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# ON THE NATURE OF NORMS: BIOLOGY, MORALITY, AND THE DISRUPTION OF ORDER

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THE GREAT DISRUPTION: HUMAN NATURE AND THE RECONSTITUTION OF SOCIAL ORDER. By *Francis Fukuyama*. New York: The Free Press. 1999. Pp. xii, 354. \$26

The analysis of where norms come from is colored by the strong ideological preferences people have as to where they *ought* to come from. [p. 189]

For a long time — and through the now-quaint division of disciplines — morals and norms have been set apart from other behavior-biasing phenomena. They have also been set apart from each other. Morals are generally ceded in full to philosophers. Norms have been ceded to sociologists.

In retrospect, it is not clear why this should be so. Reality is notoriously impervious to taxonomy, and the axis supposedly distinguishing morals from other norms is, after all, arbitrary. Moreover, behavior-biasing phenomena interact in important ways, making the study of parts — without more — just the study of parts. But one thing is clear. To the extent that understanding morals and norms is important to law, studying the two apart from other behavior-biasing phenomena creates a problem.

This problem arises because of opportunity costs. Whenever a topic — such as morality — is both relevant to law and without a uniquely legal theoretical foundation, legal thinkers must rely (at least initially) on disciplines claiming expertise. But in a world in which the academy has divided reality into disciplinary slices — which, having once been sundered, are neither differently divisible nor easily recombined — there is an ever-present risk to law of disciplinary capture. As, for example, when legal thinkers may too hastily elevate the pro-

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nouncements of one discipline, perhaps the one most hypertrophied or shouting loudest, over another.

The costs of such disciplinary capture increase according to the value that foregone knowledge from another discipline would have offered. And in today's world, in which knowledge accumulates at an ever-quickenning pace, these opportunity costs climb faster than ever before, making each choice about where to turn for insights on human behavior fraught with consequence. To disciplines like law, in particular, charged with practical matters of great human importance, the costs of foregoing useful knowledge can be affirmatively harmful, not just intellectually embarrassing.

As consumers and appliers of knowledge from other disciplines, legal thinkers should play — indeed should feel *obligated* to play — a far more active role in furthering interdisciplinary integration of subjects relevant to law. Of course, the inevitable limits on the accumulation of individual expertise make it endlessly tempting for even the most talented and committed interdisciplinary thinkers in the legal academy to mine a single disciplinary vein (economics or cognitive psychology, for example) to its maximum depths. There are economies of scale. And many great and useful insights can be and have been gained thereby. But the common isolation of our proliferated disciplinary mineshafts from even near neighbors often forecloses the important and available benefits that broad, cross-connective integration could provide. Put simply, scholars of various disciplines often work to solve the same problems, unaware that their efforts are closely paralleled by those with whom intellectual trade would yield mutual gains.

Such is the case with morals and norms. To the extent that legal thinkers have in fact recently begun to move beyond philosophy and sociology for more information, they have turned primarily to economics, psychology, and game theory. But even this happy development remains an incomplete achievement (reflecting, as it does, a latent tendency to elevate the social sciences over the life sciences, rather than partnering them). Behavioral biology has at least as much to offer to the study of morality and norms as these other disciplines, perhaps more. Many primatologists, behavioral ecologists, ethologists, neuroanatomists, and behavioral geneticists have long studied the origins of and patterns in, for example, human and nonhuman cooperation and altruism, reciprocity and hostility, division of labor, sharing of production, and identification and treatment of cheaters on social norms. Their work has sound theoretical foundations, and is empirically robust. Without the contributions of behavioral biologists to the study of morals and norms, legal thinkers risk errors that are harmful, not just intellectually embarrassing.

Why can we state this with confidence? Because: a) law is fundamentally about levering human behavior in directions it might not go

on its own; b) law's fulcrum in this effort is its model of where behavior comes from; and c) behavior is fundamentally a biological phenomenon. Consequently, *any* model of behavior inconsistent with the foundations of modern behavioral biology is inaccurate and obsolete. (Or else the unheralded ferment of a true intellectual and scientific revolution.) And thus legal approaches to understanding and influencing human behavior that are based on outdated behavioral models are simply less likely to effect socially and legally desirable outcomes than might be the case if the behavioral models were more conceptually robust.

This should hardly be surprising. The centrality of biology to understanding human behavior is not just a matter of academic accessorizing. Biology is not just another "and" at the "Law and —" buffet, to be sampled at convenience, when tastes turn. Biology is truly foundational, having both broad and practical relevance at a completely different level of analysis than, say, economics or sociology. For just as theories of chemistry must be consistent, in the end, with theories of physics — and theories of biology must be consistent, in turn, with theories of chemistry and physics — theories of economics, sociology, psychology, philosophy, anthropology, and all the rest must be consistent, in the end, with the basic principles of biology.

The most basic principle of biology, in turn, is evolution — particularly evolution by natural selection. Natural selection occurs in any system in which there is differential reproductive success as a function of heritable variation. Put simply, any population of replicators, in which variations in heritable traits affect future replicative success, will tend, over generations, to accumulate an increasing proportion of traits that contribute to replicative success.<sup>1</sup>

The power of this deceptively simple insight — and its ultimate relevance to law — lies in its ability to explain not only species-typical patterns of form, but also species-typical patterns of *behavior*. (Or what some people term a species-typical *nature*.) More specifically, natural selection shapes the physical and chemical information-processing pathways of the brain in ways that have tended, over time, to contribute to the survival and reproductive success of organisms that bear them. These information-processing pathways yield behavioral predispositions. Of which, to circle back, morals and norms are a subset.

Francis Fukuyama understands all this.<sup>2</sup> He has written an exuberantly creative, thorough, and highly stimulating book on the relationship between political and economic order on one hand, and social

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1. See generally sources cited *infra* note 27.

2. Francis Fukuyama is the Omer L. and Nancy Hirst Professor of Public Policy at George Mason University.

and moral order, on the other. Specifically, he argues that understanding the human future requires us to see underappreciated connections between politics, economics, law, social order, morals, norms, and biology. It is a big task. For Fukuyama undertakes nothing less, in *The Great Disruption: Human Nature and the Reconstitution of Social Order*, than to identify recent patterns in social order and disorder, to offer novel explanations for their origins, and to make predictions about what will happen next. But Fukuyama has never been one to shy away from big tasks. (His prior works include, for example, the ambitiously titled *The End of History and the Last Man*.<sup>3</sup>) And in *The Great Disruption*, true to his subtitle, Fukuyama ambitiously enlists the life sciences, integrating them with social sciences, in aid of a deeper understanding of human behavior and morality, and in furtherance of political science analysis.<sup>4</sup> His message is synthetic, explanatory, predictive, and in the end, consoling. His methods are, for legal thinkers and others, engaging, instructive, and sometimes cautioning.

## I. CONTEXT

Fukuyama's major hurdle, in arguing for the relevance of life science perspectives on human morality, is context. His contextual problem extends past disciplinary divisions to the history of science itself. Beyond the endlessly important but by now cliché observation that bad things have been done in the name of good science, lies an even deeper resistance to his effort. For we can view the march of the science he invokes as, in many ways, leading a steady retreat from human uniqueness.

Time and again, through history, we have developed a perfectly plausible way of viewing our place on the planet. It comports with our preferences for the way the world ought sensibly to operate. It conforms to our convictions. It makes us feel special in the dark dangerous night. And then along comes some flag-waver like Fukuyama, preaching the scientific virtues of parsimony and falsification, who shoots our favored theories full of holes. Constructive or destructive? It depends on where you happen to be standing at the time. Progress is less preferable when progress threatens prominence.

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3. FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992). Fukuyama's subsequent book, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* (1995), provides an equally ambitious argument that trust is the underappreciated linchpin of economic prosperity.

4. His efforts in this regard parallel that of legal thinkers, employing evolutionary analysis in law, who enlist life science perspectives in furtherance of existing legal goals. For information on the *Society for Evolutionary Analysis in Law* (SEAL), see <<http://www.sealsite.org>>. For sources exploring the utility to law of integrating biological perspectives, see *infra* note 27.

And science has, one must admit, served up steady threats to our prominence. When Copernican reasoning ultimately exposed as false our belief that Earth was the physical center of everything, we retreated to the less bold claim that at least, and after all, we among all life sprang full-blown from time, in full modern form, as the direct, special, and unchanged-from-the-beginning creation of a supernatural power. Theoretically possible — until Darwin shrank the probability toward zero.

Thereafter, we retreated into successively more humble claims to uniqueness.<sup>5</sup> First, we were the only tool users. But that didn't work.<sup>6</sup> Then we restaked the boundaries of uniqueness, imagining that we and we alone were capable of culture — the intergenerational and non-genetic transmission of novel information or forms of behavior. But that has proved to be equally incorrect.<sup>7</sup> Our latest, perhaps last, retreat therefore stakes the once imperialistic boundaries of human uniqueness ever closer to home — surgically dividing the moral from the amoral, with us in one camp, and all other life in another. If the physicists, chemists, biologists, anatomists, paleontologists, and astronomers can provide us few comforts in an expansive human uniqueness, then surely the philosophers can afford us safe and sole haven within moraled walls.

Francis Fukuyama apparently does not think so. For he grounds his argument, in *The Great Disruption*, on theory and evidence that modern human morality reflects the relentless influence of natural selection.<sup>8</sup> He is not the first to argue that morality cannot be fully un-

5. All species are unique, of course, by definition. But we have generally preferred to believe, *pace* Orwell, that some species are more unique than others, and that our own uniqueness is — well — unique.

6. Species as diverse as chimpanzees and crows have demonstrated the abilities not only to use tools, but to fashion them from raw materials. *See, e.g.*, Yukimaru Sugiyama, *Tool Use by Wild Chimpanzees*, 367 NATURE 327 (1994); Gavin R. Hunt, *Manufacture and Use of Hook-Tools by New Caledonian Crows*, 379 NATURE 249 (1996).

7. A recent study addressing all accumulated reports of chimpanzee cultural transmission made patent that we are not alone within the boundaries we have staked (at least so long as we avoid conveniently *ad hoc* definitions of culture that might require, for example, the painting of still lifes in acrylic). *See* Frans B. M. de Waal, *Cultural Primatology Comes of Age*, 399 NATURE 635 (1999); A. Whiten et al., *Cultures in Chimpanzees*, 399 NATURE 682 (1999).

8. To be sure, it is a grand mistake to think (as many apparently do) that the biology of behavior is about genes for this behavior or that, present in some portion of the population and absent elsewhere. As will be discussed further below, cutting edge behavioral biology incorporates far more important, far subtler, far more flexible, and far less reductionistic influences on behavior than that. Nonetheless, population-wide patterns in moral sentiments are predictably consistent with the knowable effects of evolutionary processes on the human mind. As Arnhart puts it, "Human beings have a natural moral sense that emerges as a joint product of moral emotions such as sympathy and anger and moral principles such as kinship and reciprocity," as a function of evolutionary history. LARRY ARNHART, *DARWINIAN NATURAL RIGHT: THE BIOLOGICAL ETHICS OF HUMAN NATURE* 7 (1998).

derstood without a biological foundation (as he would be the first to point out).<sup>9</sup> But where Fukuyama makes important original contributions is in his willingness to explore several possible *implications*, for tomorrow's questions about the human future, of evolution's effects on human morality. This Review will discuss the principal implications Fukuyama sees, and suggest several others in the legal arena.

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What are morals, after all, but information-processing patterns that tend to bias behavior in this way rather than that way? If those information-processing patterns tend to bias behavior in similar ways, on average, across a species, in contexts likely to be long encountered throughout evolutionary history, they are likely to be the subject of selection pressures, which favor some outcomes more than others, and thus favor psychological mechanisms leading to adaptive responses more than others. To the extent these are even slightly heritable, the historically more adaptive psychological predispositions will tend to predominate over the less adaptive ones.

For a discussion of recent work attempting to locate moral information processing within particular portions of the human brain, see, for example, Steven W. Anderson et al., *Impairment of Social and Moral Behavior Related to Early Damage in Human Prefrontal Cortex*, 2 NATURE NEUROSCIENCE 1032 (1999); and Raymond J. Dolan, *On the Neurology of Morals*, 2 NATURE NEUROSCIENCE 927 (1999).

9. Fukuyama is preceded by many evolutionists. Among the sources that consider the relationship between biology and morality are RICHARD D. ALEXANDER, *THE BIOLOGY OF MORAL SYSTEMS* (1987); RICHARD D. ALEXANDER, *DARWINISM AND HUMAN AFFAIRS* (1979); ARNHART, *supra* note 8; *BIOLOGY AND THE FOUNDATION OF ETHICS* (Jane Maienschein & Michael Ruse eds., 1999); DONALD E. BROWN, *HUMAN UNIVERSALS* (1991); CHARLES DARWIN, *THE DESCENT OF MAN* (1871); DANIEL C. DENNETT, *DARWIN'S DANGEROUS IDEA: EVOLUTION AND THE MEANINGS OF LIFE* (1995); FRANS B. M. DE WAAL, *GOOD NATURED: THE ORIGINS OF RIGHT AND WRONG IN HUMANS AND OTHER ANIMALS* (1996); *EVOLUTIONARY ETHICS* (Matthew H. Nitecki & Doris V. Nitecki eds., 1993); *INVESTIGATING THE BIOLOGICAL FOUNDATIONS OF HUMAN MORALITY* (James P. Hurd ed., 1996); ROBERT J. MCSHEA, *MORALITY AND HUMAN NATURE: A NEW ROUTE TO ETHICAL THEORY* (1990); *OSTRACISM: A SOCIAL AND BIOLOGICAL PHENOMENON* (Margaret Gruter & Roger D. Masters eds., 1986); LEWIS PETRINOVICH, *HUMAN EVOLUTION, REPRODUCTION, AND MORALITY* 25 (1995); RICHARD POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999); G.E. PUGH, *THE BIOLOGICAL ORIGIN OF HUMAN VALUES* (1977); R.J. RICHARDS, *DARWIN AND THE EMERGENCE OF EVOLUTIONARY THEORIES OF MIND AND BEHAVIOR* (1989); MATT RIDLEY, *THE ORIGINS OF VIRTUE: HUMAN INSTINCTS AND THE EVOLUTION OF COOPERATION* (1996); MICHAEL RUSE, *TAKING DARWIN SERIOUSLY: A NATURALISTIC APPROACH TO PHILOSOPHY* (1998); *THE SENSE OF JUSTICE: BIOLOGICAL FOUNDATIONS OF LAW* (Roger D. Masters & Margaret Gruter eds., 1992); JAMES Q. WILSON, *THE MORAL SENSE* (1993); ROBERT WRIGHT, *THE MORAL ANIMAL: THE NEW SCIENCE OF EVOLUTIONARY PSYCHOLOGY* (1994); C.J. Cela-Conde, *The Challenge of Evolutionary Ethics*, 1 *BIOLOGY & PHIL.* 293 (1986); Dennis L. Krebs, *The Evolution of Moral Behaviors*, in *HANDBOOK OF EVOLUTIONARY PSYCHOLOGY: IDEAS, ISSUES, AND APPLICATIONS* (Charles Crawford ed., 1998); Roger D. Masters, *Evolutionary Biology and Natural Right: Leo Strauss, Natural Science and Political Philosophy*, in *THE CRISIS OF LIBERAL DEMOCRACY: A STRAUSSIAN PERSPECTIVE* 49 (Kenneth Deutsch & Walter Soffer eds., 1987, corrected edition); R.J. Richards, *A Defense of Evolutionary Ethics*, 1 *BIOLOGY & PHIL.* 265 (1986); Michael Ruse & Edward O. Wilson, *Moral Philosophy as Applied Science*, 61 *PHIL.* 173 (1986); R. Trigg, *Evolutionary Ethics*, 1 *BIOLOGY & PHIL.* 325 (1986); Edward O. Wilson, *The Biological Basis of Morality*, *ATLANTIC MONTHLY* 53 (April 1998). For concise overviews of the resurgent interest in the influence of biology on human morality, see Jane Maienschein & Michael Ruse, *Introduction*, in *BIOLOGY AND THE FOUNDATION OF ETHICS*, *supra*, at 1, and Phillip R. Sloan, *From Natural Law to Evolutionary Ethics in Enlightenment French Natural History*, in *BIOLOGY AND THE FOUNDATION OF ETHICS*, *supra*, at 52; WRIGHT, *supra*, at 327-44.

II. THEMES OF *THE GREAT DISRUPTION*

In Fukuyama's view, maintaining social order in the face of technological and economic change is one of the greatest challenges facing information age democracies today (p. 10). Fukuyama's main concern, in helping us to face this challenge, is that we bridge disciplines and understand not only the sources of social disorder but also the processes by which social order is reconstituted. Those "renorming" processes include, he argues, not only the traditional and better-known forms of hierarchical, top-down norm creation, from governmental, religious, and community authorities, but also spontaneous, bottom-up renorming, which bubbles up independently of hierarchical impositions.

Developing this argument requires, and Fukuyama provides, an extended look at the relationship between hierarchical (formal) and spontaneous (informal) sources of order. It is here, in arguing for the probability, existence, and importance of spontaneous renorming, that Fukuyama draws not only on history and economics, but also on evolutionary biology, and biologically informed approaches to psychology and anthropology.

The book is significant for lawyers for three reasons. First, legal policymakers are, in part, in the business of combating social disorder; so a deeper understanding of both its multiple causes and the multiple ways in which order is reestablished may aid their efforts. Second, the work complements and extends recent legal scholarship that addresses the importance, origin, and development of norms (as the result of self-organization and sometimes surprising decisions of decentralized individuals<sup>10</sup>) and also addresses the centrality, to an understanding of

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10. See, e.g., Symposium, *Law, Economics, & Norms*, 144 U. PA. L. REV. 1643 (1996); Symposium, *Law and the Legal Process*, 50 STAN. L. REV. 607 (1998); Symposium, *The Legal Implications of Psychology: Human Behavior, Behavioral Economics, and the Law*, 51 VAND. L. REV. 1497 (1998); Symposium, *Social Norms, Social Meaning, and the Economic Analysis of Law*, 27 J. LEGAL STUD. (1998). A small sampling of the burgeoning literature includes Lisa Bernstein, *SOCIAL NORMS AND DEFAULT RULES ANALYSIS*, 3 S. CAL. INTERDISC. L.J. 59 (1993); Robert Cooter, *Law and Unified Social Theory: Thickening the "Self" in "Self-Interest" in SOCIO-LEGAL STUDIES IN CONTEXT* (D. J. Galilean ed., 1995); Kenneth G. Dau-Schmidt, *Legal Prohibitions as More than Prices: The Economic Analysis of Preference Shaping Policies in the Law*, in *LAW AND ECONOMICS: NEW AND CRITICAL PERSPECTIVES* 153 (Robin Paul Malloy & Christopher K. Braun eds., 1995); Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537 (1998); Peter H. Huang & Ho-Mou Wu, *More Order Without More Law: A Theory of Social Norms and Organizational Cultures*, 10 J.L. ECON. & ORG. 390 (1994); Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653 (1998); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Russell Korobkin, *Inertia And Preference in Contract Negotiation: The Psychological Power of Default Rules And Form Terms*, 51 VAND. L. REV. 1583 (1998); Bailey Kuklin, *Evolution, Politics, and Law* (March 2000) (unpublished manuscript on file with author); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998); Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181 (1996); Richard H. McAdams, *The Origin, Develop-*



norms, of game-theoretic analyses of how selfish interests can bring cooperative outcomes.<sup>11</sup> Third, the book usefully demonstrates, in a political science parallel to law, ways in which the tools of behavioral biology are both accessible to non-biologists, and useful in their academic enterprises. In that demonstration, there are a number of important lessons, taken up in Part IV below.

Fukuyama has three main points, reflected in the three main Parts of his book. In Part One, entitled "The Great Disruption," Fukuyama argues that the transition from the industrial age to the information age has been a mixed blessing. Specifically, when mental labor increasingly displaced physical labor, and services began to displace manufacturing as a source of wealth, this adversely affected our social relations and moral lives (pp. 3-4). For example, inexpensive information technology leads both to an increase in individualism and to the "miniaturization of community" (p. 91). It "erodes the boundaries of long-established cultural communities" with cheap but relentless television, radio, fax, and e-mail (p. 3), and it decreases meaningful, long-term, and truly engaged associations between people (pp. 5-6). As Fukuyama puts it, "The same innovation that increases productivity or launches a new industry undermines an existing community or makes an entire way of life obsolete" (p. 282).

This, in turn, increases social disorder. Or relatedly, as Fukuyama prefers to frame it, this causes a decline in *social capital*.<sup>12</sup> Social capital, the neglected cousin of physical capital (such as machines) and human capital (such as know-how), is the set of informal values or norms shared among members of a group that permit cooperation

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*ment, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997); Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697 (1996); Jeffrey J. Rachlinski & Forest Jourden, *Remedies and the Psychology of Ownership*, 51 VAND. L. REV. 1541 (1998); Robert K. Rasmussen, *Behavioral Economics, the Economic Analysis of Bankruptcy Law and the Pricing of Credit*, 51 VAND. L. REV. 1679 (1998); Jeffrey Evans Stake, *Loss Aversion and Involuntary Transfers of Title*, in LAW AND ECONOMICS: NEW AND CRITICAL PERSPECTIVES (Robin Paul Malloy & Christopher K. Braun eds., 1995); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996); Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175 (1997); Thomas S. Ulen, *The Growing Pains of Behavioral Law and Economics*, 51 VAND. L. REV. 1747 (1998). On the self-organization of complexity in law, see generally J. B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State*, 45 DUKE L.J. 849 (1996); J. B. Ruhl, *The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy*, 49 VAND. L. REV. 1407 (1996).

11. See, e.g., Randal C. Picker, *Simple Games in a Complex World: A Generative Approach to the Adoption of Norms*, 64 U. CHI. L. REV. 1225 (1997); JACK HIRSHLEIFER, *Evolutionary Models in Economics and Law: Cooperation versus Conflict Strategies*, in ECONOMIC BEHAVIOUR IN ADVERSITY 211-73 (1987).

12. A brief history of the coinage and changing applications of the term appears on pp. 19-20.

among them.<sup>13</sup> Such norms include, for example, reliability, honesty, and reciprocity.<sup>14</sup> The “Great Disruption,” of the book’s title, is Fukuyama’s term for the dramatic (and in his view largely negative) changes in social values, between roughly the mid 1960s and the early 1990s, that both reflected and contributed to a sharp, contemporaneous decline in social capital (p. 4).

Of course, empirically tracing fluctuations in social capital is no simple task. Fukuyama attempts to estimate changes in the supply of social capital, across several decades, by advancing a variety of positive and negative measures.<sup>15</sup> For the former, he uses data from surveys on the subjects of trust, values, and civil society, which correlate positively with the presence of social capital. For the latter, he principally employs data from national statistical agencies chronicling traditional indicators of social dysfunction. These track and evidence, he argues, the comparative absence of social capital. Such indicators include increased crime, decline of kinship as a source of social cohesion, decline in fertility, decline in the institution of marriage, increased illegitimacy, and the decline in trust — both privately (trust placed in individuals) and publicly (trust afforded institutions).<sup>16</sup> The data suggest that total social capital indeed declined between the 1960s and the 1990s, and that it did so more rapidly than it had during earlier periods of shifting norms.<sup>17</sup>

13. P. 16. In other words, as Fukuyama explains, social capital can be variously understood to be: the subset of norms that constitutes society’s stock of shared values, p. 14; a cooperative norm that has become embedded in the relationships among a group of people, pp. 27-28; and informal norms promoting cooperative behavior, p. 28. Thus, families, for example, are an important source of social capital. Pp. 16-17. James Coleman, the sociologist who is most responsible for bringing the term *social capital* into broader use, defined it as “the set of resources that inhere in family relations and in community social organization and that are useful for the cognitive or social development of a child.” P. 36 (citing JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 300 (1990)).

14. As Fukuyama illustrates:

If members of the group come to expect that others will behave reliably and honestly, then they will come to *trust* one another. Trust is like a lubricant that makes the running of any group or organization more efficient. . . . Trust is a key by-product of the cooperative social norms that constitute social capital. If people can be counted on to keep commitments, honor norms of reciprocity, and avoid opportunistic behavior then groups will form more readily and those that do form will be able to achieve common purposes more efficiently.

Pp. 16, 49.

15. His analysis is anything but parochial. He examines data not only from the United States, but also from the United Kingdom, Sweden, and Japan, as well as Canada, Australia, New Zealand, France, Germany, The Netherlands, Italy, Spain, Norway, Finland, and Korea. See, e.g., pp. 27-60.

16. Fukuyama reconciles the apparent overall decline in trust and community with data suggesting an overall *increase* in group membership by arguing that the “radius of trust” has shortened, and the number of people within one’s community circle has lowered, yielding a net decline. P. 88.

17. A discussion of methods appears on pp. 20-24. Fukuyama finds that, starting in roughly 1965, virtually all developed countries experienced a simultaneous and rapid upswing in negative measures of social capital. P. 27. Crime rates in the United States, for ex-

Apparently, this matters. Declining social capital is bad, Fukuyama argues, not simply because cooperation is normatively nice, but because the kinds of cooperation social capital fosters are economically efficient. Specifically, social capital increases aggregate economic wealth by facilitating gains from trade, as individuals contract more with those parties with whom they share norms than they do with others.<sup>18</sup> Social capital is therefore critical to a successful economy. So critical is social capital, in fact, that Fukuyama describes it as a prerequisite not only for all forms of group endeavor in a modern society but for civil democratic society itself.<sup>19</sup>

In Part Two of the book, entitled "On the Genealogy of Morals," Fukuyama essentially addresses the question: If social capital is both crucial and declining, can it be reestablished and preserved, and if so, by what process? This inquiry requires him to explore, at some length, the sources of order in human society. A great many who have thought on the subject of this question apparently tend to believe that the reconstitution of social order is possible exclusively or primarily through hierarchical authoritarian interventions from political and religious spheres of influence (p. 6).

In contrast, Fukuyama argues that social order, once disrupted, tends to be reconstituted, even in the *absence* of hierarchically imposed interventions, such as laws, regulations, holy texts, or bureaucratic organization charts. Capitalist societies are not destined to become morally poorer as they become materially wealthier.<sup>20</sup> For social

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ample, declined slightly in the mid-1980s and then jumped up again in the late 1980s, peaking around 1991-92. P. 31. And this same pattern is evident in nearly all other non-Asian developed countries. P. 31. Because families are an important source of social capital, the dramatic shifts in social norms concerning reproduction and gender relations, specifically the pill-induced sexual revolution, the rise of feminism in the 1960s and the 1970s, falling marriage rates, and increasing divorce and illegitimacy rates "introduced massive changes not just in households but in offices, factories, neighborhoods, voluntary associations, education, even the military." P. 36; *see also* pp. 92-111.

18. As Fukuyama puts it:

[S]ocial capital produces wealth and is therefore of economic value to a national economy . . . . [It enables individuals to] amplify their own power and abilities by following cooperative rules that constrain their freedom of choice, allow them to communicate with others, and coordinate their actions. Social virtues like honesty, reciprocity, and keeping commitments are not choice worthy just as ethical values; they also have a tangible dollar value and help the groups who practice them achieve shared ends.

P. 14.

19. Pp. 14, 20. Here Fukuyama follows the influential views of Putnam. *See* Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. OF DEMOCRACY 65 (1995) (although the seeds of the idea are in de Tocqueville). Putnam has helped generate a large literature in both political and legal scholarship, in which questions of civil society, "civic republicanism," and communitarianism currently form a major theme. Almost none of this literature (apart from Fukuyama) pays attention to the evolved psychology of social relations, which any attempts to "reinvigorate" civic participation inevitably must engage and use.

20. For Fukuyama, it is technological change that disrupts social order, not capitalism itself. In his view, capitalism, while both a source of disorder and order, is probably a net

order can and will emerge spontaneously, even in the most technologically sophisticated parts of the global economy, as a bottom-up phenomenon — as a function of informal, unpublished, evolving norms in communities.

This obtains, Fukuyama argues, for two reasons, both revealed in the light of disciplinary integration. First, our species-typical human psychology is intrinsically predisposed, by biological heritage, to create moral rules and cooperative social order.<sup>21</sup> This follows from the predictable effects of evolutionary processes on inclinations that historically yielded individual advantage through the mutual gains social interaction can afford. The adaptive advantage these inclinations provided leave us psychologically uncomfortable when social order is disrupted.<sup>22</sup> There is therefore a dynamic interplay between the erosion of norms and the process of renorming, as reconstitution springs from our innate human nature to seek cooperation and moral rules that bind us together in ways often facilitating mutual gain. Second, we are also by nature rational, and rational calculation will make us realize the value of cooperation, prompting us to be, in fact, more cooperative. In three chapters at the heart of the book — Eight, Nine, and Ten — Fukuyama roots each of these two reasons (one less cognitive, the other more so) in modern evolutionary biology, having described the study of how order arises from self-organization as “one of the most interesting and important intellectual developments of our time” (p. 6).

To be sure, Fukuyama does not claim that spontaneous order can solve all collective action problems. And his discussions of the limits of spontaneous order, when hierarchical interventions are necessary to increase and maintain social capital, are among the most intellectually honest (if necessarily untidy) parts of the book (Chapter 13). But the fact that hierarchically imposed norms are often necessary does not undermine Fukuyama’s principal point: spontaneous sources of norms are far more important to our understanding of human norms, and to the maintenance of a thriving economy, than previously accepted.<sup>23</sup>

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generator of norms. The very thing that makes capitalism thrive — self-interest — leads to cooperation. See, e.g., pp. 253, 261-62.

21. “Human beings by nature are social creatures with certain built-in, natural capabilities for solving problems of social cooperation and inventing more rules to constrain individual choice.” P. 231; see also p. 137.

22. This argument is summarized most succinctly on p. 6. See also p. 137 (“The situation of normlessness — what Durkheim labeled anomie — is intensely uncomfortable for us, and we will seek to create new rules to replace the ones that have been undercut. If technology makes certain old forms of community difficult to sustain, then we will seek out new ones, and we will use our reason to negotiate different arrangements that will suit our underlying interests, needs, and passions.”).

23. For a discussion on how the presence of spontaneous renorming processes can provide an emotional basis for the development and maintenance of hierarchical institutions specialized in norm-making, see *infra* Section III.D.

These spontaneous sources of norms, Fukuyama claims, could *theoretically* help to counteract the Great Disruption of social norms (and thus social capital) occasioned by the transition from the industrial age to the information age.

In Part Three of the book, entitled "The Great Reconstruction," Fukuyama assesses the extent to which that theoretical possibility is probable. He argues that understanding how evolutionary processes have affected human behavior affords us some comfort in predicting that humankind will adapt to disruption with reconstitution, and that a healthy and stable social order will once again emerge.

Thus, the good news is that the social disruption is not here to stay, as the inevitable end of the Enlightenment, secular humanism, capitalism, and the like. Social and moral disorder is reversible through renorming processes. The bad news is that the reversal is not strictly inevitable (p. 282). For while "decentralized groups of people will tend to produce order if left to their own devices" (p. 253), this is a tendency, not an inevitability.

Fukuyama argues that successful and beneficial renorming processes involve not only the spontaneous renorming of a species predisposed to renorm, but also, ideally, two parallel effects. These include the effects of hierarchical impositions (such as state police powers and religious admonishments) as well as the efforts of rational individuals who, having recognized that their communal lives have deteriorated, "work actively to renorm their society through discussion, argument, cultural argument, and even culture wars" (p. 250). That is, at the same time that Fukuyama argues that spontaneous sources of order are probable, he also argues that we cannot passively rely on spontaneous renorming alone. There are still (many readers will be relieved to learn) important roles for careful public planning and hierarchical renorming. Specifically: "Rational hierarchical authority, in the form of government and formal law, will have to serve as supplements . . . . State authority in the form of formal law will always be a necessary complement and corrective . . . to the extended order of human cooperation."<sup>24</sup>

Fortunately, argues Fukuyama, the early stages of reconstitution are already visible today. Fukuyama notes, for example, that rates of

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24. P. 221. Discussing the probable persistence of hierarchical sources of order even in informal networks, Fukuyama states:

We can argue that networks will become more important in the technological world of the future and yet concede that there are at least three reasons why hierarchy will remain a necessary part of organization for the foreseeable future. First, we cannot take the existence of networks and their underlying social capital for granted, and where they don't exist, hierarchy may be the only possible form of organization. Second, hierarchy is often functionally necessary for organizations to achieve their goals. And third, people by nature *like* to organize themselves hierarchically.

P. 222.

increase in crime, divorce, illegitimacy, and distrust have reversed or slowed substantially, particularly in the United States, but also in many of the other countries he identifies as having experienced sharp increases in social disorder in the 1960s (p. 271). He sees these data as evidence that “the Great Disruption has run its course and that the process of renorming has already begun” (p. 271). And, because internalized rules and norms of behavior are preconditions of successful reconstitution, Fukuyama predicts that “the world of the twenty-first century will depend heavily on such informal norms” (p. 7). We will see this in human organizations that show less reliance on formal hierarchies and more reliance on the shared values inherent in informal networks.

### III. LESSONS AND CHALLENGES

*The Great Disruption* is forcefully written, original, and engaging. The tackled topic — predicting the social contours of the full information age society — is important. By raising and confronting the questions of how we can maintain and increase social capital in an increasingly fractured social world, Fukuyama identifies problems, the implications of which we may not have fully recognized, and tenders a framework for thinking about and confronting them. His book provides us not only with an interesting theory to explain recent disruptions in social order, but also with a better sense of the processes by which social capital — a key component of social order — is created and maintained.

One of the questions that I think the book does not squarely confront, however, concerns the issue of net effects. That is, we now know that technological change, for all the benefits it offers, can prompt declines in valuable social capital, thereby imposing costs. Fukuyama clearly considers these costs, were they to remain unremedied, unacceptable.<sup>25</sup> But remedies — replenishing social capital — also cost, presumably. Is there no point at which the magnitude of the gains from technology simply outweighs the costs, even if some quantum of lost social capital were never replenished?

While I am confident that Fukuyama has important things to say about this question, it still remains a question. But it is not the kind of question on which I wish to focus here. In my view, the real significance of the book is more in its method than its substance. Behavioral biology is the linchpin of Fukuyama’s analysis, and of increasing importance in the legal arena, and it is therefore on Fukuyama’s use of biology that I wish to concentrate.

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25. After all, to label something a “Disruption” is, I think, to offer a value judgment rather than a mere description, identifying a normatively bad interference with what had previously been better.

Fukuyama has a clear vision of the importance of integrating life and social science perspectives into public policy analysis. But he does more, in this book, than simply turn to the evolutionary sciences (such as ethology, primatology, behavioral biology, evolutionary psychology, and evolutionary anthropology) for insights into human morality and future social ordering. He goes beyond integration and boldly attempts application, in the context of some very pressing issues. And this works better in some instances than in others.<sup>26</sup>

Fukuyama's invocations of biology reflect a current and sophisticated familiarity (to which the notes to Chapters 9 and 10, in particular, attest). He gives a broad and readable account of basic principles in modern evolutionary biology, drawing knowledgeably, for example, on the works of leading primatologists, such as Frans de Waal and Richard Wrangham. He neatly integrates accounts of the supplantation, by William Hamilton's and George Williams's theories, of earlier theories of group selection and the origins of altruistic behavior (p. 161). He provides explanations for the counterintuitive propositions that the self-serving orientation of genes will often lead to genuinely cooperative, sometimes even "altruistic," forms of behavior. And, to make the argument from biology comprehensible, he provides a competent and engaging survey of topics ranging from natural selection, sexual selection, and kin selection, on one hand, to cooperation and reciprocal altruism, on the other.

This is not easy to do, particularly in a comparatively short space, but Fukuyama does it rather well.<sup>27</sup> It is one of his great strengths that

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26. It bears emphasis that Fukuyama's approach is a sharp break from prevailing assumptions that philosophy and psychology can, either alone or in concert, provide adequate explanation for human morality and norms. It is also a sharp break from the recent trend to use game theoretic models of competing norms, analyzed solely at the cultural level of transmission, to explain dominant ones. It is an argument for both the utility and centrality of evolutionary theory in understanding complex human phenomena.

27. Pp. 154-86. For introductions to these subjects written explicitly for lawyers, see Timothy H. Goldsmith & Owen D. Jones, *Evolutionary Biology and Behavior: A Brief Overview and Some Important Concepts*, 39 JURIMETRICS J. 131 (1999) (addressing core principles of behavioral biology); Owen D. Jones, *Evolutionary Analysis in Law: An Introduction and Application to Child Abuse*, 75 N.C. L. REV. 1117, 1126-57 (1997) (Part I offers "A Primer in Law-Relevant Evolutionary Biology"); Owen D. Jones, *Law and Biology: Toward an Integrated Model of Human Behavior*, 8 J. CONTEMP. L. ISSUES 167 (1997) (discussing integration of life science and social science perspectives); Owen D. Jones, *Sex, Culture, and the Biology of Rape: Toward Explanation and Prevention*, 87 CAL. L. REV. 827, 841-53 (1999) (addressing core principles of behavioral biology).

Book-length popular accounts of behavioral biology include MATT RIDLEY, *THE RED QUEEN: SEX AND THE EVOLUTION OF HUMAN NATURE* (1994) and ROBERT WRIGHT, *THE MORAL ANIMAL: EVOLUTIONARY PSYCHOLOGY AND EVERYDAY LIFE* 55-107 (1994). Accessible textbooks include JOHN ALCOCK, *ANIMAL BEHAVIOR: AN EVOLUTIONARY APPROACH* (6th ed. 1998); DAVID BUSS, *EVOLUTIONARY PSYCHOLOGY: THE NEW SCIENCE OF THE MIND* (1999); TIMOTHY H. GOLDSMITH & WILLIAM F. ZIMMERMAN, *BIOLOGY, EVOLUTION, AND HUMAN NATURE* (forthcoming 2000); ROBERT TRIVERS, *SOCIAL EVOLUTION* (1985).

he sees the large-scale connectedness between historically separated aspects of the human condition. For example, he understands and manages to convey why there are biological bases to social emotions generally, and to moral sentiments and rule-following specifically.<sup>28</sup> Moreover, he weaves into his discussion information concerning the biological bases for status seeking, anger, guilt, pride, shame, jealousy, love of children, and the like.<sup>29</sup> He sees the deep commonalities between biological and economic reasoning, without naively supposing that these are without significant points of departure.<sup>30</sup> He sees the influence of biology on family relationships.<sup>31</sup> And, most significantly, he has a manifest awareness of the centrality of evolutionary theory in putting all of this in a coherent perspective.

There are a number of different lessons in this approach. The first lesson is that one cannot think accurately and comprehensively about important issues of human behavior without some sense of the historical, evolutionary contexts in which that behavior plays out. Period. To attempt otherwise is as silly as trying to explain modern geopolitical boundaries without any attention to history. The past shapes the present and constrains the future. To the extent that law is fundamentally about shifting human behavior in directions it might not otherwise go, the more historically accurate and contextualized framework that biology affords may help us to pursue our legal policies more efficiently.

Second, the general moral sentiments, including shame, guilt, sensitivity to injustice, a taste for reciprocity, and moralistic aggression, are rooted (like other emotions, such as sexual attraction and jealousy, love of offspring, distaste for incest and rape, and anger) in information-processing pathways that natural selection has influenced.<sup>32</sup> To the extent that morality and emotions are relevant to law,

28. See, e.g., pp. 149, 175-79, 184-85. For more on these topics, see Owen D. Jones, *Law, Emotions, and Behavioral Biology*, 39 JURIMETRICS J. 283 (1999).

29. See, e.g., p. 184.

30. See pp. 161-62 (describing both "methodological borrowing" and differences between the fields). Richard Posner has explored a number of important connections between biological and economic reasoning. See, e.g., RICHARD POSNER, *SEX AND REASON* (1992), where he observes that "there are illuminating analytical parallels between the biological and economic approaches . . . the two approaches are mutually reinforcing and may in combination constitute a more powerful theory than either by itself." *Id.* at 88. The economist Jack Hirshleifer was among the first to observe the potential for integrating biological and economic insights. See, e.g., Jack Hirshleifer, *Economics from a Biological Viewpoint*, 20 J.L. & ECON. 1 (1977). And Paul Rubin, among others, continues in this important tradition. See, e.g., Paul Rubin, *The State of Nature and the Evolution of Political Preferences*, 3 AM. L. & ECON. REV. (forthcoming 2001).

31. See, e.g., pp. 95-101 (describing biological underpinnings of family).

32. Darwin essentially argued this in *The Descent of Man*. See DARWIN, *supra* note 9, chs. 3, 5. It is interesting to note that John Rawls, in *Theory of Justice*, also speculated that there may be evolutionary origins to his basic claims about moral principles. JOHN RAWLS, *THEORY OF JUSTICE* 502-03 (1971).



the further study of biobehavioral influences on their pan-human, nonrandom patterns will provide a richer understanding of the reciprocal relationship between morality, culture, and law.

Third, integrating biology into discussions of politics, law, and other complex human behaviors is, while highly useful, at times extremely challenging. The following Sections describe four of these challenges.

### A. *The Non-Normativeness of Norms*

One of the most challenging aspects of discussing the relevance of behavioral biology to human behavior, and particularly to morality and norms, is to leave norms out of it. By that, I mean that one must simultaneously acknowledge the evolutionary influences on the form and content of norms, and avoid concluding that the norms themselves are normatively good or bad, on the basis of biology alone.

Put another way: explanation is not justification, and description is not prescription. The realms of the descriptive “is” and the normative “ought” are logically separate. To combine them is to commit what is known as the Naturalistic Fallacy — arguing that what *is* is what *ought* to be.<sup>33</sup> (Committing this error gave Social Darwinists — forever — an aptly deserved bad name, as they misappropriated Darwinian ideas, and argued that the upper classes were upper by merit, and deserved to remain there, by biology.) The results of biological processes cannot be described as good or bad without identifying and injecting a value outside biology that makes us think them so. For example, we now have a great deal of information concerning biobehavioral influences on sexual aggression and on child abuse.<sup>34</sup> But that need never lead us to conclude that sexual aggression or child abuse are permissible.<sup>35</sup>

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33. The term was coined in G.E. MOORE, *PRINCIPIA ETHICA* 62, 89-110 (Thomas Baldwin ed., 2d ed. 1993), but the concept traces to the 1888 edition of DAVID HUME, *A TREATISE OF HUMAN NATURE* 469-70 (L.A. Selby-Bigge & P.H. Nidditch eds., 2d ed. 1978). The reciprocal and less recognized error is the one more commonly committed. One commits the Moralistic Fallacy whenever one attempts to reason (usually implicitly rather than explicitly): that the way something ought to be is the way that it is; that explanation follows inclination; and that facts follow preferences. For discussion of the Moralistic Fallacy, see Charles Crawford, *The Theory of Evolution in the Study of Human Behaviour: An Introduction and Overview*, in *HANDBOOK OF EVOLUTIONARY PSYCHOLOGY: IDEAS, ISSUES AND APPLICATIONS* 9 (Charles Crawford & Dennis L. Krebs eds., 1998); Jones, *Sex, Culture, and the Biology of Rape*, *supra* note 27, at 893-95; Charles Crawford, Book Review, 20 *EVOLUTION & HUM. BEHAV.* 137, 139 (1999) (reviewing *Uniting Psychology and Biology: Integrative Perspectives on Human Development*).

34. See, e.g., Jones, *Evolutionary Analysis in Law*, *supra* note 27; Jones, *Sex, Culture, and the Biology of Rape*, *supra* note 27.

35. We could, therefore, maintain that the descriptive and normative realms are to be held *completely* separate. Of course, the matter is considerably more complicated than that. When we have a normative goal to change behavior, that goal is furthered by greater knowledge of the pathways by which the behavior arises. So much is clear. Less clear is the point,

Fukuyama meets this challenge of disentangling *is* from *ought* and demonstrates it is possible to invoke biology without claiming that what is biological is necessarily good. While he happens to believe that our evolved predispositions toward cooperation are good, it is because he values (not surprisingly) the effects of such cooperation on the economy and political order. Thus, it is because he values efficiency, increases in wealth, and political, civil, and democratic stability that he finds the particular biological predispositions to which he refers to be fortunate. This is not at all the same thing as claiming (as some critics incorrectly presume that those who invoke biology automatically claim) that all biological predispositions are fortunate, simply because they have evolved.

### B. *Adapting to Adaptation*

A second challenge to future discussions of the biology of human psychological predispositions concerns the nature of adaptation. It turns out that it is not a simple matter to differentiate adaptations from by-products of adaptations.<sup>36</sup> This is hard enough when biologists examine anatomy, but it is particularly difficult when animal psychology is involved. Information-processing patterns are not easily observable, they interact with one another, and they often include, in any event, nested algorithms sensitive to variations in environmental stimuli. But it is even more difficult to predict how given human psychological adaptations will play out in the future.

Fukuyama predicts, for example, that humans will successfully reform, in a way that preserves social capital, because evolutionary processes have rendered normlessness uncomfortable for us, and have left us psychologically predisposed to cooperate and solve collective action problems. While I share the author's hope for a successful and reformed human future, I am not yet persuaded that biology affords us quite the degree of confidence that Fukuyama thinks it does. For example, in Fukuyama's view:

[K]nowing that there are important natural and spontaneous sources of social order is not a minor insight. It suggests that culture and moral values will continue to evolve in ways that will allow people to adapt to the

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which some have argued, that while the "is" does not strictly dictate the "ought," it may be inefficient and silly to generate an ought without *some* working knowledge of even potentially surmountable constraints on the "is." For example, Lewis Petrinovich argues that "The nature of what *is* should be understood as a factor to enable us to frame the *ought* in better terms." PETRINOVICH, *supra* note 9, at 25. This line of reasoning (how can you have anything but wildly irrational values if you are ignorant of facts) is also explored in DENNETT, *supra* note 9, at 467-68.

36. An adaptation is a heritable feature of an organism enabling it to survive, and to increase the copies of its genes that appear in the next generation, in its natural environment, better than if it lacked the feature.

changing technological and economic conditions they face and that this spontaneous evolution will interact with hierarchical authority to produce an 'extended order of human cooperation'. . . . [W]e should presume that people will continue to use their innate capabilities and reason to evolve rules that serve their long-term interests and needs. [p. 244]

I am certain that Fukuyama is not arguing that reason alone, or evolved behavioral predispositions alone, are sufficient to guarantee or nearly guarantee a successful future. But I am equally certain that Fukuyama is arguing that our evolved behavioral predispositions very significantly increase the probability that such a future will obtain. I'm not sure this is right. I find it more difficult than Fukuyama does to conclude that knowledge of evolutionary processes affords us comfort in believing that humankind is very likely to meet the challenges of technological change.<sup>37</sup>

I have four reasons for reservation. First, 99.9% of all species that ever lived are extinct.<sup>38</sup> Presumably, many of them were well-adapted to their environments before some external change changed everything. The odds are against the long-term persistence of any species, let alone one as young and volatile as our own, encountering novel changes of our own creation, that we generate faster than generations.

Second, evolutionary processes adapt species to previously prevailing, not future, environments. True, we are a species for whom behavioral adaptability (or "plasticity") is itself an evolved adaptation. We are more adaptable than many other species, and our adaptability flows principally from the powerful cognitive capacities that enable us to crunch more data, in more sophisticated and nuanced fashion, than other creatures. So, to the extent that thinking hard about the present and future can help us turn the present into a viable future, our cognitive abilities may help us secure some endlessly renormed future. But this much we already knew. The optimism Fukuyama offers comes from the hope that our current brains are already up to future challenges, not from the confidence that natural selection will somehow shape our brains to successfully meet future challenges.

The distinction is important. We know that natural selection cannot design future-looking adaptations. The process is, after all, a mindless one — without foresight by definition. Natural selection appears never to have designed, nor do biologists expect it ever can design, an all-purpose adaptability mechanism designed to ensure adaptation to current or future social or technological change, when then-prevailing conditions differ from ancestral ones, in which current ad-

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37. To be sure, Fukuyama is not naive enough to think that anything "*guarantees* that there will be upturns in the cycle [of social order]." P. 282 (emphasis added). A quite distinct optimism, however, just shy of confidence, pervades the book.

38. See DAVID RAUP, EXTINCTION: BAD GENES OR BAD LUCK? 3-4 (1991) (reporting the estimate).

aptations were designed. To the extent that features of our species or others function well in current environments, it is either because the environments have not changed materially from the environments in which those features evolved, or because those features, which were adaptive in ancestral environments for one reason, turn out also to be adaptive in a different, current environment for another.

Third, the animal kingdom provides daily examples of adaptations that run aground on environmental changes. Moths do circle lamp-lights, because the moon and stars used to provide reliable reference points for navigation. Squirrels vocally harass hunters, whose guns afford novel ways of killing them. People overconsume highly caloric foods, which contain energy concentrations never before encountered in nature. And humans continue to be sexually attracted to (and sexually jealous of) people they know are (and perhaps want to be) using contraception. An adaptation is only as good as the environment in which it continues to provide advantage — and historical adaptations can, during environmental shifts, prove downright deleterious.<sup>39</sup> Some of the evolved predispositions we manifest, therefore, such as aggressive responses to threats to status, may decrease the probability of a secure future precisely because they encounter novel technological features, from street-common handguns to intercontinental ballistic missiles.

Fourth, if our human psychology turns out not to be well-adapted to the technological environment we are creating for ourselves, we know that natural selection is unlikely to yield responsive adaptations anytime soon. Soon, by evolutionary standards, is measured in generations, which for humans are rather long, compared with the rapidity of technological changes. For the distribution within a population to manifest a “new” trait soon, a heritable trait must have arisen (through mutation or genetic recombination), and it must provide — in the then existing environment — a very pronounced reproductive advantage over alternative traits contemporaneously existing.<sup>40</sup> Such circumstances are generally rare, but even more so for a species like ours with small brood size.

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39. This can lead to something I refer to as “time shifted rationality” (to distinguish it from “bounded rationality”) — the temporal mismatch of historically adaptive behavior and modern environments. See Owen D. Jones, Law, Behavioral Economics, and Evolution, Paper presented at The Olin Conference: Evolution and Legal Theory, Georgetown University Law Center (April 16, 1999), and the Annual Scholarship Conference of the Society for Evolutionary Analysis in Law (Sept. 24, 1999) (on file with author).

40. For an example of the strength of selection pressures necessary to cause speedy changes in morphology, see Jonathan B. Losos et al., *Contingency and Determinism in Replicated Adaptive Radiations of Island Lizards*, 279 *SCIENCE* 2115 (1998); Gretchen Vogel, *For Island Lizards, History Repeats Itself*, 279 *SCIENCE* 2043 (1998).

### C. *Our Dispositions Toward Predispositions*

A third challenge concerns the subtle interactions of genes and environment. Fukuyama is far too sophisticated to put stock in the ridiculous notion that there can ever be a meaningful discussion of whether a given behavior is exclusively the province of nature or of nurture.<sup>41</sup> This is like debating whether the area of a rectangle is the product of its length or its width. All biological processes, including normal brain development, ultimately depend on rich environmental inputs. Similarly, all environmental influences can only be perceived, sorted, analyzed, and understood through biological, evolved processes.

At the same time, Fukuyama recognizes that the influence of bio-behavioral predispositions is more direct, and can be spoken of more meaningfully, in the contexts of some behaviors than others. (Compare extremes: sexual behavior, for example, on one hand, with filing an SEC disclosure statement, on the other.) This has led to a tendency, presumably in the interests of verbal economy, for Fukuyama to refer to some behaviors as being under “genetic rather than cultural control,”<sup>42</sup> or as being “determined not by culture but by biology.”<sup>43</sup>

I think this tendency is, though understandable, unfortunate for two reasons. First, the use of the words “control” and “determined” — rather than variations of the word “influence,” for example — may inadvertently reinforce the misperception that behavioral biology is about genetic determinism. A reader who has not attempted to keep pace with the explosion of modern biology literature, as Fukuyama has, might fairly recoil from the impression that some significant number of complex, non-reflex human behaviors are simply unavoidable. Second, by using language of mutual exclusivity (controlled by *x* “rather than” *y*; determined “not by [*x*] but by [*y*]”) Fukuyama overdichotomizes in a way few biologists would sanction.<sup>44</sup> Again, this may confuse readers.

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41. See, e.g., p. 158 (discussing the interplay of nature and nurture).

42. The author describes how a variety of mother-infant interactions “appear to be under genetic rather than cultural control.” P. 96. See also pp. 158-59, 165.

43. P. 158 (“so too may human cultures reflect common social requirements determined not by culture but by biology”).

44. For another example, see p. 187 (“[T]he particular norms and metanorms chosen by a given group of individuals are cultural choice, not a product of nature.”). I think the distinction Fukuyama wants to draw here is not between culture and biology (or nature), but rather between cultural vectors of trait transmission and genetic vectors of trait transmission, both of which are biological. Culture is best considered as a fully integrated part of our biology — both in the sense that culture reflects natural selection’s influence on the human brain, and also in the sense that cultural practices reciprocally affect human breeding patterns, and thus contribute to selection pressures that ultimately affect the spread of heritable human psychological predispositions.

Fukuyama somewhat underemphasizes, I believe, three things he knows, but that writers on human behavioral biology could probably and usefully make greater efforts to underscore. First, a predisposition is not a predetermination. One of the advantages of our large brain is that it can accommodate a very wide and highly nuanced range of inclinations — which by measures both large and tiny can increase or decrease the probabilities of various behaviors, in the face of various circumstances. Second, biobehavioral predispositions are generally condition-dependent (that is, context-specific), not automatic.<sup>45</sup> Third, and this point underscores the second, we are talking, in all of this, about the evolved psychology aspect of behavioral biology, not the behavioral genetics aspect.

The distinction is important, and rarely explicit. Behavioral genetics involves efforts to trace the different behaviors of different individuals to genetic differences among them. (This is what most people, incorrectly, think discussions of human behavioral biology are about.) In contrast, the complementary aspect of behavioral biology, concerning evolved or “species-typical” psychology, attempts to trace many of the different behaviors of different individuals not to different versions of genes, but rather to different environmental stimuli encountered by neurologically similar brains, sporting similar, evolved, and contingent decisional algorithms. That is, humans bear species-wide (in some cases sex-wide) physical, information-processing commonalities that have evolved to yield predispositions toward certain behaviors in the face of certain categories and confluences of stimuli, and predispositions toward other behaviors in other contexts.

#### D. *Reasons for Rationality*

A fourth challenge, and perhaps the one most crucial for the law at present, concerns the relationship between rationality, its supposed opposites, and biology. There are times, in *The Great Disruption*, when Fukuyama describes both sociality *and* rationality as products of human nature.<sup>46</sup> That is, he does acknowledge, in places, that ration-

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45. This means that common psychological predispositions can sometimes underlie even cultural differences among groups, which may be the result of those predispositions processing materially different environmental circumstances. Contrast:

One of the weaknesses of any attempt to use human nature to explain phenomena like trust and social capital is that it cannot give an account of the observable differences that exist between human groups. And so too here. The kinds of universal psychological characteristics described earlier as the basis for social capital are sufficient to explain why there should be social cooperation within relatively small groups, but they do not explain why different contemporary human societies have different radii of trust. These kinds of explanations must be entirely cultural in nature, and often need to refer back to a society's religious heritage.

P. 240.

46. For example:

ality is itself a function of our biology. He is not consistent in this, however. Fukuyama's approach generally demonstrates an apparent preference for sorting behaviors on a continuum bounded by the biologically influenced, at one end, and the rationally influenced, at the other.<sup>47</sup> In these contexts, the rational pathway to behavior is somehow distinct from the biological pathway to behavior. It is clear why Fukuyama wants to draw this distinction. He is attempting to construct a useful taxonomy that attends to differences in the *extent* to which given behaviors are rationally chosen. But I do think the distinction, as framed, is a bit misleading.

Of course, there are at least two different meanings to rational. One describes a process of cognitive decisionmaking. The other describes the substantive end product behavior, judged by a standard irrespective of the process by which that behavior was generated. (Much ink has been spilled by authors using mismatched meanings, such that rational processes can lead to irrational outcomes, and irrational processes can lead to rational outcomes.) But, whichever one of these two common meanings Fukuyama intends (I think it is the process-based former), it seems likely that Fukuyama over-separates the rational from the biological.

The biological/rational distinction only makes sense if the rational is not itself importantly biological. But of course it is. Rationality, as a process, is not just trivially biological, in the sense that thinking and decisionmaking happen to take place in living tissue with chemical needs and electrical outputs. Rationality is importantly biological in the sense that the structure of the brain is believed to contain features *evolved* to facilitate precisely the kind of multiple-variable, context-specific, calculus that increases the probability of the most adaptive

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[H]uman beings are *by nature* social creatures, whose most basic drives and instincts lead them to create moral rules that bind themselves together into communities. They are also by nature rational, and their rationality allows them to create ways of cooperating with one another spontaneously.

P. 6.

47. For example:

What we find is that order and social capital have two broad bases of support. The first is biological, and emerges from human nature itself. There have been important recent advances in the life sciences, which have the cumulative effect of reestablishing the classical view that human nature exists and that their nature makes humans social and political creatures with great capabilities for establishing social rules. While this research in a certain sense does not tell us anything that Aristotle didn't know, it allows us to be much more precise about the nature of human sociability and what is and is not rooted in the human genome. The second basis of support for social order is human reason, and reason's ability to spontaneously generate solutions to problems of social cooperation.

P. 138. *See also* pp. 152-53, figs. 8.3 & 8.4; p. 249 (“[H]uman beings will produce moral rules for themselves, partly because they are designed by nature to do so and partly as a result of their pursuit of self-interest.”); p. 273 (“People are social animals by nature and, in addition, rational creators of cultural rules. Both nature and rationality ultimately support the development of the ordinary virtues like honesty, reliability, and reciprocity that constitute the basis for social capital.”).

behavioral response.<sup>48</sup> The brain's ability and tendency to calculate is an evolved capability, in the same way that the breast's ability to yield milk after birth is an evolved capability. Neither is more "biological" than the other in this broad but basic sense. Both are species-typical aspects of ways in which genes pass themselves from one generation to the next.

Similarly, for rationality as outcome, the brain of our species tends to yield rational conclusions (in many, but not all, circumstances) because ancestral individuals whose heritable brain design tended to yield irrational conclusions tended to behave in irrational ways. By definition, such behavior leads to individual disadvantage, and hence (typically) to reproductive disadvantage. That, over time, leads to proportionally fewer brains with a predisposition toward irrational preferences (which, we must remember, vastly outnumber rational preferences at every moment in time).

This leads me to conclude two things. First, that Fukuyama might have done better to label the antipode of rational causation emotional (rather than "biological") causation. Second, that Fukuyama might fruitfully have framed both the rational and the emotional within the biological. This second conclusion would afford biology a broader and more scientifically accurate role, and it would avoid over-cabining biological influences in the quadrant of Fukuyama's analysis in which only arational, spontaneous sources of order emerge. It would also highlight the deep connectedness between emotional and rational behavior, which in the end strengthens, in my view, many of Fukuyama's most interesting points.

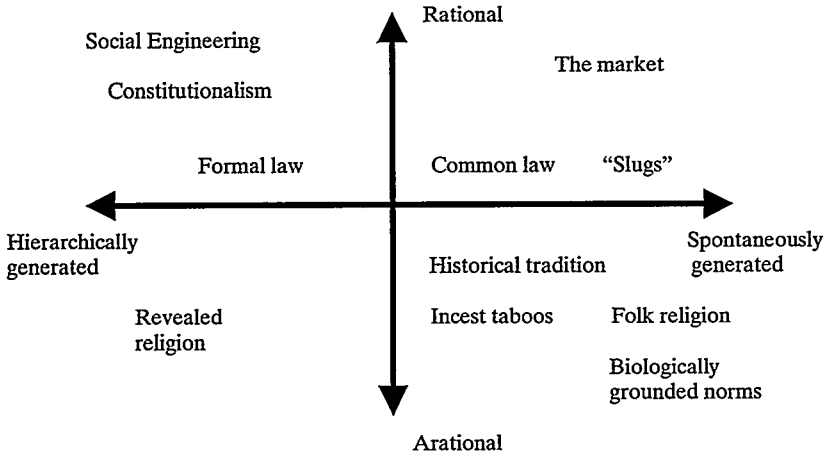
In Chapter 8, Fukuyama offers an original, two-axis, four-quadrant framework for plotting sources of order (p. 152, fig. 8.3).

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48. See generally *THE ADAPTED MIND: EVOLUTIONARY PSYCHOLOGY AND THE GENERATION OF CULTURE* (Barkow, Cosmides, & Tooby eds., 1992). The alternative includes context-insensitive decisional rules that are adaptive only on average. For example, a lemming swims across water. Most lemmings encountering water encounter streams, ponds, rivers, or lakes — which are swimmable and may afford new foraging opportunities on the other side. Sometimes the water is an ocean. But the behavioral predisposition is context-insensitive, leading to the unfortunate demise of many — but importantly not all — lemmings. For those who survive the statistically more frequent swims across shorter bodies of water, a swimming predisposition is still more adaptive, on average, than never swimming, and therefore such a species-typical predisposition can persist.



FIGURE 8.3: SOURCES OF ORDER



One axis spans from rational to arational sources of order. The bisecting axis spans from hierarchically generated sources of order to spontaneously generated sources of order. There are a variety of self-evident advantages to this framework. One of the disadvantages is that it sometimes obscures quite important relationships between different quadrants. For example, it can be interpreted to suggest that rational, hierarchically generated sources of order, including written constitutions, “formal law,” and other consciously-constructed, top-down impositions of order are not significantly biologically influenced. Fukuyama locates incest taboos within the arational, spontaneously generated, “biologically grounded” norms. At the same time, it is clear that the opposite quadrant contains formal laws written to proscribe incest. Are these not also biologically influenced, as a function of the well-documented maladaptiveness of breeding between close relatives, and the adaptive moral repugnance that typically prevents it?<sup>49</sup> The content of a norm in the hierarchical rational quadrant can be strongly influenced by the content of a biobehavioral predisposition evolved as a function of natural selection.<sup>50</sup>

49. For discussion of the evolution of incest aversion, see ROBIN FOX, *THE RED LAMP OF INCEST* (rev. ed. 1983); Debra Lieberman & Donald Symons, *Sibling Incest Avoidance: From Westermarck to Wolf*, 73 Q. REV. OF BIO. 463 (1999).

50. The Uniform Commercial Code, which presumably occupies a position in the “hierarchical/rational” quadrant of Fukuyama’s framework, states that “[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.” U.C.C. § 1-203 (1978). The force of the requirement is underscored by the fact that, in contrast to most other provisions of the Code, it cannot be waived by either party or otherwise contracted around. Although it requires some speculation, it seems probable that such a provision reflects one end result of natural selection’s operation on predispositions con-

Fukuyama is clearly too sophisticated to believe that the quadrants are not intimately connected. Yet an emphasis on the inevitability of their interrelationship is neither highlighted nor explored. Fukuyama's structure causes readers to stop just short of making one of the most important points about formal law: many of its patterns reflect biologically influenced behavioral, moral, and emotional predispositions. Similarly, the two other quadrants of Fukuyama's framework, involving arational hierarchically generated sources of order, such as religions, and rational spontaneously generated sources of order, such as the common law, are imbued with biological influences on human morality and thus on behavioral predispositions. (Anyone who believes that religious proscriptions of sexual behavior or the common law's accommodation of crimes of passion do not reflect natural selection's operation on human emotions and tastes needs to think a bit longer.)

Framing rationality and emotionality as close cousins, as I suggested above, rather than as wholly different sources of behavior, requires taking two giant steps back. From this vantage, one can see the rational and emotional capabilities of the brain as merely varied manifestations of a single aspect of brain function. This aspect has evolved to solve one problem in a variety of different ways. The problem is: how to increase the proportion of copies of one's genes that appear in the next generation. That overarching problem is subdivisible, loosely, into a variety of different kinds of challenges. Some challenges require nutritional provisioning. Others require identifying and attracting a suitable sexual partner. Some require the ability to identify and avoid life-threatening injuries. Others require the sort of in-group maneuvering for advantage that we label political.

The remarkable thing about the human brain is that it has evolved to solve these different challenges by associating some kinds of environmental stimuli with some kinds of motivational mechanisms (e.g., the more visceral emotional pathways), and other kinds of stimuli with other kinds of motivational mechanisms (e.g., the more consciously analytical pathways). For example, there are some circumstances posing sufficiently grave threats, with historically effective options so limited, that conscious analysis can be dispensed with entirely. Under these circumstances, an appropriate physiological response can be directed, immediately following perception, by parts of the brain spe-

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cerning cooperative interactions, which operation tended to yield sharp moralistic reactions to "bad faith" (i.e., cheating) acts by defectors from cooperative undertakings. The evolved emotion toward cheaters likely led to a social norm, which led in turn to customary trade practices (*lex mercatoria*), some of which were imported to the common law, and later codified. Thus, the existence and content of the norm in the hierarchical/rational quadrant may derive from sources of social order in the spontaneous/arational quadrant, via the spontaneous/rational quadrant.

cializing in non-deliberative decisionmaking. That is, the behavior of the body is removed from rational control.

For instance, in moments of grave physical danger, the brain does not route the question of appropriate response to the rational calculator. Instead, it automatically increases heart rate and respiration. It ensures that adrenaline is secreted by adrenal glands, which natural selection has favored for performing precisely this function. And it temporarily redirects energy away from digestive, reproductive, and other postponable operations, making more energy available for physical maneuvering, such as flight. In addition, it yanks the conscious brain into directing its full and focused attention on a threat perceived elsewhere in the brain and not yet routed through the rational calculator. What we call fear is the aggregated physiological responses the brain directs as a result of evolutionary processes making this way of generating behavior more likely to result in adaptive response to environmental challenges than many other ways of generating behavior.

A more pointed (if somewhat graphic) example: men do *not* say

Hmmm. I observe that my wife is having intercourse with another man. This is a breach of contract. It may yield an offspring, not mine, that by law I must care for and pay for as if it were. That is likely to be more costly, over time, than would be my effort to stop it. Hence, I should intervene. "Excuse me. . ."

The raw absurdity of processing this sort of information through a rational calculator is not lost on natural selection, which routes the information in an entirely different way. That is, it is not purely because we have learned to be jealous that we are jealous. What we call jealousy is a state of the nervous system that we can identify only because it increases the probability of *behaviors* that we take to be consistent with sexual or emotional proprietariness.<sup>51</sup> The adaptive value of those behaviors, in ancestral environments, served to preserve the propensity to respond to infidelity with the information-processing predisposition that increases the probability of those behaviors.

The main point, though, is that emotional and rational approaches, as well as every combination of emotional and rational approaches in between, are all meaningfully biological. They reflect the effects of natural selection on the brain's ability to generate the appropriate behaviors for the appropriate circumstances.<sup>52</sup> Natural selection gives to the rational calculator what tends to belong there. That does not,

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51. On the evolution of jealousy, see DAVID M. BUSS, *THE DANGEROUS PASSION: WHY JEALOUSY IS AS NECESSARY AS LOVE AND SEX* (2000) and DAVID M. BUSS, *THE EVOLUTION OF DESIRE: STRATEGIES OF HUMAN MATING* (1994).

52. For an interesting discussion of how emotions also function, adaptively, as credible pre-commitment devices, see ROBERT FRANK, *PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS* (1988).

however, render the workings or product of the rational calculator any less meaningfully biological than emotions. And seeing the deep connectedness between the two may help us to avoid the same sort of over-division that our balkanized disciplines reflect.

#### IV. LEGAL IMPLICATIONS

What are the key legal implications of this line of reasoning? At the most general level, a biologically-informed approach to law — an evolutionary analysis in law — can help to refine behavioral models, generate new legal strategies, improve cost-benefit analyses, and point directions for future research.<sup>53</sup> In the specific contexts of morals and norms, there are several specific implications.

A principal utility of evolutionary analysis in law can be summed up in two words: universal acid.<sup>54</sup> Evolutionary analysis helps to dissolve intellectual untenability. No theory of mind, no theory of behavior, no theory of culture, and no theory of rational or irrational behavior can long stand if it is inconsistent with the way natural selection has shaped the information-processing, behavior-biasing patterns of brain function. It is certainly true, of course, that not everything in modern ethics can be properly thought to emerge inevitably from naturalistic sources. Nonetheless, evolutionary analysis prevents us from telling stories to ourselves about where morality comes from that are inconsistent with scientific knowledge about how the human brain came to be the way it is. Just as no theory of flight can be inconsistent, in the end, with the theory of gravity, no theory of human behavior, morality, or norms, no matter how seemingly transcendent, can be inconsistent with the process of evolution.<sup>55</sup>

With the underbrush of untenable theories thinned, evolutionary analysis next reveals under-recognized relationships between all the behavioral subjects of law's interest. It plays connect-the-dots with morals, norms, emotions, rationalities, irrationalities, tastes for risk, and the like, making a coherent picture from an otherwise insufficiently coherent assemblage of data points. Just as the relationship between the numbers 105, 30, and 2000 cannot be fully appreciated without reference to multiples of 5, the lowest common denominator, seemingly disparate human behaviors can be neither fully appreciated

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53. See Jones, *Evolutionary Analysis in Law*, *supra* note 27, at 1226-41.

54. Dennett introduced the metaphor of evolutionary perspectives as universal acid in DENNETT, *supra* note 9, at 61-84.

55. This is not to say that evolutionary theory is categorically beyond scientific challenge. No scientific theory ever is. It is to say, however, that the evolutionary sciences are far more empirically and theoretically robust than current alternatives, and that any persuasive theory of norm formulation (for example) that is inconsistent with them bears the heavy burden of replacing them with a more accurate and systematically coherent theory.

nor reconciled without reference to psychological and generative commonalities most visible in the light of evolutionary analysis.

In short, evolutionary analysis provides a deeper, more accurate, more contextualized, and more nuanced framework for understanding the interplay between various psychological predispositions influencing behavior relevant to law. Its window on the mind opens a view on human behavior as the product of a brain that evolutionary processes have functionally specialized to perceive and process information in ways that tended to yield adaptive solutions to problems encountered in ancestral environments of evolutionary adaptation. This, in turn, yields at least three implications.

The first implication is that some norms of behavior relevant to law evolve not simply because they are more efficient than others, but because they are more appealing to the human brain than others — as a function of their effects in deep ancestral environments. Evolutionary analysis reveals the under-credited influence of visceral emotions with narrowly-tailored evolutionary significance on rational reflection and moral sentiments, from empathy to moralistic aggression.<sup>56</sup> Moralistic outrage at having been cheated by someone, for example, or at seeing someone else being cheated, can be seen to be no less a biological adaptation than our thumbs. The inquiry into what makes moral behavior feel good and immoral behavior feel bad (in broad brush) is analogous in important ways to investigating what makes sugar taste sweet and cardboard taste bad. (Answer: the former is an evolved, species-typical perception that biases eating behavior toward sources rich in energy usable by human physiology.) Once this is recognized, it is but a short step to resolving many otherwise seemingly puzzling preferences (for spiteful litigation, for example) or supposed irrationalities. These are sometimes, undoubtedly, the modern manifestations of historically adaptive psychological predispositions that are, in much-changed current environments, maladaptive. That they may lead us to seemingly irrational behavior in a novel environment does not make them inherently irrational or inexplicable.<sup>57</sup>

A second implication is that evolutionary analysis provides an entirely new tool of legal history. Because human brains, as a function of evolutionary processes, must inevitably share some historically adaptive information-processing pathways (emotions, moral fundamentals, norms, and the like) that bias behavior, we would expect to see the imprints of these on human legal systems, cross-culturally. And, in

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56. Richard Posner begins to explore the relevance of this in POSNER, *supra* note 9 (at 33-35). As an example, Amy Wax argues that an evolutionary perspective on reciprocity norms is useful in helping us understand public attitudes about welfare programs. See Amy Wax, *Rethinking Welfare Rights: Reciprocity Norms, Reactive Attitudes, and the Political Economy of Welfare Reform*, 63 LAW AND CONTEMP. PROBS. (forthcoming summer 2000).

57. See Jones, *supra* note 39.

fact, we do, although we rarely acknowledge the connection between evolutionary processes and legal artifacts. This is not to suggest, of course, that either the specific substance of law (say, the estate tax rate) or the specific procedure (of probating a will, for example) are directly traceable to psychological predispositions toward those precise legal requirements. It is to suggest that the general sentiments at the root of many human legal manifestations — and of our conceptions of law itself — are non-random.

It is not coin-flipping odds, for example, how the legal systems tend to provide that the property of an intestate decedent will flow (i.e., to relatives by marriage and blood, in priority according to degrees of consanguinity). Nor is the very notion of property coherent without reference to evolved psychological predispositions to acquire and use, or to share with some and exclude others. An evolutionary analysis — attending to ancestral effects of variations in normative reactions — helps explain why, for example, within all known human cultures, rape is proscribed to a degree disproportionate to other forms of physical harm that do not implicate reproductive capacities.<sup>58</sup> Just as history can provide important context for understanding geopolitical boundaries, and the future behavior of states, evolutionary analysis can provide important context for understanding the legal landscape, and the ways in which it may develop in the future. We will miss something important if we fail to see the connection between biologically influenced norms and the existence of, content of, and support for legal systems.

A third implication concerns efforts to predict variations in the effectiveness of different efforts to move human behavior with the tools of law. At the moment, we have neither a comprehensive nor a particularly accurate theory to explain why and predict when people will conform to certain legal prescriptions more than to others. Economics, certainly, helps us understand that, in many cases, people will behave as if they are cost-benefit maximizers of personal utility. But economics, alone, provides neither a basis for understanding why personal utility has the content it does (that is, it has no predictive theory of what people's tastes will be), nor a basis for predicting the strong emotional content to much human behavior relevant to law. Neither psychology nor sociology, unsupplemented by behavioral biology, can suffice to remedy this shortcoming. Evolutionary analysis can help.

For example, it seems to me that a principle derivable from biology, which might usefully be termed The Law of Law's Leverage, can provide tangible purchase for efforts to explain and predict those as-

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58. See Jones, *Sex, Culture, and the Biology of Rape: Toward Explanation and Prevention*, *supra* note 27; Owen D. Jones, *Law, Biology, and Rape: Reflections on Transitions*, 11 HASTINGS WOMEN'S L.J. 151 (2000).

pects of human behavior that will be most sensitive and least sensitive to changes in legal rules. It consists of two symmetrical propositions.<sup>59</sup>

*Proposition One:* The cost of using law to reduce the incidence of any behavior will correlate positively with the extent to which that behavior was adaptive for its bearers, on average, in the relevant environment of evolutionary adaptation.

*Proposition Two:* The cost of using law to increase the incidence of any behavior will correlate negatively with the extent to which that behavior was adaptive for its bearers, on average, in the relevant environment of evolutionary adaptation.

This Law of Law's Leverage predicts, for example, that it will generally be less costly to shift a behavior in ways that tended to increase reproductive success in ancestral environments than it will be to shift behavior in ways that tended to decrease reproductive success in ancestral environments. The malleability of a behavior in reaction to changes in law — and therefore, to a great extent, the commensurate cost of trying to change the behavior — will tend to vary as a function of the extent to which the behavior was historically adaptive. Put another way, the slope of the demand curve for historically adaptive behavior that is now deemed to be socially (in some cases even individually) undesirable will be far steeper (reflecting less sensitivity to price) than the corresponding slope for behavior that was comparatively less adaptive in ancestral environments. Importantly, this rule will tend to hold, even when the costs that an individual actually and foreseeably incurs in behaving in a historically adaptive way exceed the presently foreseeable benefits of such behavior.<sup>60</sup>

## CONCLUSION

Like the man who searches for lost keys only under the lamppost, because the light is better there, modern disciplines have tended to focus their efforts to understand human behavior on uniquely human cultural processes — because they are readily observable. Law has followed suit. But while the uniqueness of our species is obvious, it is neither physically nor behaviorally absolute. Relentlessly abrasive,

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59. I suppose I could combine these into one rule. But clarity recommended bifurcation, at least for the time being.

60. This idea is explored at greater length in Jones, *Law, Behavioral Economics, and Evolution*, *supra* note 39. Legal contexts in which the Law of Law's Leverage will be particularly relevant will be those aspects of, for example, constitutional law, criminal law, family law, torts, property, and contracts that involve such things as: mating, fairness, homicide, child-rearing, status-seeking, property and territory, resource accumulation, sexuality (including infidelity and jealousy), speech, privacy, empathy, and crimes of passion.

systematic, and (emphatically) knowable evolutionary processes have wrought in us, as in all other animals, a behavioral repertoire of predispositions. That natural selection has afforded our brain unparalleled self-consciousness and rational ability should not obscure the unavoidable conclusion that our fundamental emotions, moralities, norms, and predilections — many of which underlie behavior of critical importance to law — often reflect adaptations to deep ancestral environments and conditions.

Against this background, *The Great Disruption* provides something far more significant than simply arguing for the importance of social capital to a thriving economy, and the importance of reconstituting social order as we move from an industrial to information age society. (Though those, themselves, are observations worth careful study.) By exploring how predispositions toward social order can evolve, *The Great Disruption* provides a valuable example of how integrating evolutionary perspectives on human brain and behavior can further the analysis of important social and political problems. Because so much of that integration focuses on the evolution of human moral sentiments, and because an understanding of morality is central to competent legal thinking, *The Great Disruption* therefore offers law some important insights.

For example, we should be asking not whether our moral sentiments could have been influenced by evolutionary history, but how it could be otherwise. Morality cannot simply be some arbitrary cultural artifact that happened to gain a foothold because some tabula-rasa human mind, in some socio-cultural milieu, invented it. Nor are our morals and norms the glorious and deduced end product of objectively indisputable ratiocinations. For whatever else they may be, morals and norms are fundamentally subsets of human behavioral predispositions, which are in turn a product of human information-processing patterns, which are in turn a function of human brain structure, which is in turn a product of evolutionary processes. This has a variety of implications for the way we think, not only about the relationship between law and morality, but also about the relationship between law and behavior.

Viewed in this light it is clear that morals and norms can remain divorced from biology through only the most artificial and disciplinarily jealous, xenophobic, and acontextual machinations. While it would be absurd to imagine that biology could alone provide a complete explanation for human moral behavior, it is no less equally absurd to imagine that moral behavior can be understood, in any deep way, without knowledge of the pathways and principles by which the information-processing, behavior-biasing patterns of the human brain came, through knowable evolutionary processes, to be as they are. An extreme view? Hardly. Science knows of no way by which it could be otherwise. Extremity is defined by the contrary assumption: that the



brain has somehow evolved beyond the reach of the evolutionary processes that built it. It is therefore mistaken and misleading, maybe more, to champion any theory of human norm or morality formation independent of the effects of evolution on the human brain.

Francis Fukuyama clearly sees all this. He raises some interesting questions about the implications, and offers some answers. And while I don't find all of them persuasive, I am persuaded that he is on the right track, and that legal thinkers should pay attention to the rich opportunities evolutionary analysis holds for their own discipline.

# THE UNIVERSAL GRAMMAR OF CRIMINAL LAW

*Stuart P. Green\**

BASIC CONCEPTS OF CRIMINAL LAW. By *George P. Fletcher*. New York: Oxford University Press. 1998. Pp. xi, 223. Cloth, \$45; paper, \$18.95.

There is something about the criminal law that invites comparative analysis. The interests it protects are so basic, and its concerns so fundamental, that it is natural to ask whether there are aspects of criminal law that are somehow universal. We want to know whether familiar concepts such as murder and manslaughter, intent and negligence, and insanity and mistake, are characteristic of other systems of criminal law as well, and, if so, what role they play there.

In the last generation, no criminal law scholar has made better use of comparative law techniques than George Fletcher, the Cardozo Professor of Jurisprudence at Columbia Law School. And, not coincidentally, no scholar has done more to define and probe the fundamental principles of our own system of criminal justice. Now, twenty years after the publication of his classic *Rethinking Criminal Law*,<sup>1</sup> Fletcher offers *Basic Concepts of Criminal Law*, a concise, fair-minded, and remarkably clear synthesis of virtually all of the major debates in contemporary criminal law theory.

*Basic Concepts* should be of interest to at least three groups of readers. The first group comprises students in advanced criminal law classes, who will benefit from Fletcher's gift for finding concrete language to explain abstract concepts. The second group consists of teachers and scholars of substantive criminal law, who will want to see how Fletcher has clarified and augmented many of the arguments first made in *Rethinking*. The third group is potentially much broader. The most novel and provocative feature of *Basic Concepts* is its claim to offer a "deep structure" or "universal grammar" of criminal law, one that "transcends the enacted law of particular states and coun-

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1. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* (1978) [hereinafter *RETHINKING*].

tries” (p. 23) and “facilitate[s an] appreciation of the unity of the world’s legal systems” (p. 5). This aspect of the book will be of interest to comparativists and theorists in various areas of the law, who share with Fletcher an interest in the possibility of finding timeless and universal principles that underlie their respective disciplines.<sup>2</sup>

The focus of this Review is on the claim of universality and the innovative theoretical framework on which that claim rests. Part I briefly describes the overall design of Fletcher’s project, cataloguing its principal virtues and defects. Part II then explores the concepts of deep structure, universal grammar, and other kinds of human universals as they are used in other disciplines, including linguistics and anthropology. Finally, Part III seeks to test the validity of Fletcher’s theory by applying it to a collection of seemingly anomalous criminal law practices and concepts from China, Japan, Iceland, Melanesia, and elsewhere. Through this process, I hope to demonstrate both the potential and the limitations of Fletcher’s theory.

## I. BASIC CONCEPTS — DESIGN AND METHODOLOGY

For legal theorists, the goal of *Basic Concepts* is an enormously attractive one: to “take a step back from the details and the linguistic variations of the criminal codes” (p. 4), to apply “philosophical and conceptual analysis” (p. 23), and thereby find “an underlying unity,” a “deep structure” or “universal grammar” (p. 5), a “philosophical dimension” (p. vii) common to “diverse systems of criminal justice” (p. 4). How is this goal to be pursued? Fletcher’s approach is simple and elegant. Each of the twelve chapters of *Basic Concepts* deals with one of twelve “dichotomies” or “distinctions” that are said to “shape and guide the controversies that inevitably break out in every system of criminal justice” (p. 4).<sup>3</sup> These dichotomies, he says, form a common

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2. As Fletcher himself has recently written, “[t]he search for structural features of the law, the elaboration of distinctions common to all legal cultures, the clarification of the basic units of legal analysis — all of these are intellectual pursuits that unite scholars from diverse traditions in a common pursuit.” George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 AM. J. COMP. L. 683, 693-94 (1998).

3. The twelve dichotomies are as follows:

- (1) What is the difference between *substantive* and *procedural* criminal law?
- (2) How do we mark the boundaries between *criminal punishment* and *other coercive sanctions*, such as deportation, that are burdensome but not punitive?
- (3) What is the difference between treating a suspect as a *subject* and treating him as an *object*, both in terms of the criminal act and the trial?
- (4) What is the difference between *causing harm* and harm simply *occurring as a natural event*?
- (5) What is the difference between determining whether a crime has occurred (*wrongdoing*) and *attributing* that wrongdoing to a particular offender?
- (6) What is the distinction between *offenses* and *defenses*?
- (7) How should we distinguish between *intentional* and *negligent* crimes?

“deep structure” of criminal law. The issues raised by these dichotomies are resolved in different ways by different systems, thereby creating variations in “surface structure,” or positive law.

As a means for structuring his analysis, the dichotomy approach works superbly. By allowing the reader to focus directly on major points of controversy, the book offers considerable advantages over the more traditional “grand theory” approach to criminal law used in recent years by scholars such as Andrew Ashworth,<sup>4</sup> Hyman Gross,<sup>5</sup> Douglas Husak,<sup>6</sup> Nicola Lacey and Celia Wells,<sup>7</sup> Michael Moore,<sup>8</sup> Paul Robinson,<sup>9</sup> and, indeed, by Fletcher himself.<sup>10</sup>

But the dichotomy approach has its drawbacks as well. First, it tends to impose a theoretical straitjacket, forcing Fletcher to contrive distinctions that do little to illuminate his subject. The “punishment versus treatment” dichotomy, for example, turns out to be little more than a vehicle for Fletcher’s discussion of punishment, with the question of “treatment” quickly pushed to the periphery. The same can be said of his discussion concerning the “justice versus legality” dichotomy, in which Fletcher’s focus is almost wholly on the meaning of legality.

Second, there is, at times, a certain vagueness about the difference between surface and deep structure. Surface structure is supposed to be found in “statutory rules and case law decisions,” whereas deep structure is said to be found in the “debates that recur in fact in every legal culture” (p. 4). But it is obvious that many of the questions Fletcher identifies as indicative of deep structure (e.g., “how should

(8) Why should there be defenses both of *self-defense* and *necessity*, and what is the distinction between them?

(9) Why are some *mistakes relevant* to criminal liability and others *irrelevant*?

(10) How should we distinguish between *completed offenses* and *attempts* and other inchoate crimes?

(11) What is the difference between someone who is a *perpetrator* of an offense and someone who is a mere *accessory* to the offense?

(12) How do we distinguish between *legality* and *justice* in the criminal process?

4. ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* (3d ed. 1999).

5. HYMAN GROSS, *A THEORY OF CRIMINAL JUSTICE* (1979).

6. DOUGLAS N. HUSAK, *PHILOSOPHY OF CRIMINAL LAW* (1987).

7. NICOLA LACEY & CELIA WELLS, *RECONSTRUCTING CRIMINAL LAW* (2d ed. 1998).

8. MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* (1997).

9. PAUL H. ROBINSON, *STRUCTURE AND FUNCTION IN CRIMINAL LAW* (1997).

10. *RETHINKING*, *supra* note 1. For further reflections on various approaches to criminal law theorizing, see MOORE, *supra* note 8, at 3-80 (discussing the kinds of questions a theory of criminal law ought to consider); Nicola Lacey, *Contingency, Coherence, and Conceptualism: Reflections on the Encounter Between “Critique” and “the Philosophy of the Criminal Law,”* in *PHILOSOPHY AND THE CRIMINAL LAW* 9, 48 (Antony Duff ed., 1998) (distinguishing between “philosophical” and “critical,” or doctrinal, theories of criminal law).

we distinguish between *completed offenses* and *attempts* and other inchoate crimes?” and “what is the difference between someone who is a *perpetrator* of an offense and someone who is a mere *accessory* to the offense?”) are precisely the sort of questions that statutes and case law seek to resolve. What Fletcher presumably means — although he is never particularly clear on this point — is that deep structure consists not of the *rules* for determining, say, whether a defendant is a perpetrator or an accomplice, but simply of the fact that there are such distinctions in the criminal law, and that these distinctions can be observed widely, even universally.

Third, the dichotomy format means that a handful of important issues either turn up in unexpected places (e.g., the discussion of both insanity and criminal omissions is found, curiously, in a chapter entitled “Subject versus Object”), or are left out entirely. Two omissions are particularly worth mentioning. One is Fletcher’s failure to deal with the question of the extent to which criminal law is necessarily a matter of *public* rather than private law.<sup>11</sup> Another, even more important, omission is the almost complete lack of attention to the subject of specific offenses (even in a chapter entitled “Offenses versus Defenses”). As we will see below, if anything is universal in criminal law, it is almost certainly the prohibition of murder, rape, and other forms of violence.<sup>12</sup> Yet Fletcher offers few insights as to why some acts are widely (even universally) criminalized, while others are not.<sup>13</sup> Instead, like most contemporary criminal law theorists, he is preoccupied with the criminal law’s general part.<sup>14</sup>

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11. For example, *Basic Concepts* gives curiously little attention to the important question of standing — who is the proper party to bring a criminal case, and what that might tell us about the extent to which the criminal law reflects public, as opposed to private, interests. Fletcher mentions the issue only in passing, stating that “[i]n the United States and in most parts of the common law world today, the public prosecutor claims exclusive authority to seek punishment for crimes committed against private individuals.” P. 36. But he has almost nothing to say about the extent to which the *public* aspect of criminal prosecutions might itself be part of the criminal law’s deep structure.

12. See *infra* note 32 and accompanying text. Another good candidate for universality is the classification of offenses according to the nature and degree of harmfulness, which I discuss in Stuart P. Green, *Deceit and the Classification of Offenses: Federal Rule of Evidence 609(a)(2) and the Origins of Crimen Falsi*, 90 J. CRIM. L. & CRIMINOLOGY (forthcoming 2000).

13. It is worth noting that simply because some practice is universal does not necessarily mean that it is part of a “universal grammar.” As used by Fletcher, universal grammar refers to a set of generalizable abstract principles that can be derived from the observation of widespread or universal practices. Thus, the fact that criminal offenses such as murder and rape are universally prohibited might lead one to derive some more general principle regarding the criminalization of certain kinds of harmful and intentional acts. For more on the various meanings of “universal,” see *infra* notes 26-30 and accompanying text.

14. I have discussed criminal law scholarship’s preoccupation with the general part elsewhere. See Stuart P. Green, *Prototype Theory and the Classification of Offenses in a Revised Model Penal Code: A General Approach to the Special Part*, 4 BUFF. CRIM. L. REV. (forthcoming 2000). For a recent example, see LEO KATZ ET AL., FOUNDATIONS OF

Fourth, although the various horns of Fletcher's dichotomies frequently do delineate the *range* of choices that legal systems make with respect to specific issues in criminal law, there is little explanation of how and why particular systems make the choices they do *within* such ranges. To put it another way, while the dichotomy approach does a good job of explaining what is *similar* across systems, it is much less concerned with the way in which various universals express themselves *differently* in different environments.

Finally, and perhaps most importantly, Fletcher fails to offer any meta-theory that would explain the deeper meaning of his dichotomies. For example, there is no explanation as to why the criminal law reflects these dichotomies and not others, whether the dichotomy structure is also characteristic of other areas of the law, and what the ultimate source of such dichotomies might be.<sup>15</sup> In the end, what Fletcher provides is an exceptionally well-informed and insightful collection of deep-seated and widely observed distinctions in criminal law. What remains unclear are his views on the larger significance of that collection.

## II. THE SEARCH FOR "DEEP STRUCTURE," "UNIVERSAL GRAMMAR," AND "HUMAN UNIVERSALS"

Early in *Basic Concepts*, Fletcher tells us that the "deep structure" or "universal grammar" he is pursuing is akin to Noam Chomsky's famous work in linguistics.<sup>16</sup> To assess Fletcher's project, then, it will be helpful to know both what these terms mean for Chomsky, and what they might mean to Fletcher. In addition, we will want to know something about other kinds of "human universals" that might be relevant to the study of criminal law.

### A. *What Linguists Mean by "Deep Structure" and "Universal Grammar"*

As he himself has acknowledged elsewhere, Fletcher is hardly the first legal scholar to assert that he is pursuing a Chomsky-like proj-

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CRIMINAL LAW 4 (1999) (stating that book on foundations of criminal law will consider only the general part).

15. For a discussion of the possible shape of such a meta-theory, see *infra* note 32.

16. P. 5 ("As Noam Chomsky developed a universal grammar underlying all the particular languages of the world, here, in these twelve distinctions lies the grammar of criminal law."). Chomsky's most influential account of transformational grammar can be found in NOAM CHOMSKY, *ASPECTS OF THE THEORY OF SYNTAX* (1965); NOAM CHOMSKY, *SYNTACTIC STRUCTURES* (1957). For a useful introduction to Chomsky's work, see JOHN LYONS, *NOAM CHOMSKY* (1970).

ect.<sup>17</sup> Yet such scholars have offered almost no discussion of either what the Chomskyian project actually consists of, or the extent to which Chomsky's work provides them with a plausible theoretical model.

At the outset, it should be clear that linguists use the terms "deep structure" and "universal grammar" to refer to quite different concepts. Linguists attempt to offer an analysis of language that explains how and why certain word strings can be recognized as well-formed sentences by native speakers. Although there is an infinite number of sentences that can be formed in any language, it is possible to identify a finite collection of "phrase structure rules" and "lexical insertion rules" that build "base component" trees, the underlying structures of well-formed sentences.<sup>18</sup> These "deep structures," or "d-structures," are then converted into one or more actual sentences (known as "surface structures" or "s-structures") by the application of linguistic devices known as "transformations." The whole system, consisting of base components plus transformations, is known as "generative" or "transformational grammar."<sup>19</sup>

"Universal grammar," as its name suggests, refers to something quite different from the language-specific deep structures of generative grammar.<sup>20</sup> The basic idea of universal grammar is that there are certain "principles," or "super-rules," that are genetically "wired" into our brains.<sup>21</sup> These innate principles become instantiated as the determinate grammar of a particular language when the parameters of universal grammar are set, and thereby explain how it is that children are able, so easily and so quickly, to learn something as complex as their native language. The term "universal grammar" is therefore used to refer both to "the basic design underlying the grammars of all

17. See George P. Fletcher, *What Law is Like*, 50 S.M.U. L. REV. 1599, 1604 n.22 (1997) (citing numerous law review articles that have used the term "deep structure").

18. See CHOMSKY, SYNTACTIC STRUCTURES, *supra* note 16.

19. *Id.* It should be noted, however, that in his later work Chomsky no longer relies on the notion of deep structures. See, e.g., NOAM CHOMSKY, THE MINIMALIST PROGRAM (1995).

20. Chomsky himself has noted the frequent confusion between deep structure and universal grammar. See NOAM CHOMSKY, LANGUAGE AND RESPONSIBILITY 171-72 (1977) ("I have often read that what I am proposing is that deep structures do not vary from one language to another, that all languages have the same deep structure: people have apparently been misled by the word *deep* and confuse it with *invariant*. Once again, the only thing I claim to be 'invariant' is universal grammar."). For an example of such confusion, see D.L. Perrott, *Has Law a Deep Structure? — The Origin of Fundamental Duties*, in FUNDAMENTAL DUTIES 1 (D. Lasok et al. eds., 1980).

21. Chomsky's claims regarding universal grammar can be found, among other places, in Noam Chomsky, *Linguistics and Cognitive Science: Problems and Mysteries*, in LANGUAGE IN FOCUS: FOUNDATIONS, METHODS AND SYSTEMS: ESSAYS IN MEMORY OF YEHOASHUA BAR-HILLEL (A. Kasher ed., 1991); CHOMSKY, ASPECTS OF THE THEORY OF SYNTAX, *supra* note 16, at 25.

human languages” and to “the circuitry in children’s brains that allows them to learn the grammar of their parents’ language.”<sup>22</sup>

With respect to universal grammar, a considerable amount of empirical evidence has tended to substantiate Chomsky’s claims. Starting in the early 1960s, for example, a team of scholars led by Joseph Greenberg examined a sample of thirty languages from five continents, including Basque, Berber, Burmese, Finnish, Hebrew, Hindi, Italian, Japanese, Malay, Maori, Massai, Mayan, Nubian, Quechua, Serbian, Swahili, and Turkish.<sup>23</sup> In these early studies, which focused on word order and morphemes, researchers found no fewer than forty-five universals. Since then, according to linguist and cognitive scientist Steven Pinker, “many other surveys have been conducted, involving scores of languages from every part of the world, and literally hundreds of universal patterns have been documented.”<sup>24</sup>

### B. *What Anthropologists Mean by Human Universals*

The idea that there is an empirically verifiable, innate, or at least universal, quality to something as apparently culture-specific as language is, of course, an enormously intriguing one. If it is possible to prove that human language, in all of its tremendous variety, has an underlying and unchanging unity, then it may well be possible to find proof of underlying universals in other realms of human behavior as well — including, perhaps, morality, manners, social hierarchy, family dynamics, humor, music, art, or even law. Inspired in part by the work of Chomsky and Greenberg, a number of ethnographers in recent years have turned from the anthropologist’s traditional focus on cultural *differences* to a renewed interest in finding human commonalities (or universals, as they tend to be called) — behavioral patterns and

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22. CHOMSKY, ASPECTS OF THE THEORY OF SYNTAX, *supra* note 16, at 27-30; STEVEN PINKER, THE LANGUAGE INSTINCT 483 (1994).

23. See UNIVERSALS OF LANGUAGE (J.H. Greenberg ed., 1963). Greenberg and his colleagues were not explicitly attempting to confirm Chomsky’s hypotheses, but many of their findings have nevertheless had that effect. See PINKER, *supra* note 22, at 233.

24. PINKER, *supra* note 22, at 233. According to Pinker:

Some [universal patterns] hold absolutely. For example, no language forms questions by reversing the order of words within a sentence, like *Built Jack that house the this is?* Some are statistical: subjects normally precede objects in almost all languages, and verbs and their objects tend to be adjacent. . . . The largest number of universals involve implications: if a language has X, it will also have Y. . . . Universal implications are found in all aspects of language . . . [including meaning]: if a language has a word for “purple,” it will have a word for “red”; if a language has a word for “leg,” it will have a word for “arm.”

*Id.* at 233-34. “What is most striking of all,” according to Pinker, “is that we can look at a randomly picked language and find things that can sensibly be called subjects, objects, and verbs.” *Id.* at 236. What has been demonstrated, he says, is “that the same symbol-manipulating machinery, without exception, underlies the world’s languages.” *Id.* at 237.



practices that are the same regardless of cultural and ethnic boundaries.<sup>25</sup>

Anthropologists use the term universal in a variety of different contexts. Some universals exist at the level of the individual, or at least in every individual of a certain sex or age range; examples are certain emotions and facial expressions.<sup>26</sup> A second kind of universal exists at the level of society (generally defined as the manner in which individuals or groups relate to and among each other); an example is the sexual division of labor.<sup>27</sup> A third kind of universal exists at the level of culture (a term which refers to conventional patterns of thought, activity, and artifact that are passed from generation to generation); examples of this kind of universal are tools and kinship terminologies.<sup>28</sup> In addition, distinctions are often drawn between “substantive” and “formal” universals<sup>29</sup>; and “conditional” and “unconditional” universals.<sup>30</sup> Finally, we might distinguish between those practices or ideas that are universal merely in the sense that they occur at some time in every culture, and those practices or ideas that occur (comprehensively) in every relevant case in every culture.

As in the case of linguistic universals, the search for individual, cultural, and societal universals has been quite promising. Evidence of universals of one kind or another has been found in matters as diverse as sexual jealousy and Oedipal feelings; adornment of bodies and ar-

25. See, e.g., DONALD E. BROWN, *HUMAN UNIVERSALS* (1991); ROBIN FOX, *THE RED LAMP OF INCEST* (1980). The traditional anthropological approach is exemplified most famously by the ethnographic works of Margaret Mead. See, e.g., MARGARET MEAD, *COMING OF AGE IN SAMOA* (1936). For a critique of Mead’s work in Samoa, see DEREK FREEMAN, *MARGARET MEAD AND SAMOA: THE MAKING AND UNMAKING OF AN ANTHROPOLOGICAL MYTH* (1983).

26. See BROWN, *supra* note 25, at 39.

27. See *id.*

28. See *id.* at 40.

29. As Chomsky has characterized the distinction (referring to universals in language):

A theory of substantive universals claims that items of a particular kind in any language must be drawn from a fixed class of items. . . . A theory of substantive semantic universals might hold for example, that certain designative functions must be carried out in a specified way in each language. Thus it might assert that each language will contain terms that designate persons or lexical items referring to certain specific kinds of objects, feelings, behavior, and so on.

It is also possible, however, to search for universal properties of a more abstract sort. Consider a claim that the grammar of every language meets certain specified formal conditions. The truth of this hypothesis would not in itself imply that any particular rule must appear in all or even in any two grammars. The property of having a grammar meeting a certain abstract condition might be called a *formal* linguistic universal, if shown to be a general property of natural languages.

CHOMSKY, *ASPECTS OF THE THEORY OF SYNTAX*, *supra* note 16, at 28-29.

30. An “implicational” or “conditional” universal (in contrast to an “unrestricted” or “non-conditional” universal) is a trait or complex that appears if and only if certain conditions obtain — for example, “all societies possessing paved highways possess centralized government.” See BROWN, *supra* note 25, at 45.

rangement of hair; recognized facial expressions of happiness, sadness, anger, fear, disgust, and contempt; food taboos and fondness for sweets; gifts and the exchange of labor, goods, and services; and logical relations including *and*, *not*, *same*, equivalence, opposites, general versus particular, and part versus whole.<sup>31</sup> In addition, anthropologists have found a number of universals that are directly relevant to the criminal law — including concepts like intention, responsibility, rights, and property; distinctions between voluntary and involuntary behavior; procedures for seeking redress of wrongs; government, in the sense of binding collective decisions about public affairs; institutions for punishment; and “legal” prohibitions on rape, murder, and other forms of violence.<sup>32</sup>

### C. Fletcher and the Search for Universals in Law

If these linguists and anthropologists are right, if human beings really do share universal norms and practices of these sorts, what implications might there be for our understanding of law in general, and the criminal law in particular?<sup>33</sup> Fletcher never tells us precisely what he has in mind here, although at least two possibilities can be ruled out. First, it seems clear that when Fletcher invokes Chomsky, he is

31. See *id.* Brown’s findings are helpfully summarized in PINKER, *supra* note 22, at 412-15.

32. See BROWN, *supra* note 25, at 69, 134-39, 176-78, 182. Assuming that such concepts, distinctions, procedures, institutions, and prohibitions are in fact universal, the next question we would need to ask is: How did they get that way? Among the possible kinds of explanations that might be offered are the following:

(1) *Diffusionist Explanation*: Some cultural practices, such as cooking and the use of fire, seem to have been invented in some small number of societies and then spread widely throughout the world in a process known as “diffusion.” To develop a diffusionist theory of criminal law, we would need to compile evidence that various criminal law concepts (such as, say, accomplice liability or the principle of legality) developed in a similar manner.

(2) *Physical Explanation*: Some aspects of culture are thought to be a response to certain physical characteristics in humans. For example, various kinship roles seem to be a response to the physical requirements of sexual reproduction. Under a physical theory of criminal law, concepts such as rape and murder might be viewed as a response to conflicting human tendencies towards, say, violence (on the one hand) and the desire for physical safety (on the other).

(3) *Evolutionary Explanation*: Many forms of human behavior are believed to be the product of evolved human characteristics — the result of natural selection, the process by which better adapted organisms outbreed those that are less well adapted. Under an evolutionary theory, certain aspects of criminal law (again, the prohibitions on rape and murder provide a good example) would be viewed as analogous forms of adaptation.

For a survey of the literature concerning these and others explanations for human universals, see *id.* at 88-117.

33. Other legal scholars have begun dealing with similar issues. See, e.g., Jim Chen, *Law as a Species of Language Acquisition*, 73 WASH. U. L.Q. 1263, 1279 (1995) (“The existence of universal grammar reinforces the discovery of universals in other language-based disciplines.”); John O. McGinnis, *The Human Constitution and Constitutive Law: A Prolegomenon*, 8 J. CONTEMP. LEGAL ISSUES 211 (1997) (suggesting that work in the social sciences involving evolutionary theories of human nature should begin to inform legal scholarship).

not referring to the search for some finite set of underlying rules (a deep structure) from which an infinite number of legal propositions (the surface structure) can be derived — a process that would be analogous to the transformations that occur in linguistic theory. Nor does he suggest that human beings share some genetic predisposition, some “hard wiring” in our brains that manifests itself in different surface structures, norms, or behaviors that, in turn, give content to the criminal law.<sup>34</sup>

Rather, what Fletcher seems to be claiming is simply that there is, in his words, some “underlying unity among diverse systems of criminal justice,” some “basic design” that is common to all of these various and disparate systems. To put it another way, what Fletcher seems to be saying is that, if a society does develop a system of criminal justice,<sup>35</sup> then that system will possess characteristics that are contained in the continuum marked out by his collection of dichotomies.

### III. TESTING FLETCHER’S CLAIM OF UNIVERSALITY

Just as linguistic anthropologists have done fieldwork intended to confirm the theoretical construct developed by Chomsky, it is natural to ask whether empirical evidence could be found to support the thesis developed by Fletcher. But how exactly does one “test” a universal theory of law?

As noted above, anthropologists have had some success in discovering universals that are relevant to the criminal law.<sup>36</sup> Nevertheless, there is obviously a wide conceptual gap between generalized criminal law universals of this sort and criminal law universals of the sort posited by Fletcher. That is, even if there were evidence that every culture, say, distinguishes between voluntary and involuntary behavior, or imposes basic legal prohibitions on murder and rape, one might still

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34. For an example of such reasoning, see Perrott, *supra* note 20, at 10.

35. There may, of course, be societies that never actually develop such a system. One such possible exception is the Ifugao tribe of the Philippines, described in E. Adamson Hoebel’s survey of literature on the world’s legal cultures:

By virtue of the nature of Ifugao social organization there can be no criminal acts. All other legally recognized offenses are of the type known in Anglo-American law as torts: private (or civil) wrongs or injuries independent of contract. Among the Ifugao the responsibility for initiating any prosecution rests with the aggrieved; any damages, penal assessments, or physical punishment inflicted upon the defendant are imposed by the plaintiff and his kinsmen. The lines of procedure are anything but raw self-help, however. Custom requires that proper procedural protocol be carefully exhausted before resort to direct seizure of the lance is taken.

E. ADAMSON HOEBEL, *THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS* 113-14 (1967) (footnotes omitted) (citing R.F. BARTON, *IFUGAO LAW* (1919)). Unfortunately, as noted *supra* note 11 and accompanying text, one of the important issues on which Fletcher has little to say in *Basic Concepts* is the extent to which a system of public, as opposed to private, prosecutions is fundamental to the idea of a criminal law.

36. See *supra* note 32 and accompanying text.

be skeptical about the claim that every criminal law system recognizes more refined distinctions such as those between self-defense and necessity, or perpetration and complicity. If we are to find evidence of those kinds of distinctions, we need to go beyond the findings of the anthropologists.

There are two ways in which Fletcher's theory might be tested. One is to take the theory articulated in *Basic Concepts* and attempt to apply it, *in toto*, to various criminal law systems around the world. Indeed, this seems to be exactly what Fletcher has in mind. He tell us that there are plans to publish the book in various foreign editions, in which "a local commentator takes charge of the translation and adds material on the way the twelve universal distinctions . . . find expression in local positive law."<sup>37</sup>

Unfortunately, this process is likely to take years to complete. A book review calls for something more expedient. Rather than using Fletcher's approach to examine foreign criminal law systems in their entirety, I suggest that we use it to look at a collection of specific foreign criminal practices and principles. In particular, I propose that we take a collection of specific criminal law practices and principles that Fletcher himself does not consider, and which, from the perspective of contemporary Western practice, may seem anomalous; and then ask whether and to what extent Fletcher's theory can provide an adequate account.

### A. *Six Case Studies*

Viewing Fletcher's theory through the lens of the six case studies presented here should prove useful in several ways. By applying the theory to the specifics of various legal systems, we will be able to assess its reliability and comprehensiveness, confirm its significance, question its premises, and suggest possible modifications. In addition, if the theory is a good one, it should yield valuable insights into the specific legal rules and principles that are the subject of our case studies.<sup>38</sup>

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37. P. vii. One can only hope that Fletcher's foreign publishers serve him better than his prestigious English language publisher, which has released the book with a distracting number of typographical errors. See e.g., p. 14 ("The evidence on that evidence [sic] is simply inconclusive."); p. 45 ("it follows from the above syllogism — that there would be something just [sic] or conceptually untoward about punishing the bystander."); p. 111 ("These are case [sic] of intentional conduct . . ."); p. 114 ("Suppose that absentmindedly you leave the library without having first having [sic] checked out the book you were reading."); p. 123 ("Does Oswald want or desire to injury [sic] either JFK or Connally?"); p. 125 ("If Oswald acts intentionally regardless of the gun pointed at his head, how he [sic] could possibly escape liability for murder?"); p. 126 ("Oswald suddenly turned on the KGB agent and grabbed the latter's rifle, causing it [sic] discharge in the direction of the crowd below.").

38. Cf. RICHARD S. KAYNE, *FRENCH SYNTAX: THE TRANSFORMATIONAL CYCLE* xviii (1975) (stating similar goals for study that uses French syntax as case study in test of Chomskyan transformational grammar).

Before I catalogue the cases, though, several comments are in order. First, it should be noted that most, though not all, of the examples are historical. This departs from Fletcher's own orientation to contemporary legal systems, but is nevertheless well within the claims of a universal theory. Indeed, Fletcher has elsewhere referred to his dichotomies as involving "eternal questions,"<sup>39</sup> and it seems reasonable to infer that his goal is to develop a universal theory that can account for historical, as well as contemporary, practices.

It is also worth noting that the countries from which my examples come are mostly non-Western. This focus will, I hope, provide a useful antidote to the Western bias in Fletcher's own scholarship. William Ewald has described the tendency among theorists to "elevate the local rules of [their] own time and place into universal truths for all humanity."<sup>40</sup> With his deep knowledge of German and Anglo-American legal history and jurisprudence, and his respectable acquaintance with Italian, French, Spanish, Israeli, and Talmudic criminal law, Fletcher is certainly less guilty of this vice than other scholars. Yet even such considerable erudition cannot, without more, justify a claim of universality.

Finally, it should be recognized that the descriptions offered below have been drawn primarily from secondhand accounts of foreign law. I have not sought to confirm independently the validity of the interpretations offered. Nor, in general, have I sought to provide a broader context for the practices discussed. In my attempt to test the flexibility of Fletcher's theory, I have more or less taken the descriptions at face value.

Here, then, is a range of criminal law principles and practices that, from the perspective of contemporary Western legal systems, should strike the reader as anomalous:

- Much of Western legal history has witnessed cases involving the criminal prosecution and punishment of animals and inanimate objects. The *Book of Exodus*, for example, provides that an ox that gores a man or woman to death is to be stoned, and its flesh not eaten. The ancient Greeks regularly held trials involving both animals and inanimate things (e.g., stones, beams, and pieces of

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39. George Fletcher, *The Fall and Rise of Criminal Theory*, 1 BUFF. CRIM. L. REV. 275, 285-86 (1998) ("These basic concepts of criminal justice are philosophical and conceptual in nature. They possess a truth value that cannot be resolved by an act of law-making will. A legislature can no more resolve a philosophical problem than it can determine a matter of scientific controversy. . . . Codes must be understood, therefore, as tentative answers to eternal questions. Scholars must remain committed to probing the depths of those eternal questions, whatever the local code may say on the matter.").

40. William Ewald, *Comparative Jurisprudence (I): What Was It Like To Try A Rat?*, 143 U. PA. L. REV. 1889, 1958 (1995). Ewald goes on: "[I]ndeed, as is well known, the great systems of Natural Law of the seventeenth and eighteenth centuries were largely rearrangements of the rules of Justinian's *Digest*." *Id.*

iron that had caused the death of a person by falling on him).<sup>41</sup> Barthelemy Chassenée, a leading French lawyer and scholar of the sixteenth century, wrote *A Treatise on the Excommunication of Insects*, which discusses the full range of issues that would be expected to arise during a trial of insects, and offers a theoretical analysis of the issues raised by the prosecution of animals more generally, including “a careful distinction between punitive prosecutions of animals, and prosecutions that are merely intended to deter future harmful conduct.”<sup>42</sup>

- *Crime and Custom in Savage Society*, Bronislaw Malinowski’s seminal work of legal anthropology, published in 1926, describes the early twentieth century legal culture of the Trobriand Islands in Melanesia.<sup>43</sup> Although many legal practices in Melanesian society seem vague, Malinowski describes a striking incident of what he regards as a paradigmatic exercise of criminal justice: A young man was having a sexual relationship with his maternal cousin, the daughter of his mother’s sister — a relationship that was prohibited by Trobriand law. When the affair was discovered by a rival lover, the rival insulted the offending man in public, accusing him of incest. “For this,” Malinowski tells us, “there was only one remedy; only one means of escape remained to the unfortunate youth. Next morning he put on festive attire and ornamentation, climbed a coco-nut [sic] palm and addressed the community, speaking from among the palm leaves and bidding them farewell. . . . Then he wailed aloud, as is the custom, jumped from a palm some sixty feet high and was killed on the spot.”<sup>44</sup>
- The criminal law of mediaeval Iceland (around the year 800) was dominated by an elaborate system of rules regarding revenge. According to one commentator, “an individual was not regarded as a separate being to the same extent as he is today, but was looked upon as a link in the long family chain. It was the family that was responsible for right and wrong, for revenge, and for defending its own reputation. The duty to take revenge for any insult was an unwritten law based on the concept that a man’s hon-

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41. See Walter Woodburn Hyde, *The Prosecution and Punishment of Animals and Lifeless Things in the Middle Ages and Modern Times*, 64 U. PA. L. REV. 696, 698 (1916); see also EDWARD P. EVANS, *THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS* (1906); Paul Schiff Berman, Note, *Rats, Pigs, and Statues on Trial: The Creation of Cultural Narratives in the Prosecution of Animals and Inanimate Objects*, 69 N.Y.U. L. REV. 288 (1994).

42. See Ewald, *supra* note 40, at 1900-01.

43. BRONISLAW MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* (1932). For criticism of Malinowski’s methodology and findings, see sources cited *infra* note 61.

44. MALINOWSKI, *supra* note 43, at 78.

our and that of his family had to be maintained intact.”<sup>45</sup> “The starting point for penal law was the *mannhelgi*, or a free man’s legally guaranteed immunity with regard to his person, property, honour, personal peace, and security. Every violation was considered an insult to the offended person, or to his family, and the offender, by committing his unlawful deed, automatically lost his immunity partly or totally, and became *óheilagr*. This meant that in the event of revenge, nothing could be claimed for him by his family. The most appropriate response to violation was revenge, permitted everywhere, at any time, and upon any member of the opposing family.”<sup>46</sup>

- Under Japanese law of the thirteenth through fifteenth centuries, local officials known as *kendan* were given extensive powers to enforce harsh theft laws. Under these laws, punishment extended to the thief’s wife and children, in addition to the thief himself. According to one commentator, these laws tended to be enforced less for the purpose of deterring crime than for the purpose of enriching the *kendan* (and thereby preserving their place in the chain of power that ran from the emperor to the local samurai).<sup>47</sup>
- The contemporary criminal justice system in Japan has as its principal goal the “reintegration” of the offender into the community. As Daniel Foote has described, the Japanese criminal justice system “place[s] primary emphasis on reformation, which involves considering family circumstances, employment status, and other types of support mechanisms available to the offender, and, to a lesser extent, satisfaction of the victim. Confession also plays a key role . . . as both a means to and reflection of the moral catharsis of the individual deemed essential to true reform . . . . [The] approach is consciously benevolent to the extent that it reflects the view that generosity will generate feelings of gratitude and indebtedness, thereby encouraging offenders to rehabilitate themselves.”<sup>48</sup> Similar patterns of “benevolent” or “paternalistic” criminal justice have been observed in several Native American systems described by Karl Llewellyn.<sup>49</sup>

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45. Martina Stein-Wilkeshuis, *Punishment in Iceland, A Survey*, in RECUEILS DE LA SOCIÉTÉ JEAN BODIN POUR L’HISTOIRE COMPARATIVE DES INSTITUTIONS (Vol. LVI) — LA PEINE 87 (1991).

46. *Id.* at 89.

47. See Shiro Ishii, *Crime and Punishment: Japanese Traditions*, in RECUEILS DE LA SOCIÉTÉ JEAN BODIN POUR L’HISTOIRE COMPARATIVE DES INSTITUTIONS (Vol. LVIII) — LA PEINE 411, 416 (1991).

48. Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV. 317, 360 (1992).

49. KARL N. LLEWELLYN, *The Anthropology of Criminal Guilt*, in JURISPRUDENCE, 439-50 (1962). Llewellyn says that, in Cheyenne and New Mexican Pueblo culture, the pur-

- One of the principal objects of penal law during the Chinese imperial period was to secure the enforcement of fundamental Chinese morality.<sup>50</sup> “Lack of filial piety” and violation of mourning laws were both considered particularly serious offenses. For example, the Ch’ing code (1644-1911) provided that a person who concealed the death of a parent or husband and did not go into mourning was to be punished with penal servitude for one year and sixty blows with the heavy stick. Removal of the formal mourning garments before the requisite period had elapsed and indulgence in pleasures such as music or banqueting was to be punished with ninety blows from the heavy stick. The T’ang code (618-907) imposed even harsher penalties for such offenses. Moreover, if a father beat his son to death and then secretly buried the body, the father was held liable not for the killing but for the secret burial.<sup>51</sup> In addition, a child whose parent committed suicide could be held liable where the suicide could be attributed, even in the most tenuous way, to unfilial conduct.<sup>52</sup>

## B. *Applying Basic Concepts to the Test Cases*

There is much in these cases to distinguish them from contemporary Western criminal law. In what follows, I focus on certain particularly intriguing details to illustrate both how Fletcher’s theory works and where its limitations might lie.

### 1. *The Subject/Object Dichotomy and the Criminal Prosecution of Animals*

Can Fletcher’s theory account for the historically observed practice of criminal prosecutions involving animals and inanimate objects? At one point, Fletcher seems to say no. According to Fletcher, “[a]ll legal systems concur that punishment is imposed only for human action. . . . It is considered barbaric to punish animals for causing harm.”<sup>53</sup> In fact, however, this is merely a statement about positive law. (Despite the goal of digging beneath surface structure, Fletcher can hardly

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pose of the trial is to “bring the erring brother, now known to be such, to repentance, to open confession, and to reintegration with the community of which he *was and still is regarded an integral part.*” *Id.* at 448 (emphasis in original).

50. See GEOFFREY MACCORMACK, *THE SPIRIT OF TRADITIONAL CHINESE LAW* 52-68 (1996).

51. *See id.* at 61.

52. *See id.* at 65.

53. P. 44. Fletcher also deals with the prosecution of animals in *Rethinking*, in a somewhat different context. *See* RETHINKING, *supra* note 1, at 343-49 (using history to illustrate distinction between “blaming” and “tainting” in law of forfeiture and homicide).



avoid characterizing and taking various positions on positive law). As it turns out, Fletcher's dichotomy theory may well be broad enough to accommodate such prosecutions.

To deal with the question of prosecuting animals, we need to look to Chapter 3 of *Basic Concepts*, in which Fletcher discusses his dichotomy between treating defendants as "subjects" — as someone who acts, an end in himself — and treating them as "objects" — someone or something that is acted upon, a mere means to an end. Although not posed directly in positive criminal law, Fletcher says, this distinction underlies many disputes about defining and determining who is liable for committing an offense (p. 43). Retribution-based theories, under which a responsible agent is "called to account for his wrongdoing," are consistent with the Kantian requirement that human beings be treated as subjects, or ends in themselves. A deterrence-based theory, by contrast, treats a defendant as a mere object, a means to an end (p. 43).

So how should we approach the criminal prosecution of animals and inanimate objects under Fletcher's theory? Three hypotheses suggest themselves. First, one might think that such prosecutions simply reflect the far end of the subject/object spectrum. Assuming that the purpose of such prosecutions is, if not to deter, then at least to incapacitate, one might argue that prosecuting and punishing animals is merely the most extreme manifestation of an object-based system of criminal justice, the clearest case of treating a defendant as a means to an end. Second, one might use Fletcher's theory as an occasion to look more deeply into the metaphysics of such prosecutions. Perhaps animal defendants *were* being viewed as subjects, as responsible moral agents, or ends-in-themselves. Or perhaps such trials were intended, as one scholar has put it, to restore the "moral equilibrium of the community [that] had been disturbed by the" crime and further the view "that somebody or something must be punished or else dire misfortune . . . would overtake the land."<sup>54</sup> Third, one might make the kind of argument that advocates of natural law have long favored — namely, that despite their formal trappings, such prosecutions are "not really" criminal prosecutions after all, that they fall outside the universe of what Fletcher is attempting to describe.<sup>55</sup>

It is hard to say for sure which of these three approaches Fletcher would favor. His statement that "punishment is imposed only for human action" suggests that he would probably be sympathetic to the

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54. Hyde, *supra* note 41, at 698. Cf. Paul Schiff Berman, *An Anthropological Approach to Modern Forfeiture Law: The Symbolic Function of Legal Actions Against Objects*, 11 YALE J.L. & HUMAN. 1, 4-5 (1999) ("such legal proceedings permitted the community to heal itself after the breach of a social norm by creating a narrative whereby a symbolic transgressor of the established order was deemed to be 'guilty' of a 'crime' and cast beyond the boundaries of the society").

55. See, e.g., LON L. FULLER, *THE MORALITY OF LAW* 96-106 (rev. ed. 1969).

natural law, “not really” criminal law argument — one that, unfortunately, suffers from circularity.<sup>56</sup>

Whatever his favored response, though, it seems to me that Fletcher’s theory *does* provide the analytical tools to address the question posed. Whether a particular system allows for the criminal prosecution of animals and inanimate objects is ultimately a question about whether such defendants are regarded as subjects or objects. To find the answers, we would obviously have to examine the historical evidence. The value of Fletcher’s theory lies in the questions it leads us to ask.

## 2. *The Perpetration/Complicity Dichotomy and Mediaeval Icelandic and Japanese Law*

Chapter 11 of *Basic Concepts* offers a distinction between perpetration and complicity. A perpetrator is the person who commits the actual *actus reus* of the crime. An accomplice is the one who counsels, assists, advises, or solicits (p. 188). The distinction is key to determining both how responsibility should be allocated among different participants in a common scheme, and the extent to which groups *qua* groups can be held liable for a crime. Here, again, Fletcher has some interesting observations on how this distinction is played out in positive law. Some ancient legal systems, he says, seem not to have recognized accomplice liability at all. American and French law tend to support the view that perpetrators and accomplices should be treated equivalently. German and Russian law incline to the view that accomplices should be punished less severely (pp. 188-89).

The question here is whether Fletcher’s dichotomy can help explain the practice in mediaeval Icelandic and Japanese law of applying criminal sanctions not just to the person who actually committed the offense but also to members of the perpetrator’s family. Put another way, does it make sense to speak of the perpetrator’s family members as “accomplices”? Or is some other dynamic at work?

At first glance, it seems obvious that family members per se cannot meet the requirement of complicity. Neither counseling, assisting, advising, nor soliciting is a prerequisite to liability. Their only crime, as it were, is that they happen to be related — a notion that strikes our modern, Western sensibilities as deeply unjust. On the other hand, under modern statutes, a parent can be held criminally liable for “improperly supervising,” or “contributing to the delinquency of,” a minor.<sup>57</sup> Perhaps, one might think, the theory that underlies Icelandic

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56. For criticism of the natural law argument, see, for example, RONALD DWORKIN, *LAW’S EMPIRE* 102 (1986).

57. See, e.g., LA. REV. STAT. §§ 14: 92, 92.2 (West 1990).

and Japanese familial liability is similar to the theory that presumably underlies such statutes — that family members have certain duties or responsibilities to each other and that failing to prevent such criminal activity is a culpable breach of that duty. Perhaps. But it seems obvious that there is a significant moral difference between imposing liability on a parent for the acts of a child and imposing liability on a child for the acts of a parent.

One is left with the impression that familial liability in mediaeval Iceland and Japan lay somewhere outside the perpetration/complicity dichotomy. One would, of course, want to know more about the circumstances under which mediaeval Icelandic and Japanese law imposed criminal penalties on otherwise non-complicitous family members. At a minimum, though, such liability is likely to put a strain on Fletcher's conceptual framework.

### 3. *The Punishment/Treatment Dichotomy, Malinowski's Trobriand Suicide, and the "Benevolent Paternalism" of Contemporary Japanese Criminal Justice*

In Chapter 2 of *Basic Concepts*, Fletcher seeks to formulate a universally applicable definition of "punishment" by contrasting that concept to the notion of "treatment." The term "treatment" he uses to refer to assertedly nonpunitive coercive measures such as civil commitment of the dangerously insane, deportation, disbarment, and impeachment and removal from office (p. 28). All of these measures, he says, are intended to "deprive an individual of the status that enables him or her to constitute a continuing social threat," rather than to "expiate or atone for" some crime (p. 29).

But it is punishment — the "institution [that] provides the distinguishing features of criminal law" — that is Fletcher's main focus. Here, Fletcher begins, as he did in *Rethinking*,<sup>58</sup> with H.L.A. Hart's famous positivistic account of punishment, consisting of five elements: (1) punishment must involve pain or other consequences normally considered unpleasant, (2) it must be for an offense against legal rules, (3) it must be of an actual or supposed offender for his offense, (4) it must be intentionally administered by human beings other than the offender, and (5) it must be imposed and administered by an authority constituted by a legal system against which the offense is committed.<sup>59</sup>

Fletcher then "de-positivises" Hart's definition by emphasizing the phrase "for his offense" in the third element, and focusing on the con-

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58. See FLETCHER, *RETHINKING*, *supra* note 1, at 409-12.

59. See H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, in H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 4-5 (1968).

ceptual link between the crime and the punishment. Punishment must be imposed *for* the criminal act. "Strictly speaking," Fletcher says,

deportation for a heinous criminal act is not imposed *for* the criminal act; it is carried out for the sake of protecting the public. Disbarment and removal from office exhibit the same ambiguity. These sanctions may be imposed *in response* to criminal behavior but they are carried out *for the sake of* protecting the public. [pp. 34-35]

So can Fletcher's theory account for the Trobriand Island and contemporary Japanese criminal law practices described above? Let us examine each system in turn. First, consider the Trobriand Islanders. How would Fletcher's theory deal with Malinowski's claim that the Trobriand islander who committed suicide after violating the tribe's incest taboo was applying a legally approved, apparently paradigmatic, penal sanction? Looking to Fletcher's rewriting of Hart's definition of punishment, we see that conditions 1 and 2 (that punishment involve pain or other unpleasant consequences and that it be *of* an actual offender, respectively) are obviously both satisfied. So too, it seems, is condition 3 (that it be *for* an offense against legal rules). But, inasmuch as the suicide fails to satisfy condition 4 (that the punishment be "intentionally administered by human beings *other than the offender*"), it clearly fails the Hart/Fletcher test.

Even more troublesome, though, is condition 5. Would the suicide meet the requirement that it "be imposed and administered by an authority constituted by a legal system against which the offense is committed"? Here we can see the potential difficulty of finding empirical evidence to confirm or disprove Fletcher's purportedly universal theory. Malinowski, for his part, regards the suicide as a paradigmatic function of Melanesian criminal justice. In Melanesian society, he says, suicide has a "distinct legal aspect."<sup>60</sup> Two methods of suicide are prescribed — *lo'u* (jumping off a palm tree) and *soka* (taking of poison from the gall bladder of a globe-fish). Festive dress and ornamentation are worn. The suicide in this case occurred "in the presence of a pronounced crime: the breach of totemic clan exogamy . . . , one of the corner-stones of totemism, mother-right, and the classificatory system of kinship."<sup>61</sup>

For Fletcher, then, the Trobriand suicide creates a dilemma analogous to the one we saw above in the discussion of animal prosecutions. Either the suicide is regarded as "treatment," or it falls outside the punishment/treatment dichotomy entirely.

60. MALINOWSKI, *supra* note 43, at 94.

61. *Id.* at 78-79. For a skeptical view of Malinowski's assessment, see HOEBEL, *supra* note 35, at 177-210 (criticizing Malinowski's methodology); Peter Sack, *Punishment in Melanesia and Kima'i's Suicide. Instead of a General Report*, in RECUEILS DE LA SOCIÉTÉ JEAN BODIN POUR L'HISTOIRE COMPARATIVE DES INSTITUTIONS (Vol. LVIII) — LA PEINE 421 (1991).

A similar, though subtler, problem occurs in the case of contemporary Japanese criminal justice. The Japanese system is striking for the way in which it departs from our traditional Western notions of criminal justice. Rather than focus on either retribution or deterrence, the Japanese system emphasizes rehabilitation and reintegration. Can Fletcher's theory account for it?

Perhaps it can, but only with difficulty. On the one hand, the Japanese ideal seems far from the civil commitment, deportation, disbarment and impeachment of the "treatment" model. Whereas each of these processes is intended to *separate* the offender from society, the Japanese model is intended to do just the opposite — namely, to bring the offender back in. On the other hand, it is also probably wrong to speak of the Japanese ideal as involving "punishment." Although the Japanese model does satisfy conditions 2-5 of the Hart/Fletcher test, it has difficulty satisfying condition 1 — that it "involve pain or other consequences normally considered unpleasant" — i.e., that it be punitive.<sup>62</sup> Like the Trobriand suicide, then, the modern Japanese system of criminal justice seems to pose a serious challenge to Fletcher's universal theory.

#### 4. *The Crime/Offender Dichotomy and Chinese Imperial Law*

Among the numerous puzzling issues raised by Chinese imperial criminal law is the harsh treatment meted out for what we would regard as relatively minor acts of disobedience. A person who failed to show the proper filial piety or fulfill various mourning rites was subject to severe penalties. In light of modern criminal law, these practices seem aberrant. Once again we need to ask: To what extent can Fletcher's theory account for them?

One approach to this puzzle can be found in Chapter 5 of *Basic Concepts*, which offers two sets of pertinent distinctions (both of which will be familiar to readers of *Rethinking*<sup>63</sup>). The first is between crime and offender. The term "crime" refers to an offense in the abstract. The term "offender" refers to an actual person who has committed a crime. The second distinction refers to two different ways in which a criminal act can be wrong — either through wrongdoing or wrongfulness. Wrongdoing involves the violation of a victim's interest. ("Stabbing, poisoning, stealing, robbing, [and] breaking in all involve wrongdoing" (p. 78)). Wrongfulness involves the violation of a legal rule. (Homicide and theft involve wrongfulness (*Id.*)). As the crimi-

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62. I say difficult, rather than impossible, because even the Japanese system will be viewed by some defendants as punitive. Although "benevolent" and "paternalistic," the Japanese system nevertheless entails both an intrusion on defendants' autonomy and some degree of stigma. Thus, it is not correct to say that it is entirely non-punitive.

63. See FLETCHER, *RETHINKING*, *supra* note 1, at 455-59.

nal law has become increasingly a product of legislation (rather than judicial decisionmaking), Fletcher contends, its moral content has tended to shift from wrongdoing to wrongfulness. The purpose of punishing offenders, he says, "is rarely seen as an effort to restore the moral order of the universe. The primary purpose is to defend the authority of the state" (p. 80).

So how should one characterize the moral content of Chinese imperial offenses such as failing to show proper filial piety and observe mourning rites? Having written previously about the significance of defiance as an element of moral content in the criminal law, I am sympathetic to Fletcher's distinction between wrongdoing and wrongfulness.<sup>64</sup> Nevertheless, it seems to me that Fletcher's moral matrix is still too simplistic to account for criminal offenses of this sort. In Chinese society, of course, lack of filial piety and failure to fulfill mourning rights did involve violations of a legal rule. But they also involved more. In addition to the two kinds of moral content Fletcher identifies — violations of a particular victim's interests and violations of a legal rule — we need also to consider harm to society's institutions and violation of moral (as opposed to legal) norms.<sup>65</sup> Although moral content of these sorts is often associated with the understandably controversial criminalization of "morals offenses" (such as gambling, adultery, and prostitution), it is also essential to uncontroversial criminal offenses such as contempt, perjury, and obstruction of justice. Here, in the context of lack of filial piety and failure to fulfill mourning rites, it is precisely these two forms of moral content that would appear to be present.

Fletcher's failure to offer a sufficiently broad account of moral content also explains why his claim regarding the historical shift from wrongdoing to wrongfulness is faulty. As we have seen, the history of mediaeval Chinese law exemplifies a pattern of development that is precisely the converse of Fletcher's claim (i.e., a shift from wrongfulness to wrongdoing, rather than the other way around). A longer and wider comparative law perspective helps to show why the historical trends are actually more complicated than implied by Fletcher's account.

#### CONCLUSION: "RETHINKING" *BASIC CONCEPTS*

Criticizing George Fletcher for being insufficiently comparativist is a bit like denigrating the Pope for being insufficiently Catholic. It has not been my intention to do so here. Rather, I have sought to go beyond the contemporary Anglo-American and European context in

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64. See Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533 (1997).

65. See *id.* (discussing both kinds of moral content).

which Fletcher often works masterfully, in order to test the specifically *universal* and *timeless* claims of his theory.

Fletcher himself has recognized the need for such expanded analysis. In the coming years, one can look forward to foreign editions of *Basic Concepts* augmented by local criminal law materials. (It is unclear, though, whether any non-Western systems will be included.) In the meantime, we can begin to assess the validity of Fletcher's claims through an admittedly piecemeal and preliminary process of analysis.

The results of that initial assessment, I believe, are mixed. A brief and anecdotal look at selected historical practices in Japan, Iceland, China, Melanesia and elsewhere reveals a bewilderingly complex range of conduct involving what we would recognize as criminal law: animals and inanimate objects subject to prosecution and punishment, suicide serving as a recognized criminal sanction, radically divergent ideas about the purpose of criminal justice, non-complicit family members being held liable for criminal acts of a related perpetrator, and severe sanctions imposed for relatively minor acts of disobedience.

One is left, I hope, with a sense of how varied criminal law practices can be, and how difficult it is to construct a universal theory. The reader cannot help but be impressed by what Fletcher has achieved. Although Fletcher's claims to universality sometimes overreach, his dichotomy theory is rich enough to provide the tools for analyzing many of the examined anomalies. As the project to publish *Basic Concepts* in various foreign editions takes shape, this richness should become increasingly evident.

# THE TYRANNY OF MONEY

*Edward J. McCaffery\**

LUXURY FEVER: WHY MONEY FAILS TO SATISFY IN AN ERA OF EXCESS. By *Robert H. Frank*. New York: The Free Press. 1999. Pp. ix, 326. \$25.

With the greater part of rich people, the chief enjoyment of riches consists in the parade of riches, which in their eye is never so complete as when they appear to possess those decisive marks of opulence which nobody can possess but themselves.

—Adam Smith, *The Wealth of Nations*, 1776

Great wealth cannot still hunger, but rather occasions more dearth; for where rich people are, there things are always dear. Moreover, money makes no man merry, but much rather pensive and full of sorrow.

—Martin Luther, *Table Talk*, LXXXII, 1569

Probably the greatest harm done by vast wealth is the harm that we of moderate means do ourselves when we let the vices of envy and hatred enter deep into our own natures.

—Theodore Roosevelt, *Speech in Providence, Rhode Island*, August 23, 1902

## I. INTRODUCTION

The more things change, the more they stay the same.

A human activity almost as venerable as the accumulation and opulent display of vast riches is the condemnation of the accumulation and opulent display of vast riches. People have been busily engaged at each for several millennia now. Both continue in full flower as America races into the twenty-first century with its liberal capitalist democracy ascendant around the world, its rich richer than ever, its less-rich curiously lagging behind.<sup>1</sup> Yet figuring out what, exactly, is

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1. For just some of the recent books on point, see ROBERT E. GOODIN ET AL., *THE REAL WORLDS OF WELFARE CAPITALISM* (1999); FRANK LEVY, *THE NEW DOLLARS AND DREAMS* (1998); EDWARD WOLFF, *TOP HEAVY: THE INCREASING INEQUALITY OF WEALTH IN AMERICA, AND WHAT CAN BE DONE ABOUT IT* (rev. ed. 1996).



wrong with the excessive accumulation and opulent display of wealth, on the one hand, and then deciding what if anything to do about it, on the other, have been among the most troubling issues of social theory and political economy — far harder to pin down than the intuitive sense that something is, indeed, wrong.

In his interesting, important, thoughtful, if sometimes wandering, repetitive, and maddening recent book, *Luxury Fever*, the psychologically-minded economist Robert Frank of Cornell University — coauthor, with Philip J. Cook, of the related *Winner Take All Society*,<sup>2</sup> another widely accessible and important book — ventures into this familiar domain. Part economics, part social psychology, part autobiography, part cognitive psychology or behavioral economics, part game theory, part evolutionary biology, part tax policy, and part a journalistic foray into the lifestyles of the rich and famous in fin-de-siècle America, *Luxury Fever* offers up both a view of the social problems presented by luxurious living and a specific type of solution to them. In short, Frank argues that much of our spending results from a desire for relative status, leading us to want “positional goods”; since everyone else does likewise, we end up treading water with no improvement in our subjective well-being or utility. We would all be better off if we hopped off the treadmill and directed our limited resources to nonpositional goods, including more savings, leisure, and education, whose benefits endure. Frank argues that a progressive consumption tax can help us all to escape in a “win-win” way from the collective action problem of luxury fever. His description and prescription each deserve to be thought through and taken seriously. *Luxury Fever* is a good, important book.

I happen to agree with much of what Frank has to say about both the nature of the disease and its remedy, curiously enough involving tax policy.<sup>3</sup> Where I am skeptical is at the level of the whys — the precise connection between sickness and cure. It strikes me that Frank plays too fast and loose here, and that it somehow matters, a point on which Frank himself would agree (“ideas matter,” he writes) (p. 267). It strikes me, in fact, that what is omitted from Frank’s style of analysis is, in the end, more important than what is included.

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2. ROBERT H. FRANK & PHILIP J. COOK, *THE WINNER TAKE ALL SOCIETY: WHY THE FEW AT THE TOP GET SO MUCH MORE THAN THE REST OF US* (1995).

3. For some of my own work on point, see Edward J. McCaffery, *The Missing Links in Tax Reform*, 2 CHAPMAN L. REV. 233, 246 (1999) [hereinafter McCaffery, *Missing Links*]; Edward J. McCaffery, *The Political Liberal Case Against the Estate Tax*, 23 PHIL. & PUB. AFF. 281 (1994) [hereinafter McCaffery, *Political Liberal Case*]; Edward J. McCaffery, *Real Tax Reform: The Case for a Progressive Consumption Tax*, BOSTON REV., Dec. 1999/Jan. 2000, at 46 [hereinafter McCaffery, *Real Tax Reform*]; Edward J. McCaffery, *Tax Policy Under a Hybrid Income-Consumption Tax*, 70 TEXAS L. REV. 1145 (1992) [hereinafter McCaffery, *Hybrid*]; Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283 (1994) [hereinafter McCaffery, *Uneasy Case*].

But let us back up and begin where Frank himself does — with a portrait of the nation as an ailing patient.

## II. SICKNESS

Look around, and something indeed seems wrong in contemporary America.

The beginning parts of *Luxury Fever* set out the problem in sometimes gory detail — our rich are richer than ever, and boy are they flaunting it. As is perhaps to be expected, we learn about the author himself indirectly — and sometimes quite directly — through his choice of examples. Watches, household appliances (especially gas grills), wines, fancy cars (more on these anon), and houses — mansions, really — are the recurring motifs. In each case, the thing is bigger, better, or faster — and always more expensive — than ever before.

My personal favorite example — the one I have been telling friends and students about — is the Patek Phillipe watch that sold out its limited run of four for a minimum of 2.7 million dollars per watch (p. 16). This, I suppose, is the item on the book's jacket cover. Since you might as well learn about me through reading this Review, I can honestly say that I had never heard of Patek Phillipe until I read Frank's book, although I live in the shadows of Beverly Hills. I also take a perhaps perverse pride — more on this anon, too — in never having spent more than \$20 on a watch. Truth be told, when my \$19.95 Casio runs out, I often don't bother to replace its battery, which costs \$5.00, because it's easier just to get a new watch. Perhaps this decadent impatience means I have a luxury head cold.

Returning to the more general malady, what exactly the root cause of luxury fever is, or what exactly the best description of it might be, varies a bit in Frank's text. But the symptoms are clear enough. We are spending too much, on too frivolous things, and accordingly — by the zero sum logic that pervades most of the book — we are spending too little on good things, such as providing public goods and capital for our personal and collective present and futures. We are wasting our time and money on positional goods rather than on gains that endure.

Now as at least in part an economist (I have a master's degree in the dismal science), I am obliged to point out that even wasteful, conspicuous consumption need not be a zero sum game. Perhaps the ability to engage in luxurious spending is an important inducement to greater productive activity in the first place. If the wealthy preeners noticed by Adam Smith in the opening epigraph worked harder than they otherwise would in order to be able to strut their stuff in public, then the celebrated social pie would be larger on account of their perhaps perverse motivation and the socially granted opportunity to sate it. But much of Frank's analysis is static or partial equilibrium in the

economist's sense.<sup>4</sup> In particular, Frank gives short shrift to the idea that productivity might decrease under his ideal solution — a steeply progressive consumption tax.

On this as on other points, I am certain that many, probably most, professional economists will find Frank a better journalist or psychologist than an economist, although he is indeed the latter. Much of *Luxury Fever* reads like an amplification of various possible market failures: externalities and public goods, primarily, but also signaling in the presence of asymmetric information, and so on. Frank, as he does in all of his work,<sup>5</sup> enriches this standard *homo economicus* analysis with some sense of “homo realisticus” (p. 248), namely that imperfectly rational creature who suffers from various cognitive heuristics and biases, as chronicled by behavioral economists and decision theorists such as Daniel Kahneman, Amos Tversky, and Richard Thaler. But when it comes to pure economics analysis, Frank is often defensive (worrying about or dismissing what the “free marketeers,” “libertarians,” or the “perfectly rational” crowd might think) on the one hand, and imprecise on the other. It's all well and good to go beyond the narrow, rational actor model, of course, but cognitive decision theory — for all of its powerful insights — is notoriously unsystematic and underdeterminative. Granted that we mere mortals overreact to some things and underreact to others, but how can we tell which is what?<sup>6</sup> I doubt that Frank will assuage critics looking for any precise and predictive model behind his polished popular prose.

To illustrate, Frank somewhat curiously calls the specific idea that individuals will respond to incentives in the form of high tax rates on consumption by working less “trickle down economics” (p. 226, *passim*). But the idea that people respond to incentives is quite general in all rational choice social theory, as Frank elsewhere acknowledges (p. 228). The economist James Mirrlees, for example, received a Nobel Prize in large part for his work on optimal taxation. Mirrlees's analy-

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4. Frank does note in passing that: “Chaos theorists speak fancifully about how a butterfly's wings flapping in China might set off a chain of events that culminates in a hurricane in the Caribbean,” p. 222, and many of the economists he cites are indeed using general equilibrium models. No such model, however, seems to lie too close to the surface in the text.

5. In addition to *Luxury Fever*, see FRANK & COOK, *supra* note 2, as well as ROBERT H. FRANK, CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS (1985), and ROBERT H. FRANK, PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS (1988).

6. This is a point I have tried to make in my own work. Another connection I have with Frank is my own interest in cognitive psychology, which includes a project coauthored with Kahneman. See Edward J. McCaffery et al., *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 VA. L. REV. 1341 (1995) (with Daniel J. Kahneman and Matthew L. Spitzer); Edward J. McCaffery, *Cognitive Theory and Tax*, 41 UCLA L. REV. 1861 (1994); Edward J. McCaffery, *Why People Play Lotteries and Why it Matters*, 1994 WIS. L. REV. 71. For other treatments merging law and cognitive psychology, see generally BEHAVIORAL LAW AND ECONOMICS (Cass Sunstein ed., 2000).

sis falls far short of the pejorative lay idea of “trickle down” economics, and ends up pointing towards declining tax rates on upper-income earners, even and maybe especially in the name of progressivity or redistribution.<sup>7</sup>

Frank’s arguments against “trickle down” theorists, moreover, are inconsistent. He argues that we will not respond to an economic incentive against luxurious living by working any less (Chapter Fifteen), and thus that we will save more (pp. 233-35), but if we do work less, this will be good, too, because it is good for us to work less and spend more time relaxing and with our families (pp. 241-42, *passim*) — leisure being a classic nonpositional good. Frank does not close the loop by explaining how, if we all respond to a “steeply progressive” consumption tax by spending more time with our families, we would still get the “trillions of dollars” in benefits from more savings (p. 250, *passim*), except possibly for stating in passing that we should count the value of leisure time in the national income accounts (p. 242), as if this, alone, would help buy brick and mortar for public goods.

It is also unclear what the exact psychological mechanism behind luxury fever is. Frank generally writes as if we are all the same, governed by inexorable laws of nature or the relentless pursuit of self-interest, narrowly defined. But we are not all the same. Why do some of us have the fever and others not? And if all or even many of us are *inevitably* inclined towards conspicuous consumption, why would such people ever save anything at all? Those concerned with only their relative status might work even harder under a steeply progressive consumption tax, still spend every penny they get, and all that would result is more stress and possibly more tax dollars — which may be a good thing but it is not going to cure anyone’s fever. (It’s also not the kind of “simple and painless” “win-win” solution that Frank has in mind, as I consider in Part IV.) This is the maddening part of Frank’s book — he sometimes wanders, makes debaters’ points (“simply” seems to be his favorite word, as in “there is simply no reason . . .”), and generally oversells his conclusions. To a man with a hammer, everything looks like a nail. Any reader of *Luxury Fever* will sense early on that Frank’s view of human nature — as inexorably inclining us, absent some collective coordination device, toward destructive conspicuous consumptive competition — is a hammer indeed.

In any event, Frank finds that we work too hard, stress out too much, and seem to be no happier than if we did not do these things (Chapter Five). Our savings rate is dangerously low (Chapter Seven)

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7. See J.A. Mirrlees, *An Exploration of the Theory of Optimum Income Taxation*, 38 REV. ECON. STUD. 175 (1971); see also A.B. ATKINSON, PUBLIC ECONOMICS IN ACTION: THE BASIC INCOME/FLAT TAX PROPOSAL (1995). For a helpful explanation of the optimal tax literature and an application to progressive income taxation, see Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905 (1987).

— it has actually fallen precipitously since Frank, using data from the mid 1990s, sounded the alarm, although it is notoriously hard to measure.<sup>8</sup> Our spending on public goods of all sorts is also dangerously low (Chapter Four); our schools, public health system, water, environment, inner cities, and infrastructure are all woefully underfunded. If we could just shift from the rat-race treadmill of “conspicuous consumption” to more important “inconspicuous” consumption (pp. 90-92, *passim*) — more free time, more savings, more spending on public goods — we would all be better off, probably in the increasingly familiar magnitude of “trillions of dollars.”

So something is indeed wrong. We are addicted to the high life, irresistibly tempted to keep up with (or, better, to better) the Joneses, for the quite precise reason that our relative status matters. This may have something to do with our hard wiring — a law of the jungle thing. Frank discusses evidence from evolutionary biologists about the collectively foolish behavior of peacocks (their feathers are too big) or elk (antlers, this time) (pp. 149-51). Or it may be done for perfectly rational, cognitive, and instrumental reasons — a “signaling” thing. Frank discusses the need (?) of job interviewees to have the best suits (pp. 139-40), and, far less persuasively, of CEOs to have the biggest mansions. “In the current environment, Bill Gates needs a \$100 million estate to signal that he is the captain among captains of industry” (p. 160). Later, “[a]n American CEO needs a 15,000 square-foot mansion only because others of his station in life have houses that large” (p. 217). Apparently, size really does matter.

Presumably, my cheap watch aids me as an academic, as in signaling to my dean that I could use a raise, although it is worth noting that Thorstein Veblen, whom we shall revisit below, thought that the scholarly class was *most* likely to over-extend itself in conspicuous consumption, in an attempt to keep up with the wealthier classes with whom academics inevitably mingle.<sup>9</sup> But Veblen was a notorious grouch, and maybe I am just an obtuse academic. In any event, Frank thinks that we end up doing things that are “smart” (or at least really difficult to resist) “for one, but dumb for all” (Chapter Ten).

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8. See, e.g., Daniel Larkins, *Note on the Personal Savings Rate*, 79 SURV. CURRENT BUS., Feb. 1999, at 8.

9. See THORSTEIN VEBLÉN, *THE THEORY OF THE LEISURE CLASS* 113-14 (B.W. Huebsch ed., 1924):

In any modern community where there is no priestly monopoly of these [scholarly] occupations, the people of scholarly pursuits are unavoidably thrown into contact with classes that are pecuniarily their superiors. The high standard of pecuniary decency in force among these superior classes is transfused among the scholarly classes with but little mitigation of its rigour; and as a consequence there is no class of the community that spends a larger proportion of its substance in conspicuous waste than these.

## III. PRESCRIPTION

Having set out the problem, Frank poses a solution that will seem alien to many readers but is quite close to my own heart and work — use the tax system. Frank argues for a progressive consumption tax, a fairly old idea in the academic literature. Frank credits Hobbes, Hume, and others with the idea (pp. 212, 223). The more specific idea of a “cash flow” expenditure or progressive consumption tax was perhaps best developed by the eminent British economist Nicolas Kaldor (he of Kaldor-Hicks fame) in a 1955 text, although Kaldor himself was never all that clear on the moral and political bases of the idea.<sup>10</sup> In this country, the Harvard Law professor William Andrews, one of my teachers, most famously developed the idea in the legal literature in the early 1970s.<sup>11</sup> It was picked up in an influential Treasury Department study authored by David Bradford and others in the late 1970s, and became the intellectual underpinning for the Nunn-Domenici USA (“unlimited savings accounts”) tax plan, put forward in Congress in the 1990s.<sup>12</sup>

A progressive cash flow consumption tax is a wonderfully simple idea. To understand it, start with the Haig-Simons definition of income, which holds, in simplified form, that Income equals Consumption plus Savings ( $I = C + S$ ).<sup>13</sup> This tells us no more and no less than that sources equal uses or, even more basically, that all wealth is either spent (C) or not (S). By rearranging the simple identity, we get the key insight of a cash flow consumption tax:

$$C = I - S$$

That is, Consumption equals Income minus Savings. Add up your income, as we do each year on our dreaded 1040 forms, then subtract your savings, and you are left with consumption — you spent that which you made but did not save. To this base it is a simple matter — as simple as in the case of an income tax — to apply progressive marginal rates.

Frank sees a progressive consumption tax as a solution to the collective action problem posed by luxury fever. This is consistent with

10. See NICHOLAS KALDOR, *AN EXPENDITURE TAX* (1955); see also Nicholas Kaldor, *Comments to William D. Andrews, A Supplemental Personal Expenditure Tax*, in *WHAT SHOULD BE TAXED, INCOME OR EXPENDITURE?*, at 151 (Joseph A. Pechman ed., 1980).

11. See William D. Andrews, *A Consumption-Type or Case Flow Personal Income Tax*, 87 HARV. L. REV. 1113 (1974) [hereinafter Andrews, *Personal Income Tax*]; William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309 (1972) [hereinafter Andrews, *Deductions*].

12. See LAURENCE S. SEIDMAN, *THE USA TAX* (1997); see also DAVID F. BRADFORD & U.S. TREASURY TAX POLICY STAFF, *BLUEPRINTS FOR BASIC TAX REFORM* (1st ed. 1977).

13. See McCaffery, *Hybrid*, *supra* note 3, at 1149.

either the view that excessive consumption is an arms-race type problem (everybody is in a mad and counterproductive race to be the brightest peacock) or with the idea, not necessarily connected, that consumption decisions are interdependent (one person's choices affect others), and thus that there are classic externalities involved. In either case unilateral actions — “self help,” as Frank calls them (Chapter Twelve) — are limited or altogether unavailing.

While traditional economists at least since Thomas Schelling have understood the game theoretic structure of arms race problems,<sup>14</sup> they are reluctant to invoke interdependent preferences, because these destroy the firm conclusions of general equilibrium theory.<sup>15</sup> This is akin to the need for welfare economics or rational choice theory to rule out envy, for otherwise Paretian norms are unavailing.<sup>16</sup> Frank's point about the interconnectedness of preferences and feelings of self-worth (language he does not use) is an important and valuable one to stress. It provides an argument for consumption taxation not widely emphasized in the mainly economics literature arguing for such a tax. It also resonates with the social contractarian thought of Rawls, sounding in the interconnectedness of individuals in a well ordered society and, importantly, with the primary good of the “social bases of self-respect.”<sup>17</sup> This is not, however, Frank's lingua franca, as we shall see.

In recommending some form of consumption tax, Frank is clearly in step with the times.<sup>18</sup> But Frank also favors — and here he is clearly out of step with the times — “a *steeply progressive* consumption tax,” a phrase he repeats many times over. Just how steep? Frank states that the USA Tax, which had rates ranging up to 40%, was not steep enough (p. 225). In a perhaps significant glitch, in the one place he sets out a specific rate structure (p. 213), he produces a chart of “tax rates on taxable consumption” that stops at a 70% marginal rate for consumption between \$500,000 and \$999,999. But this wouldn't even cover a single Patek Phillipe watch purchase. Bill Gates, with his

14. See generally THOMAS C. SCHELLING, *ARMS AND INFLUENCE* (1966); THOMAS C. SCHELLING, *STRATEGY OF CONFLICT* (1960).

15. See ROBIN W. BOADWAY & NEIL BRUCE, *WELFARE ECONOMICS* 113 (1984) (“The first theorem of welfare economics will generally fail in the presence of jointness of consumption”); Martin Shubik, *Pecuniary Externalities: A Game Theoretic Analysis*, 61 *AM. ECON. REV.* 713 (1971).

16. See, e.g., Y. NG, *WELFARE ECONOMICS* 31-32 (1980); Geoffrey Brennan, *Pareto Desirable Redistribution: The Case of Malice and Envy*, 2 *J. PUB. ECON.* 173 (1973); Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 *YALE L.J.* 1211, 1216-18 (1991); Lawrence G. Sager, *Pareto Superiority, Consent, and Justice*, 8 *HOFSTRA L. REV.* 913, 917-18 (1980).

17. JOHN RAWLS, *POLITICAL LIBERALISM* (1993) [hereinafter RAWLS, *POLITICAL LIBERALISM*]; JOHN RAWLS, *A THEORY OF JUSTICE* (1971) [hereinafter RAWLS, *A THEORY OF JUSTICE*].

18. See, e.g., McCaffery, *Missing Links*, *supra* note 3; McCaffery, *Real Tax Reform*, *supra* note 3.

45,000 square foot mansion, surely spends more than one million dollars a year — he has to, to show that he is the “captain among captains of industry.” Just how high would Frank’s rates go?

There is not a lot of detail in Frank’s discussion of taxes. This might be just as well, given the public’s distaste for reading anything about taxes other than how to avoid them or why they are evil. And Frank has certainly written a widely accessible book, for which he deserves a great deal of credit. But one omission is particularly unfortunate. Frank does not mention the tax treatment of debt, except in passing to say that borrowing is a transition issue (p. 224). But a post-paid consumption or expenditure tax must include debt in its base or the game is over.

The reason is simple enough to see. If we allow people a deduction for savings, as a cash-flow consumption tax such as Frank proposes would do, but then do not pick up borrowing within the tax base, people can save on the one hand and borrow with the other. The result is lots of consumption, no net savings — and no tax. This situation obtains today because of the numerous exceptions for the present taxation of savings under the so-called income tax. Chief among these is the realization requirement, which holds that no tax falls due until the ultimate sale or other disposition of an appreciating asset.<sup>19</sup> When the value of Bill Gates’s Microsoft stock increased from \$50 to \$100 billion dollars in a recent year, for example, Gates paid no tax on that “mere appreciation.” If Gates were to borrow against that appreciation — presumably he can get pretty good credit card interest rates — and consume away, he would still pay no tax. If he dies with both appreciated assets and significant debt, his heirs can sell off the stock, pay off the debt — and pay no tax.<sup>20</sup> Such is the tax system our great capitalist democracy has given itself.

It may still sound odd to include borrowing in the tax base. But recall that there will be a deduction for savings,  $C = I - S$ , so borrowing that leads to savings will trigger both an inclusion (as  $I$ ) and a deduction (as  $S$ ), and thereby cancel out. On the other hand, borrowing to finance present consumption will generate tax. This is what we should want under a tax system that effects its levies on the basis of “private preclusive use,” as Andrews phrased the matter.<sup>21</sup> It works just like a sales tax — you pay sales tax, without any question, when you buy goods using a credit card. Frank’s proposal is, in essence, for a pro-

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19. Andrews refers to *Eisner v. Macomber*, 252 U.S. 189 (1920), as the Achilles’ heel of the tax system. See Andrews, *Personal Income Tax*, *supra* note 11, at 1129-30; see also McCaffery, *Real Tax Reform*, *supra* note 3.

20. See I.R.C. §1014 (1994) (stepped-up basis for assets acquired from a decedent).

21. See Andrews, *Personal Income Tax*, *supra* note 11, at 1155-57.



gressive national sales tax, as I have independently called the idea in my own work.<sup>22</sup>

There is a lot to be said for such a consistent, progressive consumption tax. One very large problem with the current tax system is its incoherent and unprincipled blending of consumption and income tax elements, which leads to the arbitrage operation I described above. We save without paying tax under a consumption tax model (as within tax-favored pension plans or IRAs, or via the realization requirement); then we borrow and spend away under the income tax model, which does not tax debt. This means that there can be consumption without taxation — that the way things are is upside down compared to where Frank, myself, and others would put them. This also means that a consistent consumption tax will have a very important base-broadening effect, one that commentators on tax policy typically ignore. While the systematic deduction for savings will shrink the tax's base, the systematic inclusion of debt-financed consumption will *increase* it. Combined with the fact that we need have no preferential rates for capital gains under a consistent cash flow consumption tax, it is far from clear that a “revenue neutral” conversion to a consumption tax will mean any increase in the rate structure at all. I'll come back to this idea later.

A final and related point that Frank, not a public finance or tax theorist, fails to stress is how close the current system already is to a consumption tax.<sup>23</sup> Perhaps this is because Frank wants to emphasize, at least at times, the “radical” aspect of his proposal (p. 223, *passim*). To be fair, Frank's proposal *is* radical in today's political climate. But its radicalism relates to the nature of Frank's arguments for it, and, more so, to its rate structure. As a matter of the tax base — of the “what” of taxation, as opposed to the “how much” — we already largely have a consumption tax. Since all income is either consumed or saved, and we do not tax much savings as is, we are mostly taxing spending: the luxuries that Frank describes are already being purchased with after-tax dollars. The two major differences between the status quo and Frank's proposal would be higher tax rates and, again ideally, the inclusion of debt-financed consumption.

A powerful argument for moving all the way towards a consumption tax is that life in the middle is precarious.<sup>24</sup> The USA Tax plan, for example, which did not feature “steeply” progressive rates, was *not* a terribly radical idea: in a nutshell, you can get there by “simply” repealing the limits on tax-deductible IRA contributions (although you must then include borrowing as income, as the USA plan tragically did

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22. See, e.g., McCaffery, *Missing Links*, *supra* note 3, at 250-51.

23. See, e.g., McCaffery, *Hybrid*, *supra* note 3, at 1152-55.

24. See generally *id.*; see also McCaffery, *Real Tax Reform*, *supra* note 3, at 47.

not).<sup>25</sup> Frank may be doing a disservice to the public political culture, not well versed in tax policy by any means, by confusing the base and rate issues, and making a consumption tax, per se, appear to be a radical idea. But he is surely to be commended for adding to and broadening the popular understanding of a very important public policy proposal.

#### IV. DIAGNOSIS

Something is wrong with our wealthiest citizens flaunting the luxurious life, and all or at least many of us following in their shadows. The tax system can be part of the solution to this thing. So far, so good. But what, exactly, is it that's wrong? Consider four possibilities:

1. Luxury fever is immediately irrational or self-harming, in that it does not even bring pleasure to the individual patient, so to speak; it has the structure of an addiction. Moralists like Luther, in the opening epigraph, clearly held this sentiment. If true, curbing the fever is in everyone's interest, and so the solution is, in welfarist terms, strictly Pareto superior. In the language of modern welfare theory, this is a subjective, ordinal, but paternalistic argument.
2. Luxury fever is individually rational in isolation, but irrational in the aggregate — it is “smart for one, dumb for all,” as Frank repeatedly (but not consistently) puts it; the disease thus has the structure of a prisoner's dilemma or arms race type problem. This is because status — which matters, according to Frank, for a variety of instrumental and material reasons, including health (pp. 140-45) — is a relative construct, leading us to crave positional goods. Everyone wants the fastest car or the most expensive watch, just because it is the fastest or the most expensive. But the social race to obtain the fastest and the most expensive positional goods is collectively foolish. Curbing the fever is a matter of devising the correct collective coordination device that will again be, in welfarist terms, Pareto superior. This is classic subjective, ordinal welfarism without paternalism.
3. Luxury fever can be enduringly rational on the individual level — it really is good to be king — but is bad for the collective because the losers' pain is worse than the winners' gains, and the whole game leads to a loss in aggregate welfare. A collective action solution that in part redistributes wealth is to be preferred. But this can no longer be on Paretian grounds, as there

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25. See SEIDMAN, *supra* note 12, at 31-32.

are now “losers” in the realignment. It must rest rather on straight utilitarian (or “Kaldor-Hicks”) grounds, looking to “the greater net balance of social well-being,” as Rawls would put it.<sup>26</sup> This is subjective *cardinal* welfarism, a strand of theory currently very much in vogue in the legal academy.<sup>27</sup>

4. Luxury fever is, well, just plain *wrong*, quite apart from (though not indifferent to) its consequential effects. This is as a matter of basic social justice and fairness, in the spirit of Kant or Rawls. Such a social contractarian theory makes reference to objective social values and our moral obligations to others. It steps outside subjectivism alone.

Frank does not clearly separate the first three arguments. But he is decisively, and consistently, in *one* of them. He is, in other words, a thoroughgoing, subjective welfarist. It is Frank’s clear desire to press the second argument, though he sometimes slips into the third — where I believe the argument better rests. But to my sensibilities, the most glaring omission in Frank’s analysis is that he never approaches the fourth argument — the broader one incorporating objective moral reasoning.

As best I can tell, the word “moral” appears only twice in *Luxury Fever* (words such as “duty,” “obligation,” “justice,” and “fairness” or their cognates fare no better; “fairness,” for example, is discussed only briefly, referring to empirical studies assessing the effect of the perception of fairness, not fairness itself, on individual behavior (p. 116)). Frank first uses “moral” when he explains his general approach in the book:

This diagnosis of why our current spending patterns are problematic suggests the possibility, at least in principle, of reducing the speed of the consumption treadmill, thereby freeing up resources that can be put to various uses that would make more of a difference in our lives. For now, I will say only that this can be accomplished in a simple and painless way. *My case for change is purely pragmatic, one based on self-interest alone.* It rests not on the social critic’s claim that luxury consumption is self-indulgent or decadent, but rather on detailed and persuasive scientific evidence that if we adopt a simple change in the incentives we face, all of us can expect to live longer, healthier, and more satisfying lives.

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26. John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 532 (1980).

27. See, e.g., RICHARD POSNER, AN ECONOMIC ANALYSIS OF LAW 1998; RICHARD POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY (1999) [hereinafter POSNER, PROBLEMATICS]; Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1984) [hereinafter Kaplow & Shavell, *Redistributing Income*]; Louis Kaplow & Steven Shavell, *Principles of Fairness Versus Human Welfare: On the Evaluation of Legal Policy*, Discussion Paper No. 277, Harvard Law School (Mar. 2000) <[http://www.law.harvard.edu/programs/olin\\_center](http://www.law.harvard.edu/programs/olin_center)>.

Yet it would be a mistake not to acknowledge that the case for changing our current consumption patterns entails a moral dimension as well. . . . [p. 11-12; emphasis added]

One page later, however, Frank is backing off the “moral dimension,” reiterating that his “aim is not to scold but to describe a striking set of possibilities” (p. 13). With that, he is off, down a road that explores the first three arguments, largely the second — trying to find a “simple and painless” way to help “all of us” to “live longer, healthier, and more satisfying lives.” This culminates in a systemic solution that can enable “luxury without apology” (Chapter Fourteen).

Now who, perchance, can argue with *that*? Frank indeed comments on why his “simple and painless” and Paretian solution has not already happened;<sup>28</sup> basically, he blames cognitive misunderstanding and a bad political system (pp. 224-26). But for these problems, we could arrive at the promised land of steeply progressive consumption taxation, apparently without any “moral dimension” to the argument at all.

So Frank leaves himself with some kind of subjective welfarist argument, and he moves around, rather uneasily, among the three basic possibilities. Early in *Luxury Fever*, Frank seems to be saying the first — people work hard to obtain rather silly things, and it certainly seems as if they would be happier if they could just jump off the treadmill. Frank does not push this line of inquiry, although it does recur. It is clearly not his major point; he backs off from it in the middle chapters, where he is more often somewhere between the second and third arguments.

Ironically, though, there is something to be said for this first point, even in the nonconsequentialist terms I mean to press. Maybe too much luxury *is* a bad thing, and a manifestation of this is that at least the otherwise moral person who engages in excessive luxury for whatever reason is left to feel pangs of guilt on this account. Luther thought that “money makes no man merry, but rather pensive and full of sorrow.”<sup>29</sup> Garry Wills describes Thomas Jefferson, perhaps America’s first great excessive consumer, as also being conflicted about his own possibly tragic lack of thrift.<sup>30</sup> Roberto Unger, a leading advocate of restoring a richer, normative vision of human nature to legal scholarship, argues that luxurious living alienates man from his own true nature and his fellow man.<sup>31</sup> The fabulous scale of human

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28. Compare Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J 1211 (1991).

29. See opening epigraph: MARTIN LUTHER, TABLE TALK 82 or LXXXII (William Hazlitt trans., Fount Paperbacks 1995) (1569) (posthumous).

30. Garry Wills, *Storm over Jefferson*, N.Y. REVIEW OF BOOKS, Mar. 23, 2000, at 1618.

31. See ROBERTO MANGABEIRA UNGER, PASSION: AN ESSAY ON PERSONALITY (1984).

wealth today certainly allows our best dressed peacocks to far outstrip the rest of the flock in a way inconceivable to other species; one really can end up all dressed up with nowhere to go, as the archetypal Kane learned too late for his own subjective well being.

Frank also has a problem here, as elsewhere, with his tendency to reduce human nature to universal essences. If biology leads *all* people to compete for status — if we all have the fever — it is not clear that anything can change us. But if, as certainly seems to be the case, only some of us have the fever, why cannot Frank argue that those without it are better off than those with it? This indeed seems to be one of the points of his discussion of individual savings behavior (pp. 98-100); spenders are penny-wise and pound-foolish on their own lights. The possibility of individual myopia has led some scholars to suggest explicitly paternalistic social savings policies.<sup>32</sup> But Frank is, for all of his wide reading and interdisciplinary range, a contemporary economist and social scientist first and foremost. Like his fellow travelers, he wants to stick with Paretian norms and to avoid paternalism at all costs (p. 273, *passim*). He cannot reside happily in the domain of this first argument, which holds that at least some people are behaving foolishly on their own lights.

This leads Frank to the second argument, the collective action problem — that we could all be happier if we stopped the insanity of excessive conspicuous consumption, so to speak. This argument is Frank's most original and important contribution to the public policy debate. It is a nice and interesting insight, and it might well be true in some cases and to some degree. But it does not seem all that tenable as a global matter of practical or political reality. Does Frank really believe that high spending Americans would be better off under a consumption tax with marginal rates ranging in excess of 70%? Or that they would find this solution “simple and painless”? If so, it would “simply” be a case of convincing them of this reality. Read this book and repent, ye self-interested fools of little faith!

Yet Frank clearly (or “simply”) does mean to be saying this. Concluding his panegyric in favor of a steeply progressive consumption tax, he writes:

The catch? There is none. The extraordinary beauty of the progressive consumption tax is its ability to generate extra resources almost literally out of thin air. It is a win-win move, even for the people on whom the tax falls most heavily. [p. 224]

Frank returns to this theme again and again; the book ends with a subsection entitled “money for nothing” (p. 279).

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32. See, e.g., Deborah M. Weiss, *Paternalistic Pension Policy*, 58 U. CHI. L. REV. 1275 (1991).

Perhaps Frank really believes his own rhetoric. But it hardly seems satisfactory as an all-encompassing view of human nature, American society, or modern times. Unless we are saying that the rich are spending too much as is under their own lights — the dreaded paternalism point — it must be the case that they are *only* spending at high levels because of relative status issues, which they cannot avoid for biological or rational reasons — we are all peacocks or job-seekers, in the end. Is this true? There are of course other reasons to spend — most of which, absent an elaborate array of deductions, would be taxed under Frank's steeply progressive consumption scheme. Spending on private education, health, or security may not be conspicuous or positional at all, but such spending, left unlimited, might still be unfair. In any event, if all that some or most of us cared about were relative status, why would things be any different under a steeply progressive consumption tax? Isn't it possible that we would save even less, and work even more, to hold true to our peacockian natures?

Frank never discusses in his rich book the fact that most rich Americans are not like his consumption-obsessed paradigm at all. *Most* millionaires seem to be frugal, and *most* elderly wealthy people continue to save, not dissave as both standard economic theory and Frank's "homo realiticus" model both suggest that they should. According to the popular best seller, *The Millionaire Next Door*, 10% of America's millionaires have never spent more than \$47 for a watch (there is hope for me yet); 50% have never spent more than \$235, and only 1% have ever spent more than \$15,000.<sup>33</sup> Granted that there is a self-selection involved — frugal people are more likely to become millionaires in the first place — there is still obvious self-restraint against the fever out there. Frank's only explanation of such frugality and thrift, within his own terms, is that such people are constrained by "social norms," a limited and unsatisfying placeholder for some sense of moral convention or propriety. I'll revisit social norms below.

As for my own humble scholarly self, I do not personally think that my simple, inexpensive watch is a signal of my unconcern with material pleasures, or a biological attempt to find a mate with similar values so that we can perpetuate a more Kantian species. Truth be told, I would find it unconscionable personally to spend thousands, let alone millions, on a watch, and I don't much care what my fellow persons think. If I had such millions (I don't), I would want to save them, or give them to charity; I certainly would not want to wear them on my wrist. I think I am autonomous in this thinking; maybe I am deceiving myself. But we can all at least hope — or pretend — that I am not.

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33. See THOMAS J. STANLEY & WILLIAM D. DANKO, *THE MILLIONAIRE NEXT DOOR: THE SURPRISING SECRETS OF AMERICA'S WEALTHY* 32 (1996).

The fact that many of us are savers does not argue against a progressive consumption tax: far from it. That such a tax is consonant with basic American values makes it more, not less, likely to succeed.<sup>34</sup> It does, however, change the argument structure. Since excessive luxury spending is no longer an unavoidable fact of nature, we can argue against it in moral and/or redistributive terms, as Frank does not.

More generally, live by the sword, die by the sword. If the empirical evidence for Frank's claims under this second argument founder — and these are very stringent empirical claims indeed, given the insistence on at least a near unanimity condition that the Pareto (or win-win) principle requires — so do his claims themselves. Early on in the book Frank presents evidence that money, at least above a certain level, does not buy happiness (Chapter Five). Now I think there is room to quibble with these studies; some people, such as the Japanese in one study Frank cites, seem to say that they are always moderately happy, which is not such a bad state of mind to carry through life's vicissitudes (or at least to tell a surveyor). But granted that such measures of subjective well-being capture the status quo, what if the numbers change? What if — as I suspect is increasingly true in America since the Reagan Revolution helped to legitimate greed and lessen the guilt of the good life — people really start becoming happier by spending more on themselves? Or what if we could make them happier, not by a “steeply progressive consumption tax,” but rather by the “simple and painless” step of convincing Americans to overcome their puritanical opposition to luxuries, along with all notions of envy and guilt? Would that justify “luxury without apology”?

Another problem with Frank's second argument circles back to an omitted aspect of the tax discussion. Frank makes a common mistake in thinking that a move to a consumption tax must decrease consumption and increase savings. It need not. The form of the tax system is neutral as to the aggregate level of capital savings.<sup>35</sup> I personally believe that we can and should have a consistent consumption tax because it would lead to a better, fairer, more sensible version of what we have now. A progressive consumption tax would get wealthy people consuming out of capital to pay *some* tax, and would give all the rich a choice of how to serve the public good — through ostensibly private savings that add to the common capital stock, or through the progressive taxes levied on their choice of lifestyle.<sup>36</sup> But the corre-

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34. This argument is central in Edward J. McCaffery, *Tax's Empire*, 85 GEO. L. REV. 71, 106-07 (1996) [hereinafter McCaffery, *Tax's Empire*]; see also McCaffery, *Uneasy Case*, *supra* note 3, at 345.

35. See Edward J. McCaffery, *Being the Best We Can Be (A Reply to My Critics)*, 51 TAX L. REV. 615 (1996) [hereinafter McCaffery, *Being the Best*].

36. Note that by allowing a deduction for charities, we could give the rich their choice. See McCaffery, *Uneasy Case*, *supra* note 3, at 257-58.

sponding higher revenue from a more inclusive tax base, higher rates on big spenders, and lower costs of capital, could be used “simply” to lower taxes on middle class consumption.

In other words, a consistent and progressive consumption tax could get and allow the rich to save, and then *stop trying* to get the middle classes to do so. Much of current tax policy has been obsessed with a targeted and probably futile attempt to do just the opposite.<sup>37</sup> There is much to be said for both the fairness and the efficiency of allowing those with the most to save save, and leaving the rest of us, many of whom live from paycheck to paycheck, alone. But if Frank’s picture of human nature is correct, this use of a steeply progressive consumption tax move would only free up the middle classes to get on, or speed up, their own consumption treadmills. Veblen was well aware that this could happen — that luxury fever has its analogs among the lower economic classes.<sup>38</sup> But such greater spending by the middle classes would in turn push those up the ladder to fret that they must compete more. This would certainly make them feel unhappy — thanks, but no thanks — with Frank’s “painless and simple” plan to make us all better off.

A steeply progressive consumption tax that self-consciously aimed to reduce present consumption, or to shift work into leisure, in contrast, will have redistributive effects across generations and among people with different preferences. It will fall on spending on nonpositional as well as on positional goods, though the motive for the former, by definition, cannot revolve around a concern for relative status. It is not a “painless and simple,” “win-win” kind of deal, and I sense that Frank has done a disservice in the midst of his generally noble public service by overselling this point. Not everything is a nail, after all, even to a man with an especially elegant hammer.

This all leads to the third argument — that a progressive consumption tax is justified on classical utilitarian grounds, redistribution and all. Frank is extremely tentative in endorsing this view, and does not really flatly come out and say it. He sometimes makes a nod, as Richard Posner does, to quasi-Paretianism, weakening the unanimity condition.<sup>39</sup> But he wants to pull up short, to stick to this we-would-all-be-better-off line, implausible as it may seem. It is also more than a little sad that Frank feels he must argue this way.

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37. See McCaffery, *Real Tax Reform*, *supra* note 3, at 47.

38. VELEN, *supra* note 9, at 36.

39. POSNER, *PROBLEMATICS*, *supra* note 27.



## V. ARE WE ALL HETERONOMOUS NOW?

Ultimately, Frank's book rather unwittingly illustrates what I take to be the single greatest challenge to normative social and legal theory as it is practiced in law schools and elsewhere. I suspect that the most common criticisms of *Luxury Fever* will come from economics sorts frustrated with the absence of more formal analytic rigor, a point that Frank repeatedly anticipates and that I touched on in Part II. But I am more troubled by the virtually complete absence of explicit moral theorizing, a point that Frank all but ignores.

A book on the topic of luxurious living could "simply" not have been written at any time in recorded history until the last few years without *some* discussion of moral theory. Frank repeatedly credits Adam Smith, quite properly, with beginning the line of inquiry. Smith was certainly sensitive to the moral dimensions of the story; he was a professor of moral philosophy, after all, most proud of his own *Theory of Moral Sentiments*, who infused the far more widely cited *Wealth of Nations* with ethical concerns. Amartya Sen has complained about the reductionist reading of Smith, stripping this rich thinker of his moral dimensions:

[I]t is precisely the narrowing of the broad Smithian view of human beings, in modern economies, that can be seen as one of the major deficiencies of contemporary economic theory. This impoverishment is closely related to the distancing of economics from ethics.<sup>40</sup>

With Sen's view in mind, it is especially troubling not only that Frank repeatedly reduces Smith to a prophet of self-interest (p. 171), but also that he should give Charles Darwin pride of place over Smith among "the only two men" from whom "our modern understanding of competition derives almost entirely": "Smith's view was by far the more optimistic, but Darwin's more hard-edged analysis holds the key to understanding our current situation" (p. 146). Apparently we persist perilously close to the ethical awareness of peacocks.

Darwin influenced Thorstein Veblen, the most important precursor to Frank's effort — although he only receives a passing mention in the text (p. 14). This is unfortunate, for Veblen is a subtle and interesting thinker who deserves more study today. He wrote widely in criticism of economists and on the connections among religion, culture, morals and competitive economic systems.<sup>41</sup> Consider his analysis of "waste," both the term and the concept, in *The Theory of the*

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40. AMARTYA SEN, ON ETHICS & ECONOMICS 28 (1987).

41. See generally A VEBLEN TREASURY: FROM LEISURE CLASS TO WAR, PEACE, AND CAPITALISM (Rick Tilman ed., 1993).

*Leisure Class*.<sup>42</sup> Veblen first notes that the conspicuous consumption of the rich *must* be wasteful:

Throughout the entire evolution of conspicuous expenditure, whether of goods or of services or of human life, runs the obvious implication that in order to effectually mend the consumer's good fame it must be an expenditure of superfluities. In order to be reputable it must be wasteful.<sup>43</sup>

Interestingly, Frank is never prepared to go this far; he does not generally question whether there is some detached, objective benefit to a luxury good. Veblen simply asserts that positional goods at the upper reaches must be wasteful.

Veblen, however, has a problem here. Like Frank, Veblen is clearly trying to be a classical social scientist. He wants to avoid questioning individual rationality. Veblen thus notes a problem with the moralistic flavor to the word "waste":

The use of the term "waste" is in one respect unfortunate. As used in the speech of everyday life the word carries an undertone of deprecation . . . . It is here called "waste" because this expenditure does not serve human life or human well-being on the whole, not because it is waste or misdirection of effort or expenditure as viewed from the standpoint of the individual consumer who chooses it. If he chooses it, that disposes of the question of its relative utility to him, as compared with other forms of consumption that would not be deprecated on account of their wastefulness.<sup>44</sup>

Veblen, like Frank, wants to avoid paternalism, so he allows the individual's decision to be dispositive of his own self-interest. But Veblen goes far further than Frank ever does, because he does not confine himself to Paretian outcomes. Veblen goes back to the use of the "term 'waste' in the language of everyday life" and explains the reason it "implies deprecation of what is characterized as wasteful":

In order to meet with unqualified approval, any economic fact must approve itself under the test of impersonal usefulness — usefulness as seen from the point of view of the generically human. Relative or competitive advantage of one individual in comparison with another does not satisfy the economic conscience, and therefore competitive expenditure has not the approval of this conscience.<sup>45</sup>

In one fell swoop, Veblen goes where Frank fears to tread: he gives us a reason to curb "luxury fever," which he calls "competitive expenditure," not by a necessarily "simple and painless" "win-win" means, but so as to satisfy the dictates of an "economic conscience."

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42. VEBLLEN, *supra* note 9, at 97-101. I discuss the concept of waste in Edward J. McCaffery, *Must We Have the Right to Waste?*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* (Steven Munzer ed., forthcoming 2000).

43. VEBLLEN, *supra* note 9, at 96.

44. *Id.* at 97-98.

45. *Id.* at 98.

This collective sensibility is grounded in objective, interpersonal values, and located in the domain of ordinary language and moral sentiment. Veblen is thus somewhere between the third and fourth arguments above; the conspicuous expenditures of the rich are bad from an impartial spectator's point of view, whether that point of view is a classical utility-based one (as in argument 3) or a moral, social contractarian one (as in argument 4). A similar structure of argument, including the discussion of popular morality, is still present at the time of Tibor Scitovsky's 1976 classic, *The Joyless Economy: An Inquiry into Human Satisfaction and Consumer Dissatisfaction*, another important (and relatively neglected) precursor to Frank's contemporary effort. These old arguments continue to have fresh force. Frank deserves credit for developing and pressing the clever second argument for a "win-win" change, but, ultimately, he might be wrong to put too much weight on it.<sup>46</sup>

Frank certainly emerges from a close reading of *Luxury Fever* as a good and decent man. We learn along the way that he had served time in the Peace Corps with his wife of long standing. He loves Ithaca's college community. He thinks twice about owning really nice cars — he did not buy a well-priced Porsche when he had the chance in the 1980s, although he now drives a BMW (pp. 168-69, 203). (Frank also concedes late in the day that he now also has a gas range with two 15,000 Btu burners — which he considers "the signature emblem of 1990s superfluity" — but he takes some comfort in noting that he does not have *four* such burners, as some fellow Ithacans have (p. 266).) He cares about his children and their education, and is respectful towards his wife. Most importantly for the present purposes, of course, Frank has dedicated much of his considerable intellectual gifts to trying to understand what might be wrong with an economic structure — advanced liberal market capitalism — that all too many people are simply celebrating as ideal. In *Luxury Fever* and in his other works he has crossed disciplines and written with sensitivity and grace about how to make the world a better, happier place.

But *must* Frank defend his rich ideas in the often impoverished language of subjective welfarism? Perhaps ordinal utilitarianism has become the lingua franca of normative social theory today, but that does not mean it is right — and that we all must end up arguing over the facts of the matter instead of their basic social justice.<sup>47</sup> The second time I found the word "moral" in *Luxury Fever* came very late in the day, when Frank writes about a public employment program. He

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46. See Cass R. Sunstein, *Vanity Fair*, THE NEW REPUBLIC, Mar. 29, 1999, at 13 (reviewing LUXURY FEVER) ("[Frank's] argument is both . . . plausible and ingenious . . . but I am not sure Frank is right.").

47. See *id.* (questioning Frank's facts).

thinks that this program would be a good place to spend the savings from a progressive consumption tax:

Completely apart from our moral responsibility to provide the best possible opportunities to our neediest families, a well-implemented public-service employment program would deliver high value for our dollars. Notwithstanding the prospect that federal welfare-reform legislation will reduce the number of people in our inner cities who are officially eligible for support from the government, these bleak environments will continue to produce large numbers who are ill-equipped to make it on their own. And the fact that they may not be eligible for welfare payments does not mean that they will cease to be costly to society. [p. 263]

This is what saddens me. Once again Frank feels compelled to argue “completely apart from moral responsibility.” Those of us who strive to generate normative legal scholarship are being told, with ever increasing if ever more puzzling force, that moral theory must be banished from our tool kit, replaced by something more avowedly consequentialist and “pragmatic” — namely subjective welfare.<sup>48</sup> But is it really the case that the fact *vel non* of our — of a decent society’s, that is — obligation to the less fortunate is a narrowly *empirical* matter? That we *must* demonstrate that the gains to the poor somehow outweigh the “losses” to the rich — that the “net balance of social well being” has increased — in the spirit of the third argument, above, in order to advocate basic decency? Or, worse, must we show that there is in fact no loss at all to the rich, in the spirit of the second argument? That our “pragmatic self-interest” alone justifies all change? That our money is being well spent on our own terms — we are getting a good “bang for our buck,” as the awful saying goes? Is this what we have come to? And what will happen if the trend of our times continues, and we cut more and more the official “support from the government,” so that the argument from backwards induction — we will have to pay more for them later, so we might as well educate them now — fails, as an accounting matter?

If this is where we have come, despair might be appropriate. Consider Rawls’s recent plaintive cry in response to the voices of a more self-interested and amoral political theory: “If a reasonably just society that subordinates power to its aims is not possible and people are largely amoral, if not incurably cynical and self-centered, one might ask with Kant whether it is worthwhile for human beings to live on the earth?”<sup>49</sup> Surely we can do better than to be better peacocks.

One ought to pause before prescribing in the name of a largely amoral humanity. Frank does not. What passes for morality in *Luxury Fever* gets wrapped up in Frank’s discussion of “social norms”

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48. See, e.g., POSNER, PROBLEMATICS, *supra* note 27; Kaplow & Shavell, *Redistributing Income*, *supra* note 27.

49. RAWLS, POLITICAL LIBERALISM, *supra* note 17, at lxii.

(pp. 201-03). This is an amorphous idea that has entered into the normative lexicon of legal theory of late.<sup>50</sup> A large part of its role seems to be to supplant anything approaching the autonomous exercise of moral reasoning. Social norms just *are*, in the standard view — though more often than not, the project of the “social norms” school is to show how such norms represent a spontaneously generated private ordering that tends towards efficiency, in the specific sense of wealth-maximization. The normative theorist in any event is relegated to a passive acceptance of such norms. Worse, in their mere existence, the role of social norms is fully heteronomous — individual actors are constrained to accept them, there is no reasoned discourse, no wide or narrow or indeed any reflective equilibrium at all.

It is in some sense astonishing — or ought to be — that Frank, an economist and social scientist, seems “simply” to accept social norms in his personal as in his professional life. Frank tells us that social norms — and social norms alone — prevented him from buying that bargain-priced Porsche in the 1980s: “[a]t that time, a red Porsche convertible really would have been seen as an in-your-face car in a community like ours” (p. 108). He still has doubts and regrets over this fateful decision:

I still wonder whether I made the right decision. In the years since this episode, a number of other Porsches have materialized here, and seeing them always kindles a twinge of regret. But what is not in question is that, at the time, there would have been a social price to pay had I bought it. [pp. 168-69]

Fortunately enough (?), times and mores have changed a bit in Ithaca. Frank now has a BMW (p. 203), and seems to think that if he could do it all over again today, he would in fact buy the Porsche.

Perhaps worst of all, Frank doesn’t even like the role of social norms in combating luxury fever, in part because they are too frail, but also because they are too “coercive” (p. 203). Heteronomy turns out to be a drag — it makes it hard to buy even bargain-basement Porsches. Better to put the tax system in place, so that we can all have “luxury without apology.” Free at last?

To be fair, I agree that we should have a fairly steep progressive consumption tax, in part because we cannot place excessive moral demands on our wealthy citizens. It is in some sense hard to be rich; too much money can be a distraction and a constant source of temptation,

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50. See, e.g., ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 123-26 (1991); Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537 (1998) (symposium issue on Social Norms, Social Meaning, and the Economic Analysis of Law); Richard H. McAdams, *The Origin, Development and Negotiation of Norms*, 96 MICH. L. REV. 338 (1997); Randal C. Picker, *Simple Games in a Complex World: A Generative Approach to the Adoption of Norms*, 64 U. CHI. L. REV. 1225 (1997); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

and the opportunities for doing good with money are complex. A progressive consumption tax sets up an institutionalized social structure in which individual wealthy capitalists are obliged to help, and are given a choice of how to do so — continue to save and invest, helping all through perpetuating the common capital stock, or spend on one's own wants but cut a large check to the collective for the privilege of doing so. The system sensitively takes into account human nature in this way. But there is no reason we have to refrain, as Frank does, from invoking the objective moral dimensions of such a tax — why we must argue that this is a “win-win” deal even for “incurably cynical and self-centered” people. After all, excessive spending on *nonconspicuous* private consumption can well be a moral harm — and it would be just as affected by Frank's steeply progressive consumption tax. Yet Frank cannot argue, by definition, that such spending is an arms-race type problem that cannot make its individual producers happy.

Fortunately, the facts of the matter do not point us down the gloomy Darwinian path. As a strictly empirical matter — and this I think is important, for lots of reasons — not all the rich have luxury fever. In fact, most don't. This is the central point of the widely popular *The Millionaire Next Door*, and it is backed up by more scholarly research.<sup>51</sup> Wealthy savers are not imposing social harms in any obvious way — saving is one of the activities that a reasonably just society should *want* its most productive citizens to do, at least as long as there are some constraints on the private use of capital to unjustly affect politics or markets.<sup>52</sup> Rawls writes of “frugal capitalists as opposed to the spendthrift aristocrats,” the former being those who uphold their “natural duties to society.”<sup>53</sup> The problem with contemporary tax policy is that it is backwards: it currently punishes the thrifty millionaire-next-door types, and thus relatively rewards the spendthrift with luxury fever.<sup>54</sup> A progressive consumption tax reverses course; it falls on spenders, not savers. This seems like the fair and just, as well as sensible, result, in large part because social structures do shape character and choice of lifestyle. One can come out rather close to Frank on the details, in other words, without ignoring the “moral dimension.”

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51. See STANLEY & DANKO, *supra* note 33, at 27-69; see also LAURENCE J. KOTLIKOFF, *WHAT DETERMINES SAVINGS?* (1989); McCaffery, *Hybrid*, *supra* note 3, at 1187-88 and notes (citing sources).

52. This point — that a consistent progressive consumption tax can regulate the use of nominally private capital — I have consistently made in my work. See McCaffery, *Being the Best*, *supra* note 35, at 632-33; McCaffery, *Uneasy Case*, *supra* note 3, at 353-56.

53. RAWLS, *A THEORY OF JUSTICE*, *supra* note 17, at 299, 537.

54. See McCaffery, *Real Tax Reform*, *supra* note 3, at 47.

Frank's insights about the tendency, at least, towards excessive conspicuous consumption are still critically important, but not because we all, inevitably, have the fever. Rather we can understand life in advanced wealthy capitalist societies as a constant battle between the thrifty and the nonthrifty, those that have the fever and the millionaires next door. There is even a risk that luxury fever is getting worse, although Frank is largely anecdotal on this differential point. Precisely because lifestyles are variables that the social structure affects — precisely, that is, because we are not “incurably” cynical and self-interested — our tax policy ought to get it right. We make choices. Frank even acknowledges — in passing — that we might be free: “I do not mean to suggest that we are not creatures of free will on some meaningful interpretation of the term” (p. 176). Social norms come from somewhere. There can be better or worse norms, more or less followed. The law can or cannot support these better ones: the law is *inevitably* moral.<sup>55</sup> This is especially so in an area as pervasive, large, and coercive as tax.

As Machiavelli wrote, “hunger and poverty make men industrious, [but] laws make them good.”<sup>56</sup> If we drop the attempt to appeal to the “better angels of our nature”<sup>57</sup> in the law, we can do no better than to become happy peacocks. Let's hope we can aim higher, and in this attempt to make us as good as we can be, moral theory — of the old fashioned Kantian sort — deserves a seat at the table.

## VI. A CHALLENGE FOR POLITICAL LIBERALISM

Before closing, I want to make a few comments on how a nonutilitarian, social contractarian approach to the problem of luxury fever — and to tax policy — might play out.

Frank is clearly writing right in the grip of something that Rawls is very much concerned with: the social bases of self-respect, among other matters of moral psychology and social justice. But Frank's mechanistic, materialistic analysis and conception of human nature sits uneasily, if at all, with the very reason for Rawls's social contractarian project — the working out of a Kantian conception of people as free and equal moral beings.<sup>58</sup> Frank's picture of human beings also seems too limited to be a global description of our species, although it certainly captures some aspects that at least some of us have at least some

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55. This point I make in Edward J. McCaffery, *Ronald Dworkin Inside Out*, 85 CAL. L. REV. 1043 (1997).

56. NICCOLO MACHIAVELLI, *THE PRINCE AND THE DISCOURSES* 118 (Luigi Ricci, Random House ed., 1950).

57. Abraham Lincoln, First Inaugural Address, *reprinted in* SPEECHES AND WRITINGS, 1859-1865, at 224 (Library of America ed., 1989).

58. See Rawls, *supra* note 26.

of the time. Frank's depiction of luxury fever and its root causes should add to our understanding of our complex and frail human natures. But it is simply not a matter of irresistible biological impulse that people who have a lot of wealth *must* show it; this is a contextual matter, and one that affects social justice.

Why then, has moral theory been banished from the social doctor's medicine bag? Why can't Frank just come out and say that something is indeed wrong with individuals' owning \$2.7 million watches? Now taking myself to be a moral theorist,<sup>59</sup> maybe it is partly our fault. After all, philosophy has been credited with killing god, embracing pluralism, and letting the pragmatic genie out of the bottle. The once regal discipline has of late flaunted its skepticism and tried to rebuild itself on the basis of evolutionary biology or rational choice social theory.<sup>60</sup> Why should a social scientist look to moral theory, when moral theory itself has been running for help to the social sciences?

A related dimension of the same problem — the seeming inhospitality of moral theory to normative social scientists like Frank — relates to the role of religion. The critics of luxury fever in the past have typically had God on their side. The ancient prophets fall into this category, along with Luther and the Puritans, of course, and many other religions condemn excessive luxury.<sup>61</sup> Smith's condemnation of luxuries came from within a distinct religion, Presbyterianism. Veblen and Scitovsky, modern social scientists, stood outside any particular religious tradition, but each evoked religious norms in understanding the social regulation of consumption. Yet Frank, writing at the dawn of a new millennium, with postmodernism and political correctness ascendant, does not — and within the social norms of our times, cannot — invoke particular religious precepts. With the moral case against

59. I think my credentials are pretty good. I majored in philosophy as an undergraduate, and have used philosophical perspectives in all of my work. See, e.g., McCaffery, *Political Liberal Case*, *supra* note 3; McCaffery, *Tax's Empire*, *supra* note 34; McCaffery, *Ronald Dworkin Inside Out*, *supra* note 55.

60. In this admittedly scandalously quick summary, I am thinking of the varied works of Nietzsche (on the death of god), Richard Rorty (on pragmatism), Bernard Williams (on skepticism and the limits of philosophy), Allan Gibbard (on the use of evolutionary biology), David Gauthier, Brian Skyrms, Greg Kavka and others (on rational choice social theory). See FRIEDRICH NIETZSCHE, *THUS SPOKE ZARATHUSTRA* (R.J. Hollingdate trans., Penguin ed. 1961) (1884); RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979); BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* (1985); ALLAN GIBBARD, *WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT* (1990); DAVID GAUTHIER, *MORALS BY AGREEMENT* (reprint ed. 1987); BRIAN SKYRMS, *EVOLUTION OF THE SOCIAL CONTRACT* (1996); *RATIONAL COMMITMENT AND SOCIAL JUSTICE: ESSAYS FOR GREGORY KAVKA* (Jules Coleman et al. eds., 1998). See generally HILARY PUTNAM, *RENEWING PHILOSOPHY* (1992).

61. See, e.g., STEPHEN INNES, *CREATING THE COMMONWEALTH: THE ECONOMIC CULTURE OF PURITAN NEW ENGLAND* (1995); BARRY SHAIN, *THE MYTH OF INDIVIDUALISM: THE PROTESTANT ORIGINS OF AMERICAN POLITICAL THOUGHT* (1994); MICHAEL WALZER, *INTERPRETATION AND SOCIAL CRITICISM* 81-91 (1985) (discussing views of Old Testament prophet Amos against luxury, *inter alia*).



conspicuous consumption linked so firmly to specific religious doctrines and traditions, Frank is led to sweep the “moral dimension” aside completely.

Rawls and his project of political liberalism both underscore the problem and point the way out. On one hand, Rawls has embraced the “fact of reasonable pluralism,”<sup>62</sup> and has thus banished particular religious — as all comprehensive moral doctrines — from the exercise of “public reason” to be used in setting up a just social structure. On the other hand, Rawls has never retreated from the view that political and moral theory compel us to attempt to establish, maintain, and support just social institutions. The central challenge for our times is to find a way to argue for morally acceptable social structures in a way that avoids moralism, in its perjorative sense — in a way that avoids privileging and entrenching any narrow, particular moral doctrine.

Tax is tied up in all of this. One of the important insights to be gained from *Luxury Fever* is the way in which the tax system affects matters of justice, as I have been arguing throughout my work — tax can be both a cause of social justice problems and a cure. The harms of luxury fever both affect the social distribution of material resources and go to the social bases of self respect, now identified by Rawls as perhaps chief among the primary goods.<sup>63</sup> As Frank well illustrates, the tax system is uniquely situated to address luxury fever. Thus, social contractarian theory — social justice generally — cannot ignore the broad contours of the tax system on account of its impacts on the basic structure of society and on the reasonable aspirations of its citizens. All this leads to one final question: Can political liberalism, stripped of anything approaching a religious voice, speak to luxury fever and its possible antidote via progressive taxation?

Of course it can. It is a critical mistake — to my mind, the worst mistake one can make in reading Rawls’s *Political Liberalism* — to think that moral virtues have dropped out of the social contractarian project. While remaining agnostic as to the internal contents of any reasonable comprehensive religious or moral doctrine, Rawls emphasizes time and again the importance of the *political* virtues, chief among them the capacity to act out of a sense of justice.<sup>64</sup> A basic moral psychology and moral sense has always been central to Rawls’s work. It is featured in an early piece on “The Sense of Justice,” played a large role in *A Theory of Justice*, and persists in *Political Liberalism*. The very reason to care about justice as fairness, after all, is that we believe that we can do better than to be happy peacocks.

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62. See RAWLS, POLITICAL LIBERALISM, *supra* note 17, *passim*.

63. See *id.*

64. See JOHN RAWLS, *The Sense of Justice*, in COLLECTED PAPERS 96 (Samuel Freeman ed., 1999).

This gets back to the question of Frank's diagnosis. Perhaps luxury fever is bad for its own patients, and perhaps it is an arms race, the solution to which will be a win-win for all, no matter how incurably cynical and self-centered we might be. But these ought not to be the primary reasons for curbing the fever. Social justice should be. The excessive spending of the rich affects the allocation of resources, making nonluxury goods more "dear," in Luther's epigraph; represents a failure to save from the capitalist classes best able to do so; lacks objective urgency, in T.M. Scanlon's (or Veblen's) sense;<sup>65</sup> and incites the kind of envy that Teddy Roosevelt noticed in another opening epigraph. Social scientists tend to rule out envy, for counting envy as a harm would disqualify many social changes from satisfying the Pareto principle. Roosevelt's quotation suggests that maybe "we of moderate means" are to be blamed, for we do the harm of envy and hatred to ourselves. But why should we simply rule a natural human feeling out of bounds in normative social theory? And why is it the case that envy is always and everywhere a self-inflicted wound? In *A Theory of Justice*, Rawls writes sensitively and well about envy, distinguishing between "excusable" envy and spite, linking envy to the social bases of self respect, and considering the conditions for a "hostile breakout of envy," importantly including within them the loss of a sense of natural duties among the rich.<sup>66</sup> If the wealthy are signaling their power and obtaining additional benefits by owning million-dollar watches and 45,000 square foot mansions, is it really improper for the rest of us to complain?

If Frank's arguments add to the case against excessive luxury spending, I am inclined to think more power to them. But note the ways in which Frank and Rawls are directly opposite, and not just in their concern with subjective versus objective values, third parties or not. Frank's picture is one of an essentially unfree, biologically driven human nature that must sometimes bind itself to the mast. It is because we are slaves to our appetites and drives that we must give up certain freedoms in the name of greater hedonistic pleasure. To Rawls and Kant before him, we are first and foremost free and equal moral beings. It is to protect and enhance our freedom and equality that we must curtail those actions of some of us that limit the freedoms and basic equalities of others of us. Holding fast to that vision of freedom, autonomy, and morality may be more important in the end than curing luxury fever. After all, ideas matter.

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65. See VEBLLEN, *supra* note 9; T.M. Scanlon, *Preferences and Urgency*, 72 J. PHIL. 655 (1975).

66. See RAWLS, *A THEORY OF JUSTICE*, *supra* note 17, at 530-41.

## VII. THE END?

Robert Frank has written another good and important book. It identifies a major problem facing contemporary America, and it advances a smart, sensible solution to that problem. In bringing to a wide general public a powerful set of arguments for a progressive consumption tax, Frank has done the world he lives in a good turn. I just wish that Frank and others arguing this way could more comfortably step outside the limited quasi-science of self-interested, subjective welfarist theories to make objective moral claims, and that contemporary moral and political philosophy would be more inviting to people of such interests.

We are still born free, but we are still everywhere in chains. Money is everywhere, and even our normative scholars have been seduced by its luster. By giving us a “simple and painless” way to enjoy “luxury without apology,” I cannot believe that Frank has pointed the way towards our ultimate human liberation. Maybe one day we can step outside the grip of money and money’s worth as a metric of our deeper moral worth, and become free at last. For in the end, the path of enlightenment may best lead to a future, not where no one buys or wears a Patek Phillipe watch, but where none of the rest of us notice those that do.