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**Does Hard Incompatibilism Really Abolish ‘Right’ and ‘Wrong’?
Some Thoughts in Response to Larry Alexander**

by John A. Humbach¹

3/14/17

In a challenge² to recent writings of Derk Pereboom and Gregg Caruso,³ Larry Alexander makes the following claim: If one accepts the Pereboom-Caruso “hard incompatibilist” view of choice, which regards blame and retributive punishment as morally unjustified because free will is an illusion, then “normativity completely disappears.”⁴ In making this claim, Professor Alexander appears to hold that the moral distinction between right and wrong conduct (“normativity”) cannot effectively exist unless those who do wrong “deserve” to receive blame and punishment in response to their misbehavior. This is not, however, necessarily so.

For context, let it be noted that a principal point made by Professors Pereboom and Caruso is that “incapacitation” (typically, physical restraint, as by incarceration) and rehabilitation would not only suffice to serve society’s need to minimize criminality but, if free will does not exist, they are essentially the only modes of criminal disposition that are morally justifiable. Stated bluntly, if wrongdoers truly cannot help doing what they do, then it is morally wrong to inflict suffering and deprivation on them, except as unavoidable incidents of incapacitation and rehabilitation. The hard-incompatibilist view also denies that wrongdoers deserve to be the targets of degrading moralistic sentiments, such as blame or reproach, which demean, debase or disgrace individuals for acts that are the result of causal factors ultimately beyond their control.

¹ Professor of Law, Elisabeth Haub School of Law at Pace University. My thanks to Gregg Caruso for his helpful comments and suggestions.

² In Larry Alexander, *Hard Incompatibilism, and the Rejection of Moral Responsibility: A Skeptical Look at an Optimistic Account* (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2921469 (hereinafter *Hard Incompatibilism*).

³ Citing Derk Pereboom and Gregg D. Caruso, “Hard-Incompatibilist Existentialism: Neuroscience, Punishment, and Meaning in Life,” in *Neuroexistentialism: Meaning, Morals, and Purpose in the Age of Neuroscience* (G. D. Caruso and O. Flanagan, eds., forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2758312; Gregg D. Caruso, “Free Will Skepticism and Its Implications: An Argument for Optimism,” in *Free Will Skepticism in Law and Society* (E. Shaw and D. Pereboom, eds., forthcoming).

⁴ *Hard Incompatibilism*, penultimate paragraph (pages are not numbered). As Professor Alexander describes it, Professors Pereboom and Caruso deny the existence of “free will required for moral responsibility” and therefore “deny what they call ‘basic desert moral responsibility’ and reject [its] corollaries both the negative reactive attitudes (blame, indignation, guilt) and their positive counterparts. He does not accept their contention that adhering this hard-incompatibilist position would not threaten “other moral judgments, such as good and bad and right and wrong” (“normativity completely disappears”) as well as “society’s ability to deal with immoral behavior, including criminal conduct.” *Hard Incompatibilism*, first and second paragraphs (pages are not numbered).

The Pereboom-Caruso hard-incompatibilist position predictably attracts significant resistance because it obviously would cast a serious moral cloud over the widely accepted “retribution” and “deterrence” rationales for punishment. In making a case against their position, Professor Alexander focuses particularly on the Pereboom-Caruso claim that normativity (e.g., the moral distinctions between right and wrong conduct) would not be threatened by acceptance of hard-incompatibilism and its rejection of blame, retributive punishment, etc.⁵ To demonstrate the point, he presents a scenario which he says supports his skepticism concerning the Pereboom-Caruso claim and shows that, if one follows the logic of hard-incompatibilism, then “normativity completely disappears.”⁶ Essentially, the scenario portrays a Holmesian “bad man” (described as “everyperson”) who concludes that it’s all right for him to punch an annoying co-worker in the face as long as doing so will not result in punishment or evoke “negative reactive attitudes” such as blame. This dubious moral conclusion reached by the “everyperson” is meant to demonstrate how “normativity completely disappears” if wrongdoers do not deserve to be targeted with degrading moralistic sentiments such as blame, or punishment. For the reasons that follow, I do not think that the demonstration quite succeeds.

First, by way of initial clarification, there is a question of what Professor Alexander means when he says “normativity completely disappears.” Does he mean that normativity depends for its *existence* on blame, guilt feelings and punishment or only for its *effectiveness as a guide for human behavior*? Obviously there is a difference: Even if normativity were to have no practical effectiveness in the absence of degrading moralistic sentiments and penal consequences, it would not follow that it does not exist at all. It appears, however, that the Pereboom-Caruso hard-incompatibilist position is not necessarily inconsistent with *either* the existence or the practical effectiveness of normativity. The two are discussed in turn.

Hard-Incompatibilism is Consistent with the *Existence* of Normativity

Most would agree, I think, that there is more to normativity than just aversion to degrading feelings or penal consequences. When conduct is wrong, it not merely because the conduct might evoke feelings of blame or lead to punishment. Wrongful conduct is wrong because (as Professor Alexander himself suggests⁷) there is some independent

⁵ As this Pereboom-Caruso claim is summarized by Professor Alexander: “[M]oral judgments, such as good and bad and right and wrong, are not threatened, nor will society’s ability to deal with immoral behavior, including criminal conduct, be hampered.” *Hard Incompatibilism*, second paragraph (pages are not numbered). As Professors Pereboom and Caruso write:

Accepting free will skepticism requires rejecting our ordinary view of ourselves as blameworthy or praiseworthy in the basic desert sense [but] even if we came to hold that a serial killer was not blameworthy due to a degenerative brain disease, we could still justifiably agree that his actions are morally bad.... [F]ree will skepticism can accommodate judgments of moral goodness and badness, which are arguably sufficient for moral practice.

Pereboom and Caruso, *supra* note 3, at 11.

⁶ *Hard Incompatibilism*, penultimate paragraph (pages are not numbered).

⁷ *Hard Incompatibilism*, 12th line of dialogue (concerning “greatest good for greatest number,” principles “that others could not reasonably reject,” etc.)

reason—independent of negative reactive attitudes or punishment fears—for trying to do the right thing and eschewing the wrong.⁸ The concept of “wrongful conduct” seems to imply, moreover, that right and wrong are perceptible qualities or properties of conduct in much the same way that colors and shapes are perceptible qualities or properties of physical objects. As such, there is no reason to think that these perceptible qualities or properties of conduct would “disappear” just because people learn that blame, guilt feelings or punishment are not morally deserved responses to wrongdoing. In other words, if conduct really can possess qualities or properties of rightness or wrongness, it is reasonable to suppose that the foundations of their existence are independent of the degrading moralistic feelings and urges to punish that people might have when sensing their presence. Normativity would not necessarily disappear just because such feelings and urges were absent.⁹

Hard-Incompatibilism is Consistent with the *Practical Effectiveness* of Normativity

Let us assume that Professor Alexander intends to make only a more limited claim, namely, that accepting hard incompatibilism would mean that “normativity completely disappears *as an effective behavior-guiding factor in human interactions,*” or something like that. He argues that this would occur in part because accepting determinism and incompatibilism would leave us “without any normative vocabulary.”¹⁰ Even this more limited claim seems doubtful, however. It is, of course, an empirical question, and a debatable one, whether moral distinctions, such as between right and wrong, depend for their practical effects on negative reactive attitudes, like blame, and punitive treatment. However, a few considerations can be mentioned:

First of all, if we accept that conduct really does have moral qualities or properties, such as right and wrong, and if those qualities or properties are perceptible (that is to say, detectable in the brain), it hardly seems likely that undermining desert and blame would leave us “without any normative vocabulary.”¹¹ Professor Alexander’s assertion to the

⁸ See preceding footnote. The independent reasons for their existence might be consequentialist, deontological or something else. Or, it may be that consequentialist, deontological or other moral reasoning may be better thought of as ways we discover or theorize the moral qualities or properties of conduct, rather than being their “source” per se. Needless to say, such speculations are beyond the scope of the present discussion. The point here is less ambitious, viz. that behavioral normativity is more than a matter of just negative reactive attitudes or fear of punishment.

⁹ To be clear, I do not intend to say that the moral qualities or properties of conduct are predicates of the *Ding in sich* (e.g., of the fundamental essence of the “act”) any more than color or shape are unqualifiedly objective qualities or properties of physical objects. Cf. Immanuel Kant, *PROLEGOMENA TO ANY FUTURE METAPHYSICS* 57 (Beryl Logan, ed. 1996). It is probably fair to say, *per* Kant, that all such predicates are subjective, partly creatures of the brain, so to speak. *Id.* All that is insisted here is that the moral qualities or properties of conduct may be perceptible and accessible even when they are not associated with degrading moralistic sentiments such as blame, reproach or guilt or with urges to punish.

¹⁰ *Hard Incompatibilism*, last paragraph (pages are not numbered).

¹¹ Again, I want to stress that I do not deny the subjectivity of moral distinctions, as we perceive them, or claim that rightness and wrongness are somehow “intrinsic” or objective features of conduct any more than

contrary seems to assume that the perceptibility of moral qualities or properties of conduct can only occur by way of degrading moralistic sentiments like blame, guilt and urges to punish. The basis for such an assumption is unclear. People surely do not need to have such sentiments or urges to make value judgments about events in general. It is perfectly normal, for example, to perceive hurricanes, earthquakes or falling tree branches as “bad” without feeling any need to blame or punish. It is hard to see why it should not be similarly possible for people to perceive the moral qualities or properties of events that reflect human choice (i.e., human acts) even without the help of degrading moralistic sentiments.

There is, of course, a moral difference between bad human acts and other kinds of bad events. Unlike other bad events, bad acts are often conventionally described as “wrong” or “immoral” and, very importantly, these latter qualities or properties can be sensibly considered as having normative significance inasmuch as anticipated perceptions of badness, wrongness or immorality can be a causal factor in the brain’s biomechanical calculations of choice. But the bottom line is that Professor Alexander provides no reason to think that negative reactive attitudes, such as feelings of blame, are the only basis on which the brain is able to detect the normative qualities or properties of human acts. It is possible to see that an act is wrong without blaming the person who did it. Accordingly, it cannot be assumed that we would be “without any normative vocabulary” to guide behavior in the absence of negative reactive feelings.

Secondly, for the cases of those who have a normative vocabulary but “don’t care” whether they do wrong (like Professor Alexander’s “everyperson”), it should be remembered that, even if hard-incompatibilism is fully embraced, society will still be entitled to take steps to minimize harmful criminality. Retribution and deterrence may be ruled out but the “incapacitation” and rehabilitation measures advocated by Professors Pereboom and Caruso would still be there to reinforce normativity’s effectiveness in guiding human behavior. What is more, in addition to the direct restraining effects of incapacitation, its prospect would likely also have incidental deterrent effects no matter how gently the incapacitation is applied or how diligently it is differentiated from punishment. And even the hardest incompatibilist is morally entitled to make attributions of “cause” (as opposed to blame) in response to harmful events, including conduct. Being named as a causal factor of harm may likewise have incidental deterrent effects.¹²

colors (as we perceive them) are intrinsic features of objects. *See supra* note 9. I do not think this means, however, that the rightness or wrongness of particular conduct is an illusion any more than the redness of Betelgeuse or the blueness of Sirius are illusions. There is, of course, a difference: Moral distinctions are subjectively perceived as normative while color distinctions are not. But I do not think that the subjectivity of normative moral distinctions makes them any less “real,” for practical purposes, because, after all, what in human experience is *not* similarly subjective?

¹² I do not understand Pereboom and Caruso to say that deterrent effects are morally prohibited per se but only that deterrence is not morally permitted as a *purpose* or *justification* for imposing adverse consequences on wrongdoers. The occurrence of “incidental” deterrent effects may possibly be theorized as a kind a “natural justice” or as simply as an amoral part of the larger, deterministic mechanisms of cause-and-effect, no more to be regarded as a kind of “punishment” than the experience of being burned when playing with fire—though both may have deterrent effects on future behavior.

But taken together, how effective would these measures be? Would normativity be *less effective* as a behavior-guiding factor under a hard incompatibilist incapacitation regime than under current penal practices, which stress deterrence and retribution? This is, as already noted, an open empirical question. However, the natural experiments that we see in comparing the results achieved in countries with differing penal regimes, such as Norway and the United States, imply that the current American approach, with its heavy reliance on retributive and deterrence, is not necessarily the one that works best.¹³

Finally, Professor Alexander's scenario raises still another concern about replacing current practices with a incapacitation-and-rehabilitation response to criminality, namely that it could be *over-effective* and therefore inhumane to persons who do wrong. The haplessly amoral everyperson in his scenario complains that he may "never be released" because (he says) he would "never be convinced" that he should not do wrong. While Professor Alexander plainly seems to see this as a bad thing, he does not explain why. I am guessing that Professor Alexander is thinking here along the lines of "negative retributivism," which apparently holds that government is morally required to unloose dangerous individuals into the streets once the retributive rationale for holding them no longer applies. This corollary of negative retributivism may possibly be morally sound, but it is far from self-evident.¹⁴

In sum, it seems not correct to say that that hard-incompatibilism (or a Pereboom-Caruso incapacitation-rehabilitation regime that it entails) would either cause normativity to disappear or deprive us of our normative vocabulary. It is not our feelings of blame, reproach or guilt or urges to punish that give rise to the differing moral qualities or properties (good/bad, right/wrong) that we perceive in different kinds of conduct. These moral qualities or properties of conduct must have a different and independent foundation (e.g., consequentialist or deontological); otherwise moral probity would be little more

¹³ See generally Gregg D. Caruso, *Free Will Skepticism and the Public Health-Quarantine Model: Replies to Objections*, draft chapter in UNJUST DESERTS: FREE WILL SKEPTICISM, CRIMINAL BEHAVIOR, AND THE PUBLIC HEALTH-QUARANTINE MODEL (forthcoming).

¹⁴ This negative retributivist position seems hard to sustain in Alexander's scenario since it would mean probabilistically sacrificing (using) future victims for the sake of the dangerous individual who is released. But because keeping the dangerous individual in custody likewise means using a person for the benefit of others (the future victims), the dilemma is not easily amenable to the usual deontological prohibition on treating persons as means. The use of a person for another would occur either way.

In any case, Professors Pereboom and Caruso would not necessarily agree that the fact that everyman never comes around would be reason enough to continue to incapacitate him. On this general point they write:

While we do believe that we should indefinitely detain mass murderers and serial rapists who cannot be rehabilitated and remain threats, we do not believe that nonviolent shoplifters who remain threats and cannot be rehabilitated should be preventatively detained at all, by contrast with being monitored, for example. Our view does not prescribe that all dangerous people be detained until they are no longer dangerous. Certain kinds of persisting threats can be dealt with by monitoring by contrast with detention. Moreover, other behavior that is currently considered criminal might not require incapacitation at all. Our view is consistent, for example, with the decriminalization of nonviolent behavior such as recreational drug use, and thus is consistent with many fewer people being detained than in the US currently. Pereboom and Caruso, *supra* note 3, at 30-31.

than an expression of aversion to undesirable personal consequences. However, as long as the normative qualities or properties of conduct (good or bad, right or wrong) are perceptible and have a foundation independent of negative reactive attitudes and fears of punishment, they can be as firmly entrenched, well expressed and (as far as we know) efficacious in a hard incompatibilist world as they would be in a world with free will.