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## ARTICLE

### **Some Realism about Punishment Naturalism**

*Donald Braman,† Dan M. Kahan,†† & David Hoffman‡*

*In this Article, we critique the increasingly prominent claims of Punishment Naturalism—the notion that highly nuanced intuitions about most forms of crime and punishment are broadly shared, and that this agreement is best explained by a particular form of evolutionary psychology. While the core claims of Punishment Naturalism are deeply attractive and intuitive, they are contradicted by a broad array of studies and depend on a number of logical missteps. The most obvious shortcoming of Punishment Naturalism is that it ignores empirical research demonstrating deep disagreements over what constitutes a wrongful act and just how wrongful a given act should be deemed to be. But an equally serious shortcoming of Punishment Naturalism is that it fails to provide a credible account of the social and cognitive mechanisms by which individuals evaluate both crime and punishment, opting instead for explanations that are either specific and demonstrably wrong or so vague as to be untestable.*

*By way of contrast, we describe an alternative approach, Punishment Realism, that develops the core insights of legal realism via psychology and anthropology. Punishment Realism, we argue, offers a more complete account of agreement and disagreement over the criminal law and provides a more detailed and credible account of the social and cognitive mechanisms that move people to either agree or disagree with one another on whether a given act should be praised or punished and how much praise or punishment it deserves. The differences between these two empirical accounts also suggest contrasting implications for how those interested in maximizing social welfare and public satisfaction with the law should approach questions of crime and punishment.*

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*The sure fatality is to imagine variance not there or wait for it to go away.*

–Clifford Geertz<sup>1</sup>

## INTRODUCTION

You are at the bus station, bringing the rings to your best friend's wedding, when your wallet and ticket are stolen. No one will lend you money to pay the fare. You notice a well-heeled fellow traveler heading to the restroom, leaving jacket and ticket behind. You think about it. He could afford another ticket. There's no chance you'd be caught. But in the end you can't bring yourself to do it. As painful as it will be to miss the wedding, you just know that stealing the ticket would be wrong.

But *how* do you know that? How do any of us know right from wrong? Is our morality by and large determinate and innate, the product of evolutionary forces acting over millions of years, or do we acquire it within our lifetimes, reading acts in relation to variable social norms that we have assimilated from those around us? How we answer these questions matters. If humans share highly specific intuitions about justice as a consequence of innate moral mechanisms, then it will be quite difficult, perhaps even impossible, to alter those intuitions, and we should be very cautious if we plan to adopt an approach to punishment that deviates from these innate preferences. If, on the other hand, we develop a sense of morality over our lifetimes in relation to varied social norms, then we might 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.

This Article argues that although moral judgments depend on numerous cognitive and physiological mechanisms that are presumably the product of evolutionary pressures, they are not innate insofar as they depend crucially on social meaning that varies across cultural groups. In our opening hypothetical, you (or, rather, our hypothetical version of you) refused to steal the ticket. But not everyone would, as evidenced not only by the hypothetical (though perhaps familiar) theft of your wallet, but also by extensive empirical research that we describe below.

In developing this account, this Article critiques the increasingly prominent claims of *Punishment Naturalism*—the notion that highly nuanced intuitions about most forms of crime and punishment are

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<sup>1</sup> Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* 219 (Basic Books 1983).

broadly shared because they are innate.<sup>2</sup> To their credit, Punishment Naturalists marshal an impressive array of empirical research into widely shared human intuitions. Many humans do share broad intuitions that provide them with nearly effortless appraisals of wrongdoing. But if the core claims of Punishment Naturalism are deeply attractive and intuitive, they are not unassailable. There are extensive data showing dissensus over punishment for which naturalism cannot account. There is also a troubling void in naturalism where one would expect a credible account of either the social or cognitive mechanisms by which individuals evaluate crime and punishment.

A fuller and more accurate explanation of human intuitions about wrongdoing is offered by what we call *Punishment Realism*.<sup>3</sup> Uniting the insights of legal realists with research conducted by anthropologists, social psychologists, and evolutionary biologists, 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. Thus, while there are a number of important (perhaps even universal) features of human cognition that shape our understandings of wrongdoing, they are features that interact with, and enable the construction of, varied social norms rather than produce them in a determinate manner.

How varied are our norms? If you thought you should refrain from taking the ticket because it was wrong, then you agree with most Americans. On a naturalist account, this makes sense: the “taking of property without consent” is a moral violation, part of the “core of wrongdoing”<sup>4</sup>—something on which nearly all humans normally agree.

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<sup>2</sup> Although this Article is limited to the specific application of naturalism to punishment theory, Punishment Naturalism partakes of a broader trend toward legal analyses drawing on research in the area of evolutionary psychology, much of which avoids the pitfalls we describe herein. See, for example, Owen D. Jones and Sarah F. Brosnan, *Law, Biology, and Property: A New Theory of the Endowment Effect*, 49 *Wm & Mary L Rev* 1935, 1953–54 (2008); Rose McDermott, James H. Fowler, and Oleg Smirnov, *On the Evolutionary Origin of Prospect Theory Preferences*, 70 *J Polit* 335, 337–38 (2008); Herbert Gintis, *The Evolution of Private Property*, 64 *J Econ Behav & Org* 1, 2–3 (2007); Jeffrey E. Stake, *The Property “Instinct,”* 359 *Phil Transactions Royal Socy B: Bio Sci* 1763, 1767 (2004); Paul H. Rubin, *Darwinian Politics: The Evolutionary Origin of Freedom* 173 (Rutgers 2002). The naturalism that we describe here is distinct from, and should not be confused with, the philosophical use of the term. See, for example, Keith Campbell, *Naturalism*, in Donald M. Borchert, ed, 6 *Encyclopedia of Philosophy* 492, 492 (Thomson 2d ed 2006) (defining naturalism in the philosophical context as representing the proposition that “the natural world is the only real one, and that the human race is not separate from it, but belongs to it as a part”).

<sup>3</sup> See generally Donald Braman and Dan M. Kahan, *Legal Realism as Psychological and Cultural (Not Political) Realism*, in Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey, eds, *How Law Knows* 93, 112–13 (Stanford 2007).

<sup>4</sup> For further discussion of these terms, see note 35 and accompanying text.

And no one can blame you for missing the wedding—after all, you have a reasonable excuse for missing it. But researchers who posed the same question in India found that the vast majority of participants there thought that you would be justified in taking the ticket.<sup>5</sup> Where American subjects tended to justify missing the wedding in moral terms that centered on individualized justice and personal property, Indian participants tended to justify the theft in moral terms that emphasized the social and relational responsibilities of friends, particularly at such an important event. When researchers asked tribal leaders in Papua New Guinea how they would resolve a similar scenario, the leaders not only thought that stealing would be justified, but blamed the people who failed to be of assistance: “If nobody helped him and he did that I wouldn’t charge him for that because I would say we had caused that problem.”<sup>6</sup> These broad cultural differences reflect variations in underlying norms regarding property, mutual responsibility, and accountability—norms that fundamentally shape the way we evaluate the wrongfulness of specific acts.

Before we turn to the details of this critique, we feel it is vital to disclose our motivations for undertaking it. We apprehend the world of criminal law from the intertwined vantage points of scholars, teachers, and interested citizens. What we see fills us simultaneously with wonder and fear, hope and anxiety.

To us, the most conspicuous feature of the criminal law landscape is *political conflict*. We observe persistent and intense disagreement on a wide variety of issues, many going to the core of the State’s twin obligations to protect its citizens from harm and to respect their freedom. When a man kills an attacker in a public space despite the opportunity to flee, is that *murder* or a justified exercise of self-defense?<sup>7</sup> How about when a woman kills a sleeping husband who for years has subjected her to physical torment and emotional degradation?<sup>8</sup> If a

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<sup>5</sup> See Joan G. Miller and David M. Bersoff, *Culture and Moral Judgment*, 62 *J Personality & Soc Psych* 541, 547 (1992) (reporting that 45 percent of American adults and 85 percent of Indian adults thought taking the ticket was appropriate, and that 43 percent of American third graders and 98 percent of Indian third graders thought that taking the ticket was appropriate).

<sup>6</sup> Anne M. Tietjen and Lawrence J. Walker, *Moral Reasoning and Leadership among Men in a Papua New Guinea Society*, 21 *Develop Psych* 982, 989 (1985) (characterizing the tribe’s conception of morality as emphasizing “community harmony”).

<sup>7</sup> See Patrik Jonsson, *Is Self-Defense Law Vigilante Justice?*, *Christian Sci Monitor* (Feb 24, 2006), online at <http://www.csmonitor.com/2006/0224/p02s01-usju.html> (visited May 1, 2010) (reporting on the national controversy over a newly enacted spate of “stand your ground” laws that permit the use of deadly force despite the possibility of retreat). See also Dan M. Kahan and Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 *Colum L Rev* 269, 329–32 (1996) (describing the historical underpinnings of the dispute in competing cultural styles).

<sup>8</sup> See Kahan and Nussbaum, 96 *Colum L Rev* at 332–33 (cited in note 7) (comparing how jurisdictions treat this issue to how they treat duty to flee under self-defense doctrine).

man has sex with a woman who repeatedly says “no,” should he be deemed a *rapist*—or even punished at all?<sup>9</sup> Should a man who “loses control” and kills his wife for having sex with another man be treated as less culpable than a premeditated murderer?<sup>10</sup> How about a man who kills another man for soliciting sex from him?<sup>11</sup> Should people be sent to jail for using recreational drugs?<sup>12</sup> Is a corporation’s decision to promote its stock with boastful speech about its balance sheet a form of criminal fraud, or merely puffery that is protected by both the common law and the First Amendment? To us, disputes over issues like these attest to the remarkable heterogeneity of cultural values within our society.

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 and of the resulting urgency of using law to promote morally defensible norms. At the same time, our recognition of the unavoidable connection between the law’s position in such conflicts and the status of contested visions of the good life makes us 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.

This is decidedly *not* the picture of the criminal-law world painted by Punishment Naturalists. They perceive not conflict but consensus, not cultural heterogeneity but biological uniformity. As they read the evidence (generated by their studies and those of others), “human intuitions of justice about core wrongdoing . . . are deep, predictable, and widely shared,”<sup>13</sup> the product of “evolved predisposition” and of “social learning arising *only* from an aspect of human life experience . . . so fundamental as to be essentially universal to all persons without regard to circumstances or culture.”<sup>14</sup>

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<sup>9</sup> See generally Susan Estrich, *Real Rape* (Harvard 1987) (discussing the controversy over this issue).

<sup>10</sup> See Kahan and Nussbaum, 96 Colum L Rev at 346–47 (cited in note 7) (noting contested and changing attitudes on this issue).

<sup>11</sup> See Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 Harv L Rev 413, 465–67 (1999) (describing the political conflict over whether such offenses should be graded as the aggravated “hate crime” form of murder or instead mitigated to voluntary manslaughter).

<sup>12</sup> See John Hoefel, *Bid to Legalize Pot Advances: Initiative Backers Gather What Is Likely to Be Enough Signatures to Put Their Measure on the California Ballot in November*, LA Times A14 (Jan 29, 2010). Consider also Gary Fields, *Shorter Sentences Sought for Crack: Administration Tells Congress It Favors Ending Disparity with Powder Cocaine*, Wall St J A3 (Apr 30, 2009) (detailing proposals by the Obama administration to eliminate the sentencing disparity between crack and powder cocaine offenses).

<sup>13</sup> Paul H. Robinson and Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 Minn L Rev 1829, 1892 (2007).

<sup>14</sup> Paul H. Robinson, Robert Kurzban, and Owen D. Jones, *The Origins of Shared Intuitions of Justice*, 60 Vand L Rev 1633, 1646, 1687 (2007).

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. “[T]he universal and intuitive nature of core judgments about justice” cautions against being “optimistic that arguments or education necessarily will produce . . . change[s] in judgments about justice.”<sup>15</sup> And “trying to alter people’s intuitions of justice” through *law* reform—or as the naturalists put it, “criminal law manipulation” by “social engineers” aimed at “get[ting] people to view conduct . . . as condemnable or more condemnable”<sup>16</sup>—must be viewed with deep suspicion: “[A] criminal justice system that regularly fails to do justice or that regularly does injustice, as judged by shared intuitions of justice . . . will inevitably be seen as failing in a mission” that the community thinks important,<sup>17</sup> thereby vitiating its “moral credibility” and fomenting “generalized contempt for the system in all its aspects, and a generalized suspicion of all of its rules.”<sup>18</sup> The dilemma of how to manage the norm-shaping potential of law in a liberal society is thus dispelled by the proclaimed nonexistence of meaningful cultural conflict combined with the prudential necessity of respecting genetically programmed moral instincts.

But the tangled complex of hopes and fears we experience when we survey criminal law is not vanquished by Punishment Naturalism. We think it is important to advise others who share our sensibilities that there is nothing in Punishment Naturalism to make them feel better (or worse). As far as we can tell, there is not a single position of any consequence on any of the contested issues we have already adverted (or on many like ones) that is ruled out or in by Punishment Naturalism.

The Punishment Naturalists might well demur; their target, they might claim, consists of marginal “academics or policy wonks”<sup>19</sup> who believe that law should be structured on the basis of a utilitarian calculus that excludes public sensibilities altogether, or that the institution of criminal law or the practice of “punishment” should simply be abolished.<sup>20</sup> (Ironically, the most serious purveyors of these positions are a pair of Antipunishment Naturalists who draw exactly the opposite

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<sup>15</sup> Paul H. Robinson and John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S Cal L Rev 1, 51–52 (2007).

<sup>16</sup> *Id.* at 52.

<sup>17</sup> Robinson, Kurzban, and Jones, 60 Vand L Rev at 1688 (cited in note 14).

<sup>18</sup> Robinson and Darley, 81 S Cal L Rev at 24 (cited in note 15). See also *id.* at 23.

<sup>19</sup> *Id.* at 54.

<sup>20</sup> See Robinson, Kurzban, and Jones, 60 Vand L Rev at 1688 (cited in note 14).

conclusion from the materials upon which the Punishment Naturalists themselves rely.<sup>21</sup>)

But their sweeping language, as well as some of their own examples of suspect “[norm-]reform programs”—ones aimed at “eradicat[ing] the notion that women often pretend to withhold consent to intercourse to appear more alluring,” at “rais[ing] the general level of societal condemnation of the [domestic] abuser,” and at “build[ing] public acceptance of both same-sex intercourse and the legal recognition of same-sex unions,” for example<sup>22</sup>—invite a more expansive understanding of the significance of their work. As one thoughtful commentator reviewing Punishment Naturalist writings recently concluded:

Whatever theorists may think people should feel as a normative matter, as an empirical matter, members of the public share surprisingly fixed notions of justice in traditional crimes—and especially the kinds of crimes discussed in a criminal law course. . . . From the standpoint of law reform, then, reformers likely need to accept these shared intuitions as settled. And from the standpoint of teaching criminal law, I would add, professors need to recognize that there are relatively fixed and surprisingly hard-wired judgments widely shared in society that help to generate the legal rules found in criminal law codes and casebooks.<sup>23</sup>

Accordingly, in this Article, we address Punishment Naturalists’ arguments on the assumption that they *are* intended to have implications for the pressing and conspicuous issues that are the everyday focus of mainstream criminal law scholars and of ordinary citizens interested in criminal law. And we show why it would be a mistake for anyone to accept that what they have to say counsels against arguing for reform of existing law.

In what follows, we argue that variations in cultural norms pervade evaluations of wrongdoing, even within what the Punishment Naturalists describe as the “core of wrongdoing.” We explore these issues in four Parts. We begin by making the strongest case we can for Punishment Naturalism—and that case is tantalizing. It gets many things right and taps into deep intuitions that many individuals have about justice and the law. So while naturalism is significantly—even

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<sup>21</sup> See generally Joshua Greene and Jonathan Cohen, *For the Law, Neuroscience Changes Nothing and Everything*, 359 *Phil Transactions Royal Socy B: Bio Sci* 1775 (2004) (arguing that advances in neuroscience will create a shift in people’s intuitions regarding free will and responsibility, resulting in a turn toward consequentialist punishment models).

<sup>22</sup> Robinson and Darley, 81 *S Cal L Rev* at 52–53 (cited in note 15).

<sup>23</sup> Orin Kerr, *The Intuition of Retribution* (Feb 17, 2010), online at <http://crim.jotwell.com/the-intuition-of-retribution> (visited May 1, 2010).



fundamentally—flawed, to understand why it is also deeply attractive and surprisingly persistent, it is important to acknowledge what it gets right and, perhaps more importantly, what it gets *nearly* right.

After laying out the naturalist claims, we then describe some of the problems that emerge from an examination of the available data. A host of studies in the fields that naturalists cite cannot bear the weight that naturalists place on them. For the most part, naturalists make the same kinds of mistakes that those making grand claims about universal human nature have long made: they fail to see the significance of the diversity that exists—diversity present not only in many of the studies they cite, but even in studies they themselves conduct.

We then describe Punishment Realism, an alternative approach that accounts for more of the available data and, we think, offers more practical purchase. Using cross-cultural examples and statistical analyses, we present a series of cases for which realism offers more detailed and parsimonious explanations than naturalism in two ways. First, rather than ignoring or downplaying diversity of intuition about wrongdoing, realism suggests that, to the extent that people value persons, objects, and practices differently, they also evaluate injuries to and interferences with them differently. Second, rather than positing an untestable “moral organ,”<sup>24</sup> Punishment Realism explains evaluations of wrongdoing with reference to well-established features of human cognition that are open to empirical evaluation.

Finally, we make a pragmatic pitch for the comparative advantage that Punishment Realism offers in the face of social dissensus. Where Punishment Naturalism suggests that attempting to educate individuals away from their instinctual intuitions regarding wrongdoing will be either fruitless or exceedingly difficult, Punishment Realism points reformers toward the cognitive and social mechanisms of norm formation. Conflict and dissensus based on differing worldviews will always be hard to resolve, but getting the source of the disagreement right, we think, is a step in the right direction.

## I. NATURALISM AND WRONGDOING

Punishment Naturalism, which holds that our sense of right and wrong is largely innate, rests on observations of broadly shared sentiments about justice. Generally speaking, when someone commits a wrong—murder, rape, theft, or fraud, say—we share an intuitive sense that the wrongdoer should be punished. Moreover, we are likely to agree that some crimes are far worse than others: all other things

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<sup>24</sup> For a description of the use of the term “moral organ,” see note 28 and accompanying text.

equal, a drawn-out, brutal, and deliberate rape-homicide seems worse than a quick and impulsive homicide. And just as we can distinguish between types of killings quickly and easily, so too can we distinguish among more and less serious forms of aggression from murder to rape to assault to battery, and the same can be said of theft and fraud: within each extremely general category, we can distinguish more serious from less serious cases.

As Punishment Naturalists note, this highly nuanced set of distinctions seems to come effortlessly. Where, Punishment Naturalists ask, do those intuitions come from? And why are they so widely shared? Surely, they answer, it is *natural* to feel the way we do about crime and punishment.<sup>25</sup> A specialized cognitive module devoted to moral evaluations, naturalists argue, would explain both the extent of our shared intuitions and the ease with which we arrive at moral judgments. Marc Hauser, a professor of psychology at Harvard, captures the idea in his book, *Moral Minds: How Nature Designed Our Universal Sense of Right and Wrong*, writing that humans have “evolved a moral instinct, a capacity that naturally grows within each child, designed to generate rapid judgments about what is morally right or wrong based on an unconscious grammar of action.”<sup>26</sup>

Naturalists deploy a series of analogies to bring this point home. Marc Hauser, John Mikhail, and others, extending Noam Chomsky’s famous (and famously controversial) analogy of linguistic cognition to the functioning of bodily organs,<sup>27</sup> posit a “moral organ” or “module” in the mind that provides every normal human with a universal “grammar of action,” a generic moral code that underlies the apparent

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<sup>25</sup> While naturalism might seem like a more modest restatement of natural law, it is distinct in a number of ways. First and foremost, Punishment Naturalism makes no claims that these broadly shared sentiments are anything like a law. Nor does it claim that human intuitions are deontologically fair or materially useful; indeed, naturalists acknowledge that intuitions about the law may be unfair or counterproductive. On this account there is nothing “natural” about justice itself, there is only something “natural” about our intuitions about justice. Another way of saying this is that whereas the ambition of a theory of natural law is primarily normative, the ambition of Punishment Naturalism is primarily positive. Punishment Naturalists might derive practical implications from their research, but their goal is to tell us how humans actually do think, not how they should think, about crime and punishment. Punishment Naturalism thus dispenses with the philosophical debates of traditional legal theory by making claims that can be tested empirically and evaluated in terms of their practical value to policymakers and ordinary citizens. See Paul H. Robinson, *Empirical Desert*, in Paul H. Robinson, Stephen P. Garvey, and Kimberly Kessler Ferzan, eds, *Criminal Law Conversations* 29, 38 (Oxford 2009).

<sup>26</sup> Marc Hauser, *Moral Minds: How Nature Designed Our Universal Sense of Right and Wrong* xvii (HarperCollins 2006).

<sup>27</sup> See Noam Chomsky, *Syntactic Structures* (Mouton 1975); Noam Chomsky, *Knowledge of Language: Its Nature, Origin, and Use* (Praeger 1986). [FLIP: GET PINS]

diversity of values and practices in the world.<sup>28</sup> Paul Robinson, Robert Kurzban, and Owen Jones have similarly argued that “intuitions about morality and justice seem to develop” in “the same way that baby teeth grow from gums and adult teeth replace baby teeth.”<sup>29</sup> There is, on this account, a sense of right and wrong that, while non-obvious, is ever present, governing our evaluations of one another in ways that are surprisingly consistent.

Moreover, Punishment Naturalists argue, the innate nature of our intuitions about wrongdoing is of significant practical consequence. The fact that our intuitions arise from millions of years of shared evolutionary pressure matters because, if true, attempts to educate individuals away from their innate instincts are likely to be controversial, costly, and largely ineffective.<sup>30</sup> Whatever pressures may have produced our innate sense of morality over the course of our evolution, they argue, “it is [now] beyond the normal influence of culture or demographic. If it were not so insulated, one would see differences in intuitions of justice among different demographics and cultures.”<sup>31</sup> Upon reflection, we might not like what our instincts tell us; but we should know what these instincts are. Highlighting the potential clash between socially constructed norms and natural intuitions, they argue that

policy wonks and politicians should listen more closely to the moral voice of our species[; for] in developing policies that dictate what people ought to do, we are more likely to construct long-lasting and effective policies if we take into account the intuitive biases that guide our initial responses to the imposition of social norms.<sup>32</sup>

The level of specificity at which the hypothesized innate mechanisms operate is crucial. Punishment Realists and Punishment Naturalists alike accept some form of innate sensitivity to social norms as part of

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<sup>28</sup> See, for example, Marc D. Hauser, *The Liver and the Moral Organ*, 1 *Soc Cog & Affective Neurosci* 214, 214–15 (2006); Susan Dwyer, *How Good Is the Linguistic Analogy?*, in Peter Carruthers, Stephen Laurence, and Stephen Stich, eds, 2 *The Innate Mind: Culture and Cognition* 237, 238 (Oxford 2006).

<sup>29</sup> Robinson, Kurzban, and Jones, 60 *Vand L Rev* at 1664 (cited in note 14).

<sup>30</sup> See Robinson and Darley, 81 *S Cal L Rev* at 18 (cited in note 15) (arguing that “deviations [from humans’ innate intuitions about punishment] can have undesirable consequences and unjustified costs that can ultimately hurt rather than help effective crime control”).

<sup>31</sup> *Id.* at 11.

<sup>32</sup> Hauser, *Moral Minds* at xx (cited in note 26). See also Robinson and Darley, 81 *S Cal L Rev* at 11 (cited in note 15) (“This insulation [from culture] means that there may be serious limits on whether and how social engineers can manipulate intuitions of justice, at least those intuitions of justice about core wrongdoing upon which there is broad agreement.”).

humans' capacity to learn.<sup>33</sup> But the form of naturalism that we are describing rejects the notion that moral intuitions are principally the result of generic abilities to develop and act in response to socially constructed and shared meanings. The naturalism of the scholars we describe here, while readily admitting that individuals are made sensitive to norms by something like generic cognitive mechanisms, rejects innate-norm-sensitivity accounts as too limited, lacking in specialized cognitive mechanisms that supply much of the content of morality. Instead, naturalists argue, humans have cognitive features that determine the structure of highly predictable and largely invariant intuitions about wrongdoing, intuitions that began as advantageous human variations among our ancestors and, over centuries, were continually selected and refined as collective heritable traits. Although humans are not, on the naturalist account, identical moral machines, our innate moral intuitions are shared at surprisingly fine levels of granularity because of innate cognitive structures rather than socially acquired norms.

In support of these claims, naturalists offer empirical studies documenting the extent to which individuals share intuitions about whether acts are wrongful and how wrongful they are. They also develop an account of the sources of agreement and disagreement. Let us review each claim—the extent of shared intuitions and the source of this agreement and disagreement—in turn.

#### A. The Extent of Shared Intuitions

Where crime and punishment are concerned, humans certainly appear to disagree quite often; headlines and policy debates are filled, it seems, with clashing moral accounts.<sup>34</sup> Is it possible that there is a deeper order lurking within the variance and dissensus that we observe around us? A growing number of researchers argue that there is a structure to our intuitions that is both nuanced and pervasive. Paul Robinson and Robert Kurzban, two prominent theorists working in the area of criminal law, have developed some of the most striking empirical studies supporting naturalist claims. Reviewing dozens of studies and conducting several themselves, they write:

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<sup>33</sup> There are dozens of norms-based models of cognition. For a recent review and addition, see Chandra Sekhar Sripada and Stephen Stich, *A Framework for the Psychology of Norms*, in Carruthers, Laurence, and Stich, eds, *The Innate Mind* 280, 289–90 (cited in note 28) (arguing that the “acquisition mechanism” people use to observe the existence of a norm “is both automatic and involuntary”).

<sup>34</sup> See, for example, Dan M. Kahan and Donald Braman, *The Self-Defensive Cognition of Self-Defense*, 45 *Am Crim L Rev* 1, 6–8 (2008) (listing potentially clashing justifications for self-defense doctrine).

[A]vailable evidence suggests that human intuitions of justice about core wrongdoing . . . are deep, predictable, and widely shared. While there are disagreements about the relative blameworthiness of wrongdoing outside the core, the core wrongs themselves—physical aggression, takings without consent, and deception in exchanges—are the subject of nuanced and specific intuitions that cut across demographics.<sup>35</sup>

The studies to which Robinson, Kurzban, and other naturalists cite involve participants who have been asked to rank the seriousness of offenses. The remarkable thing about such ranking exercises, they suggest, is the relatively stable rank order of the offenses evaluated by participants.

Consider the following sample from one recent study conducted by Robinson and Kurzban. Topping out the serious end of the spectrum is kidnapping an eight-year-old girl for ransom, raping her, recording her screams while burning her with a cigarette lighter, and then killing her once a demanded ransom is received. Consistently ranked as less serious than that is keeping pitbulls that escape repeatedly and ultimately kill someone. Less serious than that is slapping (and thus bruising) a man wearing a hat that makes fun of the defendant's favorite band. Less serious still is stealing a drill from a garage. And at the bottom of the culpability spectrum is taking (without eating) two whole pies from an "all you can eat" buffet.<sup>36</sup>

That list is not exhaustive; the study includes over twenty acts that participants rank, and which they rank with a very high degree of consistency and ease. (A full listing of the offenses is provided in the Appendix.) How consistently do members of the public rank these offenses? Participants agreed on 91.8 percent of all pairwise judgments, and the ranking produces a Kendall's W of 0.88.<sup>37</sup> As you might imagine, the most common disagreements were on those acts that were ranked just next to one another. When the researchers discounted the "flipping" of adjacent offenses, the extent of agreement rose to 93.9 percent.<sup>38</sup>

A summary of the scenarios and their rankings is provided in Table 1, below, and full descriptions are provided in the Appendix. Notice that the first four scenarios were generally thought to deserve no

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<sup>35</sup> Robinson and Kurzban, 91 *Minn L Rev* at 1892 (cited in note 13).

<sup>36</sup> *Id.* at 1869 (providing a table ranking behavior according to the amount of punishment the study's subjects believed was warranted).

<sup>37</sup> *Id.* at 1877–78.

<sup>38</sup> *Id.* at 1878 (noting that one-third of all deviations were "adjacent flip" deviations).

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punishment and thus are unranked. The following offenses are listed in order of ranked seriousness.

TABLE 1. RANKINGS OF RELATIVE WRONGFULNESS BY VARIOUS DEMOGRAPHIC GROUPS.<sup>39</sup>

Act	All Subjects	Male	Female	Non-white	<\$60K Income*	>\$60K Income*	<2yr Degree	>2yr Degree
Self-defense	0†	0	0	0	0	0	0	0
Coerced theft	0	0	0	0	0	0	0	0
Umbrella mistake	0	0	0	0	0	0	0	0
Hallucination	0	0	0	0	0	0	0	0
Pies	5	5	5	5	5	5	5	5
Short change	6	6	6	7	6	6	6	6
T-shirt	7	6	7	6	7	7	7	7
Radio theft	8	8	8	7,8‡	8	8	8	8
Drill theft	9	9	9	9	9	9	9	9
Microwave theft	10	10	11	11	10	10	11	10
TV destruction	11	11	11	8	11	11	11	11
Slap	12	12	12	12	12	12	12	12
Head-butt	13	13	13	13	13	13	13	13
Stitches	14	14	14	14	14	14	14	15
Necklace & Stitches	15	15	15	15	15	15	15	14
Robbery	16	16	16	16	16	16	16	16
Clubbing	17	17	17	17	17	17	17	17
Pit bulls	18	18	18	18	18	18	18	18
Infant	19	19	19	19	19	19	19	19
Stabbing	20	20	20	20	20	20	20	20
Ambush	21	21	21	21	21	21	21	21
Abduction	22	22	22	22	22	22	22	22
Burning	23	23	23	23	23	23	23	23
Ransom	24	24	24	24	24	24	24	24
N =	246	123	123	53	103	103	169	77

\* Forty-one subjects did not provide income information.

† “No punishment” as the modal response is shown as 0.

‡ The two ranks were a tie, thus both modes are reported.

Not only are the rankings highly consistent, but the researchers found “little variation in the modes of scenario rankings”<sup>40</sup> across a broad array of demographic variables (arrayed across the top of Table 1 above). In addition to these demographic variables, the researchers also report that an “investigation of . . . political party, ideology, marital status, whether they have children, religion, level of religious activity, [and] libertarianism showed a similar lack of any meaningful difference between demographic groups’ modal rankings.”<sup>41</sup>

The acts ranked here are also, Robinson and Kurzban claim, broadly representative of criminal wrongdoing more generally. While they concede that individuals disagree about the wrongfulness of some acts, these divisive acts are outside of what the researchers consider to

<sup>39</sup> Robinson and Kurzban, 91 Minn L Rev at 1879 (cited in note 13).

<sup>40</sup> Id.

<sup>41</sup> Id at 1879 n 200.

be the “core” of wrongdoing: “physical aggression, takings without consent, and deceit in exchange.”<sup>42</sup> The core, by Robinson and Kurzban’s estimation, comprises the vast majority of criminal conduct: “94.9% of the offenses committed in the United States.”<sup>43</sup>

Nor are these findings specific to a single time or place. While Robinson and Kurzban’s is the most striking of recent studies conducted in the United States, ranking studies of this sort have been conducted for over forty years and in a number of countries with similar results. Thorsten Sellin and Marvin Wolfgang’s classic 1964 study demonstrated that Americans consistently ranked many crimes in the same order, and that these could be reliably reported as an index of crime seriousness.<sup>44</sup> Dogan Akman and Andre Normandeau’s 1967 study reported similar findings across a dozen samples taken from various Canadian locales, concluding that rankings of many offenses were stable and reliable enough to construct a crime index for Canada.<sup>45</sup> In 1980 Sandra Evans and Joseph Scott reported that American and Kuwaiti students ranked many offenses and punishments similarly.<sup>46</sup> And in 2006, Sergio Herzog reported remarkable similarities in the rankings of offense seriousness across cultural groups in his study of Israeli Arabs and Israeli Jews.<sup>47</sup>

Robinson and Kurzban are careful to note that agreement on the relative seriousness of various forms of wrongdoing is not equivalent to agreement on how to punish in *absolute* terms. Some individuals may be more punitive than others overall, generating disagreement that has long masked the pervasive structure of our punishment intuitions about

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<sup>42</sup> Id at 1892.

<sup>43</sup> Robinson and Kurzban, 91 Minn L Rev at 1867 (cited in note 13).

<sup>44</sup> See generally Thorsten Sellin and Marvin E. Wolfgang, *The Measurement of Delinquency* 263–65 (Wiley 1964) (finding similar rankings among judges, police officers, and two groups of students, despite their positions in very “different sociocultural groups”). Several studies have since replicated and extended these findings in the United States. See, for example, Don C. Gibbons, *Crime and Punishment: A Study in Social Attitudes*, 47 Soc Forces 391, 395 (1969) (studying proposed sentences among Californians and finding general agreement on which crimes should get severe versus more moderate punishment); Peter H. Rossi, et al, *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 Am Soc Rev 224, 230–31 (1974) (finding broad agreement on assessments of crime seriousness among residents of Baltimore regardless of race, sex, or educational attainment); Stephen D. Gottfredson, Kathy L. Young, and William S. Laufer, *Additivity and Interactions in Offense Seriousness Scales*, 17 J Rsrch Crime & Delinq 26, 29 (1980) (studying the relative-seriousness rankings of several criminal offenses by undergraduate and graduate students at Johns Hopkins University). See also Monica A. Walker, *Measuring the Seriousness of Crimes*, 18 Brit J Criminol 348, 348–51 (1978). But see Parts II–III.

<sup>45</sup> See Dogan D. Akman and Andre Normandeau, *The Measurement of Crime and Delinquency in Canada*, 7 Brit J Criminol 129, 147 (1967).

<sup>46</sup> See Sandra S. Evans and Joseph E. Scott, *The Seriousness of Crime Cross-Culturally*, 22 Criminol 39, 48–49 (1980).

<sup>47</sup> See Sergio Herzog, *Public Perceptions of Crime Seriousness: A Comparison of Social Divisions in Israel*, 39 Isr L Rev 57, 59, 66 (2006).

wrongfulness. To use the analogy to Chomskian “universal grammar” that many naturalists employ, the *relative order* in which wrongdoings are ranked is a “principle” determined by a moral mechanism or module in the brain, and the *amount* of punishment to be meted out—the “end point[s] of the punishment continuum,” as Robinson and Kurzban call them<sup>48</sup>—are “parameters” that may be set by culture, experience, and other non-innate influences on preference.<sup>49</sup>

On the naturalist account, then, while we may disagree over some things, this superficial dissensus masks the deeper structure of our shared intuitions. Looking for the kinds of serious disagreements that are often described as refuting naturalist accounts, Robinson and Kurzban report having “failed to find the limits of shared intuitions of justice for core wrongdoing.”<sup>50</sup> The levels of agreement in rank ordering are, they argue, “astonishingly high.”<sup>51</sup>

## B. The Source of Shared Intuitions

Researchers involved in these studies describe the degree of shared intuitions about wrongdoing and punishment as “stunning[ ],”<sup>52</sup> “remarkable,”<sup>53</sup> “striking,”<sup>54</sup> and even “shock[ing].”<sup>55</sup> To explain the extraordinary concordance they see, they develop an evolutionary theory of human psychology. By and large, they propose one or more specialized cognitive mechanisms developed in response to evolutionary pressures. As Marc Hauser writes: “Part of [our natural sense of justice] was designed by the blind hand of Darwinian selection millions of years before our species evolved; other parts were added or upgraded over the evolutionary history of our species, and are unique both to humans and to our moral psychology.”<sup>56</sup> For naturalists, developing a moral sensibility over the course of a lifetime is “like growing a limb”<sup>57</sup>—a highly specialized form that normally develops in a predictable manner.

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<sup>48</sup> Robinson and Kurzban, 91 Minn L Rev at 1855 (cited in note 13).

<sup>49</sup> Hauser develops this concept extensively. See Hauser, *Moral Minds* at 419–20 (cited in note 26).

<sup>50</sup> Robinson and Kurzban, 91 Minn L Rev at 1867 (cited in note 13).

<sup>51</sup> Id.

<sup>52</sup> Robinson, Kurzban, and Jones, 60 Vand L Rev at 1654 (cited in note 14).

<sup>53</sup> Evans and Scott, 22 Criminol at 53 (cited in note 46).

<sup>54</sup> Robinson, Kurzban, and Jones, 60 Vand L Rev at 1638 (cited in note 14). See also Robinson and Kurzban, 91 Minn L Rev at 1867–74 (cited in note 13).

<sup>55</sup> Joss Whedon, dir, *Dr. Horrible's Sing-Along Blog* Act 2, 00:11:59 (2008), online at <http://drhorrible.com> (visited May 1, 2010) (“All the time that you beat me unconscious I forgive / . . . It's a brand new me / I got no remorse / Now the water's rising / . . . I'm gonna shock the world / Gonna show Bad Horse.”).

<sup>56</sup> Hauser, *Moral Minds* at xvii (cited in note 26).

<sup>57</sup> Id at xviii (clarifying that the acquisition of moral norms does not occur through formal education).



The advantages that these intuitions provide are often not specific to an individual, they argue, but rather accrue to kin groups, to local populations, or to the species as a whole. Thus, while it may be costly for an individual to demand or inflict punishment on another for a core wrongdoing, overall the group to which that individual belongs (and, presumably, within which she has many genetic relatives) will thrive if she does. Robinson, Kurzban, and Jones develop a specific conception of the mechanism by which our shared intuitions have evolved, one that rests on the conditions of mutual interdependence and social interaction:

We argue . . . that human sociality has laid the foundation for an evolved predisposition to acquire shared intuitions of justice and that such intuitions benefit the individuals bearing them. . . . [E]volution has in particular contributed to intuitions that physical harm, the taking of property, and cheating in exchanges are matters for particular attention and condemnation.<sup>58</sup>

Another way to put this is that specific forms of antisocial behavior are evolutionarily counterproductive, so groups (and individuals in groups) that have innate rules that foster cooperation—including cooperation around punishment—are more likely to thrive.

In support of this theory, researchers commonly cite two pools of evidence:<sup>59</sup> experimental games of cooperation and punishment among humans, and studies that turn on distinctions between moral and conventional wrongdoing. We review each of these in turn.

### 1. Fairness games.

Consider, first, one of the most common tools for assessing how individuals assess fairness and how much they are willing to sacrifice to punish someone who is behaving unfairly: the “Ultimatum Game.”<sup>60</sup> The structure of the game is simple. Two people—a “Proposer” and a

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<sup>58</sup> Robinson, Kurzban, and Jones, 60 *Vand L Rev* at 1646 (cited in note 14).

<sup>59</sup> Naturalists provide other evidence, though in general it tends to be at a greater inferential remove. Brain imaging studies, for example, are cited quite often. While these studies do provide insight into which regions of the brain (it is usually multiple regions) are most active when individuals are attempting to resolve various problems, they do not provide much in the way of evidence about whether the content is innate or learned. There is, so far as we can discern, no evidence that moral decisions are made exclusively or even predominantly by regions of the brain that are responsive to only “innate,” as opposed to “learned,” intuitions. See *id.* at 1659–64 (arguing, based on neurological studies, that “basic moral sentiments humans share are products of evolutionary processes”). See also *id.* at 1655–59 (providing evidence from animal studies); *id.* at 1664–74 (providing evidence from studies of child development).

<sup>60</sup> Joseph Henrich, et al., “*Economic Man*” in *Cross-Cultural Perspective: Behavioral Experiments in 15 Small-Scale Societies*, 28 *Behav & Brain Sci* 795, 798 (2005).

“Responder”—are anonymously paired. The Proposer is offered a modest or significant amount of money. She then proposes a split of the money with the Responder. The Responder decides whether to accept the split or reject it. If she accepts, both will get the amount allocated by the proposed split. If she rejects, neither gets anything. One common interpretation of such a rejection is that it is a form of punishment that the Responder visits on the Proposer for being unfair, a punishment that costs whatever the Responder would have received had she accepted the Proposer’s suggested split.

If humans are selfish actors in the way neoclassical economics posits, then the Responder would *never* reject an offer greater than zero, no matter how small. Why? A rational Responder should accept an offer of any size because some money, no matter how little, is better than no money. As such, every neoclassically rational and selfish Proposer would offer as little as possible, keeping the lion’s share for herself.

Yet in most studies of industrialized societies, the mean offer is between 40 percent and 50 percent.<sup>61</sup> Moreover, if Proposers offer significantly less than this, Responders tend to reject the offers in proportion to their divergence from the norm. But few people make such low offers.<sup>62</sup> Indeed, experimenters often had to add in random offers to test the lower bounds of what a Responder would accept because Proposers deviated from the mode so rarely and, when they did, by very little. The consistency of these findings across a range of settings led many researchers to posit a “taste” for fairness at approximately these levels.<sup>63</sup>

Marc Hauser has conducted a number of studies of the Ultimatum Game. In a recent version broadcast on national television,<sup>64</sup> for example, he gave half of a group of students some Skittles candies and had them determine whether and how many they wanted to share with those who were given none. To a person, they all gave half. The reason?

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<sup>61</sup> Id at 801.

<sup>62</sup> Id at 797 (characterizing the infrequent nature of low offers as demonstrative of fairness and concerns of reciprocity).

<sup>63</sup> See, for example, James Konow, *A Positive Theory of Economic Fairness*, 31 *J Econ Behav & Org* 13, 32–33 (1996) (identifying accountability, altruism, and efficiency as important motivators); Gary E. Bolton and Rami Zwick, *Anonymity versus Punishment in Ultimatum Bargaining*, 10 *Games & Econ Behav* 95, 113 (1995) (arguing that “punishment for unfair treatment” accounted for most of the variation from perfect equilibrium play in the study’s results); Colin Camerer and Richard H. Thaler, *Anomalies: Ultimatums, Dictators and Manners*, 9 *J Econ Persp* 209, 216 (1995) (explaining that etiquette and perceived norms of fairness often overcome income maximization as motives in the Ultimatum Game); Alvin E. Roth, *Bargaining Experiments*, in John H. Kagel and Alvin E. Roth, eds, *The Handbook of Experimental Economics* 253, 264–65 (Princeton 1995) (detailing types of bargaining experiments and noting that some theorists have rallied around the explanatory power of fairness considerations).

<sup>64</sup> See “Modern Morality: Inside the Brain,” *ABC News* (ABC television broadcast, May 2, 2007).

When pressed, the students gave explanations that seem either intuitive or like a confabulation to most people: “Because then . . . you all get the same amount.”<sup>65</sup> To them, it was just *natural* to share equally.

Like Hauser, most naturalists describe the typical deviation from the rational-actor model in evolutionary terms. The argument for naturalism based on these games is that natural selection has crafted a sense of fairness in humans that might be modified modestly by experience but is essentially innate. Fairness, on this account, is no more cultural than any other human organ; instead, it is an organic “moral faculty—an organ of the mind that carries a universal grammar of action.”<sup>66</sup> On this account, the limited range of fairness is part of human adaptive fitness, and the “architecture of our mind, leftover circuitry from the cavemen.”<sup>67</sup>

Hauser’s theory also comes with at least one prediction. Because these constraints on fairness have long been essential to our survival, he argues that “no culture will ever [accept] offers under 15 percent, and no culture will ever offer more than 50 percent. If they do, such patterns will exist for the blink of an eye in human history.”<sup>68</sup> We return to Hauser’s claim later, as it shares a form of logical error common to many naturalist claims about punishment and human intuition.

## 2. Conventional and moral wrongdoing.

A second body of work cited as supporting the naturalist account derives from empirical studies distinguishing “moral” from “conventional” wrongdoing,<sup>69</sup> a distinction that roughly tracks the legal distinction between acts that are traditionally described in legal parlance as *mala in se* and *mala prohibita*.<sup>70</sup> Following Elliot Turiel, Judith Smetana, and

<sup>65</sup> *Id.*

<sup>66</sup> Hauser, *Moral Minds* at 11 (cited in note 26).

<sup>67</sup> *Id.* at 85–86.

<sup>68</sup> We have corrected a typo here; Hauser writes: “no culture will ever reject offers under 15 percent,” *id.* at 85, but that cannot be what he means because most do. But see notes 119–29 and accompanying text (critiquing this form of hypothesizing in general and describing experiments among the Sukuma in Mahenge, Tanzania that exceed Hauser’s hypothesized bounds on fairness).

<sup>69</sup> For early research in this area, see generally Larry P. Nucci and Elliot Turiel, *Social Interactions and the Development of Social Concepts in Preschool Children*, 49 *Child Dev* 400 (1978); Judith G. Smetana, *Preschool Children’s Conceptions of Moral and Social Rules*, 52 *Child Dev* 1333 (1981); Larry P. Nucci and Maria Santiago Nucci, *Children’s Social Interactions in the Context of Moral and Conventional Transgressions*, 53 *Child Dev* 403 (1982). Some, following Turiel, suggest a third category of “personal” wrongs. See, for example, Jenny Yau and Judith G. Smetana, *Conceptions of Moral, Social-Conventional, and Personal Events among Chinese Preschoolers in Hong Kong*, 74 *Child Dev* 647 (2003).

<sup>70</sup> Many legal scholars have argued that a context-independent distinction between the two is impossible. See, for example, Peter Alldridge, *Making Criminal Law Known*, in Stephen C. Shute and A.P. Simester, eds, *Criminal Law Theory: Doctrines of the General Part* 103, 106–10 (Oxford 2002) (discussing the difficulties of distinguishing these categories, particularly when

Larry Nucci's early empirical work in the late 1970s and early 1980s,<sup>71</sup> these studies suggest that humans, in the course of normal development, learn to distinguish moral wrongs, which implicate "justice, rights, or welfare" (hitting, stealing, or refusing to share an abundant good, for example), from conventional wrongs, which merely violate a local convention (wearing pajamas to school or work, swearing, or eating lunch while standing up, for example). Conventional transgressions are thought to be less serious, and assessments of their seriousness are dependent on context and rules set by authorities; moral transgressions, on the other hand, are thought to be more serious, typically involving clear harm to a victim, and the seriousness of the transgression is thought to be "authority independent"—that is, it does not depend on what any authority says is acceptable.<sup>72</sup>

Naturalists often cite studies of moral and conventional wrongs showing that children appear to learn that hurting others is wrong before they learn other norms. For example, the finding that "the first moral concept to appear in children is the concept that physical aggression is wrong" is relevant, Robinson, Kurzban, and Jones argue, because it seems "likely more than coincidence that this is also the first step in [a naturalist] account of the evolutionary origins of intuitive justice."<sup>73</sup> That is, the development of morality in childhood parallels

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applied to market situations where it is unclear whether the legal rule is simply "declaring the pre-legal public wrongfulness of the actions in question"); Nancy Travis Wolfe, *Mala In Se: A Disappearing Doctrine?*, 19 *Criminol* 131, 139–40 (1981) (arguing that mala prohibita offenses are different from mala in se offenses only in that the legislatures have labeled them as such).

<sup>71</sup> See Larry P. Nucci, *Conceptual Development in the Moral and Conventional Domains: Implications for Values Education*, 52 *Rev Educ Rsrch* 93, 100 (1982) (describing early studies by Turiel, Nucci, and Smetana in which subjects evaluated less wrongful actions "in terms of their relation to the social order, social expectations, social institutions, and contextual or culturally specific regulations and standards of behavior" and more wrongful actions "in terms of the effects the actions had on the rights or well-being of others").

<sup>72</sup> There are several good reviews of the literature. See, for example, Judith G. Smetana, *Understanding of Social Rules*, in Mark Bennett, ed, *The Development of Social Cognition: The Child as Psychologist* 111, 112–14 (Guilford 1993); Marie S. Tisak, *Domains of Social Reasoning and Beyond*, in Ross Vasta, ed, 11 *Annals of Child Development* 95, 100–01 (Jessica Kingsley 1995); Larry P. Nucci, *Education in the Moral Domain* 7–9 (Cambridge 2001). See generally Larry P. Nucci, Elliot Turiel, and Gloria Encarnacion-Gawrych, *Children's Social Interactions and Social Concepts: Analyses of Morality and Convention in the Virgin Islands*, 14 *J Cross-Cult Psych* 469 (1983) (finding that adults and preschoolers from the Virgin Islands responded to "moral transgressions" by pointing out the hurtful or unjust consequences of the actions upon victims, but reacted to "conventional" transgressions by referring back to aspects of the social order); Marida Hollos, Philip E. Leis, and Elliot Turiel, *Social Reasoning in Ijo Children and Adolescents in Nigerian Communities*, 17 *J Cross-Cult Psych* 352 (1986) (finding that Nigerian children's "moral" and "conventional" judgments can be distinguished along similar axes); Yau and Smetana, 74 *Child Dev* at 647 (cited in note 69) (finding that Chinese preschool children also treated "personal," "moral," and "conventional" events differently).

<sup>73</sup> Robinson, Kurzban, and Jones, 60 *Vand L Rev* at 1670 (cited in note 14).

the evolutionary development of the moral organ.<sup>74</sup> Lack of cooperation around physical aggression would, on this account, pose especially grave risks to survival, so intuitions governing its regulation would be the most fundamental and earliest to develop.

Over the last quarter century, several researchers have reported similar patterns across a diverse set of subjects ranging in age from toddlers as young as three and one-half years to adults, with a substantial array of different nationalities and religions.<sup>75</sup> Reading these studies, naturalists have drawn the inference that these distinctions between moral and conventional wrongs are “universally recognized, similar among boys and girls, and even consistent in cultures with seemingly different parental styles—in China and the United States.”<sup>76</sup>

Moreover, they argue, because these studies tend to show that “moral rules are inviolable and universally applicable,”<sup>77</sup> they can be taken as evidence of an “evolutionary explanation for the origins of intuitions of justice.”<sup>78</sup>

In light of the universal nature of these intuitions, naturalists suggest that the alternative is simply implausible:

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

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<sup>74</sup> This argument echoes Ernst Haeckel’s fascinating recapitulation theory, which (incorrectly) held that “ontogeny recapitulated phylogeny”—that is, that the physical development of each human over the course of its lifetime parallels the evolutionary development of the species. See Stephen Jay Gould, *Ontogeny and Phylogeny* 7–9 (Belknap 1977) (discussing the origins of the recapitulation theory and arguing that it collapsed once “Mendelian genetics repudiated the generality of its two necessary principles—terminal addition and condensation”).

<sup>75</sup> See Nucci, Turiel, and Encarnacion-Gawrych, 14 *J Cross-Cult Psych* at 469 (cited in note 72) (studying Virgin Islands children and adults); Hollos, Leis, and Turiel, 17 *J Cross-Cult Psych* at 352 (cited in note 72) (studying Nigerian children); Yau and Smetana, 74 *Child Dev* at 647 (cited in note 69) (studying Hong Kong preschoolers). For reviews, see Smetana, *Understanding of Social Rules* at 126–33 (cited in note 72) (discussing research in various domestic contexts as well as in such countries as Japan and Zambia); Tisak, *Domains of Social Reasoning and Beyond* at 103 (cited in note 72) (discussing results across age ranges); Nucci, *Education in the Moral Domain* at 20–51, 94–106 (cited in note 72) (discussing results across a variety of religions and cultures).

<sup>76</sup> Hauser, *Moral Minds* at 291 (cited in note 26).

<sup>77</sup> *Id.* at 292.

<sup>78</sup> Robinson, Kurzban, and Jones, 60 *Vand L Rev* at 1666 (cited in note 14) (finding collateral support for this explanation in evidence that “children everywhere progress through similar stages of moral reasoning about justice at roughly the same ages”).

within cultures, such a general learning system would yield very different paths and timing in the acquisition of intuitions of justice for different individuals.<sup>79</sup>

In short, they argue, there is profound agreement on the core moral wrongs that we confront, and that agreement appears to be intuitive, nuanced, and organic—in all probability the product of a specialized and innate cognitive moral organ that has developed over millions of years through natural selection.

## II. PROBLEMS WITH NATURALISM

Naturalists have assembled an impressive collection of studies in support of their claims, and the literature on precisely which aspects of morality are innate has become a booming cottage industry.<sup>80</sup> Moreover, they do so by referencing empirical data, which is surely an advance on many earlier anecdotal studies.<sup>81</sup> But they face a host of problems. Some stem from simple logical missteps that underlie their most strident claims. A more serious problem is posed by empirical evidence contradicting the central claim that evaluations of serious wrongfulness do not vary across social conditions or individuals. Setting up the discussion of Punishment Realism in Part III, this Part starts with a few basic examples that give a sense of the research that naturalists have overlooked or failed to incorporate, then describes some of their broader logical errors.<sup>82</sup>

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<sup>79</sup> *Id.*

<sup>80</sup> See generally Erica Roedder and Gilbert Harman, *Grammar*, in Doris, Nichols, and Stich, eds, *Empirical Moral Psychology* (Oxford forthcoming 2010); Ron Mallon, *Reviving Rawls's Linguistic Analogy Inside and Out*, in Walter Sinnott-Armstrong, ed, 2 *Moral Psychology: The Cognitive Science of Morality: Intuition and Diversity* 145 (MIT 2008); Jesse Prinz, *Resisting the Linguistic Analogy: A Commentary on Hauser, Young, and Cushman*, in Sinnott-Armstrong, ed, *The Cognitive Science of Morality* 157 (rejecting the analogy to Noam Chomsky's "universal grammar" by suggesting that "general-purpose emotion systems and socially transmitted rules" could be an alternate explanation for the empirical findings of Hauser and others); Frances Myrna Kamm, *Intricate Ethics: Rights, Responsibilities, and Permissible Harm* (Oxford 2007); John Mikhail, *Universal Moral Grammar: Theory, Evidence, and the Future*, 11 *Trends Cog Sci* 143 (2007); Hauser, *Moral Minds* (cited in note 26).

<sup>81</sup> See generally Robinson, *Empirical Desert* (cited in note 25) (describing the relative virtues of empirical conceptions of desert).

<sup>82</sup> We do not mean to select Paul Robinson, Robert Kurzban, John Darley, and Owen Jones for special scrutiny; in fact, they are to be applauded for presenting claims in a manner that is amenable to critical examination and testing. Other naturalists who cite many of the same studies theorize a "universal moral grammar" that has, so far as we can tell, no rules that can actually be tested. As Michael Waldmann has noted, the notion of a universal moral grammar is developed without an explanation of what, exactly, distinguishes the rules from parameters in the proposed universal moral grammar:

Findings that show that different cultures generate similar intuitions . . . are viewed as evidence for universal rules, whereas other studies showing huge cultural differences are in-

### A. Some Skepticism about Scope

One of the first major hurdles that naturalism faces is the tremendous scope of disagreement over what constitutes wrongdoing. Naturalists' principle strategy is to suggest that the disagreements are relatively minor and cloud our view of the inner workings of moral intuition. There are disagreements about crimes, they concede, but these are marginal crimes, relatively infrequent when compared to the "core" crimes on which there is significant agreement. As noted above, Robinson and Kurzban, drawing on data from the National Criminal Victimization Survey conducted by the Bureau of Justice Statistics, claim that the "kinds of offenses in the scenarios" they study "represent 94.9% of the offenses committed in the United States."<sup>83</sup> As such, the kinds of offenses on which people disagree are necessarily less common.

But is the public really in agreement about the relative seriousness of the vast majority of bad acts committed in the United States? Anyone familiar with the source of these data will immediately recognize one problem with the claim: a survey of criminal victimization does not include any so-called "victimless" or "vice" crimes—crimes over which there is tremendous public disagreement.<sup>84</sup> As indicated in Tables 2 and 3 below, the incidence of these crimes greatly outnumbers the incidence of criminal victimizations. Indeed, the number of people estimated to be using marijuana in the last year alone exceeded the number of all those estimated to have suffered criminal victimization of any kind. Add prostitution (recent studies find that more than one in six adult males has paid for sex<sup>85</sup>) and you begin to see just how common controversial crimes are. Also excluded from the list are a number of regulatory crimes. While far harder to estimate, surveys suggest that rates of willful tax evasion—the seriousness of which is also disputed—run as high as 25 percent of the population.<sup>86</sup>

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terpreted as evidence for the role of parameters. This flexibility of the theory makes it hard to envision what could constitute a strict empirical test of the theory.

Indeed, many of the empirical studies [cited] could even be taken as evidence against the moral grammar view.

Michael R. Waldmann, *A Case for the Moral Organ?*, 314 *Sci* 57, 57 (2006).

<sup>83</sup> See note 43 and accompanying text.

<sup>84</sup> Whether or not they are actually "victimless" is one of the points of contention.

<sup>85</sup> See sources cited in note 91.

<sup>86</sup> See Robert Mason and Lyle D. Calvin, *A Study of Admitted Income Tax Evasion*, 13 *L & Socy Rev* 73, 80–81 (1978) (reporting that 24.2 percent of survey respondents had either overstated deductions, underreported income, or failed to file altogether).

TABLE 2. INCIDENCE OF CRIMINAL VICTIMIZATION: 2006<sup>87</sup>

Criminal Victimization	Incidence
Murder	17,034
Rape/Sexual assault	260,940
Robbery	712,610
Assault	5,120,840
Household burglary	3,560,920
Motor vehicle theft	992,260
Theft	14,362,570
Any criminal victimization	25,200,384

TABLE 3. INCIDENCE OF VICE CRIMES

Crime	Incidence
Marijuana use <sup>88</sup>	16,700,000/mo
Underage drinking <sup>89</sup>	27.2% of 12–20 year-olds
Tax evasion <sup>90</sup>	24% of adults
Paying for sex <sup>91</sup>	15% of adult men

These estimates are, of course, quite rough. But the point stands: even if we were to add only those crimes listed in Table 3—and there

<sup>87</sup> Statistics for all crimes but murder taken from the Bureau of Justice Statistics' National Crime Victimization Survey for 2006. See Bureau of Justice Statistics, *Criminal Victimization in the United States, 2006 Statistical Tables* 14 table 1 (Aug 2008), online at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus06.pdf> (visited May 1, 2010). Murder Statistics taken from the 2006 Uniform Crime Report. See Federal Bureau of Investigation, *Uniform Crime Report: Crime in the United States, 2006: Murder \*2* (Sept 2007), online at <http://www.fbi.gov/ucr/cius2006/documents/murdermain.pdf> (visited May 1, 2010).

<sup>88</sup> US Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, *1 Results from the 2009 National Survey on Drug Use and Health: Summary of National Findings* 13 (Sept 2010), online at <http://www.oas.samhsa.gov/NSDUH/2k9NSDUH/2k9ResultsP.pdf> (visited Sept 24, 2010).

<sup>89</sup> Id at 35.

<sup>90</sup> Mason and Calvin, 13 L & Socy Rev at 80–81 (cited in note 86) (reporting a tax evasion rate of 24.2 percent).

<sup>91</sup> Robert T. Michael, et al, *Sex in America: A Definitive Survey* 63 (Little, Brown 1994). See also ABC News Primetime Live, *The American Sex Survey: A Peek beneath the Sheets* 1 (Oct 21, 2004), online at <http://abcnews.go.com/images/Politics/959a1AmericanSexSurvey.pdf> (visited May 1, 2010) (indicating that 15 percent of all men report that they have “paid for sex”). Of course, given the continued illegality in the United States of all of the activities described in Table 3, it is likely that all of these numbers are underreported. Consider also Andre Jeannin, et al, *Patterns of Sex Work Contact among Men in the General Population of Switzerland, 1987–2000*, 84 *Sexually Transmitted Infections* 556, 556 (2008) (indicating that 23 percent of Swiss men between the ages of 31 and 45 reported purchasing sex from a prostitute); Theo Sandfort, et al, *Sexual Behavior and HIV Risk: Common Patterns and Differences between European Countries*, in Michel Hubert, Nathalie Bajos, and Theo Sandfort, eds, *Sexual Behaviour and HIV/AIDS in Europe: Comparisons of National Surveys* 403, 410 (UCL 1998) (indicating that 38.6 percent of adult men in Spain reported paying for sex in their lifetime).



are many more that could be added<sup>92</sup>—the crimes of the sort that naturalists believe form stable rankings turn out to be in the minority rather than the majority.

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—a few of which are summarized in Table 4 below. For example, while hard to estimate with a high degree of accuracy, most researchers estimate that there are over one million abortions performed each year in the United States.<sup>93</sup> Sodomy, which was illegal until quite recently in many jurisdictions, is estimated to be more common among men and women, both straight and gay, than all violent crime, property crime, and illegal drug use combined.<sup>94</sup> Similarly, more people possess and view pornography than are listed as victims of all the crimes in the statistics that Robinson and Kurzban cite.<sup>95</sup> Nor does the “core” cover the failure to assist others who are in need—for example, in instances where a person could help a small child who is being abused but does not.<sup>96</sup> These *noncriminal* acts should also be considered when estimating the extent of agreement because the theoretical question being addressed is not about what happens to be listed in a victimization survey, but about what kind of wrongdoing is considered serious.

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<sup>92</sup> Child pornography, narcotics use and distribution, public urination, and indecent exposure, to name just a few.

<sup>93</sup> See, for example, Rachel K. Jones, et al, *Abortion in the United States: Incidence and Access to Services, 2005*, 40 *Persp Sex & Repro Health* 6, 9 (2008) (estimating that 1,206,200 abortions were performed in 2005); Lawrence B. Finer and Stanley K. Henshaw, *Estimates of U.S. Abortion Incidence, 2001–2003* \*2 (Aug 3, 2006), online at [http://www.guttmacher.org/pubs/2006/08/03/ab\\_incidence.pdf](http://www.guttmacher.org/pubs/2006/08/03/ab_incidence.pdf) (visited Sept 25, 2010) (estimating that 1,287,000 abortions were performed in 2003). See also Center for Disease Control and Prevention, *Abortion Surveillance—United States, 2006* (Nov 27, 2009), online at [http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5808a1.htm?s\\_cid=ss5808a1\\_e](http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5808a1.htm?s_cid=ss5808a1_e) (visited Sept 25, 2010) (estimating that 846,181 abortions were performed in 2006). But see Rachael K. Jones, et al, *Trends in Abortion in the United States*, 52 *Clinical Obstetrics & Gynecology* 119, 120 (2009) (criticizing the CDC data as unreliable due to underreporting).

<sup>94</sup> See William D. Mosher, Anjani Chandra, and Jo Jones, *Sexual Behavior and Selected Health Measures: Men and Women 15–44 Years of Age, United States, 2002*, *Adv Data Vital & Health Stats* 25 (Sept 15, 2005), online at <http://www.cdc.gov/nchs/data/ad/ad362.pdf> (visited May 1, 2010) (indicating that 40 percent of men and 35 percent of women reported having had anal sex by age forty-four). See also William Saletan, *Ass Backwards: The Media's Silence about Rampant Anal Sex*, *Slate* (Sept 20, 2005), online at <http://www.slate.com/id/2126643> (visited May 1, 2010).

<sup>95</sup> ABC News Primetime Live, *The American Sex Survey* at 2 (cited in note 91) (indicating that one in five respondents reported having looked at pornography on the Internet).

<sup>96</sup> See Stacy Finz, *Killing of Girl, 7*, in *Casino Spurs Good Samaritan Bills*, *SF Chron* A21 (Dec 9, 1998) (observing that the inability to charge a college student for his failure to either prevent or report the murder of a young girl prompted the legislative introduction of reporting requirements in California).

TABLE 4. ESTIMATED INCIDENCE OF CONTROVERSIAL  
NONCRIMINAL ACTS

Act	Incidence
Sodomy <sup>97</sup>	80,000,000/yr
Abortion <sup>98</sup>	1,000,000/yr
Internet pornography <sup>99</sup>	21,000,000/mo
Gambling <sup>100</sup>	>60% adults/yr
Nude performances	Unknown
Failure to assist in an emergency	Unknown

How do we know that people disagree about the seriousness of these criminal and noncriminal acts? For starters, different communities regulate these activities in a wide variety of ways. Prostitution is legal in Nevada, but not in New York;<sup>101</sup> Internet gambling is legal in New York, but not in Louisiana;<sup>102</sup> nude performances are illegal in Iowa,<sup>103</sup> but not in California;<sup>104</sup> failing to help someone who is in grave danger when you can do so without much trouble is not punished in California, but it is in Vermont.<sup>105</sup>

But even more convincing is evidence from experiments conducted by Robinson and Kurzban themselves, reported in the same

<sup>97</sup> People engaging in sodomy per year (presumably some engage in it more than once a year). See Michael, et al, *Sex in America* at 140 (cited in note 91) (observing that 10 percent of men and 9 percent of women have engaged in anal sex within the past twelve months).

<sup>98</sup> Jones, et al, 40 *Persp Sex & Repro Health* at 9 (cited in note 93).

<sup>99</sup> People viewing online pornography per month. See Timothy Egan, *Erotica Inc: A Special Report: Technology Sent Wall Street into Market for Pornography*, NY Times A1 (Oct 23, 2000).

<sup>100</sup> National Opinion Research Center, *Report to the National Gambling Impact Study Commission* 8 (Apr 1, 1999), online at <http://www2.norc.org/new/gamb-fin.htm> (visited May 1, 2010) (showing that 60 percent of women and 67 percent of men had gambled in the previous year).

<sup>101</sup> Compare Nev Rev Stat § 244.345 with NY Penal Law § 230.00 (McKinney). Rhode Island only recently barred citizens from paying money for sex, but street solicitation and the operation of brothels were already prohibited. See Associated Press, *Rhode Island: New Prostitution Law*, NY Times A17 (Nov 4, 2009).

<sup>102</sup> Compare NY Penal Law §§ 225.00, 225.05, 225.10 (McKinney) (regulating only certain gambling activities) with La Rev Stat Ann § 14:90.3 (West) (prohibiting Internet gambling). See also Julia Kollwe, *Former Gambling Chief Dicks Is Freed in US*, Independent (Sept 30, 2006), online at <http://www.independent.co.uk/news/business/news/former-gambling-chief-dicks-is-freed-in-us-418184.html> (visited May 1, 2010) (noting that the governor of New York refused to sign an order to extradite an alleged Internet gambler to Louisiana).

<sup>103</sup> Iowa Code Ann § 728.5 (West).

<sup>104</sup> See *Nunez v Holder*, 594 F3d 1124, 1144–45 (9th Cir 2010) (Bybee dissenting) (discussing the application of Cal Penal Code § 314, which prohibits indecent exposure, to nude dancing at clubs).

<sup>105</sup> Compare Cal Penal Code § 152.3 (West) (imposing the duty to report only in certain situations involving children) with 12 Vt Stat Ann § 519(a) (Equity) (mandating that a person who knows that another person is “exposed to grave physical harm” must, under certain circumstances, “give reasonable assistance to the exposed person unless that assistance or care is being provided by others”). Minnesota also has a statutory duty to assist. Minn Stat Ann § 604A.01 (West).

article arguing that there was broad agreement on intuitions regarding wrongdoing, summarized in Table 5 below.<sup>106</sup> They found, for example, that a third of participants thought that smoking marijuana should bring no penalty at all. A similarly large percentage of the population felt the same way about prostitution. And while many of the acts that Robinson and Kurzban included are less controversial (most would agree that an abortion in the seventh month is wrong, but what about in the third or fourth month?), they provide enough evidence of public dissensus on these issues to make one wonder how they can be so confident in their claims that our understandings of wrong acts are so broadly shared and deeply nuanced.

TABLE 5. SUMMARY OF RANKINGS OF CONTROVERSIAL ACTS SHOWING SIGNIFICANT DISAGREEMENT OVER RELATIVE WRONGFULNESS.<sup>107</sup>

Scenario	Mean Rank	Modal Rank	Percent Assigning "No Liability"
Marijuana	2.2	†	33
Prostitution	2.4	†	30
Cocaine	4.0	†	19
Bestiality	4.2	†	16
Teen alcohol	4.8	5	6
Drunk crash	6.2	6	0
Third theft	7.1	7	0
Late abortion	7.5	12	11
Cocaine dealer	7.9	9	6
Unwanted sex	8.7	11	1
Cocaine importer	8.9	10	6
Rape	11.1	12	0

N = 246 [VERIFY]

† These scenarios had a modal rank of "no punishment."

## B. Core Meltdown

How do naturalists explain this disagreement? These controversial acts, they argue, should not be evaluated alongside the others because they are outside of the "core" of wrongdoing: "physical aggression, takings without consent, and deception in exchanges." On this

<sup>106</sup> Robinson and Kurzban, 91 *Minn L Rev* at 1883 (cited in note 13) ("[T]here are punishment-assignment issues on which people do indeed disagree.").

<sup>107</sup> *Id.* at 1888 table 8.

account, there are some acts that are so important to our individual and collective welfare that we have evolved a shared intuition that they are wrong; others are less important, so there is more room for diverse intuitions.

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. Are we agreed that controversial acts (incest, abortion, prostitution, mistakes about sexual consent, failing to help a child in need, drug use, whippings, cannibalism, just to name a few) are unimportant? Sexual misconduct, for example, might reasonably be included in the “core” on evolutionary grounds, as sexual activity (so far as we can tell, anyway) is central to continued survival; and yet there is dramatic cross-cultural disagreement over the enforcement of sexual mores and the punishment of sexual misconduct.

Many of the cross-cultural ranking studies that naturalists cite actually *support* the conclusion that there is no reliable core–periphery or moral–conventional distinction. Consider, for example, the rankings reported by Evans and Scott in their cross-cultural comparison of crime seriousness among US and Kuwaiti students, excerpts of which are reported in Table 6 below.

TABLE 6. A COMPARISON OF SELECTED RANKINGS OF CRIME SERIOUSNESS BY KUWAITI AND US CITIZENS<sup>108</sup>

Description of Act	Kuwaiti Ranking	US Ranking	Difference
A married woman committed adultery	1	32	31
A married man committed adultery	5	31	26
A man killed his wife during an argument	6	1	5
A woman engaged in prostitution	7	29	22
A man stabbed his wife with a knife during an argument	8	3	5
A male engaged in homosexuality	9	34	25
An individual abandoned religion and espoused atheism	13	36	23
An individual threw burning liquid in someone's face, which caused scars	15	10	5
An individual accused a woman of adultery without adequate proof	17	30	13
A single man committed fornication	18	37	19
A woman had an illegal abortion	22	35	13
An individual intending only to injure someone by throwing a stone accidentally killed him	25	6	19

The disagreements are stark. Notice, for example, that Kuwaitis rank a woman committing adultery as more serious than a man killing his wife, and they rank a male engaging in homosexuality as more serious than an individual who throws burning liquid in someone's face, causing scars. Americans, in contrast, seem relatively unconcerned about adultery and homosexuality, and relatively distressed about the killing of adulterous wives and acid attacks—although, again, there is significant disagreement across subcommunities in the United States on the former two.<sup>109</sup>

<sup>108</sup> Evans and Scott, 22 *Criminol* at 48–49 (cited in note 46). Seriousness is ranked on a scale from one to thirty-seven.

<sup>109</sup> While Maryland, for example, has explicitly excluded spousal infidelity as “adequate provocation” and potential grounds for mitigation of murder to manslaughter, most states have not. Compare, for example, Md Crim Code Ann § 2-207(b) with *Commonwealth v Schnopps*, 417 NE2d 1213, 1215–16 (Mass 1981) (holding that the killing of a spouse can be voluntary manslaughter when it immediately follows the victim's oral admission of adultery).

### C. The Morality Convention

What of the studies distinguishing moral and conventional wrongdoing? A series of critiques has been leveled against the moral-conventional studies, noting that the findings reported depend on carefully selecting the questions asked. As one group of researchers recently noted, “the range of transgressions involving harm that has been included in these studies is remarkably narrow,” typically involving “behaviors that would be familiar to youngsters, such as pulling hair or pushing someone off a swing.”<sup>110</sup> This poses a problem because teachers across cultures discourage hitting, pulling hair, and so on, making it difficult to disentangle what is innate from what is learned.

Studies that varied the cultural frame, however, generated substantially different results. Many children, for example, hold clear and authority-independent intuitions about the wrongness of acts that do not fit the pattern of moral (rather than conventional) transgressions. Across many countries, for example, children were found to consistently rank a broad array of transgressions as serious independent of authority, including “privately washing the toilet bowl with the national flag,” “mixed-sex bathing,” “addressing a teacher by his first name,” and violating a number of religious rules.<sup>111</sup>

Another set of studies has challenged the distinctness of moral harms. In one study of adults, for example, Daniel Kelly and his fellow researchers asked participants about a series of paired harms. Here is one:

(1A) Mr. Williams was an officer on a cargo ship 300 years ago. One night, while at sea, he found a sailor drunk at a time when the sailor should have been on watch. After the sailor sobered up, Williams punished the sailor by giving him 5 lashes with a whip.

Is it OK for Mr. Williams to whip the sailor? [Yes/No]  
On a scale from 0 (not at all bad) to 9 (very bad), how would you rate Mr. Williams' behavior? **[FLIP: Apostrophe placement?]**

(1B) Mr. Adams is an officer on a large modern American cargo ship in 2004. One night, while at sea, he finds a sailor drunk at a time when the sailor should have been monitoring the radar screen. After the sailor sobers up, Adams punishes the sailor by giving him 5 lashes with a whip.

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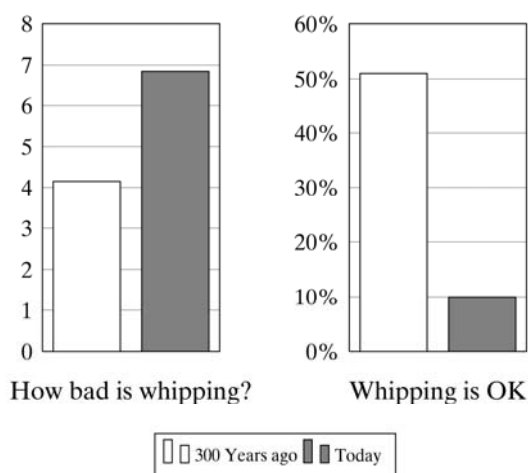
<sup>110</sup> Daniel Kelly, et al, *Harm, Affect, and the Moral/Conventional Distinction*, 22 *Mind & Lang* 117, 121 (2007).

<sup>111</sup> *Id.* at 120. See also Nucci, *Education in the Moral Domain* at 52–75 (cited in note 72) (discussing these studies in detail).

Is it OK for Mr. Adams to whip the sailor? [Yes/No]  
 On a scale from 0 (not at all bad) to 9 (very bad), how would you rate Mr. Williams' behavior?<sup>112</sup> **[FLIP: Here too]**

Based on the notion that moral harms are intuitive and generalizable, one would expect a consistent answer to both questions. As indicated in Figure 1 below, however, this was not the case. Rather, most participants in the study indicated that it was “OK” to whip the sailor three hundred years ago, while only one in ten thought it was “OK” today. Participants also considered the two acts to be significantly different when evaluating the wrongfulness of the act (“how bad” the whipping was).

FIGURE 1. JUDGMENTS ABOUT THE ACCEPTABILITY OF WHIPPING A DERELICT SAILOR<sup>113</sup> **[Reformat, add “today”]**



Similar variations were observed across several other scenarios, including the acceptability of abusing military trainees when prohibited and not prohibited by authority, the acceptability of eating the flesh of a dead person at a funeral when customary and when not customary, a teacher spanking students when prohibited and not prohibited, and practicing slavery in ancient Rome and in the United States.<sup>114</sup>

The point here is not that we cannot or should not distinguish between more or less wrongful acts. Rather, it is to say that if the main

<sup>112</sup> Kelly, et al, 22 *Mind & Lang* at 123–24.

<sup>113</sup> Id at 127–28 (cited in note 110) (presenting the results of an online survey conducted by the authors). The bar graph on the left shows the percent of YES responses to the binary “Is it OK?” question ( $\chi^2=79.01$ ;  $p=0.000$ ). The bar graph on the right represents responses to the question: “How would you rate Mr. X’s behavior?” ( $t(198)=13.55$ ;  $p=0.000$ ).

<sup>114</sup> See id at 126–28.

distinction that can be made between important and unimportant criminal offenses is the degree to which individuals agree on them, then the statement that people tend to agree about core offenses amounts to saying that people tend to agree about offenses about which they tend to agree. It is no help to say that what distinguishes “core” from “periphery” is the importance of the act to our collective survival if the only manner of discerning the importance of behavior to our survival is our degree of agreement about the behavior. It is, at its core (so to speak), a contentless distinction.

#### D. Playing Fair with Fairness Games

Similar problems have arisen with the studies of ultimatum games cited by Punishment Naturalists. Many anthropologists and economists were not satisfied with early research in the field; they noticed that the studies, while conducted across many countries, all focused on educated students in highly industrialized societies. They decided to take the same game further afield to see if the results in other cultures resembled those reported by researchers studying individuals who were well integrated into Western capitalist culture.<sup>115</sup>

What they found was revealing. Although something does move Responders to sacrifice what they might have gained from an unfair offer to punish the Proposer of the unfair offer, precisely *what is considered fair and unfair* varies significantly.<sup>116</sup> For example, in societies where norms regarding equal distribution are strong, the Proposer is far more likely to propose something close to an even split than in societies where egalitarian distribution is not the norm; and if the Proposer in an egalitarian culture offers a lopsided split benefitting herself, the Responder is highly likely to reject the proposal, sacrificing her own share to punish the Proposer.<sup>117</sup> But norms regarding fair distribution are far from universal; many societies demand egalitarian sharing while others feature intricately delineated social hierarchies. Consider Figure 2 below, which graphs the wide variation in offers made by people occupying the role of the Proposer across fifteen societies with

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<sup>115</sup> See, for example, Alvin E. Roth, et al, *Bargaining and Market Behavior in Jerusalem, Ljubljana, Pittsburgh, and Tokyo: An Experimental Study*, 81 Am Econ Rev 1068, 1068–69 (1991). See also generally Joseph Henrich, et al, *Introduction and Guide to the Volume*, in Joseph Henrich, et al, eds, *Foundations of Human Sociality 1* (Oxford 2004) (describing an account of the origins of this research).

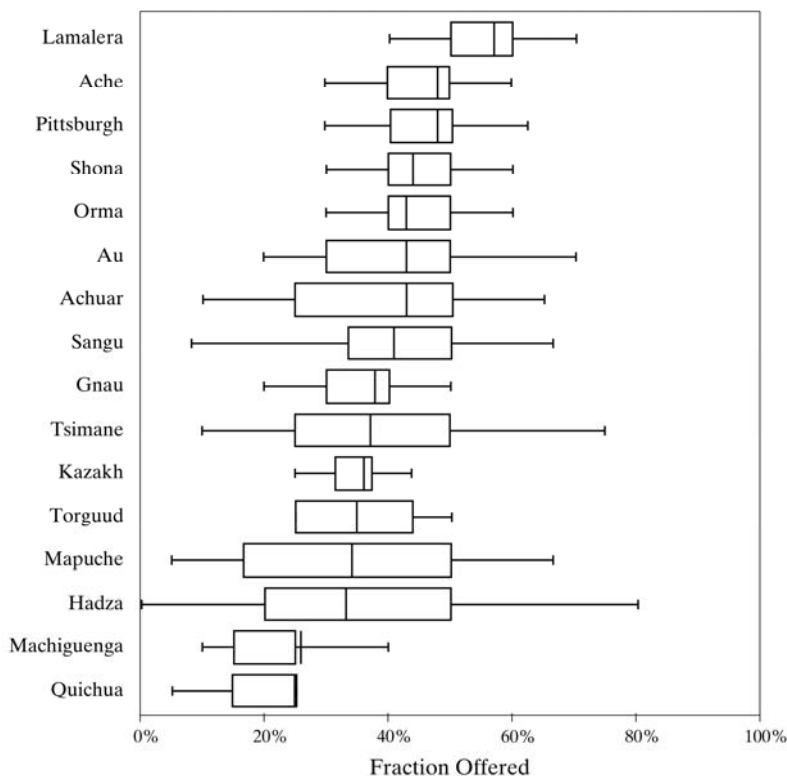
<sup>116</sup> This does not mean that people necessarily conform their behavior to what is considered fair because they are intrinsically motivated to be fair. It might be the case that individuals adjust their behavior strategically in order not to be punished for what they believe others will perceive as unfair behavior.

<sup>117</sup> Henrich, et al, 28 Behav & Brain Sci at 812–13 (cited in note 60).



differing cultural attitudes and a variety of levels of integration into world markets.

FIGURE 2. MODIFIED BOX PLOT OF ULTIMATUM GAME OFFERS ACROSS FIFTEEN SOCIETIES<sup>118</sup>



One parsimonious explanation for these differences features variations in social meaning. Where there is an expectation of egalitarian sharing, a proposal that disproportionately rewards one individual at the expense of another will seem untoward and worthy of punishment. (Why should one person expect to gain more than another from this arrangement?). In others, it will seem quite reasonable and sensible (after all, no matter what the offer, the Responder will be getting

<sup>118</sup> Joseph Henrich, et al, "Economic Man" in *Cross-Cultural Perspective: Behavioral Experiments in 15 Small-Scale Societies* \*54 figure 2 (working paper), online at [http://www.som.yale.edu/Faculty/keith.chen/negot.%20papers/CamererEtAll\\_CrossCultUltimatum01.pdf](http://www.som.yale.edu/Faculty/keith.chen/negot.%20papers/CamererEtAll_CrossCultUltimatum01.pdf) (visited May 1, 2010). For the published version of this paper, see note 60. The box gives the interquartile range for offers in each society. The vertical line within each box, except for the Machiguenga, is the mean offer, not the median as in a standard box plot. The mean offer for the Machiguenga lies outside of the interquartile range and is represented by the vertical line just to the right of the box.

something for nothing). In both cases, the sense of fairness (or lack thereof) and the desire to accede (or to punish) will turn on local customs that prescribe what form fairness takes.

The Lamalera, for example, were among the most generous ultimatum players—with Proposers typically offering up half or more than half of the money.<sup>119</sup> They are subsistence whale hunters who share their bounty communally, often dividing a single whale among a hundred or more individuals—many of whom help maintain the boats, dry and cook the meat, or conduct other important non-hunting-related tasks in the village. Subsequent to a whale hunt, then, the dozen men who ventured out into the sea to catch the whale will typically take only a small portion of the whale they have caught for themselves. For the Lamalera, the most important part of their subsistence economy requires regular partitioning of goods in ways that might seem foolish to Westerners, but which make sense when considering the other benefits that accrue to whale hunters as a result.<sup>120</sup>

The Machiguenga, by contrast, hunt and gather small amounts of food, largely for themselves and their immediate families. Hunters (typically men) eat first and typically take the most, followed by women and children who eat whatever remains.<sup>121</sup> Observers speculate that this is because men expend a significantly larger amount of energy hunting and gathering than the women, but, whatever the reason, the practice appears to instill a very different norm regarding the fair division of goods. The Machiguenga Proposers appear, by Western standards, exceptionally selfish, typically offering only a quarter of the money. Ethnographers, however, describe them as kind, decent, and thoughtful; they simply have, the researchers suggest, a different understanding of what fairness and generosity entail.<sup>122</sup>

Among the Gnau and Au of Papua New Guinea, another set of norms prevails. With extensive reciprocal demands made of one another (individuals are often expected to give away or share common possessions and goods on demand), receiving a gift is seen as incurring a kind of burden or debt. Because individuals are expected to reciprocate gift-giving or incur significant social costs, they are reluctant to accept offers of gifts that they feel will place a serious potential burden on

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<sup>119</sup> Sixty-three percent of Proposers divided the pie equally, and most who did not offered more than 50 percent. Henrich, et al, 28 *Behav & Brain Sci* at 811 (cited in note 60). See also generally Michael S. Alvard and David A. Nolin, *Rousseau's Whale Hunt? Coordination among Big Game Hunters*, 43 *Curr Anthro* 533 (2002).

<sup>120</sup> See Alvard and Nolin, 43 *Curr Anthro* at 540 (cited in note 119).

<sup>121</sup> See Ethan Russo, *Machiguenga: Peruvian Hunter-Gatherers*, 1 *Wise Traditions* (Summer 2000), online at <http://www.westonaprice.org/in-his-footsteps/236-machiguenga.html> (visited Sept 21, 2010).

<sup>122</sup> See Henrich, et al, 28 *Behav & Brain Sci* at 811–13 (cited in note 60).

them.<sup>123</sup> So while an individual may achieve social status through generous giving, others may reject gifts in order to resist indebtedness and its attendant lower status. Among the Gnau and Au, the Ultimatum Game generated an exceptionally high number of “fair” (50 percent) and “hyper-fair” (more than 50 percent) offers. But hyper-fair offers were often rejected. The suggestion by researchers is that this reflected the common aversion to accepting overly generous gifts.<sup>124</sup>

Hyper-fair offers are not rejected in all societies, though. Among the Sukuma of southwestern Tanzania (who are not shown on the chart above), the most common offer was 90 percent, the mean was 61 percent, and no offer was rejected.<sup>125</sup> Moreover, participants were willing to accept offers of as little as 10 percent, even though no person actually made an offer that low. Again, the researchers explain the results as reflecting local norms. Sukuma socialize their children to be extremely generous, requiring them to give away much of their food. They also have strong in-group identifications and exceptionally generous responses to poverty, which anthropologists attribute to the stochastic nature of their agricultural economy and the necessity of pooling resources to survive.<sup>126</sup>

If these studies suggest variation among social groups, another set of studies suggests that conceptions of fairness are socially contingent even *within* Westernized societies that are well integrated into the capitalist market system.<sup>127</sup> In a series of studies conducted by Swee-Hoon Chuah, Robert Hoffman, Martin Jones, and Geoffrey Williams in the United Kingdom and Malaysia, what individuals thought was fair and the amount that individuals were willing to sacrifice to punish

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<sup>123</sup> Id at 811. Those who repeatedly fail to reciprocate are shunned and disparaged. Consider id at 812.

<sup>124</sup> Id at 811. See also Herbert Gintis, et al, *Explaining Altruistic Behavior in Humans*, 24 *Evol & Hum Behav* 153, 159 (2003) (“[This] reflects Melanesian culture of status-seeking through gift giving. Making a large gift is a bid for social dominance in everyday life in these societies, and rejecting the gift is a rejection of being subordinate.”). The hypothesis offered by Gintis and his coauthors is consistent with the extensive anthropological literature on reciprocal exchange in many societies, with “gifts” being thought of as conferring status on the giver and a burden on the recipient. See, for example, Marcel Mauss, *The Gift: The Form and Reason for Exchange in Archaic Societies* 65 (Routledge 1990) (W.D. Halls, trans) (originally published 1950) (“The unreciprocated gift still makes the person who has accepted it inferior, particularly when it has been accepted with no thought of returning it.”).

<sup>125</sup> Brian Paciotti and Craig Hadley, *The Ultimatum Game in Southwestern Tanzania: Ethnic Variation and Institutional Scope*, 44 *Curr Anthro* 427, 429–31 (2003).

<sup>126</sup> Id at 431.

<sup>127</sup> See, for example, Swee-Hoon Chuah, et al, *An Economic Anatomy of Culture: Attitudes and Behaviour in Inter- and Intra-national Ultimatum Game Experiments*, 30 *J Econ Psych* 732, 733 (2009); Swee-Hoon Chuah, et al, *Do Cultures Clash? Evidence from Cross-National Ultimatum Game Experiments*, 64 *J Econ Behav & Org* 35, 36 (2007); Roth, et al, 81 *Am Econ Rev* at 1092 (cited in note 115).

offers they thought of as unfair varied significantly with the values they espoused. Individualism, desire for gender equality, and a host of other values related to market participation strongly influenced the behavior of participants, suggesting that cultural mores *within* each society were important determinants of fairness as well.<sup>128</sup>

How do naturalists account for this kind of variation in fairness games? For the most part, they either ignore or gloss over the data. One strategy, employed by Hauser, is to offer a substantially diminished version of naturalism. On this “softer” naturalism account, we have not evolved any specific intuitions; rather, we have moral “principles” like fairness, and culture sets the “parameters” that tell us what is fair and what is not. The “principles and parameters” approach to a universal moral grammar is employed as an analog to Chomsky’s “principles and parameters” approach to constructing a universal grammar of human language. The problem with this tack is that on this softer account, nature asks culture to do all the work. If fairness can be whatever culture supplies, then it is not clear what work the hypothesized moral organ is doing.

The alternative approach (also employed by Hauser at times) is little better. Arguing that nature sets *specific limits* on our conception of fairness requires a specification of what those limits are. Hauser, as we noted above,<sup>129</sup> very conveniently chooses 15 percent and 50 percent as the lower and upper bounds—precisely the limits observed in the studies he had read at the time! If that is how one determines the limits set by our common moral organ, then it is certainly true that it will (as a matter of logic) always accurately reflect observed data; but it loses any explanatory or predictive force. It also cordons off as “parameters” the richness of the social meanings and practices that give rise to norms governing fairness, sharing, reciprocity, and punishment. Naturalism can tell us nothing about *why* we have different intuitions from the Quichua, or why the Quichua have different intuitions from the Sakuma. For that, we need a theory that incorporates variations in social norms.

Our point here is not that people’s reactions are random or without structure—quite the reverse. There *is* a deep but highly generalized structure—*individuals are willing to make significant sacrifices to punish those they believe are being unfair*—but that structure relies upon socially constructed norms to give it content. Without recognizing the way social meaning provides for the specific articulation of that structure, it is impossible to give a coherent interpretation of the

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<sup>128</sup> See Chuah, et al, 30 J Econ Psych at 742 (cited in note 127).

<sup>129</sup> See note 68 and accompanying text.

data. As the researchers involved in conducting these cross-cultural studies concluded, “[f]ailure to recognize the extent of human diversity and the range of processes that have generated the human mosaic[] may doom large sections of social science to an empirically false and culturally limited construction of human nature.”<sup>130</sup>

### III. REALISM VERSUS NATURALISM AND “CORE” OFFENSES

We doubt that naturalists will discover some independent way to distinguish the core of harms from the periphery, moral transgressions from conventional, or principles from parameters. But even if there is some yet-to-be-discovered distinction, naturalists would still face a more serious problem: there is substantial disagreement about what constitutes wrongdoing and how serious given offenses are *within* the so-called “core” of wrongdoing. As such, the claim that core offenses are noncontroversial requires not only that we ignore disagreement over what constitutes core and noncore offenses, but also that we ignore significant controversies *within* the three categories of core offenses: “physical aggression, takings without consent, and deception in exchanges.”<sup>131</sup>

Comparing the abilities of realist and naturalist accounts to manage both agreement and disagreement over the wrongfulness of physical aggression, takings without consent, and deception in exchanges, however, requires at least a preliminary account of the realist perspective.

#### A. Punishment Realism

Punishment Realism, in our account, applies to the study of punishment the insights of classical legal realism and contemporary empirical research into human judgment.<sup>132</sup> Legal realism observes that abstract concepts, doctrines, and rules of law do not provide unique, determinate resolutions to most difficult cases, and that in deciding such cases, legal actors—consciously or not—are necessarily moved by extralegal influences that shape their choice of one or another of the various possible justifications and outcomes. For the most part, these extralegal influences will move legal actors to agree, but sometimes they will move them to disagree.

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,

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<sup>130</sup> Henrich, et al, “*Economic Man*” in *Cross-Cultural Perspective* at \*45 (cited in note 118). See also Kelly, et al, 22 *Mind & Lang* at 117–131 (cited in note 110).

<sup>131</sup> Robinson and Kurzban, 91 *Minn L Rev* at 1892 (cited in note 13).

<sup>132</sup> See generally Braman and Kahan, *Legal Realism as Psychological and Cultural (Not Political) Realism* (cited in note 3).

fairness, or expressive concern they favor. As such, realists want to understand the cognitive biases and heuristics that move individuals to interpret law and facts in particular ways.<sup>133</sup> But where the naturalist account describes highly specific moral intuitions, the realist account emphasizes the interplay between relatively generic cognitive mechanisms and varied social meanings. On the realist account, cognition is, to be sure, shaped by a host of demonstrable and perhaps nearly universal cognitive biases and heuristics, many or all of which are the product of evolutionary pressures or accidents. But Punishment Realism, at least as we conceive of it, views these innate cognitive traits as interacting with and generating a variety of social meanings that ultimately determine our understanding of and reaction to wrongdoing.

Punishment Realism recognizes that intuitions about wrongdoing and punishment like these will often *seem* natural and universal even when they are, in fact, socially contingent. Perhaps the most obvious way that individuals come to see their own parochial conceptions of justice as natural and universal can be described in terms of explicit value preferences: individuals simply prefer their own value hierarchies over those of others.<sup>134</sup> Classic cultural clashes over sodomy, abortion, slavery, and many other issues are often described in these terms: participants may recognize that the moral hierarchies of others vary, but they are unlikely to prize other people's mores and commitments more highly than their own; at best they may view other value structures as strange or foreign, at worst as false and debased. And while those involved in such moral disputes may understand that their preferred outcomes derive from their values, they will often have trouble articulating the source of their values. Their values will seem, at least to them, to be natural.<sup>135</sup>

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<sup>133</sup> There are a number of accounts that might fit this description. For a comparison of the two main accounts, see Dan M. Kahan, "Ideology in" or "Cultural Cognition of" Judging: What Difference Does It Make?, 92 Marq L Rev 413, 422 (2009).

<sup>134</sup> Consider Mary Douglas and Aaron Wildavsky, *Risk and Culture* 72–73 (California 1980) (making the analogous point that private individuals "choose not to be aware of every danger," and that when choosing between risks, "subjective values must take priority").

<sup>135</sup> That our values are not universal or transcendental, but historically specific intuitions of our collective making, is a perspective well described by Stanley Fish:

I intend [the title of the book *Doing What Comes Naturally*] to refer to the unreflective actions that follow from being embedded in a context of practice. This kind of action . . . is anything but natural in the sense of proceeding independently of historical and social formations; but once those formations are in place (and they always are), what you think to do will not be calculated in relation to a higher law or an overarching theory but will issue from you as naturally as breathing.

Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* ix (Duke 1989).

But the overt privileging of one's values over those of others often masks a subtler and even more pervasive way that individuals come to see their own intuitive sense of justice as natural and universal: *cultural cognition*. Cultural cognition refers to the tendency of individuals to conform their perceptions of risks and their factual beliefs to their core cultural commitments. It is cognitively easier to believe factual assertions that comport with our norm-pervaded moral evaluations and cognitively harder to believe those that conflict with or threaten them.

Numerous studies have shown that culture implicitly shapes factual perceptions in this way, shaping our beliefs without our noticing that it is doing so. Culture constructs our understandings of fact both through cognitive mechanisms (such as avoiding cognitive dissonance, the tendency of individuals to discount information that conflicts with their existing beliefs and values) and social practices (such as selecting information sources like favored news outlets and friends who share our values). Individuals with varied and durable conceptions of what is *noble* and what is *base* thus form equally varied and durable conceptions about what is *true* and what is *false*. As a result, even where individuals are willing to agree to a single legal standard that requires specific factual findings (as jurors must), a host of cognitive biases and heuristics can move them to conform their understanding of relevant facts so that they arrive at varied appraisals of wrongfulness.

These two forms of cultural influence—one explicit and one implicit—are often mutually reinforcing. Because individuals tend to credit factual claims that are consistent with their normative visions of a just social order, when they reflect on their cultural commitments they have plenty of facts to suggest that their worldview is naturally preferable to others. And, because their cultural commitments will seem naturally preferable to them, they are less likely to question these commitments or their influence on their factual perceptions.

We have more to say below about Punishment Realism and the various social and cognitive mechanisms that sustain it, but with that brief summary in hand, we turn to crimes within the so-called “core of wrongdoing.”

## B. The Core Offenses

There are recurrent themes in the kinds of acts that are prohibited in many cultures. Robinson and Kurzban have helpfully collected them under the rubrics of “aggression, takings without consent, and deception in exchange,” and argue that acts falling into these categories constitute “the core of wrongdoing.” As we argue below, none of these categories 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. We start with “takings without consent” and “deception in exchange,” two easy cases. Then we take on rape, followed by the hardest case—the core of the core of wrongdoing, so to speak—murder, around which we develop our argument in greater detail.

### 1. Takings without consent.

The anecdote at the beginning of this Article provides some measure of the problems faced by naturalist claims about a *universal* or *normal* intuition regarding takings without consent. A substantial part of the dissensus over takings relates to varied conceptions of property. As the anthropologists Franz von Benda-Beckmann, Keebet von Benda-Beckmann, and Melanie Wiber describe, the concept of property can be thought of as depending on three variable concepts: “first, the social units (individuals, groups, lineages, corporations, states) that can hold property rights and obligations; second, the construction of valuables as property objects; and third, the different sets of rights and obligations social units can have with respect to such objects.”<sup>136</sup>

As we noted in the Introduction, even where everyone is in agreement on the idea that *someone* owns *something of value*—a train ticket, for example—that individual’s rights and obligations can vary dramatically from context to context. In the United States, we typically have highly individualistic conceptions of rights and obligations—at least relative to those living in India and Papua New Guinea. As a result, an act that would be considered an invasion of some property-like right in one time or place can seem perfectly normal in another because the norms governing who has access to what and under which conditions vary so dramatically across time and place.

The anthropological literature on non-Western cultures provides ample illustration of this,<sup>137</sup> but we need look no further than recent

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<sup>136</sup> Franz von Benda-Beckmann, Keebet von Benda-Beckmann, and Melanie G. Wiber, *The Properties of Property*, in Franz Benda-Beckman, Keebet von Benda-Beckmann, and Melanie G. Wiber, eds, *Changing Properties of Property* 1, 15 (Berghahn 2006).

<sup>137</sup> Anthropologists have come to view the notion of property as often contested:

[P]eople have at any given moment a number of “languages” available to them for characterizing objects in circulation as commodified, gift-like, inalienable, and so on. These languages are often in tension; actors also have differential access to them. And they use these languages within a context that may constrain the use of some idioms and support the use of others. This perspective . . . helps us understand how multiple or hybrid forms of value occur simultaneously.

Elizabeth Emma Ferry, *Not Ours Alone: Patrimony, Value, and Collectivity in Contemporary Mexico* 18 (Columbia 2005). David Graeber and Maurice Godelier provide two recent and influential general accounts of the way value and property vary across time and place. See generally David



domestic debates (over, for example, the law of taxation, in which the ownership of a good that is highly valued—money—is continually contested;<sup>138</sup> or eminent domain,<sup>139</sup> adverse possession, nuisance, or intellectual property, on which the members of the public, the academy, and the bench regularly disagree) to get a flavor of the sticky dissensus over “takings without consent” closer to home.<sup>140</sup>

It is no help to modify the naturalist account by suggesting that, although the idea of property varies, the notion does not vary that transgressions of those rights are intuitively wrong. Without providing content to the rights themselves, this simply passes along the cognitive puzzle of what is wrongful to local norms governing what exactly it is that comprises a property right. This is not to say that there may not be some very general traits that humans share with respect to affection for various possessions.<sup>141</sup> The question is whether we have universal intuitions about when an act is theft and, if so, how wrongful it is relative to other acts. And that is something that simply cannot be resolved without reference to variable social norms.

This is a modified version of Jerry Fodor’s “input problem” for evolutionary theories that rely on multiple cognitive modules of this sort.<sup>142</sup> If the argument is that we have a module that helps us quickly compute a judgment such as “theft is wrong,” we need to have some sense of when something qualifies as theft. But the definition of theft (or fraud or murder) is fairly complex and socially contingent in evolutionary contexts, depending on social groups, status, and a host of other concerns. Because you need complex social information to assess whether something is theft, you have not really bought any cognitive efficiency with a module that tells you that theft is wrong, because

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Graeber, *Toward an Anthropological Theory of Value: The False Coin of Our Own Dreams* (Palgrave 2001); Maurice Godelier, *The Enigma of the Gift* (Chicago 1999) (Nora Scott, trans).

<sup>138</sup> Compare, for example, Liam Murphy and Thomas Nagel, *The Myth of Ownership* 8 (Oxford 2002) (arguing that private property is a legal convention defined in part by the tax system) with Stephen Moore, *In Their Own Words*, Natl Rev Online (Apr 23, 2002), online at <http://www.nationalreview.com/moore/moore042302.asp> (visited May 1, 2010) (critiquing Murphy and Nagel’s book).

<sup>139</sup> As Janice Nadler and Shari Diamond have found in their research, variable concepts like “subjective attachment to property” are paramount in shaping “the perceived justice of a taking.” Janice Nadler and Shari Seidman Diamond, *Eminent Domain and the Psychology of Property Rights, Proposed Use, Subjective Attachment, and Taker Identity*, 5 *J Empirical Legal Stud* 713, 713 (2009). See also, for example, *Kelo v City of New London*, 545 US 469 (2005), which provoked public debate over property rights and takings without consent.

<sup>140</sup> Special thanks to Stephanie Stern for making this point to us.

<sup>141</sup> See, for example, Richard C. Stedman, *Toward a Social Psychology of Place*, 34 *Envir & Behav* 561, 563 (2002).

<sup>142</sup> See Jerry Fodor, *The Mind Doesn’t Work That Way* 71–78 (MIT 2000) (describing the input problem).

the same complex social information that tells you that something is theft can also tell you that it is wrong and how wrong it is.

It is, of course, possible to move away from specifics and develop general rules on which people agree. But such definitions invariably depend on some variable notion of what makes something wrongful. Taking without consent and deception in exchange are thus not always wrong; rather, they are wrong when social customs tell us so.

## 2. Deception in exchange.

If ever there was a messy and discordant conception in law and morality, it is that governing “deception in exchange.” Punishment Naturalists assert that deception in exchange is one of the core areas of agreement in our moral development. They suggest that the moral norm against deception arises because of the “analogical closeness to inflicting direct personal harm on another” or because it is an “extremely useful mechanism for a society to develop”:<sup>143</sup> intuitions like these enable cooperation because they punish defectors and cheats.<sup>144</sup>

We agree that across societies, individuals exhibit a general (and widely shared) dislike of shirking and fraud. The positive version of this dislike is instantiated in the norm of reciprocity.<sup>145</sup> But that general principle falls apart at the level of specificity at which the law typically operates. Individuals, it turns out, have quite divergent views about whether specific *kinds* of lying are wrongful, and how far the law ought to go to protect buyers in commercial exchanges from their own bad judgment in relying on a seller’s speech. Because these are the live issues in the criminal regulation of deception, we briefly explore such divergent views here.

Consider first the definitional problem. For example, judges commonly take from the jury actions for civil or criminal fraud in sale of goods cases where the seller has “puffed” her goods.<sup>146</sup> This alone suggests that the general principle “do not lie in commercial exchange” has

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<sup>143</sup> Robinson and Darley, 81 S Cal L Rev at 58–59 (cited in note 15).

<sup>144</sup> Robinson, Kurzban, and Jones, 60 Vand L Rev at 1647–49 (cited in note 14).

<sup>145</sup> See generally Kathleen Vohs, Roy Baumeister, and Jason Chin, *Feeling Duped: Emotional, Motivational, and Cognitive Aspects of Being Exploited by Others*, 11 Rev Gen Psych 127 (2007); Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 Mich L Rev 71 (2003).

<sup>146</sup> Many of the issues in puffery, such as questions of falsifiability in false advertising cases, are often resolved as matters of law rather than fact. See Jean W. Burns, *Confused Jurisprudence: False Advertising under the Lanham Act*, 79 BU L Rev 807, 867–71 (1999); Ivan L. Preston, *The Definition of Deceptiveness in Advertising and Other Commercial Speech*, 39 Cath U L Rev 1035, 1040–41 (1990).

a variety of concrete meanings.<sup>147</sup> The Supreme Court itself has advanced distinct—and often competing—definitions of what the term “misleading” means.<sup>148</sup> Both jurists and lay people simply do not have stable preferences about what constitutes “deception.” Instead, their views about whether speech in fact deceives turn on their implicit views of whether it should.

One might be tempted to believe that these various rules on the meaning of deception turn on a general empirical finding that individuals do not believe sales talk. But, as a number of studies have found, “puffery is believed by large numbers of consumers,”<sup>149</sup> though not all.<sup>150</sup> In this way, the law of fraud is full of conflicts over values—do we want individuals to bear the responsibility for their own choices, or do we want individuals to recognize context and market power as important—masquerading as disputes about fact. That dissensus in turn produces the hotly disputed political fights regarding the law of deception in exchange we see all around us, including the scope of the securities laws and the appropriateness of most forms of consumer protection regulation.

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<sup>147</sup> See David Hoffman, *The Best Puffery Article Ever*, 91 Iowa L Rev 1395, 1400–16 (2006) (defining the puffery defense in false advertising, securities, UCC warranty, and promissory estoppel cases). See also Ivan L. Preston, *Puffery and Other “Loophole” Claims: How the Law’s “Don’t Ask, Don’t Tell” Policy Condone Fraudulent Falsity in Advertising*, 18 J L & Commerce 49, 54–55 (1998) (noting that puffery may take a variety of forms, including claims that a product is the “best,” “best possible,” “better,” and “specially good”). Hoffman provides a host of instances where intuitions vary on seemingly similar cases:

Advil’s claim that it, “like Tylenol,” “doesn’t upset the stomach” was found not to be immune puffery because a court believed that consumers would have viewed the statements to be a factual comparison with other brands. Similarly, a motor-oil company’s claim to provide “longer engine life and better engine protection” was not held to be puffery. By contrast, a puffery defense succeeded with respect to Bayer’s statement that it made the “the world’s best aspirin” that “works wonders.” And a videogame manufacturer escaped liability, despite claiming to have made “The Most Advanced Home Gaming System in the Universe.” . . .

The claim that yogurt is “nature’s perfect food” apparently may be falsified and is not puffery. But, to enthusiasts’ chagrin, Nestlé’s boast that it sells the “very best chocolate” is a meaningless puff. If, upon eating too much chocolate yogurt, one needed a diet, the makers of topical gel could be liable for claiming to “dramatically interfere with the process of converting calories to fat” and “inhibit the creation of new fat cells.” But, the makers of a weight-loss pill trumpeting the drug’s ability to cause you to “Lose Weight Fast” would be protected.

Hoffman, 91 Iowa L Rev at 1404 (cited in note 147) (alterations omitted).

<sup>148</sup> See generally Hoffman, 91 Iowa L Rev 1395 (cited in note 147), Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L Rev 1 (2000).

<sup>149</sup> Perry Haan and Cal Berkey, *A Study of the Believability of the Forms of Puffery*, 8 J Marketing Comm 243, 246 (2002) (citing studies).

<sup>150</sup> See Hoffman, 91 Iowa L Rev at 1442 (cited in note 147).

Thus, while it may be “intuitively easy to make the connection between physically taking property and physically harming another,”<sup>151</sup> the category of “deception in exchange” lacks legal coherence. Rather, some kinds of deception, in certain circumstances, are actionable and morally wrongful. Sometimes, violators of the “norm” of reciprocity are held to be legally responsible by most of the population, sometimes by only part of the population, and sometimes by only a small minority.<sup>152</sup> The contingency of the finding turns on individuals’ views of what we owe to one another as citizens, the degree to which individuals should be responsible for their own flourishing or should turn to social systems for protection, and the amount of freedom we ought to permit speakers to falsely extol or mislead by omission.

### 3. Rape.

The law of rape has been a site of intense legal and political conflict for over thirty years, and “date” or “acquaintance rape” has been at the center of that dispute.<sup>153</sup> In particular, those involved in the debate disagree over how the law should deal with cases in which a woman engages in “verbal resistance”—that is, *says* “no”—but does not display the form or quantum of “physical resistance” demanded by the traditional, common law definition of rape.<sup>154</sup> Arguing that the law’s resistance to convicting in such cases leaves women unprotected from one especially common form of coerced sex, feminist and other reformers have successfully attained a variety of reforms. All jurisdictions have now adopted evidentiary rules that prohibit proof of a complainant’s “sexual history” designed to show a propensity to consent.<sup>155</sup> Some, but not others, have modified elements of the traditional common law definition of rape, such as elimination of the “force or threat of force” element or the reasonable mistake of fact defense

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<sup>151</sup> Robinson and Darley, 81 S Cal L Rev at 58–59 (cited in note 15) (arguing for the “analogical closeness” of these categories).

<sup>152</sup> See Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Efficient Breach: A Psychological Experiment*, 108 Mich L Rev 633, 654–64 (2010) (demonstrating that individuals’ feelings of moral loss associated with contractual breach can be ameliorated by private law side agreements). See also Tess Wilkinson-Ryan and David A. Hoffman, *Breach Is for Suckers*, 63 Vand L Rev 1003, 1022–33 (2010) (demonstrating that individuals’ perceptions of loss of status due to breaches of reciprocity could be manipulated in various contractual scenarios).

<sup>153</sup> See generally Susan Caringella, *Addressing Rape Reform in Law and Practice* 12–17 (Columbia 2009); Stephen J. Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* 29–46 (Harvard 1998).

<sup>154</sup> Compare, for example, Estrich, *Real Rape* at 102–03 (cited in note 9) (arguing for a “no means no” standard in the law) with D.N. Husak and G.C. Thomas, *Date Rape, Social Convention, and Reasonable Mistakes*, 11 L & Phil 95, 122–25 (1992) (arguing against a standard that treats a verbal “no” as sufficient).

<sup>155</sup> See, for example, FRE 412.

relating to consent, aimed at forcing judges and jurors to treat “no” as “no” for purposes of rape law.<sup>156</sup> These reforms, however, seem to have had little impact in practice<sup>157</sup> and continue to generate scholarly and political debate.<sup>158</sup>

Punishment Naturalists have voiced skepticism, if not hostility, toward such reform efforts. They identify the imposition of “[s]trict liability in cases where culpability may be difficult to prove, but is likely to exist” as an ill-considered departure from what are asserted to be shared intuitions.<sup>159</sup> Among “the reform programs” that they identify as involving “criminal law manipulation . . . to alter people’s intuitions of justice” is the “attempt[] to eradicate the notion that women often pretend to withhold consent to intercourse to appear more alluring or simply to avoid appearing ‘promiscuous,’ rather than as a genuine indication of not wanting to engage in sexual activity.”<sup>160</sup> But nothing in their carefully conducted empirical studies of shared intuitions in fact supports the sort of conservative stance toward reform efforts that these comments imply.

The Punishment Naturalists conclude that rape is among the “core” forms of “wrongdoing” that are “the subject of nuanced and specific intuitions that cut across demographics.”<sup>161</sup> The evidence consists of multiple studies showing that demographically diverse individuals are highly likely to agree that “rape” should be punished and is a more “serious” form of wrongdoing than various other offenses.<sup>162</sup> The Punishment Naturalists have themselves found that subjects tend to regard “rape” as more serious than imposition of mere “unwanted sex.”<sup>163</sup>

It is simply not possible to derive from this evidence any reason to be skeptical, much less any reason to oppose, date-rape reform efforts. There might well be “consensus” that rape should be punished and is “worse” than inducing another to engage in “unwanted sex.” But there most manifestly is *not* consensus in American society on how “rape” should be defined, and in particular whether a man who engages in sex with a woman who repeatedly tells him “no” before and during intercourse has committed “rape” or merely succeeded in achieving “unwanted sex,” or over how severely, if at all, to punish

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<sup>156</sup> See, for example, Schulhofer, *Unwanted Sex* at 30–33 (cited in note 153).

<sup>157</sup> See generally Jody Clay-Warner and Callie Harbin Burt, *Rape Reporting after Reforms: Have Times Really Changed?*, 11 *Violence Against Women* 150 (2005).

<sup>158</sup> See generally Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why*, in *Acquaintance-Rape Cases*, 158 *U Pa L Rev* 729 (2010).

<sup>159</sup> Robinson and Darley, 81 *S Cal L Rev* at 46–47 (cited in note 15).

<sup>160</sup> *Id.* at 52.

<sup>161</sup> Robinson and Kurzban, 91 *Minn L Rev* at 1892 (cited in note 13).

<sup>162</sup> See *id.* at 1853 & n 100, 1856 & n 123, 1859 & nn 135, 138.

<sup>163</sup> See *id.* at 1885–88.

such a man. Indeed, the Punishment Naturalists themselves have reported finding less consensus surrounding whether and how much to punish “unwanted sex,” presumably because people *do* disagree about whether it should be regarded as a crime, and, if so, as serious a crime as rape.<sup>164</sup>

The source of that disagreement is cultural. Psychologists and sociologists specializing in women’s studies have shown that disagreements over a host of beliefs and attitudes toward rape correlate with competing sets of moral norms—one that is “hierarchical” in nature and prescribes highly stratified gender roles, and another that is more “egalitarian” and rejects the proposition of separate male and female spheres in society.<sup>165</sup> A recent mock-juror study conducted by the Cultural Cognition Project at Yale Law School found that the outlooks individuals subscribed to predicted high levels of disagreement over whether a man should be found guilty of rape in a case patterned on *Commonwealth v Berkowitz*,<sup>166</sup> a “no means yes” acquaintance rape case that provoked intense political controversy in the 1990s and that continues to be featured in scholarly commentary. The disagreement among ordinary citizens over such cases can be linked to a form of cultural status competition insofar as both hierarchical and egalitarian individuals perceive that the stance the law adopts on this issue will align it with the norms of one or the other cultural group. Indeed, the group *most* resistant to and resentful of reform of the common law of rape, the study found, consisted of *hierarchical women* (particularly older ones), whose high social status is most conspicuously tied to continued public endorsement of the traditional, but not bitterly contested, norms of sexuality.<sup>167</sup>

This controversy is fraught with difficult issues. *Should* the law weigh in on the side of those who want to make “no” mean “no” for purposes of rape law as a means of promoting egalitarian norms? Or would that be an inappropriately partisan and illiberal application of law to promote a moral and cultural orthodoxy? Alternatively, if the law *resists* demands for change, is it not siding with the hierarchical position, effectively endorsing that position’s understanding of idealized gender norms? If the law is to be made to take a side in this debate, *how* can it do so effectively? If it wants to be genuinely neutral, what stance would effectively communicate that intention? These questions cannot

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<sup>164</sup> See *id.* at 1890–91 & n 230.

<sup>165</sup> See, for example, Michael W. Wiederman, *The Gendered Nature of Sexual Scripts*, 13 *Fam J* 496, 499 (2005); Martha R. Burt, *Cultural Myths and Supports for Rape*, 38 *J Personality & Soc Psych* 217, 225 (1980).

<sup>166</sup> 641 A2d 1161 (Pa 1994).

<sup>167</sup> See Kahan, 158 *U Pa L Rev* at 734 (cited in note 158).

even be framed intelligibly, much less answered satisfactorily, by any theoretical framework of criminal law that insists on confining its attention to issues on which there is “consensus”—issues that are peripheral to urgent, pressing debate whether or not they might be said to be at the “core” of a set of “shared intuitions.”

Indeed, a framework that fails to acknowledge or recognize that it is addressing issues at the practical and political periphery of criminal law can easily generate unreliable explanations and prescriptions. One Punishment Naturalist, Owen Jones, posits (on the basis of extrapolation from sociobiological theory) differences in “male and female brains” that cause them to “process rape victimization differently,” with the latter predisposed to take it much more seriously because of the impact it had in disrupting “female mate choice in ancestral environments.”<sup>168</sup> Jones surmises (on the basis of further conjecture) that these ingrained biological differences are the likely source of the inefficacy of rape law reforms and identifies (without necessarily endorsing) various reforms aimed at making the biological foundations for male–female disagreements manifest, thus promoting greater resolve on the part of the legal system to convict rapists and punish them more severely.<sup>169</sup>

As fascinating and insightful as it is, this account will not be of much use to anyone earnestly engaged in trying to understand and promote morally appropriate solutions to the existing debate over rape law reform. The one feature of this account that admits of empirical examination—its assertion that the inefficacy of rape-reform laws stems from male and female differences over the seriousness of rape victimization—is contrary to all the available evidence. Indeed, without (as far as we know) following any of Jones’s strategies for remedying a deficiency in how seriously men take the harm of rape, the law *has* made progress in reducing the incidence of *violent stranger rape* comparable in degree to the progress it has made in reducing many other forms of common crimes, including homicide, in recent decades.<sup>170</sup> The *form* of rape that apparently has *evaded* reduction is exactly the type—date or acquaintance rape—at which the “no means no”

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<sup>168</sup> See Owen D. Jones, *Sex, Culture, and the Biology of Rape: Toward Explanation and Prevention*, 87 Cal L Rev 827, 917 (1999).

<sup>169</sup> See *id.* at 917–20.

<sup>170</sup> See Bureau of Justice Statistics, *Key Facts at a Glance: National Crime Victimization Survey Violent Crime Trends, 1973–2008*, online at <http://bjs.ojp.usdoj.gov/content/glance/tables/viortrdtab.cfm> (visited Oct 22, 2010) (reporting a drop in the incidence of rape from 2.8 per 1,000 to 0.4 per 1,000 between 1979 and 2004).

reforms have been directed.<sup>171</sup> As explained, the force that has limited those reforms is not biological but cultural. The conflict here is not one originating (in brains, genes, or anything else) between men and women; it is between men *and* women of *one* cultural outlook and men *and* women of *another*. Indeed, the group with the narrowest apprehension of what “rape” is—the one most likely to see “no” as meaning “yes”—consists of hierarchical *women*. What reason is there for supposing that “contextualizing women’s emotional reactions to rape within the evolutionary processes”<sup>172</sup> would help make them more likely as citizens to support rape law reform or to vote as jurors to convict under reform statutes once they are enacted?

Indeed, far from helping to advance the cause of those who want to reduce the incidence of acquaintance rape, Jones’s attempt to derive guidance from the (conjectured) sociobiological differences in men’s and women’s apprehensions of the harm of rape are more likely to obstruct it. Jones, for example, argues against the enactment of “sexual assault” statutes, apparently unaware of the role that such statutes are intended to play in norm reform: calling nonconsensual sex that is unaccompanied by force or threat of force “sexual assault” is less likely to trigger resistance to punishing forms of “unwanted sex” that some men and women condemn but do not regard as “rape”; and by assuring at least some degree of punishment for such behavior now, such statutes make it more likely that in the future more men and women will join the ranks of those who already regard such behavior as “rape” and who see it as meriting designation and punishment as such.<sup>173</sup> How successful this strategy has been, and whether it is otherwise morally appropriate, are matters of reasonable debate.<sup>174</sup> But the only arguments that will contribute meaningfully to that discussion are the ones that come to grips, in an empirically informed way, with the real cultural differences in individuals’ understandings of what “rape” is.

Perhaps naturalists’ conceptions of takings without consent, deception in exchange, and rape are complicated in these ways because these offenses less central to the naturalist conception of “the core of wrongdoing” than offenses involving the most serious form of physical aggression: killing. In what follows, we focus on the most serious of

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<sup>171</sup> Clay-Warner and Burt, 11 *Violence Against Women* at 167 (cited in note 157) (concluding that the incidence of reporting of “simple” or acquaintance rape, as opposed to “aggravated” or stranger rape, has not changed since the 1970s).

<sup>172</sup> See Jones, 87 *Cal L Rev* at 918 (cited in note 168).

<sup>173</sup> See Schulhofer, *Unwanted Sex* at 104–05 (cited in note 153); Kahan, 158 *U Pa L Rev* at 752 (cited in note 158).

<sup>174</sup> See Kahan, 158 *U Pa L Rev* at 752–53 (cited in note 158).



wrongdoings in this class, murder. If naturalism is to prevail anywhere, surely it should be with the most serious crimes in our legal repertoire.<sup>175</sup>

#### 4. Murder.

Punishment Naturalism holds that people agree both on what constitutes murder *and* on how serious a given murder is relative to other potentially bad acts. Punishment Realism, in contrast, holds that while people agree on many cases (for example, the heinous kidnapping-torture-murder case described above<sup>176</sup>), they also frequently disagree about both whether an act is so wrong as to be criminal and, if it is, how serious the criminal offense is.

*a) Ambiguous agreement.* Take, as an example, Robinson and Kurzban's study showing that people generally agree that the killer in the first of the following vignettes is guilty and should be punished while the killer in the second is innocent and should not:

SCENARIO A: John knows the address of a woman who has highly offended him. As he had planned the day before, he waits there for the woman to return from work and, when she appears, John shoots her to death.<sup>177</sup>

SCENARIO B: John is knocked down from behind by a man with a knife who moves to stab him. As the man lunges for him, John stabs him with a piece of glass he finds on the ground, which is the only thing he can do to save himself from being killed. The man later dies of his injuries.<sup>178</sup>

We do not doubt that there is little disagreement over either claim in cases like these in the contemporary United States. Most people will define the former as a crime and the latter as not a crime; and even where they do believe the latter to be a crime, they consistently rank it as less serious than the former. But what underlies this consistency?

Naturalism and realism *both* furnish explanations for this agreement. The naturalist explanation features evolutionary pressures: if we did not agree on the wrongfulness of taking human life, our existence would be—at least relatively speaking—nasty, brutish, and short. Collectively, then, humans who intuitively viewed this kind of aggression as wrong and deserving of punishment were more likely to survive as a group; those who did not were less likely to survive. The result was a

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<sup>175</sup> Naturalists themselves agree with this prioritization of violence over other wrongs. See, for example, Robinson, Kurzban, and Jones, 60 Vand L Rev at 1635 n 5 (cited in note 14).

<sup>176</sup> See text accompanying note 36.

<sup>177</sup> Robinson and Kurzban, 91 Minn L Rev at 1897 (cited in note 13).

<sup>178</sup> Id at 1894.

gradual growth of human sociality;<sup>179</sup> but this sociality should be thought of not as an agreement or an implicit norm to which people are acculturated, but as a modest but ever increasing biological disposition to view these acts as wrong and deserving punishment.

Realism, by contrast, explains this agreement as the product of shared social meaning, an agreement deriving from cultural norms that are widely shared in our society. While both scenarios are quite vague, they provide enough for readers to form a picture of the defendant in each case and to evaluate, relative to socially constructed norms, the moral quality of each act. On this account, the impulse to view the first act as wrong and the second as innocent stems not from an innate moral organ, but rather from shared socialization. This does not mean that there are not innate cognitive mechanisms at work, but rather that they are quite general and allow for the construction of social meanings that may vary substantially. Nor does it mean that humans will necessarily disagree: if they are similarly socialized, then they will in all probability evaluate the social meaning of these acts in similar ways.

Both accounts fully explain the lack of variation found by Robinson and Kurzban on this item. And, if humans always agreed on what distinguishes a good from a bad killing, it would be impossible to figure out which of the two accounts furnishes a better explanation of the available data. To distinguish between the two accounts, then, we have to alter the scenarios such that the social meaning of an act is in dispute. We could then see if variations in cultural outlooks explained variations in appraisals of guilt.

In what follows, we do that. We look first at examples in which there are explicit disagreements over which standards should govern what constitutes a serious wrong. We then look at instances in which, even where individuals accept a single standard, they disagree over which acts meet the standard.

*b) Disagreement over standards.* One way to evaluate these two accounts is to ask whether there have been cultural regimes in which the meaning of these acts varied. History, as it happens, furnishes many such examples; we describe just a few.<sup>180</sup>

While the contemporary formulation of self-defense doctrine addresses persons in universal terms, supplying a unitary standard that makes no reference to the social identities of the persons entitled to use

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<sup>179</sup> See Robinson, Kurzban, and Jones, 60 Vand L Rev at 1646–54 (cited in note 14) (arguing that human social impulses laid the foundation for a predisposition to acquire shared intuitions of justice, which provided evolutionary benefits to the individuals bearing them).

<sup>180</sup> These are drawn from Kahan and Braman, 45 Am Crim L Rev at 3 n 2 (cited in note 34).

deadly force or those against whom they are entitled to use it,<sup>181</sup> this was not always the case. Historically, many societies conditioned the use of deadly force in self-defense on membership in a privileged class.<sup>182</sup>

One need not leave the United States to find such contentious social meanings: the law in the antebellum American South also made such distinctions, denying blacks the authority to use deadly force to protect themselves from deadly assaults by whites and affording whites greater authority to use deadly force against blacks than against fellow whites.<sup>183</sup> As Justice William Brennan noted in his famous dissent in *McCleskey v Kemp*,<sup>184</sup> during the colonial period, “black slaves who killed whites in Georgia, regardless of whether in self-defense or in defense of another, were automatically executed,” but “a person who willfully murdered a slave was not punished until the second offense, and then was responsible simply for restitution to the slave owner.”<sup>185</sup>

What would members of *that* historical moment have made of the following vignettes?

MODIFIED SCENARIO A: John owns a slave who has highly offended him. As he had planned the day before, he waits for his slave to return from work and, when he appears, John shoots him to death.

MODIFIED SCENARIO B: Joe, a slave, is knocked down from behind by his owner, John, who moves to stab him. As John lunges for him, Joe stabs him with a piece of glass he finds on the

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<sup>181</sup> The traditional standard is couched in terms that are reflected in nearly every jurisdiction in the United States today: a person who has not otherwise provoked aggression is entitled to resort to deadly force against another (and hence is protected from criminal liability for doing so) when she honestly and reasonably believes that deadly force is necessary to prevent an imminent threat of death or great bodily harm to herself. See Wayne R. LaFare, 2 *Substantive Criminal Law* § 10.4(b) (West 2d ed 2003). [FLIP: PAGE #?] If the threat is of some lesser magnitude, a person may repel it only with nonlethal force. See id.

<sup>182</sup> See generally David B. Kopel, Paul Gallant, and Joanne D. Eisen, *The Human Right of Self-Defense*, 22 *BYU J Pub L* 43, 104–13 (2008) (describing which classes were able to use self-defense under Greek, Jewish, and Roman law).

<sup>183</sup> See, for example, A. Leon Higginbotham, Jr and Anne F. Jacobs, *The “Law Only as an Enemy”: The Legitimization of Racial Powerlessness through the Colonial and Antebellum Criminal Laws of Virginia*, 70 *NC L Rev* 969, 1042 (1992):

Despite the unrelenting punishments and beatings that a slave might receive at the hands of an overseer, an owner, or another white, there were only rare instances in which a slave might claim self-defense in the killing of a white person. Such cases generally involved whites of low socioeconomic background.

<sup>184</sup> 481 US 279 (1987).

<sup>185</sup> Id at 329 & n 8 (Brennan dissenting), citing A. Leon Higginbotham, Jr, *In the Matter of Color: Race in the American Legal Process: The Colonial Period* 253, 254 & n 90, 256 (Oxford 1978).

ground, which is the only thing he can do to save himself from being killed. John later dies of his injuries.

While it would be hard for naturalists to account for the distinctive understandings of these vignettes in colonial and contemporary American communities, realism offers a straightforward explanation for the observed variation. A realist account would describe the changing importance of social status within colonial and contemporary American society and the various rights and duties (or lack thereof) that accompanied status. Within a society that embraces such status distinctions, the social meaning of aggression by someone of stature and rank against a subaltern was distinct from the meaning of aggression by the subaltern against a person of status.<sup>186</sup>

Again, even if we limit our scope to the United States, it is well known that tolerance of the use of deadly force to protect various nonvital interests has varied significantly across time and place. Marks of social status, such as displays of deference in public space and male dominion over the sexual lives of wives and daughters in particular, are a conspicuous characteristic of communities guided by honor norms.<sup>187</sup> For example, in many Southern jurisdictions in the United States, it was once the case that the paramour could not “lawfully defend himself against the husband’s violence, and stand his ground and shoot or cut in order to repel the husband’s attack upon him.”<sup>188</sup> Again, we can modify the vignettes slightly to alter their social meaning in this historical context:

MODIFIED SCENARIO A: John knows the address of a man, Tom, who has offended him by implying he had sex with his wife. As he had planned the day before, he waits there for Tom to return from work and, when he appears, John confronts him and shoots him to death.

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<sup>186</sup> Similar status hierarchies can be found in many societies. Consider, for example, the Tokugawa administrative code in feudal Japan that granted Samurai the privilege of “*kiri-sute-gomen*, that is the privilege of a *samurai* to cut down a commoner with impunity.” E. Herbert Norman, *Japan’s Emergence as a Modern State: Political and Economic Problems of the Meiji Period* 18 (Institute of Pacific Relations 1940). See also David B. Kopel, *The Samurai, the Mountie, and the Cowboy: Should America Adopt the Gun Controls of Other Democracies?* 30 (Prometheus 1992) (“Any disrespectful member of the lower class could be executed by a Samurai’s sword.”).

<sup>187</sup> See Richard E. Nisbett and Dov Cohen, *Culture of Honor: The Psychology of Violence in the South* 32 (Westview 1996) (arguing that the culture of the South included a tolerance for the use of violence for the protection of vital as well as what would now be considered nonvital interests).

<sup>188</sup> William M. McKinney and Burdett A. Rich, eds, 13 *Ruling Case Law* 834 (Thompson 1916), citing *Dabney v State*, 21 So 211, 211–12 (Ala 1897); *Drysdale v State*, 10 SE 358, 358 (Ga 1889).

MODIFIED SCENARIO B: After implying he had sex with John's wife, Tom is knocked down from behind by John who moves to stab him with a knife. As John lunges for him, Tom stabs him with a piece of glass he finds on the floor, which is the only thing he can do to save himself from being killed. John later dies of his injuries.

In considering how varied the evaluations of these vignettes might be, consider the experiments conducted by Richard Nisbett and Dov Cohen discussing honor norms that govern interactions like these in the contemporary United States.<sup>189</sup>

In one particularly revealing study, Nisbett and Cohen told participants about a man named Fred and asked how justified Fred would be in fighting an acquaintance who had affronted him in some way. The first set of questions asked respondents how justified physical aggression would be if it were in response to another man who "looks over Fred's girlfriend and starts talking to her in a suggestive way," "insults Fred's wife, implying that she has loose morals," or "tells others behind Fred's back that Fred is a liar and a cheat." In a second set of questions, they asked whether Fred would be justified in *shooting* the person who had committed certain "more serious affronts."<sup>190</sup>

A summary of the results are provided below in Figure 3. Across all the questions, Southerners were more likely to suggest that a violent response was "extremely justified" and that Fred would not be "much of a man" if he did not respond violently.<sup>191</sup>

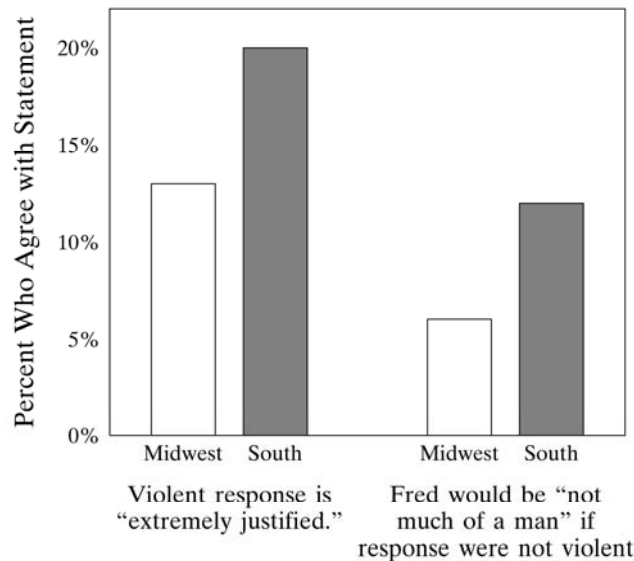
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<sup>189</sup> Nisbett and Cohen, *Culture of Honor* at 31 (cited in note 187).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

FIGURE 3. PERCENTAGE OF SOUTHERNERS AND MIDWESTERNERS APPROVING OF A VIOLENT RESPONSE TO VARIOUS SCENARIOS<sup>192</sup>



Nisbett and Cohen reason that the regional variation they see in the responses reflects differences in local norms regarding what constitutes appropriately masculine behavior. "Fighting to answer an affront is part of the masculine ideal for southerners in a way it is not for midwesterners," but this difference "was not due simply to midwesterners' being more nonviolent generally. When questions were asked about men who fight when there has been no affront, midwesterners and southerners gave the same assessment of the men" as fitting "poorly" with their "definition of manhood."<sup>193</sup>

Dov Cohen, Richard Nisbett, Brian Bowdle, and Norbert Schwartz expanded on these studies in a series of ingenious "ethnographic experiments."<sup>194</sup> Participants were selected for having grown up in either the North or South. All participants had to pass a (large, 6' 3", 250 lbs) confederate of the researchers in a narrow hallway where there was only room for one person to walk comfortably. The new confederate walked down the center of the hall on a collision

<sup>192</sup> Id at 32.

<sup>193</sup> Nisbett and Cohen, *Culture of Honor* at 31 (cited in note 187).

<sup>194</sup> See generally Dov Cohen, et al, *Insult, Aggression, and the Southern Culture of Honor: An "Experimental Ethnography,"* 70 *J Personality & Soc Psych* 945, 945 (1996).

course with the participant and did not move (except at the last second to avoid bumping into the participants).<sup>195</sup>

Members of one group, after making their way past this single confederate, were exposed to a battery of tests, including tests for cortisol and testosterone levels, and were asked to self-assess their masculinity. Members of the other group were exposed to the same stimuli with one addition: prior to passing the large confederate in the hallway, they were insulted by a different confederate who bumped into each participant and called him an “asshole.”<sup>196</sup> While the differences between Northern and Southern groups who were not bumped were insignificant, the differences between regional groups who were bumped were remarkable.

As the researchers described their findings (and as displayed in Figures 4–7 below), compared to Northerners, insulted Southerners were “more likely to think their masculine reputation was threatened,” “more upset (as shown by . . . cortisol levels),” “more physiologically primed for aggression (as shown by . . . testosterone levels),” “more cognitively primed for aggression,” and “more likely to engage in aggressive and dominant behavior” (as indicated by their unwillingness to back down when encountering the second confederate).<sup>197</sup>

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<sup>195</sup> Id at 948, 950, 953.

<sup>196</sup> Id at 948.

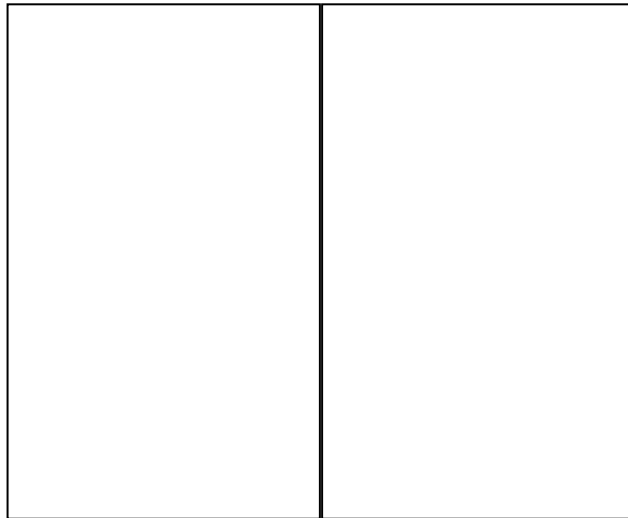
<sup>197</sup> Id at 945.

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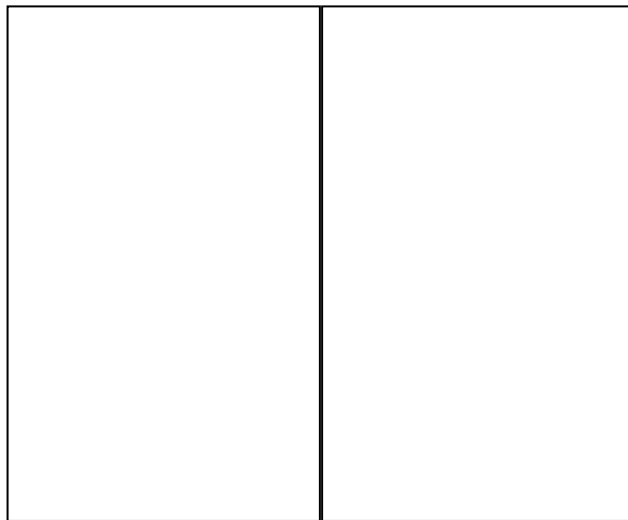
*Some Realism about Punishment Naturalism*

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FIGURES 4 AND 5. CHANGES IN CORTISOL AND TESTOSTERONE  
LEVELS FOR INSULTED AND NON-INSULTED SOUTHERNERS AND  
NORTHERNERS.<sup>198</sup>



FIGURES 6 AND 7. DIFFERENCES IN WILLINGNESS TO BACK DOWN  
AND SELF-PERCEPTIONS OF MASCULINITY.<sup>199</sup>



The researchers conclude that Southern culture supplies a social meaning to physical aggression and status that is distinct from that

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<sup>198</sup> Cohen, et al, 70 J Personality & Soc Psych at 952 (cited in note 194) (depicting figures 1 and 2).

<sup>199</sup> Id at 954, 956 (depicting figures 4 and 6).



supplied by Northern culture. Southerners are more likely to view insults as diminishing a man's status, and Southern males are more likely to attempt to restore lost status through aggressive or violent behavior.<sup>200</sup>

Clearly, our argument here is *not* against biology or natural selection for cognitive mechanisms that underwrite intuitions about the wrongfulness of violent acts of aggression. Individuals, on this account, do have rapid, intuitive, emotional responses fed by cognitive and biological mechanisms that have emerged over the course of human evolution; but those responses, while partially driven by physiological and biochemical responses,<sup>201</sup> are dependent on the social meaning of the acts that precede them rather than a discrete moral module within the brain. Social norms, as these researchers describe, shape what individuals view as untoward behavior and what individuals consider appropriate responses to that behavior.

*c) Disagreements over which acts meet a given standard.* The examples above illustrate divergent standards governing behavior and appropriate responses to perceived wrongs, and one can easily imagine those evaluating the acts describing their disagreements in terms of explicit value differences and self-consciously norm-inflected morality. But as we mentioned above, cultural cognition will often produce subtler forms of dissensus that reflect the implicit influence of our diverse cultural commitments in the face of a single standard. Thus, even when individuals agree on a legal or moral standard to be employed, they may disagree vehemently over whether those standards have been met. That is, they may disagree about the facts as much as—or more than—they disagree about the law.

By way of illustration, we describe two examples from a series of large-scale experiments that we conducted and that are reported in greater detail elsewhere.<sup>202</sup> In each, we asked members of the public to serve as mock jurors on a case, and in each case participants were asked to make factual findings and determine guilt.

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<sup>200</sup> Id at 956–57. There are evolutionary explanations that we do not evaluate here. See, for example, Todd K. Shackelford, *An Evolutionary Psychological Perspective on Cultures of Honor*, 3 *Evol Psych* 381, 389 (2005) (arguing that these results can be explained via evolutionary psychology).

<sup>201</sup> Pain often generates responses that are similar to those stemming from a perceived social threat, even when the pain is internal to, and completely independent of, the social circumstances. See Raymond W. Novaco, *Anger*, in Alan E. Kazdin, ed, 1 *Encyclopedia of Psychology* 170, 171 (Oxford 2000).

<sup>202</sup> See Kahan and Braman, 45 *Am Crim L Rev* at 21–49 (cited in note 34) (detailing “neutral umpire,” “political partisanship,” and “self-defensive cognition” models of evaluating self-defense evidence).

The first, modeled on the facts of the Bernard Goetz case,<sup>203</sup> featured a slight white man who shot a larger black youth after the youth demanded, "Give me five dollars." The defendant had been mugged twice before and claimed that this time, based on past experience, he knew that his victim was about to seriously hurt him. He also claimed, and an expert witness avowed, that as a result of his prior muggings he suffered from posttraumatic stress syndrome. Participants were asked to read the following summary of the facts before making any factual findings or rendering a verdict:

George is charged with murdering Alvin.

George (a 48-year-old white male; 5' 7", 142 lbs.) fatally shot Alvin (a 17-year-old African American male; 6' 2", 215 lbs.) after Alvin stated "give me some money, man." The shooting occurred on a city subway platform at 5:30 p.m. on a weekday evening. After shooting Alvin, George fled but turned himself in to police three hours later.

George had been mugged on three previous occasions. On one of these, he had been beaten and required fifteen stitches under his eye. George had reported the robberies, each of which had been committed by persons George described as "teen aged, African American males," but police failed to make any arrests. George bought the handgun used in the shooting after the third mugging.

Testifying in his own defense, George told the jury that, although he'd never seen Alvin before, George "could tell from his body language and the aggressive tone of his voice" that Alvin was "going to mess with me." "It was exactly like the other time I had been attacked," George stated. "I felt I had no choice but to shoot him," George said, "because I knew if I didn't he was going to hurt me real bad." Alvin had a pocket knife on his person, but had not displayed it before being shot.

The defense also called an expert witness: Dr. Leonard Wallace, a Ph.D. psychiatrist on the faculty of a major university. Based on a [thorough] psychiatric examination of George, Wallace offered his opinion that George was suffering from "post-traumatic stress syndrome." "Like many victims of repeated violent beatings," Wallace testified, "George lived in constant fear of additional attacks." "In my opinion, George honestly perceived that Alvin would attack him if he didn't kill him first; that belief was quite reasonable,

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<sup>203</sup> See *People v Goetz*, 68 NY2d 96 (1986). See also George P. Fletcher, *A Crime of Self Defense: Bernard Goetz and the Law on Trial* 1-2, 198 (Free Press 1988).

given the muggings George had previously suffered, and the effect of those muggings on his psyche,” Wallace concluded.<sup>204</sup>

The second, based on the trial of Judy Norman,<sup>205</sup> featured a wife who, after years of severe physical abuse, shot her husband in his sleep. She too claimed that, based on past experience, she sensed that her husband would seriously hurt or kill her when he awoke. She also claimed, and an expert witness avowed, that as a result of her prior abuse she suffered from battered-spouse syndrome. Participants were asked to read the following summary of the facts before making any factual findings or rendering a verdict:

Julie is charged with murdering her husband, William, whom she shot in the head as he slept.

William had persistently abused Julie during their ten-year marriage. This mistreatment included physical beatings, some of which resulted in injuries (facial cuts; broken ribs; twice a broken nose) requiring emergency medical treatment. Three times the police arrested William for assaulting Julie, but released him from custody each time after Julie declined to press charges.

Testifying in her own defense, Julie told the jury that William had beaten her on the morning of the shooting after returning home from a night of hard drinking and then fallen asleep in the bedroom. Julie testified that she then went to her mother’s nearby home and obtained the hand gun used in the shooting. “I felt I had no choice except to shoot him,” she stated, “because I knew when he woke up this time he was going to hurt me really bad.”

The defense also called an expert witness: Dr. Leonard Wallace, a Ph.D. psychiatrist on the faculty of a major university. Based on a thorough psychiatric examination of Julie, Wallace offered his opinion that Julie was suffering from “battered woman syndrome.” “Like other victims of chronic domestic violence,” Wallace testified, “Julie believed that she was powerless to leave and that no one could or would help her.” “In my opinion, Julie honestly perceived that her husband would attack her if she didn’t kill him first; that belief was quite reasonable, given the beatings

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<sup>204</sup> See Kahan and Braman, 45 Am Crim L Rev at 26, 65 (cited in note 34).

<sup>205</sup> See *State v Norman*, 378 SE2d 8, 13 (NC 1989) (affirming the conviction of Judy Norman for voluntary manslaughter because there was no evidence that she “reasonably believed that she was confronted by a threat of imminent death or great bodily harm”).

she had previously suffered, and the effect of those beatings on her psyche,” he concluded.<sup>206</sup>

The stimuli to which participants were exposed, it should be noted, are distinct in several ways from the stimuli in ranking studies described in Parts I and II. The factual summaries read by respondents in our studies were far more detailed. Participants who read these more detailed scenarios were also provided with jury instructions summarizing the doctrinal standard and specifying the relevant facts they needed to find in order to convict or acquit. Participants were then asked to answer a series of questions regarding legally relevant facts and, once they made those findings, to render a verdict.

Thus, whereas participants in ranking studies are asked whether they think an act described in highly simplified terms is wrong, participants in our studies were given highly detailed fact patterns and a specific standard under which to evaluate the wrongfulness of the act in question. Given the naturalist assertion that the “potential for exaggerating the extent of disagreement becomes greater as the crime descriptions become more skeletal, and is at its worst when researchers use crime labels rather than factual descriptions,”<sup>207</sup> we would expect, on the naturalist account, to find far less disagreement here than in the ranking studies.

How did the participants react to these stimuli? To begin with, there was significant variation across several dimensions. Blacks were more likely to convict George than they were to convict Julie, while whites were more likely to convict Julie than George. Similar patterns emerged for women and men, Democrats and Republicans, liberals and conservatives, and egalitarians and hierarchs, communitarians and individualists. In each case, the former were more likely than the latter to see George as more deserving of punishment than Julie. The results are provided in Table 7 below.

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<sup>206</sup> Kahan and Braman, 45 Am Crim L Rev at 26, 79 (cited in note 34).

<sup>207</sup> Robinson and Kurzban, 91 Minn L Rev at 1860 (cited in note 13).

TABLE 7. FREQUENCY OF GUILTY VERDICTS ACROSS RACE, GENDER, PARTY, IDEOLOGY, AND CULTURAL ORIENTATION

	George	Julie
N =	772	838
black : white	56% : 29%	41% : 48%
male : female	34% : 32%	50% : 44%
Republican : Democrat	24% : 39%	51% : 43%
liberal : conservative	43% : 23%	42% : 56%
egalitarian : hierarch	44% : 23%	42% : 51%
individualist : communitarian	26% : 40%	51% : 43%

These cross-tabulations begin to suggest what the differences across the population are like. Every demographic group listed above showed significant differences (at  $p \leq 0.10$ ) in determinations of guilt with one exception: men and women did not significantly differ over George's case.<sup>208</sup> These findings, of course, stand in stark contrast to the ranking studies described above,<sup>209</sup> which found no differences in relative seriousness.

But this kind of simple comparison is far from an ideal evaluation of differences of opinion across the population. People are not generically black or white, male or female, Republican or Democrat, liberal or conservative, egalitarian or individualist; these characteristics and values tend to come in packages. How would more fleshed-out types of people react to each of the cases?

Imagine two Americans.<sup>210</sup> Ron, a white male who lives in Arizona, overcame his modest upbringing to become a self-made millionaire businessperson. He deeply resents government interference with markets but is otherwise highly respectful of authority, which he believes should be clearly delineated in all spheres of life. Politically, he identifies himself as a conservative Republican. Linda is an African American woman employed as a social worker in Philadelphia, Pennsylvania. She is a staunch Democrat and unembarrassed to be characterized as a "liberal."

<sup>208</sup> Kahan and Braman, 45 Am Crim L Rev at 34 table 1 (cited in note 34).

<sup>209</sup> See Part I.A.

<sup>210</sup> Yes, these are the same folks made famous in a recent and brilliant article assessing the Supreme Court's decision in *Scott v Harris*, 550 US 372, 386 (2007) (finding that a law enforcement officer acted reasonably in terminating a car chase by taking an action that caused substantial injuries to the driver). See 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, 895-99 (2009) (arguing that the Supreme Court's reasoning failed to connect perceptions of societal risk and contested visions of the ideal society, and invested the law with culturally partisan overtones that detract from the law's legitimacy).

Zelig, a statistical application designed by Kosuke Imai, Gary King, and Olivia Lau,<sup>211</sup> facilitates simulating such complex profiles, furnishing a perfect fit for comparing responses across more detailed types of people. It allows for reasonable statistical predictions of the perceptions of fairly specific types of people by setting pertinent characteristics—cultural values, gender, race, region of residence, political ideology, and party affiliation—to appropriate values in Zelig simulations.

Individually and collectively, these analyses present a test for the naturalist and realist perspectives. If, as naturalists assert, humans evaluate cases involving human aggression with high degrees of consistency, then we would expect similar assessments of the wrongfulness of each act across the population. Recall that naturalists 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. On the other hand, if the realist position is right, then the social meaning of the acts will move them to evaluate the cases differently, either increasing or decreasing the likelihood of conviction or acquittal.

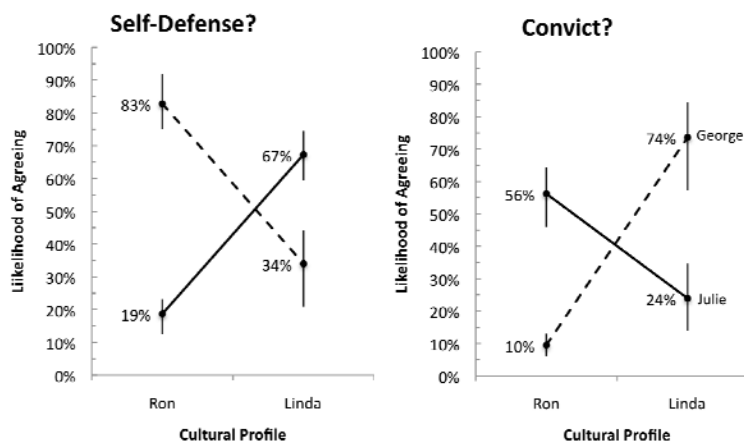
Relatedly, on the naturalist account, the cases should be viewed as consistently more or less bad *relative to each other*. That is, the perceived wrongfulness of acts might not be absolute across the population, but it should be consistently ranked across the population. On the realist account, by contrast, the contingency of the social meaning of the acts should cause egalitarians and communitarians like Linda to view George's shooting of strangers (with racial overtones) as worse than the act of Julie, the battered woman shooting her husband; and it should cause those who favor individualism and traditional social hierarchies to view Julie's shooting of her husband as worse than George's shooting, which they would view as a legitimate act of self-defense.

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<sup>211</sup> See Kosuke Imai, Gary King and Olivia Lau, *Toward a Common Framework for Statistical Analysis and Development*, 17 *J Computational & Graph Stats* 892, 894 (2008).. In conventional regression analysis, the influence of some set of explanatory variables on a dependent variable is expressed in a mathematical equation, the elements of which (regression coefficients, standard errors, p-values, and so forth) are reported in a table. Zelig is intended to generate data analyses that simultaneously extract more information and present it more intelligibly. Using Zelig, an analyst specifies values for the independent variables that form a regression model. The application then generates a predicted value for the dependent variable through a statistical simulation that takes account of the model's key parameters (including the standard errors for the regression coefficients). It then repeats that process. Then it repeats it again. Then it repeats it again and again and again—as many times as directed by the analyst (typically ten thousand times, or enough to give a reasonable approximation of the probability distribution for the dependent variable). The resulting array of values for that dependent variable can then be analyzed with techniques that are statistically equivalent to those used in survey sampling to determine an average predicted value, plus a precisely calculated margin of error. See *id* at 895–96.

So how would these two distinct members of the American venire evaluate these cases? As indicated in Figures 8 and 9 below, Zelig reveals the kind of demographic and values-based variation that naturalism theorists suggest does not exist.

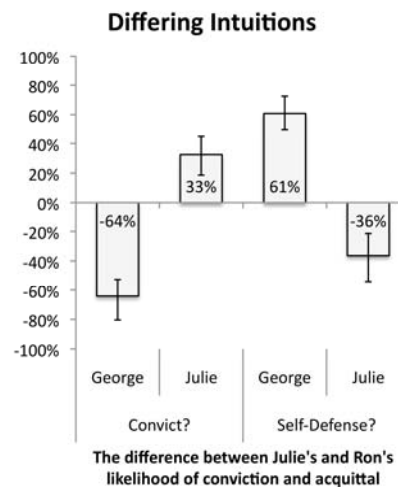
FIGURES 8 AND 9. RON AND LINDA'S WILLINGNESS TO CONVICT OR ACQUIT<sup>212</sup>



Notice that it is not the case, as naturalists argue, that disagreement is generally about the “endpoints” of punishment. What we see here are *different rates of conviction and acquittal*. Moreover, and even more strikingly, we see that people with a cultural profile like Ron are inclined to acquit George but convict Julie, whereas those with cultural profiles like Linda are inclined to do just the reverse.

<sup>212</sup> With 95 percent confidence intervals. [Should this be a full sentence?]

FIGURE 10. RESULTS OF TAKING FIRST DIFFERENCES BETWEEN GEORGE AND JULIE'S LIKELIHOOD OF CONVICTION AND ACQUITTAL<sup>213</sup>



Because it assumes a lack of diversity in the core of wrongdoing, naturalism cannot account for the variation we see in the data. If individuals have an intuitive sense of the relative wrongfulness of acts, then we would expect people with cultural profiles like Ron and Linda to agree—perhaps not on precisely how much punishment a person deserves, but at the very least on the relative culpability of the two defendants. For naturalism, dissensus in the core of wrongdoing remains a puzzle.

#### IV. PRACTICAL IMPLICATIONS

What should those who care about these issues take away from all of this? Does either theory provide useful guidance with respect to the practical questions that those involved in live debates over criminal law face?

##### A. (Anti-)Punishment Naturalism?

To begin with, it is hard to see how legal actors can draw *any* normative conclusion from the naturalist literature. We have pointed out how evidence amassed by social scientists in various disciplines furnishes ample reason to doubt that universally shared “core intuitions of justice” dispel dissensus, across space and time, about the sorts

<sup>213</sup> With 95 percent confidence intervals. [Should this be a full sentence or are we good?]



of conduct that should be forbidden and punished. But however one characterizes the extent or importance of innate apprehensions of wrongfulness, the issue of the *moral* significance of such sensibilities is an entirely different matter. Since at least Hume, it has been well known that facts—about anything—do not entail moral “oughts.”<sup>214</sup> Accordingly, showing that intuitions of justice are shared does not mean they have to be respected.

The Punishment Naturalists, consistent with their characteristic care and thoughtfulness, of course never suggest otherwise. Their injunction that lawmakers and advocates of reform respect laws consistent with “shared intuitions” reflects a judgment about the enormous effort that would be required to talk humans out of predispositions that reflect “600 million years”<sup>215</sup> of biological programming. “Evidence suggests that it takes a dramatic, concerted effort to alter fundamentally a person’s intuitive notions of justice. Such changes in core judgments have been notably observed in cases of coerced indoctrination, often referred to as ‘brainwashing.’”<sup>216</sup> This understanding of the intractability of core judgments of punishment transforms into a conservative admonition to be wary of even trying, but only after Punishment Naturalists take stock of the potentially disastrous consequences of failed attempts to do so. “The criminal law can most effectively maximize its moral credibility and thereby minimize resistance and subversion by adopting criminal rules that track shared community intuitions of justice,” Paul Robinson and John Darley observe.<sup>217</sup> “The danger of failing to harmonize criminal codes with intuitions of justice is that the code may lose credibility on a wide array of prohibitions if too many are perceived to be against notions of what is just.”<sup>218</sup> Surely, no one would be in favor of any reform program that can depend for its success only on the sorts of mental reprogramming strategies used by the “Chinese military on American soldiers captured during the Korean War”<sup>219</sup> and that would likely, in any case, culminate in “a generalized contempt for the system in all its aspects, and a generalized suspicion of all of its rules” and ultimately in the emergence of “active forces of subversion and resistance” within the general population.<sup>220</sup>

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<sup>214</sup> See David Hume, 3 *A Treatise of Human Nature* 455 (Clarendon 1896) (L.A. Selby-Bigge, ed) (originally published 1739–1740).

<sup>215</sup> Jones, 87 Cal L Rev at 855 (cited in note 168).

<sup>216</sup> Robinson and Darley, 81 S Cal L Rev at 51 (cited in note 15).

<sup>217</sup> *Id.* at 28.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 54.

<sup>220</sup> Robinson and Darley 81 S Cal L Rev at 24 (cited in note 15).

But are these admittedly terrifying prospects really the likely outcome of efforts to use law to try to change norms on, say, “date rape,” “drunk driving,” “drug use,” or “same-sex intercourse and . . . same-sex unions”<sup>221</sup>—examples that the Punishment Naturalists cite as involving “criminal law manipulation” by “social engineers”?<sup>222</sup> Where is the empirical evidence of *that*? Indeed, where is the empirical evidence that even the much more wide-ranging reform effort that Punishment Naturalists oppose—one evincing uniform hostility to popular retributivist sensibilities generally and their replacement nonjudgmental utilitarian schemes of treatment and control—would result in widespread social tumult?

Perhaps the most obvious clue that the conservative posture associated with Punishment Naturalism does not follow in any straightforward or obvious way from the evidence of the origins of punitive sensibilities on which it is based can be found in the work of another group of highly accomplished scholars who draw exactly the opposite conclusions from that same evidence. We call these scholars, who include Joshua Greene and Jonathan Cohen, the *Antipunishment Naturalists*.

In work that Punishment Naturalists actually cite for support,<sup>223</sup> Greene and Cohen (in work to which Darley also contributed) present evidence of the biological origins of widespread moral sensibilities. The evidence includes fMRI studies that show that “deontological” moral judgments, of which retributive intuitions are a conspicuous component, originate in parts of the brain that are associated with fast-acting, unconscious, and automatic affective processes. Accordingly, they are much more likely to influence action than are “consequentialist” or utilitarian moral judgments, which these same studies show originate in a more slow-acting, reflective part of the brain, whose thought processes can override those of the faster-acting, reactive part only with the exertion of considerable, time-consuming effort.<sup>224</sup>

Like the Punishment Naturalists, Greene and Cohen identify an evolutionary or genetic origin for retributive and like judgments, which

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<sup>221</sup> Id at 52–53.

<sup>222</sup> Id at 52.

<sup>223</sup> See id at 58 (citing “Joshua Greene’s neuroscience studies” as support for the observation that the “core of wrongdoing seems to start with direct personal action”). But see Jonathan McGuire, et al, *A Reanalysis of the Personal/Impersonal Distinction in Moral Psychology Research*, 45 J Exp Soc Psych 577 (2009) (showing that reanalysis of Greene’s data does not support a “direct/personal” distinction); Joshua D. Greene, *Dual-Process Morality and the Personal/Impersonal Distinction: A Reply to McGuire, Langdon, Coltheart, and Mackenzie*, 45 J Exp Soc Psych 581 (2009) (acknowledging flaws in the Greene study but noting that additional studies support a more fundamental “dual process” neural theory of moral reasoning).

<sup>224</sup> See generally Joshua D. Greene, et al, *The Neural Bases of Cognitive Conflict and Control in Moral Judgment*, 44 Neuron 389 (2004); Joshua D. Greene, et al, *An fMRI Investigation of Emotional Engagement in Moral Judgment*, 293 Sci 2105 (2001).

they claim were well adapted to social conditions distinctive of the sorts of ties and transactions that were characteristic of our remote tribal past.<sup>225</sup> They agree too that it is difficult, if not impossible, to “educate” or talk people out of the punitive positions that they are impelled to by their genetic-neurological hardwiring, in part because integral to the same circuitry is a disposition to “confabulate”—that is, to seize on post hoc rationalizations that occur to us after our unconscious affective sensibilities have committed us to a moral position and that stubbornly resist the battering of conscious, reasoned examination.<sup>226</sup>

But from this foundation—as close as it is to that of the Punishment Naturalists in various critical particulars—the Antipunishment Naturalists derive a very different set of normative conclusions. For them, the evolutionary origins of our widespread punitive intuitions, far from enhancing the moral authority of retributive and like sensibilities, strips them of any pretense of being *moral* at all: “as an evolutionary matter of fact, we have a taste for retribution, not because wrongdoers truly deserve to be punished regardless of the costs and benefits, but because retributive dispositions are”—or at least were at one point—“an efficient way of inducing behavior that allows individuals living in social groups to more effectively spread their genes.”<sup>227</sup> For Greene and Cohen, the *truly* moral judgments are the ones that can be defended on the basis of (nonconfabulatory) reflection on what conduces to the best state of affairs in our current situation.

Of course, if, as the Punishment Naturalists warn, it were futile or even self-defeating to oppose retributive sensibilities (however outmoded and insusceptible of reasoned defense they are), it would also be foolish to try to supplant them with intuitions that reflect a consequentialist orientation. But the Antipunishment Naturalists have a different account of how such a reform program would fare. As they see it, the discoveries of sociobiology and neuroscience on which they and the Punishment Naturalists both rely will themselves transform our *culture*:

The net effect of this influx of scientific information will be a rejection of free will as it is ordinarily conceived, with important ramifications for the law. As noted above, our criminal justice system is largely retributivist. . . . [R]etributivism . . . ultimately

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<sup>225</sup> See Greene and Cohen, 359 *Phil Transactions Royal Socy B: Bio Sci* at 1782 (cited in note 21); Joshua Greene, *From Neural “Is” to Moral “Ought”: What Are the Moral Implications of Neuroscientific Moral Psychology?*, 4 *Nature Reviews Neurosci* 847, 848–49 (2003).

<sup>226</sup> See, for example, Joshua D. Greene, *The Secret Joke of Kant’s Soul*, in Walter Sinnott-Armstrong, ed., 3 *Moral Psychology: The Neuroscience of Morality: Emotion, Brain Disorders, and Development* 35, 60–63 (MIT 2008).

<sup>227</sup> *Id.* at 71.

depends on an intuitive, libertarian notion of free will that is undermined by science. Therefore, with the rejection of common-sense conceptions of free will comes the rejection of retributivism and an ensuing shift towards a consequentialist approach to punishment, i.e. one aimed at promoting future welfare rather than meting out just deserts.<sup>228</sup>

The Antipunishment Naturalists offer no empirical evidence (as opposed to conjectural storytelling) to back up this account of how a program to abolish a retributive system of criminal law will be received. But that just means that they present no less empirical evidence than do the Punishment Naturalists in support of their grim account of the consequences that meaningful pursuit of that vision would entail.

If one conclusion can confidently be drawn from this disagreement, then, it is that none of the materials on which *both* the punishment *and* the Antipunishment Naturalists rely has any obvious moral upshot. The privilege of thinking about what to do, and the empirical work necessary to determine whether and how it can be done, survive naturalism of any variety.

#### B. Relevant to What?

We take it, though, that Punishment Naturalists believe that the evidence they furnish is of significant practical import to debates over the criminal law. On their account, the most serious problem posed by our intuitions about wrongdoing is the attempted imposition of social norms that are at odds with human nature. As Robinson and Darley recently argued:

[T]hese findings regarding the nature of intuitions of justice have serious implications for a variety of criminal justice debates that focus on substantial alterations of criminal justice systems, including the abolition of punishment, the distribution of punishment according to principles that conflict with shared intuitions of justice, and programs to change people's intuitions about what constitutes serious wrongdoing and about how much it should be punished.<sup>229</sup>

Marc Hauser is similarly worried about “policy wonks and politicians” who attempt to develop laws that are out of step with our natural intuitions.<sup>230</sup> This might be generalized to something along the following

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<sup>228</sup> Greene and Cohen, 359 *Phil Transactions Royal Socy B: Bio Sci* at 1776 (cited in note 21).

<sup>229</sup> Robinson and Darley, 81 *S Cal L Rev* at 11 (cited in note 15).

<sup>230</sup> Hauser, *Moral Minds* at xx (cited in note 26).

lines: the state should pay close attention to widely shared intuitions about justice; it may like them or not, but it ignores them at its peril.

Do realists object to that? No. But to the realist it is puzzling advice, for it does not address any live policy debate. What political candidate is running on a platform of “*Abolish Punishment Now!*”? What legislator is attempting to implement a program punishing crimes that most people think are very serious less harshly than those that most people think are not very serious? Even if we were to accept the naturalist account of moral intuition, the added value of assuming that our intuitions about punishment are natural rather than social seems negligible; it just does not address the practical problems that we face related to punishment.

But Punishment Naturalists do offer advice to people involved in contemporary debates over the criminal law. And, from criminal reform efforts on everything from date rape to drug use, the advice that they have to offer is pretty discouraging. On their account, issues that fall within the core of wrongdoing—and recall that, on their account, this comprises the vast majority of criminal acts—there will be little chance of making a lasting impact. As Robinson and Darley put it: “Because of the universal and intuitional nature of core judgments about justice . . . these judgments cannot easily be changed.”<sup>231</sup> And, for those few wrongful acts that remain outside of the core, they offer advice for those interested in reform. The activity in question has to be plausibly viewed as intentionally inflicting harm on others in ways that can be viewed as similar to some wrong within the “core” of wrongdoing, and the most effective mode of argument is to analogize to that core wrong.<sup>232</sup>

What could possibly be wrong with this advice? In fact, picking reasonable targets for reform and then hammering home the message that the targeted activity is similar to other stigmatized and punished acts certainly seems like common sense.

But is it? The advice on offer strikes us as simply inapposite. Individuals disagree about whether a car salesman who successfully convinces his target to buy a lemon has committed fraud—at the core of deception in exchange—or has simply displayed admirable American

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<sup>231</sup> Robinson and Darley, 81 S Cal L Rev at 53 (cited in note 15). To drive home the point of how difficult any reform efforts (even those outside of the core of wrongdoing) will be, they describe the failures of various indoctrination campaigns, including the immense effort required for, and relatively short-term effects of, the brainwashing of POWs during the Korean war, the impossibly strained conditions that produce Stockholm Syndrome, and the failure of Prohibition to reform intuitions about alcohol consumption—and these involved efforts aimed at offenses outside of the “core”!

<sup>232</sup> See Kerr, *The Intuition of Retribution* (cited in note 23).

salesmanship.<sup>233</sup> The question is not whether it is *analogous* to fraud; the question is whether it *is* fraud.

If fraud strikes you as not quite “core” enough, imagine, for example, that you were concerned with reducing acquaintance rape, including the imposition of unwanted sex on women whose verbal resistance is ignored. The idea that such behavior is “analogous” to—or just *is*—rape has been exactly what reformers have been arguing, and their opponents resisting, for decades. The argument is not about what is analogous to the core; it is about what the core *is*. No position that abstracts away from the cultural dispute over the definition of rape can possibly generate advice to reformers about what they should do.<sup>234</sup>

Or imagine that you were concerned with reducing violence against women. You see that women who are victims of homicide are often killed by husbands or boyfriends who discover or suspect infidelity. The law, you come to believe, encourages this behavior by allowing those who kill an unfaithful partner to be convicted not of murder, but of the lesser crime of manslaughter. Infidelity, the law tells the public, is “adequate provocation” for such mitigation. Judges, moreover, say that the law reflects a perfectly natural sentiment.<sup>235</sup> The advice to “argue from analogy” to agreed-upon “core” offenses is unhelpful because it simply ignores that the core is itself a site of intense cultural dispute: there is a serious dispute about whether the act is—or *is not*—murder.

Similarly, people of varying cultural outlooks disagree about whether a woman who kills her chronically abusive husband has committed a *core* crime—murder—or no crime at all, not about how to deal with some peripheral offense “analogous to” murder. And the list goes on.<sup>236</sup>

### C. Some Realist Advice

Realists, like naturalists, are circumspect about the prospects for resolving many disputes over the law, though for different reasons and

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<sup>233</sup> Analogously, individuals disagree about whether and when *omitting* information in an exchange is a form of lying or no wrong at all. See Richard Craswell, *Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere*, 92 Va L Rev 565, 574–75 (2006).

<sup>234</sup> See Kahan, 158 U Pa L Rev at 805 (cited in note 158).

<sup>235</sup> One judge, famously quoted by Cynthia Lee in her book, *Murder and the Reasonable Man*, lamented his duty to impose *any* sentence at all on a man who shot and killed his wife after discovering her infidelity, saying “I seriously wonder how many men [on discovering spousal infidelity] would have the strength to walk away without inflicting some corporal punishment.” Cynthia Lee, *Murder and the Reasonable Man* 41 (NYU 2003).

<sup>236</sup> See Kahan, 158 U Pa L Rev at 805 (cited in note 158) (discussing the problem of disagreement over the core offense in the acquaintance rape context).

with different consequences. Realist circumspection derives not from the view that reform within the core pits impotent cultural forces against powerful innate intuitions, but rather from the view that reform of most of the salient legal standards pits powerful cultural forces against one another. The realist reasons that many debates over the law are so fraught because they are about whose values the law will privilege. This can lead to fierce social conflict with the status of the law marking which social group has prevailed.<sup>237</sup>

But even if the structure of some cultural conflicts requires the law to choose a winner, in at least some other instances, diverse citizens *are* willing to focus on shared concerns. Talk about deterrence, utility, and social welfare often signals that parties are attempting to resolve their disputes without resorting to culturally sectarian forms of argument.<sup>238</sup> This is, in essence, the basis of liberal democratic deliberation.

But even those committed to a liberal ideal of deliberation over the law can polarize on issues along cultural lines. A growing literature suggests that this can be explained by the phenomenon of cultural cognition, which causes individuals to conform their factual beliefs to their cultural priors, preventing them from reaching agreement despite their commitment to social welfare maximization or some other nonsectarian ground for deliberation.<sup>239</sup>

Here, we think, a little realism may be of assistance. Where parties have agreed to resolve a dispute on nonsectarian terms, but are hampered by cultural biases that cause them to come to conflicting conceptions of the facts, it may be possible to help parties attend to factual data in a less biased manner. While research in this area is ongoing, understanding the nature of the conflict as cultural is crucial to developing effective strategies for mitigating polarization of factual beliefs along cultural lines.

#### D. Doing What Comes Naturally

Ironically, although Punishment Naturalism is focused on shared intuitions about wrongfulness, taking it to heart seems likely to *escalate* social conflict over the criminal law. To understand why, though, one has to understand how Punishment Naturalism leverages well-established psychological phenomena involved in evaluating wrongful acts and actors.

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<sup>237</sup> See generally Dan M. Kahan and Donald Braman, *Cultural Cognition and Public Policy*, 24 *Yale L & Pol Rev* 147 (2006).

<sup>238</sup> See generally Kahan, 113 *Harv L Rev* 413 (cited in note 11).

<sup>239</sup> See generally Dan M. Kahan, *The Cognitively Illiberal State*, 60 *Stan L Rev* 115 (2007).

The first phenomenon is *naïve realism*.<sup>240</sup> Naïve realism suggests that people are quite good at spotting bias in others, but not very good at spotting it in themselves. (The *realism* part of naïve realism refers to the ability of individuals to perceive biasing influences on other people; the *naïve* part of naïve realism refers to the belief that such biases do not obtain in the self.) As a result of this widely studied mechanism, we are likely to view other people as having biased and abnormal conceptions of the world—at least relative to ourselves. As a result, when it comes to moral disputes, we are likely to view others (rather than ourselves) as suffering from some form of moral bias.

The self-serving nature of naïve realism echoes another phenomenon that is one of the most famous in all of social psychology: *fundamental attribution error*.<sup>241</sup> When attempting to attribute our own acts to either some fundamental attribute or situational influence, we tend to view our socially desirable acts as stemming from fundamental attributes and undesirable acts as stemming from situational influences. When evaluating the acts of others, though, the reverse is true: actors tend to attribute the undesirable acts of others to fundamental attributes and desirable acts to situational influences.<sup>242</sup> Thus, if we think of our own moral acts and expressions as desirable, we will tend to think of them as reflecting a fundamental moral character rather than some contingent or situational valuation; and the same will be true for our attributions of the undesirable acts—acts we perceive as immoral—of others. In moral disputes, then, we tend to view our different behaviors as reflecting relatively fundamental attributes in both ourselves and those with whom we disagree.

What does this have to do with Punishment Naturalism? Think, for a moment, about the way naturalist explanations orient individuals with respect to their disagreements with one another. Recall that naturalism posits that normally developed humans will share naturally occurring intuitions about the vast majority of wrongful acts. And recall that because of the phenomenon of naïve realism and fundamental attribution bias, individuals are more likely to attribute such biases to others than to themselves and to think of them as reflecting fundamental differences. Then ask yourself this: does thinking that someone

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<sup>240</sup> See Lee Ross and Andrew Ward, *Implications for Social Conflict and Misunderstanding*, in Edward S. Reed, Elliot Turiel, and Terrance Brown, eds, *Values and Knowledge* 103, 110–11 (Lawrence Erlbaum 1996).

<sup>241</sup> See generally Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, in Leonard Berkowitz, ed, 10 *Advances in Experimental Social Psychology* 173 (Academic 1977).

<sup>242</sup> See generally Bertram F. Malle, *The Actor–Observer Asymmetry in Attribution: A (Surprising) Meta-Analysis*, 132 *Psych Bull* 895 (2006).



who disagrees with you is innately abnormal in a fundamental moral capacity increase or decrease the likelihood of your understanding their concerns and working toward viable reform? As it happens, what research has been done in this area suggests that it is quite easy to think of outgroup members as fundamentally different from oneself, and that this decreases the likelihood of cooperation.<sup>243</sup>

When evaluating one another's claims, realists caution themselves against viewing those with whom they disagree as having an innately or fundamentally abnormal moral instinct. This does not by any means guarantee that they will be able to come to an agreement or effect reform—explicit value differences have underwritten and continue to generate serious social conflict. But it does, we hope, help guard against the all-too-easy jump to thinking that those who disagree with our moral intuitions do so because they suffer from some fundamental moral abnormality. Indeed, is this not already a problem in conflict around the world: that we come to think of the people with whom we disagree as intrinsically less moral rather than contingently different along cultural lines?<sup>244</sup>

Fundamental attribution error and naïve realism can also help us understand why it is that Punishment Naturalism, despite all of the contrary evidence, *feels* so natural to so many people. These (perhaps even universal!) cognitive mechanisms cause us to favor arguments like Punishment Naturalism. And it is these cognitive mechanisms that Punishment Naturalists reinforce when they argue that we should “listen more closely to the moral voice of our species” and avoid the call of “policy wonks” who tell us that we should adjust our intuitions to fit their reasoned arguments for improving social welfare. Our moral intuitions, our cognitive biases persuade us, are both unbiased and reflect a fundamentally positive aspect of our nature.

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<sup>243</sup> What research does exist in this area suggests that those who view human nature as largely set and inflexible are also more likely to look upon out-group members as less likely to be cooperative, and are thus less likely to actually cooperate with them; the inverse is true for those who view human nature to be more malleable. See generally, for example, Sheri R. Levy, Chi-yue Chiu and Ying-yi Hong, *Lay Theories and Intergroup Relations*, 9 *Group Processes Intergroup Rel* 5 (2006) (describing how various lay theories about human attributes and cognition affect intergroup relations); Nick Haslam, et al, *Psychological Essentialism, Implicit Theories, and Intergroup Relations*, 9 *Group Processes Intergroup Rel* 63 (2006) (finding that the belief that human attributes are malleable increases intergroup cooperation); Giulio Boccato, et al, *The Automaticity of Infra-humanization*, 37 *Euro J Soc Psych* 987 (2007) (finding support for the infra-humanization hypothesis that uniquely human emotions are automatically more linked in memory with the in-group than with the out-group).

<sup>244</sup> See Nick Haslam, *Dehumanization: An Integrative Review*, 10 *Personality & Soc Psych Rev* 252, 252 (2006) (noting the tendency to treat out-group members “as animal-like” and to represent them as “objects or automata”).

We think Punishment Realism gets it right—that is, it furnishes a more accurate depiction of human moral intuitions than Punishment Naturalism—and for most people, getting it right will be enough. But we also think it can help solve—or at least not exacerbate—collective action problems. Realism points citizens in a productive direction, focusing attention on issues around which there is genuine dispute and lack of coordination. It also highlights the social and cognitive mechanisms that generate that unnecessary conflict, allowing legal actors to develop tools with which to understand the source of dissensus. That certainly does not guarantee a quick or easy resolution, but it does, we think, provide a reasonable start toward solving the difficult problems involved in such disputes.

#### CONCLUSION

We hope that the reader has come to this point with an appreciation for the way widely shared—perhaps even universal—cognitive mechanisms can give rise to diverse and often conflicting intuitions about justice. Many of these mechanisms may be the products of natural selection, but their flexibility lends our intuitions tremendous range and scope. Knowledge about our cognitive building blocks, on this realist account, can help us understand why our intuitions about what is just *seem* so natural, even when they are so clearly subject to cultural variation.

We have the utmost respect for Punishment Naturalism, which we recognize as embodying a rich and growing stock of insights informed by highly rigorous and sophisticated methods. There is a growing trend toward the integration of empirical insights from a variety of disciplines into legal scholarship. The originality of argument and the scope of the research that characterize Punishment Naturalism are a testament to the value of this trend.

We do feel deep concern, however, 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. Popular understandings of wrongfulness, we are repeatedly told, are “deep, predictable, and widely shared.”<sup>245</sup> They are the product of inexorable biological

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<sup>245</sup> Robinson and Kurzban, 91 Minn L Rev at 1892 (cited in note 13).

forces—“an evolved predisposition” combined with “social learning” of the sort that “arise[s] *only* from . . . human life experience[s] so fundamental as to be essentially universal to all persons.”<sup>246</sup> As such, it is naïve to expect “arguments or education” to change them;<sup>247</sup> something much more fundamental, and much more odious, would be necessary “to fundamentally alter . . . intuitive notions of justice,” something akin to the “coercive indoctrination” that is characteristic of totalitarian states and that would never “be tolerated in a modern liberal democracy.”<sup>248</sup> Less extreme “social engineering programs aimed at changing”<sup>249</sup> norms through laws are not only likely to fail, but also to blow up in the engineers’, and everyone else’s, faces: “when the criminal justice system is seen as out of tune with community sentiments,” the law suffers a “loss of moral credibility” that can grow into “a generalized contempt for the system in all its aspects, [ ] a generalized suspicion of all of its rules,” and ultimately the destruction of its “relevance as a guide to good conduct.”<sup>250</sup>

It is possible that the Punishment Naturalists mean to direct their cautionary, “hands off” admonition only to academic theorists who call for replacing “punishment” informed by retributive sensibilities of any sort with a humanistic—or perhaps simply technocratic—utilitarian regime animated by goals of incapacitation and therapy.<sup>251</sup> As we have pointed out, the most intriguing theoretical architects of such a system build their regime on the same psychobiological foundation on which the Punishment Naturalists rest their own populist retributivism.<sup>252</sup> But the generality with which the Punishment Naturalists couch the lessons they draw from their work, and the nature of the concrete examples they give of “recent reform programs” that embody “criminal law manipulation . . . by social engineers”<sup>253</sup>—programs aimed at reforming rape law, at reducing smoking, at increasing punishment of domestic violence, at discouraging recreational drug use, at focusing attention on drunk driving, at combating workplace sexual harassment, and at “build[ing] public acceptance of both same-sex

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<sup>246</sup> Robinson, Kurzban, and Jones, 60 Vand L Rev at 1646, 1687 (cited in note 14).

<sup>247</sup> Robinson and Darley, 81 S Cal L Rev at 52 (cited in note 15).

<sup>248</sup> Id at 54–55.

<sup>249</sup> Id at 51.

<sup>250</sup> Id at 24.

<sup>251</sup> See, for example, Robinson and Kurzban, 91 Minn L Rev at 1892 (cited in note 13) (“[I]t may be unrealistic to expect the population to all ‘rise above’ its desire to punish wrongdoers, or to expect the government to ‘reeducate’ people away from their interest in punishing wrongdoers, as is urged by some reformers.”). See also Robinson, Kurzban, and Jones, 60 Vand L Rev at 1688 (cited in note 14).

<sup>252</sup> See Part IV.A.

<sup>253</sup> Robinson and Darley, 81 S Cal L Rev at 52–53 (cited in note 15).

intercourse . . . and same-sex unions”<sup>254</sup>—invite readers (who have indeed accepted the invitation<sup>255</sup>) to see their resistance to using law to change norms as having much broader normative significance.

Our goal has been to show that Punishment Naturalism does not supply a basis for any particular position on any live and disputed issue in the criminal law informed by clashing cultural values. We conclude with a statement of three interrelated propositions that we think survive close engagement with Punishment Naturalism and that defeat any attempt to derive a generic, conservative suspicion to norm reform from it.

*First, as a matter of politically consequential fact, intuitions of justice are characterized by immense cultural heterogeneity.* It might be the case that, for the most part, human beings everywhere and at all times have been opposed to murder, rape, and misappropriation. But over space and over time, *what counts* as murder, rape, and misappropriation have varied tremendously. The reason is that cultural norms define key elements of those wrongs—who counts as a person, for example, what sorts of behavior interfere with a person’s vital interests, what kinds of behavior surrender rightful control of one’s body, what sorts of personal and communal claims constrain individual entitlements to property, and the like. Opposing understandings like these persist across identifiable cultural groups in contemporary American society. They are what animate debates about rape reform, gradations of homicide, abortion, the scope of antifraud provisions, and myriad other issues.

*Second, intuitions of justice are plastic.* By this we mean that such understandings do in fact change in one place over time. Often change is slow and gradual; but sometimes it is quite sudden and dramatic.

*Third, intuitions of justice and law are endogenous.* This is the simple point that understandings of wrongdoing and law are reciprocally related: what is considered “wrongful” influences law, and what the law prohibits influences understandings of what is wrongful, and also how wrongful it is. Accordingly, law reform often *can* be a catalyst for norm change—indeed, for norm change that itself feeds back on law and thus back on itself. Examples of such interplay are legion, including the prominent example of homicide law in the United States, where the changing factual circumstances that the law (formally through doctrine, and practically through jury verdicts) recognizes as

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<sup>254</sup> Id.

<sup>255</sup> See Kerr, *The Intuition of Retribution* (cited in note 23).

full or partial defenses show how highly interactive culture, law, and intuitions relating to core wrongdoing can be.<sup>256</sup>

We want to close with an admission and some appreciation. It is quite possible that we are wrong. The beauty of the best naturalist work—and here we are thinking of the work of those we have criticized above—is that it makes clear claims based on readily discernible data. We think that the naturalists have missed data and that their claims are too broad, but they have moved the ball forward significantly by articulating claims that previously had been made without data and which were thus nearly impossible to engage on the merits. And perhaps we are too critical. Perhaps we are succumbing to cognitive biases that cause us to favor evidence supporting our own parochial perspective. Perhaps. Happily, if you think that, you are already a realist.

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<sup>256</sup> See Kahan and Nussbaum, 96 Colum L Rev at 346–50 (cited in note 7).

## APPENDIX

Items from the ranking studies conducted by Robinson and Kurzban.<sup>257</sup>

*The following four scenarios were typically assigned no punishment and were thus unranked.*

DEFENDING ATTACK. John is knocked down from behind by a man with a knife who moves to stab him. As the man lunges for him, John stabs him with a piece of glass he finds on the ground, which is the only thing he can do to save himself from being killed. The man later dies of his injuries.

COERCIVE THREAT TO CHILD. A man grabs John's child and puts a sharp knife to her throat. He tells John that he will kill the child if John does not steal an expensive digital camera from a nearby shop or he attempts to contact police. Because the man can see everything he does, John does as he is told in order to save his child.

UMBRELLA MISTAKE. John takes another person's umbrella assuming it to be his own because it has the same unusual color pattern as his own, a fact that the police confirm.

HALLUCINATION. Another person slips a drug into John's food, which causes him to hallucinate that he is being attacked by a wolf. When John strikes out in defense, he does not realize that he is in fact striking a person, a fact confirmed by all of the psychiatrists appointed by the state, who confirm that John had no ability to prevent the hallucination.

*The following twenty-four were typically ranked as increasingly serious offenses and as deserving increasing quanta of punishment.*

WHOLE PIES FROM BUFFET. The owner has posted rules at his all-you-can-eat buffet that expressly prohibit taking food away; patrons can only take what they eat at the buffet. The owner has set the price of the buffet accordingly. John purchases dinner at the buffet, but when he leaves he takes with him two whole pies to give to a friend.

LOGO T-SHIRT FROM STORE. John notices in a small family-owned music store a T-shirt with the logo of his favorite band. While the store clerk is preoccupied with inventory, John places the \$15 T-shirt in his coat and walks out, with no intention of paying for it.

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<sup>257</sup> Robinson and Kurzban, 91 Minn L Rev at 1894–98 (cited in note 13).

SHORT CHANGE CHEAT. John is a cab driver who picks up a high school student. Because the customer seems confused about the money transaction, John decides he can trick her and gives her \$20 less change than he knows she is owed.

CLOCK RADIO FROM CAR. As he is walking to a party in a friend's neighborhood, John sees a clock radio on the backseat of a car parked on the street. Later that night, on his return from the party, he checks the car and finds it unlocked, so he takes the clock radio from the back seat.

ELECTRIC DRILL FROM GARAGE. John does not have all the tools he needs for his workshop but knows of a family two streets over who sometimes leave unlocked the door to the detached garage next to their house. When he next sees his chance, he enters the detached garage through the unlocked door and takes a medium-sized electric drill, intending to keep it forever.

MICROWAVE FROM HOUSE. While a family is on vacation, John jimmys the back door to their house and steps into their kitchen. On the counter, he sees their microwave, which he carries away.

SMASHING TV. While a family is away for the day, John breaks in through a bedroom window and rummages through the house looking for valuables. He can only find an eighteen-inch television, which angers him. When he gets it outside, he realizes that it is an older model than he wants, so he smashes it onto the driveway, breaking it into pieces.

SLAP AND BRUISING AT RECORD STORE. A record store patron is wearing a cap that mocks John's favorite band. John follows him from the store, confronts him, then slaps him in the face hard, causing him to stumble. The man's face develops a harsh black and yellow bruise that does not go away for some time.

HEAD-BUTT AT STADIUM. While attending a football game, John becomes angry as he overhears an opposing fan's disparaging remarks about John's team. At the end of the game, John sticks his face in the man's face and head-butts him, causing a black eye and a gash that requires two stitches to close.

STITCHES AFTER SOCCER GAME. Angry after overhearing another parent's remarks during a soccer match in which John's son is playing, John approaches the man after the game, grabs his coffee mug, knocks him down, then kicks him several times while he is on the ground, knocking him out for several minutes and causing cuts that require five stitches.

NECKLACE SNATCH AT MALL. As a woman searches her purse for car keys in a mall parking lot, John runs up and grabs her gold necklace but it does not break. He yanks the woman to the ground by her necklace, where she gashes her head, requiring stitches. John runs off without the necklace.

ATTEMPTED ROBBERY AT GAS STATION. John demands money from a man buying gas at a gas station. When the man refuses, John punches the man several times in the face, breaking his jaw and causing several cuts that each require stitches. He then runs off without getting any money.

CLUBBING DURING ROBBERY. To force a man to give up his wallet during a robbery attempt, John beats the man with a club until he relinquishes his wallet, which contains \$350. The man must be hospitalized for two days.

MAULING BY PIT BULLS. Two vicious pit bulls that John keeps for illegal dog fighting have just learned to escape and have attacked a person who came to John's house. The police tell John he must destroy the dogs, which he agrees to do but does not intend to do. The next day, the dogs escape again and maul to death a man delivering a package.

INFANT DEATH IN CAR. John is driving to see a man about buying an illegal gun but must baby-sit his friend's toddler son. It occurs to him that it is too hot to safely leave the toddler in the car but he decides to leave him anyway and to return soon. He gets talking with the seller, however, and forgets about the toddler, who passes out and dies.

STABBING. John is offended by a woman's mocking remark and decides to hurt her badly. At work the next day, when no one else is around, he picks up a letter opener from his desk and stabs her. She later dies from the wound.

AMBUSH SHOOTING. John knows the address of a woman who has highly offended him. As he had planned the day before, he waits there for the woman to return from work and, when she appears, John shoots her to death.

ABDUCTION SHOOTING. A woman at work reveals John's misdeeds to his employer, thereby getting him fired. John devises a plan to get even with her. The next week he forces the woman into his car at knife point and drives her to a secluded area where he shoots her to death.

BURNING MOTHER FOR INHERITANCE. John works out a plan to kill his sixty-year-old invalid mother for the inheritance. He drags [her] to her bed, puts her in, and lights her oxygen mask with a cigarette, hop-



ing to make it look like an accident. The elderly woman screams as her clothes catch fire and she burns to death. John just watches her burn.

**RANSOM, RAPE, TORTURE AND STRANGLING.** John kidnaps an eight-year-old girl for ransom, rapes her, then records the child's screams as he burns her with a cigarette lighter, sending the recording to her parents to induce them to pay his ransom demand. Even though they pay as directed, John strangles the child to death to avoid leaving a witness.