval on this point).

³ Id at 1644–45.

⁴ See, for example, id at 1652.

describe it—indeed, it is an admirably sophisticated and clear conception that improves our own understanding.

We agree, too, with Paul Robinson, Owen Jones, and Robert Kurzban (“RJK”) in their insistence that the empirical evidence reveals “not just disagreements about relative blameworthiness, but also about whether the conduct should even be criminal.”⁵ And we are heartened that, in their separate article, Jones and Kurzban share our “opposition to genetic determinism, [our] commitment to plasticity in human cognition, and a deep (in fact scientifically unavoidable) commitment to recognizing the crucial role that social environment plays in each individual’s development of intuitions of justice.”⁶

But the core of our agreement with them has a clear and definite periphery. As RJK now clearly explain, they used a method carefully designed to exclude from measurement any “aspects” of “core” offenses on which there is demographic or cultural *disagreement*.⁷ Accordingly, we simply disagree with them when they assert that their work has important implications for criminal law reformers.

Here is what they say:

What is the “core”? [Braman, Kahan, and Hoffman (“BKH”)] suggest that its contours are quite vague and difficult to identify, 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.

What cases are included in the core? Those cases on which there is high agreement across demographics. . . .

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, but this could hardly be the situation. Our research used factors upon which we judged there was high agreement. 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. . . .

...

⁵ Paul H. Robinson, Owen D. Jones, and Robert Kurzban, *Realism, Punishment, and Reform*, 77 U Chi L Rev 1611, 1619 (2010).

⁶ Owen D. Jones and Robert Kurzban, *Intuitions of Punishment*, 77 U Chi L Rev 1633, 1634 (2010).

⁷ Robinson, Jones, and Kurzban, 77 U Chi L Rev at 1616–17 (cited in note 5).

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. . . .

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. 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.⁸

As we emphasized in our article—and as RJK now say is “obviously” correct—people of diverse identities (within and across societies) are intensely divided about whether certain conspicuous, recurring forms of behavior *count* as instances of the offenses that punish core criminal wrongdoing.⁹ In the United States, for example, there are intense cultural divisions on whether battered women who kill their husbands in their sleep, or “true men” who stand their ground and kill attackers when they could easily flee, are murderers;¹⁰ whether male college students (and others) who persist in engaging in intercourse with a woman who repeatedly and emphatically objects are rapists;¹¹ and whether squatters have property rights¹² or digital versions of songs can be shared among friends.¹³

⁸ Id at 1616–18.

⁹ Id at 1621. RJK pose various empirical “challenges” to us, see id at 1622–23, but those have no connection to the only empirical point we are making: there is significant cultural variation, and resulting political conflict, over what count as *instances* of offense types included in the RJK core. We stand by the evidence in our article on that. See Donald Braman, Dan M. Kahan, and David A. Hoffman, *Some Realism about Punishment Naturalism*, 77 U Chi L Rev 1531, 1566–92 (2010).

¹⁰ See Braman, Kahan, and Hoffman, 77 U Chi L Rev at 1581–92 (cited in note 9).

¹¹ Id at 1574–75.

¹² See generally Lee Anne Fennell, *Efficient Trespass: The Case for “Bad Faith” Adverse Possession*, 100 Nw U L Rev 1037 (2006).

¹³ See Alain d’Astous, François Colbert, and Daniel Montpetit, *Music Piracy on the Web: How Effective Are Anti-piracy Arguments? Evidence from the Theory of Planned Behaviour*, 28 J Consumer Policy 289, 305–07 (2005).

RJK unconvincingly try to deflect this argument by suggesting that the work we rely on shows the influence of cultural variation only in “justificatory norms” as opposed to “prohibitory” ones.¹⁴ But as the work of Mark Alicke has shown, people tend to conform their perceptions of the various components of culpable behavior—such as volition, action, causation, and harm—to social norms extrinsic to those concepts.¹⁵ It follows that people with different norms, even when they agree about what conduct is morally blameworthy (or otherwise worthy of “prohibition”) generally, will systematically disagree about what *counts* as an instance of that conduct. Our work on cultural cognition seeks to identify the particular norms that make the most conspicuous contribution to this form of motivated perception and hence to the highly politicized disputes we see in law and society generally over *who* should be blamed for wrongdoing and *when*.¹⁶

RJK’s “core” definitely measures *something* on which diverse people agree. But because their methods deliberately exclude from the specification of “core” offense types precisely those “aspects” of them that provoke cultural dispute about what *counts* as murder, rape, and fraud, the construct they measure cannot predict or explain who sees what as wrong (indeed, criminally wrong) and why in the real world.

For the same reason, what they are measuring when they find a “core” of agreement has no normative or prescriptive consequence. Whether the fact of “a high level of agreement” is treated as evidence of an act’s wrongfulness or simply recognized as a political constraint

¹⁴ Robinson, Jones, and Kurzban, 77 U Chi L Rev at 1620 (cited in note 5).

¹⁵ See generally Mark D. Alicke, *Culpable Causation*, 63 J Personality & Soc Psych 368 (1992); Mark D. Alicke, *Culpable Control and the Psychology of Blame*, 126 Psych Bull 556 (2000).

¹⁶ See, for example, Dan M. Kahan, David A. Hoffman, and Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 Harv L Rev 837, 879–80 (2009) (identifying values that generate systematic disagreement about the culpability of a driver seeking to evade police in a high-speed chase); Dan M. Kahan and Donald Braman, *The Self-Defensive Cognition of Self-Defense*, 45 Am Crim L Rev 1, 44–46 (2008) (identifying how values shape perceptions of intent and other facts relevant to determining liability for homicide); Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance Rape Cases*, 158 U Pa L Rev 729, 793–95 (2010) (identifying values that motivate different groups to perceive use of force or intimidation and lack of consent in sexual assault cases); Donald Braman, Dan M. Kahan, and John Gastil, *A Cultural Critique of Gun Litigation*, in Timothy D. Lytton, ed, *Suing the Gun Industry* 105, 108–15 (Michigan 2005) (describing the role of varied perceptions of causation in shaping intuitions about harms underlying litigation against the gun industry). In a paper coauthored with Avani Mehta Sood, Darley, too, has recently examined the role that motivated reasoning plays in generating disagreements about *harm* among persons with different values. See Avani Mehta Sood and John M. Darley, *The Plasticity of Harm: An Experimental Demonstration of the Malleability of Judgments in the Service of Criminalization* *15–19 (unpublished manuscript, July 2010) online at <http://ssrn.com/abstract=1641022> (visited Oct 24, 2010). We thank John Mikhail for bringing our attention to this during his exceptionally enlightening seminar.

on the possibility of reform,¹⁷ the fact remains that the kind of “agreement” RJK measure lacks sufficient connection to live controversies to matter in either of these ways. The admonition that one should not undertake reform in any area where there is “consensus” (regardless of whether it involves murder, rape, torture, theft, fraud, or anything else) is simply beside the point, because there is not consensus on the sorts of issues that are at the practical core of efforts to evaluate and reform criminal law in American society.¹⁸

We agree, in short, that RJK are talking about something other than what we and many other academic and political commentators are talking about. The whole point of our article was to make this unmistakably clear, lest anyone think that Punishment Naturalism supplies a reason either to doubt the reality of profound political conflict over the content of the criminal law in our society or to resist particular positions about how that conflict should be resolved. We are glad that RJK acknowledge this point.

Still, in response to their bafflement about why it would even seem necessary for us to make it, we note that the RJK response itself risks perpetuating the sort of overreading of their work that we warned against. To rebut the charge of conservatism, RJK insist that their “program is designed to give reformers tools for more effective reform.”¹⁹ These “tools” consist of pieces of advice such as “it may often be unwise to invest limited reform resources on trying to change intuitions of justice that will be difficult to change,”²⁰ and “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.”²¹ But to whom exactly are they addressing this prudential counsel? Presumably it cannot be anyone, for example, who is currently proposing reforms relating to “aspects”²² of murder, rape, and theft on which there is cultural *dissensus*, for RJK insist there is nothing in their research that speaks to such issues. Yet, in fact, they proceed to draw a “conclusion” from their work for those who want to reform rape law to combat the contested norm that “no means yes”: avoid a “strict liability” standard lest the conflict between law and “internalized norms” cause “defendants . . . [to] be seen as blameless” and vitiate the “moral credibility” of law generally.²³ Can they really be surprised if readers

¹⁷ Robinson, Jones, and Kurzban, 77 U Chi L Rev at 1613 (cited in note 5).

¹⁸ See Braman, Kahan, and Hoffman, 77 U Chi L Rev at 1534–36 (cited in note 9).

¹⁹ Robinson, Jones, and Kurzban, 77 U Chi L Rev at 1628 (cited in note 5).

²⁰ Id.

²¹ Id.

²² Id at 1617.

²³ Robinson, Jones, and Kurzban, 77 U Chi L Rev at 1629 (cited in note 5).

(and not just us, as we pointed out in our article²⁴) see their work as evincing resistance to reform on culturally disputed issues when they themselves read their work that way?

But we will not dwell on the possibilities for misunderstanding that persist. Instead, let us offer our own advice to would-be reformers of the criminal law.

First and foremost, contemporary debates in criminal law are characterized by dissensus over what deserves—and what should comprise—punishment. If you are involved in such a debate over torture, rape, self-defense, intellectual property, eminent domain, consumer fraud protection, or any other contentious legal issue, if you are an advocate for reform, or if you feel the law is unjust, you should be utterly undissuaded from attempting to reform the law by any notion that the content of the current law reflects a *universal* or *innate* intuition about justice.

Second, any attempt at legal reform is likely to be quite difficult and culturally fraught. The difficulty, however, has little to do with an innate “moral organ,”²⁵ and everything to do with the cultural significance that those on both sides of the debate invest in the law. Recognition of the unavoidable connection between the law’s position in such conflicts and the status of contested visions of the good life should make you circumspect about the prospects of reform. It should also make you anxious when assessing the proper scope for norm shaping in a liberal society and intent on discovering means for avoiding cultural domination and accommodating difference.

Third, and finally, nothing about the innate structure of our minds will absolve you of the hard work of determining what should populate the categories of offenses that we condemn and punish, or assessing what the law will convey about the status of the communities to which it speaks. Intuition is often a poor guide for understanding the motivation and reasoning of those who oppose the social reordering you desire. Understanding and overcoming opposition in culturally contested battles over the law is profoundly difficult work, but it is also deeply important work.

²⁴ See Braman, Kahan, and Hoffman, 77 U Chi L Rev at 1602–04 (cited in note 9).

²⁵ See *id.* at 1539–40.