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LAY PERCEPTIONS OF JUSTICE VS. CRIMINAL LAW DOCTRINE: A FALSE DICHOTOMY?

*Dan M. Kahan**

It is nearly impossible to overstate the importance of Robinson and Darley's work on the relationship between lay perceptions of justice and doctrines of substantive criminal law.¹ Consequently, it is nearly impossible to advance an important criticism of it. I do, however, believe that there is one significant gap in their methodology that they ought to fill as their project continues to unfold.

This gap is their failure to address the importance of *prototypical* reasoning by jurors. A growing body of experimental studies suggests that jurors are not very much influenced by formal tests embodied in the substantive criminal law doctrines; instead they consult prototypical representations, absorbed from their immersion in social and cultural life, to determine whether the facts add up to a particular crime or defense.² Because jurors seem more or less automatically to understand the law to be whatever they intuitively think it is,³ Robinson and Darley may well be overstating the existence of conflict between lay sensibilities and law.

The work I have in mind is in fact an offshoot of work in cognitive psychology that tries to make sense of the phenomenon of intuitive perception—our capacity to “know” something when we “see” it, without being able to explain why. For example, we distinguish among different colors, different sounds, and different tastes without being able to articulate the bases on which we are making such discriminations.⁴ Each

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1. See PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* (1995).

2. See, e.g., Vicki L. Smith, *Prototypes in the Courtroom: Lay Representations of Legal Concepts*, 61 J. PERSONALITY & SOC. PSYCHOL. 857, 868 (1991) (“[T]hat subjects’ prior knowledge is a potential source of conflict with the judge’s instructions.”).

3. See *id.* at 870.

4. See PAUL M. CHURCHLAND, *THE ENGINE OF REASON, THE SEAT OF THE SOUL: A PHILOSOPHICAL JOURNEY INTO THE BRAIN* 144 (1995).

of us learns to recognize thousands of faces, a skill that even the most powerful computers cannot be programmed to emulate.⁵ Whether grammar can be reduced to a set of stateable rules—an issue on which philosophers of language disagree—mastery of a language clearly does not depend on being aware of such rules or on consulting them before one speaks.⁶ In all of these settings and in countless others, we make critical judgments, less by reflectively deducing what is important than by intuitively apprehending it.⁷

Psychologists link intuitive perception to a cognitive operation that they refer to as *pattern recognition*.⁸ According to this theory, what goes on in the brain when individuals recognize faces, construct grammatical sentences, play chess, or perceive tastes, colors, and smells is not a form of algorithmic computation, but rather a rapid, pre-verbal cycling process whereby the case at hand is compared to, contrasted with, and ultimately matched against a wide range of mentally inventoried prototypes.⁹

Experimental data suggests that moral and other types of evaluative reasoning fit this profile. Individuals intuitively “recognize cruelty and kindness, avarice and generosity, treachery and honor, mendacity and honesty, the cowardly way out and right thing to do” by drawing on “a hierarchy of moral prototypes,” compiled from their exposure to “a substantial number of relevant *examples* of the moral kinds at issue.”¹⁰

How about legal concepts? They have also been shown to display the key features of pattern recognition.

Consider the insanity defense. Mock jury studies show that jurors instructed under the liberal Model Penal Code (“MPC”) test, which excuses both volitional and cognitive defects,¹¹ are no more likely to convict or acquit than those instructed under the traditional *M’Naghten* rule,

5. See HOWARD MARGOLIS, PATTERNS, THINKING, AND COGNITION: A THEORY OF JUDGMENT 3 (1987).

6. See CHURCHLAND, *supra* note 4, at 143-44.

7. Many other examples involve specialized tasks. Reading x-rays, interpreting aerial photographs, and grading of commodities such as cheese and wool all involve perceptual intuition. See ELEANOR J. GIBSON, PRINCIPLES OF PERCEPTUAL LEARNING AND DEVELOPMENT 6-9 (1969). Expert play in chess also involves perceptual intuition. See MARGOLIS, *supra* note 5, at 104-05.

8. See MARGOLIS, *supra* note 5, at 1.

9. See *id.* at 1-6; CHURCHLAND, *supra* note 4, at 21-34.

10. CHURCHLAND, *supra* note 4, at 144, 146; see also MARGOLIS, *supra* note 5, ch. 5 (discussing how people check judgments and noting the role of social acceptance); Gerald Dworkin, *Unprincipled Ethics*, 20 MIDWEST STUD. PHIL. 224 (1995) (discussing the nature of moral judgments).

11. See MODEL PENAL CODE § 4.01(1) (1985).

which focuses only on cognitive impairments;¹² indeed, the verdicts of those instructed under either test are indistinguishable from those given an “insanity” instruction that specifies *no* definition of the term.¹³ However instructed, juries determine the offender’s sanity according to a lay construct that focuses on a wide array of extra-doctrinal considerations, including “the defendant’s background,” his “relationship with the victim,” his “intent to harm,”¹⁴ and his “culpab[ility] before the act for bringing about [his] incapacity.”¹⁵ Just as significant, jurors’ lay construct of insanity shifts unpredictably as experimenters alter the facts. The considerations that strike jurors as decisive in one case turn out to be irrelevant, or decidedly less important than some other previously irrelevant consideration, in the next case.¹⁶

Consequently, although it is possible to specify the factors that juries take into account, it is not possible to systematize those factors into a stateable rule or test. Like other phenomena involving pattern recognition—from the identification of faces, to the construction of grammatical sentences, to the discernment of anger or fear in others—the perception of insanity is a task that individuals can perform but not explain in a verbally cogent manner.

The same goes for jurors’ perception of various types of criminal offenses. Experimental studies suggest that jurors identify crimes prototypically rather than algorithmically.¹⁷ That is, to determine whether a given set of facts constitutes “kidnapping,” “murder,” “assault,” or “robbery,” jurors consult inventoried prototypes, which consist not of necessary and sufficient conditions, but rather of collections of attributes, against which putative instances of a crime are judged more or less typical.¹⁸ Moreover, as with their perceptions of “insanity,” jurors’ per-

12. See James R.P. Ogloff, *A Comparison of Insanity Defense Standards on Juror Decision Making*, 15 L. & HUM. BEHAV. 509, 522-23 (1991). In *Regina v. M’Naghten*, the House of Lords stated that the defendant should be found not guilty by reason of insanity if

at the time of committing the act, the defendant was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know what he was doing was wrong.

8 Eng. Rep. 718 (H.L. 1843).

13. See Ogloff, *supra* note 12, at 523.

14. *Id.* at 526.

15. Norman J. Finkel & Sharon F. Handel, *How Jurors Construe “Insanity”*, 13 L. & HUM. BEHAV. 41, 57 (1989).

16. See Norman J. Finkel, *De Facto Departures from Insanity Instructions: Toward the Re-making of Common Law*, 14 L. & HUM. BEHAV. 105, 114 (1990).

17. See Smith, *supra* note 2, at 868.

18. See *id.*

ceptions of whether actions constitute particular crimes are unaffected by the definitions contained in the instructions that courts give them.¹⁹

What is the significance of pattern recognition for Robinson and Darley's work? The nerve of *Justice, Liability, and Blame: Community Views and the Criminal Law* is to document the convergence and, even more importantly, the divergence between formal doctrines and lay sensibilities of justice.²⁰ But, if pattern recognition plays the role in juror decision-making that this work suggests, their anxieties about the divergence may well be overstated.

Substantive criminal law doctrines—from duress to insanity to self-defense—are highly abstract. To make these doctrines produce concrete results, experimental studies suggest that jurors draw on their pre-existing intuitions about what it is they are supposed to be looking for.²¹ And if doctrine is given content through lay sensibilities in this way, there is no reason to expect conflict between laws and sensibilities.

Robinson and Darley, of course, do purport to find conflicts of this very sort. But the conflict may be more apparent than real. Having been socialized to apprehend the theoretical aims of the drafters of the MPC, Robinson and Darley are able to say when the MPC's "substantial step" test, for example, would produce results different from the common-law "dangerous proximity" test.²² But jurors have not been seeped in those theories. They have their own prototypes, drawn from a wide-range of everyday sources of social learning, about what counts as an "attempt."²³ Their sensibilities of what counts as an attempt might not conform to what the MPC regards as one. But by virtue of the influence that pattern recognition exerts over legal decision-making, there is no reason to believe that jurors will *apply* the MPC test, the common-law test, or any other abstract doctrine in a way that disappoints their sensibilities.

At a minimum, the existing experimental work on prototypical reasoning and juror decision-making suggests that Robinson and Darley should modify their methodology in an important way. Whenever they conclude that there is in fact a divergence between lay sensibilities and the results that they believe doctrine entails, they should run an additional test to see whether mock jurors, supplied with the relevant doctrine, would in fact apply the doctrine in a way that disappoints their

19. See *id.* at 870.

20. See ROBINSON & DARLEY, *supra* note 1, at xv-xvi.

21. See Smith, *supra* note 2, at 870.

22. See ROBINSON & DARLEY, *supra* note 1, at 14-23.

23. See *id.* at 205.

sensibilities. Consistent with existing experimental work, my hypothesis is that they will rarely, if ever, see this result.

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