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LEGAL AESTHETICS OF THE FAMILY AND THE NATION:
AGORAXCHANGE AND NOTES TOWARD RE-IMAGING
THE FUTURE

JACQUELINE STEVENS*

I. OVERVIEW

This paper lays out the legal aesthetics behind agoraXchange,¹ an online forum for the rules, design, and code of an online global politics game. A crucial premise of the project is that experts and politicians who use evolutionary rhetoric to defend the laws that have created our present institutions of family and nation are not simply bad social scientists; they are also bad artists. Such leaders of political institutions, as well as their minions in the academy, transform us into passive subjects who must accept as our birthright alliances of family and nation that these natural and social scientists actually invent for us.

The agoraXchange website and the forthcoming game pay special attention to the distributive implications of institutions that organize us into families and nations. These are the primary sites where invocations of birth cause inequality and violence.² Laws constructing beliefs about ancestry give rise to war and the intergenerational transfers of wealth that are responsible for between 40% and 90% of economic inequality among and within nations.³

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1. <http://www.agoraxchange.net> (last modified July 22, 2004). The internet site is a project commissioned and hosted by an art museum, Tate Online, and initiated and coordinated by Natalie Bookchin and Jacqueline Stevens. A detailed explanation of the theory and empirical evidence for agoraXchange appears in Jacqueline Stevens, *States without Nations* (in progress, unpublished manuscript) (on file with author).

2. See JACQUELINE STEVENS, *REPRODUCING THE STATE* 3 (1999).

3. See Lawrence Kotlikof & Lawrence Summers, *The Role of Intergenerational Transfers in Aggregate Capital Accumulation*, 89 J. OF POL. ECON. 706 (1981) (attributing 70% of all U.S. wealth as resulting of intergenerational transfers). Economists debate these figures and the methods for ascertaining them, but the range is seldom under 50% and of course, by definition, never acquired through individual effort. Hence inequalities perpetuated by family origin are always incompatible with liberal capitalist modes of accumulation. This range most likely understates the importance of intergenerational transfers of wealth worldwide because the United States is one of the most mobile socie-

The aim of agoraXchange is to demonstrate how law constructs inequalities in a way that makes them seem entirely natural, and to enlist participants in developing alternatives.⁴

In keeping with this analysis, the forum solicits ideas for an alternative world game, one in which players may choose any state in which to be citizens; wealth at death is redistributed through a global agency to provide for basic needs; there is no official kinship relation recognized by any state; and states own all land, assigning use to individuals and corporations through long-term or lifetime leases.

The site emphasizes the trope of birth and not capitalism because one's birth status not only substantively affects the quality of one's life, but also because hereditary aesthetics make people believe inequality and violence are impossible to challenge, a view that leads to passive acceptance of the status quo. Drawing on the collective contributions of a global public to develop a game in which governments do not legislate distinctions of birth (through either immigration policies or inheritance laws) and then putting this game online is an experimental and synecdochal rendering of the new collaborations and conflicts that might emerge in this alternative global system. AgoraXchange is at once both a model and a small example, designed to reveal how the present world order is the result of elective choices.

Such a project clearly draws from many literatures and invites many kinds of disagreements as to the desirability and feasibility of these goals. For purposes of this Essay, rather than defend the proposals on their merits, the Essay addresses a recurring problem that faces any effort that fundamentally challenges prevailing legal institutions: the concept of "human nature." Any discussion of how to

ties in the history of the world. If parental wealth has such a large influence on the next generation's wealth, then one's material conditions of birth clearly are significant, not only in the United States, but also elsewhere. As suggested in his study of pre-industrial countries, J. Bradford DeLong found that inherited wealth alone accounted for a whopping 91% of all wealth. J. Bradford DeLong, Mimeo, *INHERITANCE: AN HISTORICAL PERSPECTIVE* (2001), cited in Karen Dynan, Jonathan Skinner & Stephen P. Zeldes, *The Importance of Bequests and Life-Cycle Saving in Capital Accumulation: A New Answer*, 92 AM. ECON. REV. 277, 2002.

4. See Jacqueline Stevens, *On the Class Question*, in *FEMINIST INTERPRETATIONS OF KARL MARX* (Christine diStefano ed., forthcoming), available at www.jacquelinestevens.org (last updated Aug. 3, 2004).

imagine future forms of governance that would change the family and the nation is strongly influenced by intuitions about human nature. Often unstated, these beliefs nonetheless shape, if not determine, the kinds of changes thought beneficial and possible.

After a brief discussion of the still novel phrase “legal aesthetics,” the Essay maps the terrain on which political and legal theory since the late 19th century has grappled with questions about human nature, pointing out how the economic social science used to guide public policy has been drawn from a very narrow camp of writers, namely, those who advance sociobiological visions that are simply ugly (as well as empirically questionable). Next, the sociobiological hypothesis of inevitable aggression that arises from group loyalties is reviewed and critiqued, especially as it bears on intuitions about the family and the nation. This is discussed at some length because its claims have a very profound resonance in today’s popular and legal imagination. Third, the relevance of these legal aesthetics in shaping who we are is explained in some detail. Finally, this Essay describes how *agoraXchange* challenges evolutionary psychologists’ assumptions about human nature.

II. LEGAL AESTHETICS

In the last few years legal theorists have begun to pay increasing attention to legal aesthetics.⁵ In some approaches, legal aesthetics is simply the use of law to regulate images. For others, legal aesthetics is akin to an epistemology or a method implicit in judicial opinions and scholarly texts. Finally, some scholars — and this is the approach this Essay adopts — see the law as a wide-ranging aesthetic activity in itself.

A. *Law and Overt Visual Policies*

Costas Douzinas and Lynda Nead write, “[L]aw has always had a visual policy and understood the importance of the governance of images for the maintenance of the social bond.”⁶ This is probably the most accessible understanding of legal aesthetics pertaining to

5. See *LAW AND AESTHETICS* 10-17 (Roberta Kvelson ed., 1992) (early contributions defining the sub-field of legal aesthetics).

6. See *LAW AND THE IMAGE: THE AUTHORITY OF ART AND THE AESTHETICS OF LAW* 5 (Costas Douzinas & Lynda Nead eds., 1999).

legal policies regulating everything from pornography to public art. While many important studies exist in this field, this conventional understanding of what counts as art and image may also reinforce narrow thinking about legal texts and institutions. The notion that there is a fairly circumscribed field of what counts as “art” deters us from seeing how all sorts of forms and objects, including laws themselves, can be seen as art. This is not to say that all objects must be seen as art, only that the dichotomy that separates regulatory subjects from their objects discourages us from using a more subtle vocabulary in which to understand art and law (and much else).

B. *Legal Writing*

In a study of what he calls the aesthetics of U.S. American law, Peter Schlag focuses on “forms shaping law,” and not laws shaping forms. “In this conception,” Schlag writes, “the aesthetic pertains to the forms, images, tropes, perceptions, and sensibilities that help shape the creation, apprehension, and even identity of human endeavors, including, most topically, law.”⁷ If one consults his quadripartite taxonomy (the grid, energy, perspectivist, and dissociative)⁸ one begins to sense, however, that his analyses deal with studies other than those of aesthetics. Schlag puts center stage the criteria of truth or the narrative strategies used and advocated for the interpretation of U.S. Constitutional law. At any point in his analysis one could substitute “epistemology” or “genre” for “aesthetics” without changing the meaning of his arguments. This is because Schlag concerns himself with the project of specific interpretivist strategies for reading Constitutional law, so that Schlag’s law is a literary text that has attracted different readings, and not an object or form in itself. The question to which Schlag’s article is really responsive is “what are the different assumptions about the truth or reality that exists in the Constitution and the style of reasoning that follows from this?” This is not a bad question, but it seems that a study of legal aesthetics, as distinct from legal criticism, would ask, “How does the form of U.S.-American law relate to its content?” and

7. Peter Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1050 (2002); see also Brian E. Butler, *Aesthetics and American Law*, 27 LEGAL STUD. FORUM 203 (2003) (explaining that law has literary qualities that should enlist aesthetic evaluations).

8. Schlag, *supra* note 7, at 1051-52.

not inquire into truth claims or what counts as knowledge (the field of epistemology). Or better ask, “How do we consider the relation between the form of laws and their substance so as to better understand what law means?”⁹

C. Legal Aesthetics of the So-Called Real World

A third approach to legal aesthetics, and the one pursued in this Essay, is that which sees law as a medium and an object of far-reaching aesthetic effects and choices, capable of shaping the world according to its authors’ blend of vision and impulse.¹⁰ The law’s effects seem permanent and even inevitable, but they are always subject to change. Inspired by Nietzsche’s understanding of power, Adam Gearey writes:

The law rests upon an unsure foundation. Law embodies a form, a set of values that mandate a way of living. What allows the law to be posited in the first place could also perhaps lead to its overcoming Aesthetics is, at heart, this energy to mandate the form of a world, to create oneself.¹¹

Although law contains imaginative energies, many of today’s practitioners and scholars view the law as the result of an immutable sociobiological order: “The law effectively denies that the world could be otherwise, but precisely because the world is constructed,

9. IMMANUEL KANT, *THE CRITIQUE OF JUDGEMENT* (Clarendon Press 1952) (1795).

10. EVE DARIAN-SMITH, *BRIDGING DIVIDES: THE CHANNEL TUNNEL AND ENGLISH LEGAL IDENTITY IN THE NEW EUROPE* (1999). In Darian-Smith’s analysis, laws managing specific territorial boundaries of the nation are reshaping the imaginations of local populations in areas the tunnel impinges. The territory gains its look and meanings through the micro-actions that occur in accord with a template of legal provisions, a very powerful form with powerful substantive implications that also bears on nature and other effects considered natural, such as one’s English identity. Reviewers aptly have referred to an “ethnography of aesthetics,” in which “law emerges as both present and absent, immediately consequential in times of conflict or change, but as a background hum at other times, elusively ordering an aesthetic world without itself becoming the primary aesthetic concern. This is the primordial stuff of legal consciousness . . .” Jonathan Goldberg-Hiller & Neal Milner, *Governing Out of Order: Space, Law, and the Politics of Belonging*, 27 *LAW & SOC. INQUIRY* 339, 361 (2002) (reviewing EVE DARIAN-SMITH, *BRIDGING DIVIDES: THE CHANNEL TUNNEL AND ENGLISH LEGAL IDENTITY IN THE NEW EUROPE* (1999)).

11. ADAM GEAREY, *LAW AND AESTHETICS* 51 (John Gardner ed., 2001).

it can be made again through conscious activity.”¹² Although Gearey does not mention this, Nietzsche himself addressed this power of sociobiologists to distort the foundations of their work by making them seem happened upon and not constructed, to appropriate the space that was divine will with that of the equally immutable natural order.¹³ In the case of family law and citizenship rules — the focus of agoraXchange — the aesthetics of social Darwinians shape the world of sex, reproduction, and violence in complicated ways that belie the apparent parsimony of their starting assumptions.

III. LAW AND HUMAN NATURE

James Madison wrote: “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.”¹⁴ While widespread and apparently convincing, the premise misleads. The problem for legal theorists is not simply that people behave in ways that may advance selfish interests and therefore result in chaos and brutality. In addition, there is also substantial disagreement as to what counts as an “angel.” That is, political thought diverges fundamentally on what an imaginary perfect society would look like.

Would a society of angels distribute their work products through a free market or would they have a centralized economy — with one angel, a committee of angels, or a majority of angels deciding who would receive what? Would a society of angels have separate angel nations, or just one? Would a society of angels need marriage laws to bestow special recognition on certain intimate relations? Would a society of angels rely on inheritance to distribute wealth to the next generation? In short, regardless of whether we assume people are angels or devils, substantial questions remain as to how even perfect citizens would order their affairs. Rather than accept the notion that political and legal theory is necessary because we are not angels, for angels and nonangels alike, we may disagree as to how our affairs are best conducted.

12. *Id.* at 31.

13. See Jacqueline Stevens, *On the Morals Of Genealogy*, 31 POL. THEORY 558 (2003).

14. THE FEDERALIST NO. 51 (James Madison).

Agreeing to some extent that they are angels themselves, or at least not devils — no political theorist claims to advance ideas so that evil and chaos will prevail, or to advance his or her selfish agenda — political and legal theorists have adopted three basic approaches to grappling with the “human nature” of the subjects and citizens populating their treatises. When it comes to the basic material with which they are working, they disagree about the nature and malleability of human beings, offering three mutually exclusive characterizations of human nature: (1) that it is plastic and made good or bad by our political institutions; (2) that it is fundamentally bad and political institutions are needed to repress inherently selfish, anti-social behaviors; and (3) that human nature is neither good nor bad, but a fixed distillation of instincts whose evolution should be recognized and drawn on by our political institutions in ways consistent with our immutable impulses. Each choice is implicitly elaborating a distinct legal aesthetic, a taste for a certain form of the body politic.

A. *Human Nature Plastic*

An example of the first point of view, that human nature is malleable, can easily be seen in Plato’s *Republic*, where indoctrination about hierarchy can be used to create a just society and, in turn, just subjects.¹⁵ In Plato’s account, there is little fixed in us — including family structures and sex roles — but rather, our behaviors and ideas take shape as a result of how our political institutions socialize us. Instruct people from an early age with new ideologies through the dissemination of, say, a “noble lie” about one’s traits at birth, and it is possible to create a society in which philosopher kings will make good laws and people will accept them.¹⁶

Another especially prominent example of this point of view can be seen in Thomas More’s *Utopia*.¹⁷ Here the possibility of a

15. PLATO, *THE REPUBLIC* (Benjamin Jowett trans., Prometheus Books 1986) (c. 360 B.C.).

16. *Id.*, Bk. III. In this political fantasy, children are told they are born bronze (farmers, merchants, craftspersons), silver (guardians), or gold (philosopher-kings), the thought being that if you have a metal from birth your condition is therefore inalterable.

17. SIR THOMAS MORE, *UTOPIA* (Robert M. Adams ed. & trans., W.W. Norton & Co. 1975) (1516).

completely different form of society is described — that of the Utopians somewhere in South America — for the purpose of showing More's contemporaries in England that the feudal exploitation of serfs is not natural but a set of happenstance legal relations his readers would be well-advised to reject. By revealing an alternative human civilization, More implies England's medieval norms are not God-given, but contingent.¹⁸ Such is also the approach among the scores of contemporary critical legal theorists who emphasize the actual plasticity of hierarchies that also continue to persist in the name of nature, especially those following from family roles (sex and sexuality), as well as race.¹⁹

18. See generally *id.* Rich scholarly debate exists on various interpretative questions occasioned by the publication of related texts framing *Utopia*, including the open letter from Erasmus and the book's publisher advancing More's prank by authenticating the text. Regardless of where More's intentions lie along the dubiously dichotomized continuum of earnestness and irony, the very form — casting doubt on the necessity of feudal institutions — could only produce in his audience feelings that some other political system was, if not desirable, at least feasible. A nice example and analysis of parody's ultimately self-consuming impossibility can be seen in the observation of a *New York Times* letter-writer who considers the mocking of some products on television entertainment shows as advertisements themselves, "Perhaps most effectively in 'Saturday Night Live' or David Letterman's parodies. Positive or negative, it sure makes me remember the product." Diane Yamini, *Ads if Not by Name*, N.Y. TIMES, June 22, 2004, at A18.

19. Various exemplary texts contend that inequalities of wealth, race, sex, sexuality, ethnicity, and nationality, are largely created by political institutions (and indeed undermine the belief that these taxonomies even exist independent of political institutions). See, e.g., LOUIS ALTHUSSER, *LENIN AND PHILOSOPHY, AND OTHER ESSAYS* (Ben Brewster trans., 1971) (illustrating how the state plays a key role in organizing social relations perceived to be free of state influence); see also LOUIS ALTHUSSER, *SPECTRE OF HEGEL: EARLY WRITINGS* (G.M. Goshgarian trans., 1997) (illustrating how Marx underestimated the importance of the state in constituting social relations); NATION AND NARRATION (Homi Bhabha ed., 1990) (containing essays on the role of the state in shaping the nation); FRANZ BOAS, *RACE AND DEMOCRATIC SOCIETY* (J.J. Augustin 1945) (containing essays on how laws create differences among races); VIRGINIA DOMÍNGUEZ, *WHITE BY DEFINITION: SOCIAL CLASSIFICATION IN CREOLE LOUISIANA* (1986) (illustrating how legal documents create racial classifications); W.E.B. DU BOIS, *THE NEGRO* (Univ. Penn. Press 2001) (1915) (Hegelian project to construct "the Negro" through an analysis of African tribes and the political practices that ground the Negro in this geography); Lisa Duggan, *Queering the State*, 39 SOC. TEXT 1 (1994) (critiquing the role the state plays in establishing marriage and heterosexuality); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989) (critiquing the construction of a family unit and a set of sexual relationships in a liberal state); PLATO, *supra* note 15 (advancing a possibility of a state organizing hierarchies based on myths that they are natural); MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* (1994) (illustrating how state policies lead to racial stratification); MAX WEBER,

B. *Human Nature Evil*

The framework emphasizing the plasticity of institutions and people, while popular in law school journals and classrooms, does not enjoy universal currency in politics, nor is it much listened to in the halls of the Congress or other venues of policymaking in the United States, where it would be dismissed as “idealistic,” or, indeed, utopian. Instead, social and legal theory written for policymakers in the areas of inequality and difference are far more likely to draw on one of the two latter approaches to human nature. An instance of the second approach is most commonly associated with biblically-inflected scholarship that ultimately harks back to the story of original sin, where punishment for a moment’s depravity produces a species condemned to be sinful in perpetuity. With great effort such impious impulses, at best, may be restrained in one’s lifetime, the end being solace deferred until one’s troubling (e.g., greedy, selfish, cruel, arrogant) mortal body and existence have been shed.

As we shall see below, those who believe that human nature is downright evil are eager to implement policies to curtail the consequences of evil, while those who are certain that human evil is natural have the banal urge to let it be.

C. *Human Selfishness Natural*

This third, Darwinian, approach to human nature, the main focus of this Essay, is the one that is the most analytically confused, but it is also one widely used among social scientists in the United States, and it is especially prominent in the work of those promoting conservative political agendas, though, interestingly, the following premises are not widely embraced by political elites in other countries.²⁰ Assuming that human behaviors are fixed to result in a relatively narrow range of outcomes and relations, theorists influenced by sociobiology spend little time evaluating differences in

ECONOMY AND SOCIETY 2 (Guenther Roth & Claus Wittich eds., 1978) (arguing that ethnicities and nationalities seemingly classified by “blood” are created by the state); MARY WOLLSTONECRAFT, A VINDICATION OF THE RIGHTS OF WOMEN (1989) (arguing that gender differences that seem natural are created by political institutions).

20. RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT (Beacon Press 1992) (1954).

other theorists' or citizens' preferred outcomes but study the biological similarities supposedly yielding similar preferences in circumstances held constant. "[I]f better behavioral models can yield more effective legal tools," writes Owen Jones, a prominent advocate of evolutionary psychology, "and if human behavior is influenced by evolutionary processes, then greater knowledge of how evolutionary processes influence behavior may improve law's ability to regulate it."²¹ According to this school of thought, human behavior is another branch of animal behavior. Although some of the authors equivocate, the overwhelming message is that this Darwinian understanding of human nature should inform law-making, law-interpretation, and law-enforcement. Just as one would not bring to the study of the natural sciences a review of subjective preferences, say, for how gravity *should* function or how whales *should* mate, what one thinks about how humans should behave is irrelevant to evolutionary psychologists as well.

It is a common refrain for sociobiologists to claim they are just observing the facts and will leave to others the policy implications of their research. John Beckstrom, a leading figure in the law and sociobiology field, is one who doth protest in this vein rather frequently:

I am a lawyer by formal training, but I am not writing this book as an advocate. The book was written to simply report the considerable overlap between the interests of lawyers and sociobiologists and to illustrate some areas where the interests seem to entwine. Most knowledgeable scientists would agree that sociobiological theory, as such, should not be used as a basis for lawmaking until it has become more settled and empirically substantiated.²²

However, this and other caveats leave an impression reminiscent of the cautious inventor, Agent Q, telling James Bond that the latest nifty gadget is still being tested, while the audience shares Q's knowledge that this weapon will most certainly be used in a later scene (and just as it was intended, with effects more stunning and

21. Owen D. Jones, *Evolutionary Analysis in Law: Some Objections Considered*, 67 BROOK. L. REV. 207, 209 (2001).

22. JOHN H. BECKSTROM, *SOCIOBIOLOGY AND THE LAW: THE BIOLOGY OF ALTRUISM IN THE COURTROOM OF THE FUTURE* 5 (1985).

explosive than even Q had suggested). Indeed just four years later Beckstrom himself will author a far less hesitant treatise replete with policy proposals — *Evolutionary Jurisprudence: Prospects and Limitations on the Use of Modern Darwinism throughout the Legal Process* — although nothing in the underlying sociobiology had changed.²³

The epistemological commitment to an ostensibly objective view of human development has dovetailed with those whose agenda it is to construct a world of sexism, ethnic divisions, nepotism and greed. Exemplary of such a view is the work done by Richard Posner in a field he calls “bioeconomics,”²⁴ which draws from evolutionary theory in general and theories of genetic selection in particular, including the work of Richard Dawkins, *The Selfish Gene*, discussed below. While Posner himself is not on the cutting edge of what its advocates refer to as the “law and evolutionary biology” movement,²⁵ his work is worth mentioning because of his stature as a legal commentator, not to mention a federal judge, and the resonance of his tendentious arguments outside the academy.

After dwelling for several chapters on the relevance of sociobiology to economic analysis, Posner comments that the “reader need not accept sociobiology to find the main arguments of this book persuasive.”²⁶ The remark betrays the fascination with and authority of this field in the legal imagination. If sociobiology is not a premise Posner needs to sustain his analyses then it seems either a waste of time or manipulative to devote such space to this field. We

23. JOHN H. BECKSTROM, *EVOLUTIONARY JURISPRUDENCE: PROSPECTS AND LIMITATIONS ON THE USE OF MODERN DARWINISM THROUGHOUT THE LEGAL PROCESS* (1989).

24. RICHARD A. POSNER, *SEX AND REASON* (1992).

25. According to Owen Jones, an advocate of this field who organized the Society for Evolutionary Analysis in Law and runs a website supporting it, he himself should be credited with the first use of the term “evolutionary analysis in law.” Owen Jones, *Evolutionary Analysis in Law: An Introduction and Application to Child Abuse*, 75 N.C.L. REV. 1117, 1117 (1997); *Society for Evolutionary Analysis in Law*, available at <http://www.sealsite.org> (last visited at Sept. 30, 2004). The Gruter Institute is another organization devoting a substantial budget for seminars and reports proselytizing on the importance of evolutionary biology in law. See generally <http://www.gruterinstitute.org/gounder.html> (last visited Oct. 18, 2004). The Gruter Institute is named after Margaret Gruter, also considered a founder of this field with her early work in the 1980s. See *infra* note 55 (citing numerous extensive critical reviews of this literature). My point here is not to repeat these criticisms but to explain the aesthetic function of this discourse and propose how we might go beyond it.

26. POSNER, *supra* note 24, at 110.

do not find Posner offering corollaries between his sociolegal observations and astrological predictions, accompanied by a similar caveat. Posner knows that the astrological discourse would not be taken seriously and would delegitimize his findings, whereas he believes that sociobiological credentials put his work in respectable company and enhance the stature of his conclusions. Richard Epstein also uses a view of human nature to justify conservative policies.²⁷ Thomas Grey observes that Epstein “reads into American constitutional law the view with which Malthus scandalized the civilized world at the beginning of the 19th century — the view that government must leave the weak and helpless to their fate.”²⁸ It is not surprising that Posner and Epstein, who both come out of the Chicago School — known for its interest in applying economic analyses to law — would both embrace evolutionary theory. As Epstein himself writes: “Economics no longer makes arbitrary postulates about individual behavior: it derives and refines its assumptions through evolutionary theory, which explains not only how wings evolve from limbs, but also what mental traits natural selection equips ordinary human beings who breed, feed, and kill in conditions of extreme scarcity.”²⁹

Despite variation in human behavior, numerous social scientists and politicians have used analyses such as those in Posner and Epstein to infer very narrow and strong norms for our political-economic institutions. Although serious evolutionary biologists acknowledge that they find natural selection accommodates selfish, as well as altruistic behaviors, the public policy proponents of evolutionary biology in law pursue strictly conservative political agendas.³⁰ But matters would not improve if the sociobiologists’ accommodations of altruism were also incorporated into policy debates. Because sociobiology is supposedly a science devoted to prediction, these frameworks are poorly suited for understanding conflicting data and extreme variation under circumstances held

27. See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

28. Thomas C. Grey, *The Malthusian Constitution*, 41 *MIAMI L. REV.* 21, 47 (1986).

29. Richard Epstein, 41 *J. OF ECON. LITERATURE* 586-87 (2003) (reviewing PAUL H. RUBIN, *DARWINIAN POLITICS: THE EVOLUTIONARY ORIGIN OF FREEDOM* (2002)).

30. See generally SARAH BLAFFER HRDY, *MOTHER NATURE: MATERNAL INSTINCTS AND HOW THEY SHAPE THE HUMAN SPECIES* (2000) (an excellent self-critique of sociobiology).

constant. As a result, in striving to keep the sociobiological faith, practitioners offer analyses that often lack rigor and consistency. Beckstrom's work, cited with approval by Posner, is exemplary of this. While adopting an overt tone of modest scientific neutrality, he puts forward unfalsifiable arguments that betray two glaring failures. First, he treats contemporary law in the United States as both a dependent and an independent variable for something like the field of sociobiology. Second, he deploys different decision rules for interpreting the evidence. When U.S. policies violate Beckstrom's natural selection hypotheses, he suggests that U.S. policies should change. On the other hand, when U.S. policies are consistent with Beckstrom's sociobiological models, then this is evidence that sociobiology is a robust science. Beckstrom's empirical inferences are internally inconsistent elsewhere as well. Exactly the same practices may mean one thing in one context and the direct opposite in another — both of course supporting his overarching sociobiological project.

“[I]t may seem circular or inconsistent to suggest that a theory, when substantiated, may be used to add strength and verity to a structure like the law and then suggest that there is some strength of verity in the structure that might be used to test the theory,”³¹ Beckstrom acknowledges. This observation crystallizes the paradox of the sociobiologist's mission — to add “strength” to what its own survival suggests is already powerful, and to add “verity” to what, by its own self-account, is indisputably true. Although Beckstrom seems to recognize he is in a bit of a muddle, without this circularity sociobiology is just another source of testable hypotheses, and not a privileged site for policy prescriptions.

In addition to the revealing semantics of Beckstrom's methodological admissions, the goal of using the law as a dependent and an independent variable substantively requires research outcomes that are every bit as pre-determined as the human behavior Beckstrom investigates. Real change, creativity, imagination, something new and interesting is impossible. Laws can only “strengthen” what is already there, albeit not in effect, which is very dull indeed. If one is going about advocating a new thing, why not celebrate its newness rather than treat it as more of the same? In other words,

31. BECKSTROM, *supra* note 23, at 114.

the decision to advocate change is not for fixed moral reasons, but for fixed natural ones. If one is going to advocate change, then it is clear something is missing, something will be done differently.

The decision for law to be an instrument of science is not a moral, but an aesthetic one. The actual result of all this is that even those experiences that confound sociobiological expectations are ones Beckstrom points out need to be adjusted so as to “strengthen” the social organism,³² while those behaviors consistent with Beckstrom’s sociobiological hypotheses prove their “verity.”³³ The defense of this sometimes bidirectional, sometimes inferential process is the assertion that it is possible to distinguish “aspects of the law and legal process that might profitably be looked to for testing from those that might be in need of fine tuning.”³⁴ The suggestion that one could just as easily swap causes with effects inadvertently reveals the laziness of those who inhabit the sociobiological universe.

Exemplary of the empirical sloppiness in Beckstrom’s work is the epistemic status of lawmakers themselves. His account of his subjects’ attributes changes depending on the section of the book. Where Beckstrom wants to convince his readers that legal opinions confirm sociobiological predictions he says the “three million easily accessible reports on human transactions written by educated, experienced, and generally articulate members of U.S. society should be considered the equivalent of the accumulated cultural knowledge of ‘elders,’ in a broad sense of the term [used] by anthropologists.”³⁵ Just as tribal elders supposedly provide a good clue into the broader norms of the societies they inhabit, when judicial elders share the “same opinion regarding typical behavior, their consensus lends confidence that it was right,” and hence such opinions “can assist in testing sociobiological theory.”³⁶ However, when examining these same “elders” elsewhere in the text he wants to use them to advance a contradictory sociobiological claim, namely that such lawmakers are not representative, but rather selfish individuals seeking to advance the interests of their own narrow group.

32. See *id.* at 22; BECKSTROM, *supra* note 22, at 25.

33. See BECKSTROM, *supra* note 23, at 87.

34. *Id.* at 114.

35. *Id.* at 97.

36. *Id.* at 116.

In trying to understand how it is the case that avowedly representative political institutions regularly pass laws that “disproportionately benefits a narrow group that includes the lawmakers,”³⁷ Beckstrom points out that this too confirms sociobiologists’ predictions. Legislation consistently favoring the older, wealthy, white men “illustrate[s] how one might approach an isolated legal action from a sociobiological viewpoint in an effort to uncover the self-interest of the responsible lawmakers.”³⁸ Since the traits of wealth, age, sex, and race Beckstrom imputes to the majority of legislators hold for the majority of the judges who write legal opinions, it is difficult to understand why the views of the legislators should be held to be partial and the views of the judges to indicate unmediated elder reports on their broader culture. From the outset it is simply impossible, by Beckstrom’s own account, to assess whether laws and court opinions reveal something about the motives of the participants making decisions or those of some median “average” individual in a particular society.

Another example of this flawed reasoning occurs in Beckstrom’s discussion of custody law. When it suits his argument that “parental solicitude” is reserved to genetic progeny,³⁹ Beckstrom says that marriage is not a good proxy for inferring paternity.⁴⁰ However, in a much earlier section, making a different point on the subject, he asserts that marriage *is* a good indicator of paternity.⁴¹

“What to make of this kind of stuff?” asks Thomas Grey, after listing similar inconsistencies in the analysis and evidence that Richard Epstein uses to advance evolutionary frameworks for understanding property law:

In one sense, *Takings* belongs with the output of the constitutional lunatic fringe, the effusions of gold bugs, tax protestors, and gun-toting survivalists. It is a sign of the times that the book is published not under some vanity or right-wing specialty imprint, but by the Harvard University Press. Richard Epstein himself is no semi-literate pamphleteer, but the James Parker Hall Professor of Law

37. *Id.* at 82.

38. *Id.* at 85.

39. BECKSTROM, *supra* note 22, at 15; BECKSTROM, *supra* note 23, at 50.

40. BECKSTROM, *supra* note 22, at 90.

41. *Id.* at 24.

at the University of Chicago In the face of all this it seems necessary to say that *Takings* is a travesty of constitutional scholarship.⁴²

Although the scholarship of sociobiologists has been severely criticized over the years, the work still retains the aura of rigor and objectivity or, as Posner puts it, a non-ideological “pragmatism” that claims to be interested purely in making our society run with the least friction possible.⁴³

IV. WHAT WORKS: A NEW PRAGMATISM

One way to think about the dichotomy between those who emphasize the importance of nature and those who emphasize the role of ideas — including political tracts, art, and scientific articles — in shaping human behavior and laws is to understand the two poles as forming a dialectic between what works and our ideas about what works. In other words, we are used to thinking that although our ideas of reality may shape behaviors that then affect reality, there is a very distinct realm of what is real, and ideas about what is real only affect the former through a mediating agent or institution. Legal scholars committed to sociobiology want to avoid mistaken conceptions of reality: only when we are correct are we the most efficient (“strong”) or the most truthful (sociobiology’s “verity”).

When we abide by such a dichotomy between nature and ideas we do not pay attention to the tremendous range in what can work and hence overlook the large number of possibilities for what will be the so-called right idea. Many practices may work, and many potentially right ideas exist, the truth of any one is dependent on what is being done, and especially on what is being institutionalized through law at any particular point.⁴⁴ This differs from a perspectivist claim that what counts as the truth varies in the eye of the beholder. Here it is in their uses — various, conflicting, and at different levels of self-consciousness — that ideas are grasped as

42. Grey, *supra* note 28, at 24-5.

43. POSNER, *supra* note 24.

44. See G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT (Allen W. Wood ed., H. B. Nisbet trans., 1991) (1820) (offering the strongest and also the most nuanced theoretical explication on the subtle ways that law makes truth).

having different degrees of reality;⁴⁵ and this differs from claiming that what seems true changes depending on subjective beliefs of observers. This challenge to the view of what counts as real depends on a new understanding of physics, not metaphysics. Ideas, symbols, and beliefs only exist as things, as the ink on the page, the electronic emissions on the screen, the compression of air when one speaks and so forth. Noticing this may assist those anxious about acknowledging power and truth in what cannot be seen and touched, in realizing that ideas too are real, because they too are material.

The ostensibly objective views of law put forward by Posner, Beckstrom, and Epstein are actually visions, guidelines for what will be created, with imminence conveyed by being grounded in matters of fact. As is the case in all views, they may emerge first in a subtle material, as talk, or an academic paper circulated on the internet, just as others may be presented in an avant-garde film, a joke or a prayer perhaps, and then, for some of these ideas, in forms that seem much more tangible than “mere” ideas, in buildings, in transportation networks, in nations, families, races, sexes, ethnicities, religions, and then in nature, from the Latin *nasci*, meaning birth, that which cannot be changed, questioned, a real fact. Any indeterminacy of what is real, what is material, does not depend on what is either *a priori* practical or material, but rather what is put into practice. Laws and behaviors are materialized through the vision and will of political agents implementing their aesthetics, not our instincts.

Were it the case that laws could claim legitimacy on the grounds that they were simply reinforcing innate instincts, evolutionary theorists in the United States should be demanding the end of state sanctioned marriage, since the practice clearly is not one that people are finding especially adaptive. As to those behaviors that are truly selected for by nature, governments do not need to impose rules or provide special incentives, as did President George W. Bush in his proposal to spend \$1.5 billion to bolster the institu-

45. See also Jacqueline Stevens, *Symbolic Matter: DNA and Other Linguistic Stuff*, 20 SOC. TEXT 105, 105-136 (2002).

tion of marriage.⁴⁶ That the legal codification of “heterosexuality” is not always easy does not, however, mean it is not pragmatic, or even that it is wrong. The present marriage policy in the United States is both impractical and practical, depending on what one wants society to look like. The real problem facing those who want to use insights about the role of law in society to improve the human condition is not that we lack empirical information on what laws do, or even what works best, but the sense that law is reflecting human nature and not creating it, that our beliefs about human nature are fixed in certain ways because we are led to believe human nature itself is a fixed and determinate condition.

The first reason that such a view on the relation between law and nature needs to be directly addressed is that most of what people believe about our most important practices and identities, from marriage to nationalism to religious observance, is based on neuroses. Second, and relatedly, if people hold fast to their present beliefs this means death to creativity, openness, and possibility.⁴⁷ When law’s form is seen as passively reproducing nature’s plan, then this affects, or better, refracts the content in a particular manner that in turn informs us of law’s shape as well. This is not because of any direct causal activity between form and content, but rather how the fit between law’s form and content yields a specific meaning. The effectiveness of this can be seen in its ability to exercise its authority so quietly and imperceptibly.

One can find numerous political and legal theoretical treatises dedicated to explaining how the authors know that governance should be based on the assumption that human nature, though plastic or evil, can be molded or repressed. But very few authors in the social sciences are associated with a thoroughgoing theoretical or epistemological defense of sociobiology.⁴⁸ Instead, one finds so-

46. See Robert Pear & David D. Kirkpatrick, *Bush Plans \$1.5 Billion Drive for Promotion of Marriage*, N.Y. TIMES, Jan. 14, 2004, at A1.

47. This is Nietzsche’s critique of sociobiology’s effect on moral psychology. See FRIEDRICH NIETZSCHE, *THE GAY SCIENCE* (Bernard Williams ed., Josefine Nanckhoff trans., Cambridge University Press 2001) (1887) [hereinafter *THE GAY SCIENCE*]; see also FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALITY* (Keith Ansell-Pearson ed., Carol Diethel trans., Cambridge University Press 1994) (1887) (critiquing and parodying sociobiologist Paul Ree).

48. Cf. EDWARD O. WILSON, *CONSCIENCE: THE UNITY OF KNOWLEDGE* (1999) (a natural scientist’s theoretical defense of sociobiology).

cial scientists, especially economists and political scientists, but also legal theorists, simply referencing social biologists and evolutionary psychologists as a matter of empirical veracity. Implicit in the absence of a political theoretical defense of sociobiology in the social sciences is the belief that the objective discussion of observed human behaviors does not require a justification, that this research and its policy implications are simply representing reality.

An example of this invocation of scientific authority without any theoretical inquiry appears in a law journal article explaining the basis of the U.S. Constitution in proto-evolutionary theory. John McGinnis writes:

It is only recently that the fruits of this revolution in the social sciences have become widely available to the public, partly because many social scientists are hostile to these ideas for political reasons. In the long run, however, science cannot be suppressed. The ongoing rediscovery of the constraints of human nature accounts in large measure for the recent skepticism in Washington about collectivist solutions imposed in the past.⁴⁹

The market-based solutions for awarding the hazards and benefits of public goods and the absence of national health care are symptoms of Washington's embrace of evolutionary theory McGinnis endorses. As an implicit corollary, McGinnis must think that the "rediscovery" of social Darwinism by U.S. policymakers — because social Darwinism is the right lens for understanding human behavior — makes the United States a better country than those that have more communitarian and altruistic norms. Rather than take the United States's acceptance of evolutionary psychology as endorsement of U.S. policies, the more empirically interested investigation of this sort would have noticed that every other advanced industrial society in the world today has a much more substantial investment in public goods and welfare, and might have inquired into this variation (especially in light of the higher life expectancies and lower rates of infant mortality in these other countries, that natural selection especially would seem to favor). By only applying the natural selection hypothesis to the United States, McGinnis vio-

49. John O. McGinnis, *The Original Constitution and Our Origins*, 19 HARV. J.L. & PUB. POL'Y 251, 261 (1996).

lates a basic rule of social science. Selecting his case on the dependent variable (conservative social policies during Reagan's presidency), he overlooks the plethora of practices at odds with his hypothesis. McGinnis never asks why "constraints of human nature" only are recognized by the homo sapiens in 1980s Washington, D.C. and not those in Stockholm. A more honest appraisal of the social policies among countries would lead to dismissal of the truisms of evolutionary psychology rather than an elevation of the stature of U.S. policies for their agreement with McGinnis's sociobiological premises.

Explicitly committed to an agnostic pragmatism (whatever leads to survival is practical), sociobiologists are inevitably apologists for a crusading, albeit confused, conglomeration of patriarchalism, individualism, and nationalism (whatever leads to advancing men's honor, self-interest, and a nation's dominance is good). In her review of Posner's *Sex and Reason*, Margaret Chon nicely states the tension between the commitment to utopianism and to pragmatism that runs through Posner's work. On the one hand, Chon writes, Posner reveals the "modernist desire for objective reason and the utopian possibilities it might release, if we only could just get it right."⁵⁰ On the other hand, she quotes Posner writing, "The pragmatist's real interest is not in truth at all but in belief justified by social need."⁵¹ Summarizing the tension she writes:

[T]hough he confirms elsewhere that science is a social activity, he adheres in *Sex and Reason* to a narrative of science that reinforces the way things are in nature perspective His selective use of evolutionary theory shows a compulsive need to authenticate his discipline of economics as this type of science, much like a nervous outsider who name-drops endlessly in an effort to be accepted at a party.⁵²

To be clear, I am not claiming that the academic terrain of legal theory in the United States is dominated by evolutionary psycholog-

50. Margaret Chon, *Sex Stories — A Review of Sex and Reason by Richard A. Posner*, 62 GEO. WASH. L. REV. 162, 174 (1993) (book review).

51. *Id.* at 175.

52. *Id.*

ical models. The Chicago School's glorification of markets because they mimic natural selection or Posner's use of evolutionary theory to explain human behavior are just one part of legal theory. In fact, a cursory review of articles in leading law and law and society journals would suggest that the field of legal theory is equally populated by social critics with subtle readings of the complexities of power, violence, and how law presently shapes, or should shape, our legal relations. Those essays on sex, sexuality, race, ethnicity and justice that dominate law school syllabi and most of those in the top ranks of U.S. law faculties today have little interest in sociobiology.

Indeed the disparity between the legal aesthetic sensibilities of leading law scholars and those setting the social policy agenda for the U.S. government over the past twenty years is truly stunning. To take the obvious example of Rawls, criticized in law journals for his conservatism more than anything else, one would think that there is an inverse relationship between a theorist's importance to other scholars and the extent to which a theorist's ideas will be debated, much less implemented, at the highest levels of U.S. government.⁵³

So if people like Posner, Beckstrom, Epstein, and McGinnis are not gleaning their views from most law review articles, and in fact are fiercely attacked by their peers, what is the intellectual community authorizing these evolutionary frameworks for law? In order to understand the basis of the views held not only by many influential legal theorists, but much of the American public, we need to turn to experts on whom their approaches rely, writers who are not legal scholars themselves, but evolutionary biologists and psychologists.

53. Peter Schlag writes:

This pluralization of the study of law entails a proliferation of idioms, methods, and the like. In the classic academic scenario, a 'new' form of knowledge is 'discovered.' . . . Conferences are held. Symposia are organized. And a few years later, no one remembers. All that is left are the rows upon rows of silent, bound books neatly shelved in the law library. Differentiations are produced. But they lack staying power.

Schlag, *supra* note 7, at 1101.

V. WHO ARE THE SOCIOBIOLOGISTS BEING CITED BY TODAY'S
LEGAL SCHOLARS?

To be persuaded that legal practices and other human creations should be contemplated without reference to beliefs about biological constraints, as agoraXchange requires, means showing that the family in particular, and the nation more generally — institutions providing the bedrock of the human sociobiological paradigm — result from laws, not genes. This entails considering the authors' sociobiological legal scholars reference, in particular competing evidence to claims that the family, the nation — indeed any bonding within so-called primordial groups antagonistic to others — and all other organisms are partial to their own kind.⁵⁴ To the extent that the premises of the writers such as E.O. Wilson, Richard Dawkins, and Donald Symons are flawed, the analyses drawing on these works by Posner, Beckstrom, Epstein, and McGinnis to ratify a passive hierarchical violent world merely are reflecting the fantasies of these writers. Calling attention to the problems in this work is important because the proliferation of these sociobiological fantasies is producing an ugly world, and not simply because bioeconomic legal fictions misapprehend the world.

A. *The Human Family Exists Because of Evolution and Natural Selection*

According to the revised 2000 edition of E.O. Wilson's famous textbook on sociobiology:

The building block of nearly all human societies is the nuclear family. The populace of an American industrial city, no less than a band of hunter-gatherers in the Austra-

54. For a critique of these sociobiological authors, see generally ANNE FAUSTO-STERLING, *MYTHS OF GENDER: BIOLOGICAL THEORIES ABOUT WOMEN AND MEN* (2d ed., 1992) (1985); STEPHEN JAY GOULD, *EVER SINCE DARWIN: REFLECTIONS IN NATURAL HISTORY* (1977); STEPHEN JAY GOULD, *THE STRUCTURE OF EVOLUTIONARY THEORY* (2002); *FEMINISM AND EVOLUTIONARY BIOLOGY: BOUNDARIES, INTERSECTIONS, AND FRONTIERS* (Patricia Adair Gowaty ed., 1993); DONNA HARAWAY, *PRIMATE VISIONS: GENDER, RACE, AND NATURE IN THE WORLD OF MODERN SCIENCE* (1989) (primatologists take images of families from human societies and use them to represent other primates); RICHARD LEWONTIN, *BIOLOGY AS IDEOLOGY: THE DOCTRINE OF DNA* (1991) (critique of genetic determinism); ALAS, *POOR DARWIN: ARGUMENTS AGAINST EVOLUTIONARY PSYCHOLOGY* (Hilary Rose & Steven Rose eds., 2002); R.C. LEWONTIN ET AL., *NOT IN OUR GENES: BIOLOGY, IDEOLOGY AND HUMAN NATURE* (1985).

lian desert, is organized around this unit. In both cases the family moves between regional communities, maintaining complex ties with primary kin by means of visits (or telephone calls and letters) and the exchange of gifts. During the day the women and children remain in the residential area while the men forage for game or its symbolic equivalent in the form of barter and money. The males cooperate in bands to hunt or deal with neighboring groups. If not actually blood relations, they tend at least to act as 'bands of brothers.' Sexual bonds are carefully contracted in observance with tribal customs and intended to be permanent. Polygamy, either covert or explicitly sanctioned by custom, is practiced predominantly by the males.⁵⁵

This section, coming at the end of a long textbook climbing the evolutionary tree, implies that the alleged frequency of the "nuclear family" in other species and in our hunter-gatherer ancestors proves its necessity for human society. The passage from Wilson also suggests that the nuclear family is nested in a larger modern-day equivalent of a clan, or band of blood brothers who establish rules regulating sexual access among themselves to ensure stability for competing against "neighboring groups." The family is the most cohesive and foundational unit of any group, sociobiologists believe, and hence they infer that just as a father will identify first with his family against others, families will also coalesce and defend their groups against others as well.

The result of such patterns, according to Wilson, is first tension with other groups, and later war:

Any group of people that perceives itself as a distinct group, and which is so perceived by the outside world, may be called a tribe. The group might be a race, as ordinarily defined, but it need not be; it can just as well be a religious sect, a political group, or an occupational group. The essential characteristic of a tribe is that it should fol-

55. EDWARD O. WILSON, *SOCIOBIOLOGY: THE NEW SYNTHESIS* 553 (2000) (1975) (citing V. Reynolds, *Kinship and the Family in Monkeys, Apes and Man*, 3 *MAN* 209 (1968)); Lila Leibowitz, *Founding Families* 21 *J. OF THEORETICAL BIOLOGY* 153 (1968).

low a double standard of morality — one kind of behavior for in-group relations, another for out-group.⁵⁶

Wilson points to the Sinhalese and Tamil ethnic conflict in Ceylon as exemplary of this dynamic, explaining that when there is awareness of group difference, “Xenophobia becomes a political virtue” and the result is violence. “History is replete with the escalation of this process to the point that the society breaks down or goes to war,” Wilson explains, “No nation has been completely immune.”⁵⁷

Emphasizing the instinctive character of such fighting, sociobiologist Konrad Lorenz in his book on aggression writes that the “militant enthusiasm” of group membership is “dangerously akin to the triumph ceremony of geese and to analogous instinctive behavior patterns of other animals.” He continues:

The social bond embracing a group is closely connected with aggression directed against outsiders. In human beings, too, the feeling of togetherness which is so essential to the serving of a common cause is greatly enhanced by the presence of a definite, threatening enemy whom it is possible to hate.⁵⁸

Lorenz proposes that an objective visitor from Mars would “unavoidably draw the conclusion that man’s social organization is very similar to that of rats, which, like humans, are social and peaceful beings within their clans, but veritable devils toward fellow-members of their species not belonging to their own community.”⁵⁹

Even Joshua Goldstein, a social scientist who reviewed twenty-one hypotheses for why it is virtually always men who go to war, thinks that while biology does not explain the ubiquity of male soldiers, the very fact of war itself has biological roots:

[The] interstate system reproduces at the level of large groups the biologically based scripts and dynamics found at the level of small groups. Overall, the international hierarchy resembles a dominance system, fluid international alliances resemble chimpanzee politics, and the tit-

56. *Id.* at 565 (citing Garrett Hardin, *Population Skeletons in the Environmental Closet*, in 28 BULL. OF THE ATOM. SCI. 37 (1972)).

57. WILSON, *supra* note 55, at 565.

58. KONRAD LORENZ, ON AGGRESSION 245-46 (Marjorie Latzke trans., 1996).

59. *Id.* at 205.

for-tat reciprocity studied by international relations researchers resembles the reciprocal behaviors that enable cooperation in small groups.⁶⁰

Although institutions such as the United Nations and multilateral treaties may ameliorate some harms, the biological roots of group difference ultimately demand deadly confrontations, meaning “armies that answer to large-group rules — conquest, dehumanization, and lethal violence.”⁶¹

B. Assessing the Evidence on the Evolutionary Basis of the Family

Significantly, Wilson’s fantasies about the so-called average family in a typical city have no basis in our empirical experiences. In the United States, about half of those over fifteen years old are unmarried, and among those married only 21% conform with Wilson’s statement of what is normal, i.e., a household with a sole male wage-earner.⁶²

Also, Lorenz and other sociobiologists assume domestic harmony. But if Lorenz’s Martian were to touch down on earth this visitor would observe that about half of all violent deaths worldwide since 1989 have occurred in war (about 8 million),⁶³ and of the remaining, the plurality were a result of intimate partner violence, parental violence, and suicide.⁶⁴ As alluded to above, Wilson’s description of the family in an industrial city, supposedly written for a revised 2000 edition, misrepresents the facts. Almost half the children in the United States will not be raised by two parents who are genetically related to them,⁶⁵ a situation sociobiologists predict would not occur because individuals should have little interest in devoting their resources to the continuation of someone else’s genes and genetic fathers should stay with the mothers of their chil-

60. JOSHUA GOLDSTEIN, *GENDER AND WAR* 408 (2001).

61. *Id.* at 409.

62. United States Census Bureau, *America’s Families and Living Arrangements*, Table A2 and Table FG2, (June 29, 2001), available at <http://www.census.gov/population/www/socdemo/hh-fam.html>.

63. World Health Org. *World Report on Violence and Health* (Etienne Kurg et al. eds., World Health Organization 2002).

64. *Id.*

65. United States Census Bureau, *America’s Families and Living Arrangements*, Table A2 and Table FG2 (June 29, 2001), available at <http://www.census.gov/population/www/socdemo/hh-fam.html>.

dren to protect them.⁶⁶ While one might expect such an empirical error from a casual social commentator, that it comes from an esteemed natural scientist speaks volumes about the importance of ideology in this field.

Not only is Wilson's bread-winner model of the family inaccurate, when such families exist, they tend to be those with the most violence. A study of ethnographic data from ninety societies concludes that "wife beating occurs more often in societies in which men have economic and decision-making power in the household [and] where women do not have easy access to divorce. . ."⁶⁷ Interestingly, whereas Wilson's genetic account would predict men would not harm pregnant wives, as that would endanger their progeny, the data show that intimate partner violence is responsible for a great deal of maternal mortality: "A recent study among 400 villages and seven hospitals in Pune, India, found that 16% of all deaths during pregnancy were the result of partner violence. . . Being killed by a partner has also been identified as a important cause of maternal deaths in Bangladesh and in the United States."⁶⁸

And even more damning for Wilson's claims about genetics than evidence that marriage contributes to fathers harming the mothers of their children and indirectly harming their children, are data showing parents directly injuring and killing their own children. Compare Wilson's prototype of happy hunter-gatherer families with the following:

66. Martin Daly and Margo Wilson claim sociobiological theory accommodates this behavior because the vast majority of familial violence is men attacking their partners or stepfathers attacking their partners' children — behaviors they infer do not jeopardize the progeny of genetic children. Martin Daly & Margo Wilson, *The Evolutionary Social Psychology of Family Violence*, in *HANDBOOK OF EVOLUTIONARY PSYCHOLOGY: IDEAS, ISSUES, AND APPLICATIONS* (Charles Crawford & Dennis Krebs eds., 1998). But, partner violence frequently includes attacks on the mothers of their genetic children. Hence, since Daly and Wilson also believe that being raised by a genetic mother enhances the fitness of one's progeny, they make an inferential error by not realizing that killing or impairing the mother of one's genetic children would indeed adversely impact one's genes. Martin Daly & Margo Wilson, *Evolutionary Social Psychology and Family Homicide*, 242 *SCI.* 519 (1988). See Hans Temrin et al., *Step-parents and Infanticide: New Data Contradict Evolutionary Predictions*, 267 *PROC. OF THE ROYAL SOC'Y, Series B*, 943 (2000) (citing new empirical challenges to their data).

67. World Health Org. World Report on Violence and Health (Etienne Kurg et al. eds., World Health Organization 2002).

68. *Id.* at 102 (internal citations omitted).

- In a cross-sectional survey of children in Egypt, 37% reported being beaten or tied up by their parents and 26% reported physical injuries such as fractures, loss of consciousness or permanent disability as a result of being beaten or tied up.
- In a recent study in the Republic of Korea, parents were questioned about their behavior towards their children. Two-thirds of parents reported whipping their children and 45% confirmed that they had hit, kicked or beaten them.
- A survey of households in Romania found that 4.6% of children reported suffering severe and frequent physical abuse, including being hit with an object, being burned or being deprived of food. Nearly half of Romanian parents admitted to beating their children 'regularly' and 16% to beating their children with objects.
- In Ethiopia, 21% of urban schoolchildren and 64% of rural schoolchildren reported bruises or swellings on their bodies resulting from parental punishment.⁶⁹

A study in China indicated an annual rate of "severe violence against children, as reported by parents, of 461 per 1000."⁷⁰ In light of the high proportion of children sustaining injuries from their parents and even being killed by them, it is easy to see why Freud would think the many of us who find value in the family, even when we are not directly participating in violence ourselves, are not affirming but denying life.

The above statistics about family violence and misery are very incomplete portraits of family life. We all know that families can also be sources of tremendous warmth and intimacy. Many parents provide for their children's emotional and physical needs in ways that are entirely admirable. But because the opposite occurs as well, it seems important that when evaluating the contributions to human well-being made by the present family structure we take in what happens there in all of its complexity, which requires abandoning myths enticing us to embrace it wholeheartedly as a site of safety and unambivalent love. Looking objectively at the history of the family, it is impossible to see how anyone could meet the burden of proving the extravagant claims offered on behalf of its contributions to the happiness and well-being of its members.

69. *Id.* at 62 (internal citations omitted).

70. *Id.* at 63 (internal citations omitted).

Just as family violence is not primarily a consequence of families fighting against each other but a site of internal conflict, the nation and war are not necessary expressions of innate aggression, either, both having been challenged frequently and intensely by those with empathic and cosmopolitan commitments.⁷¹ Eloquently summarizing the impulse informing the acts of courage by those opposing violence in their name, Dunja Blazevic, Director of the Soros Center for Contemporary Arts, Sarajevo told me, “The first responsibility everyone has is to resist the nationalism of their own country.” By showing the centrality of legal changes to the variation in our past and present affinities, it is possible for legal theorists to demonstrate the plausibility of new images of governance, such as those agoraXchange promotes, and relatedly, to counter the conservative pseudo-empiricism, in other words, the wishful thinking of conservative ideologues.

C. Sociobiologists as Utopians

The conventional wisdom these days pits sociobiological “realists” against social constructivist “idealists,” with the former telling the latter that their visions of change are idle fantasies. But as we see in the evidence above, insofar as sociobiological preferences for the nuclear family with a male head of household is neither adaptive nor prevalent, the norms that follow from their theories are as utopian as the cosmopolitan, egalitarian ones they dismiss.

It is telling that the sociobiologist who authored the “selfish gene” theory Posner celebrates, Richard Dawkins, actually rejects inferences from genes to decisions about war and peace. At the end of a book urging that natural selection occurs at the level of individual genes and not species, Dawkins says that the basis on which individual humans decide whether and how to join and perpetuate groups is *not* determined by genetic natural selection:

As an enthusiastic Darwinian, I have been dissatisfied with explanations that my fellow-enthusiasts have offered for human behavior. They have tried to look for ‘biological advantages’ in various attributes of human civilization. For instance, tribal religion has been seen as a mechanism for solidifying group identity . . . The argument I

71. See STEVENS, *supra* note 2.

shall advance, surprising as it may seem coming from the author of earlier chapters, is that, for an understanding of the evolution of modern man, we must begin by throwing out the gene as the sole basis of our ideas of evolution.⁷²

Instead of biological fitness selecting for genes as the motor of human civilization, Dawkins argues that it is new ideas that may be selected for — what he calls “memes” — and that these convey discrete beliefs. The ones people like — evaluated on many grounds and not just whether they are conducive to biological fitness — are the ones that survive and that influence human behavior independent of genetic pressures.⁷³

Although he does not acknowledge it, Dawkins must have known he was echoing a point that had been made by philosophers and social critics since Plato, that as our biology shapes the ideas that may be selected for — certain beliefs are simply unimaginable because of our biology and environment — our ideas shape our biology. In the case of Plato’s *Republic* it was assumed that if a “noble lie” were told indicating people were born of the earth with gold, silver, or copper, then people would behave in a manner conducive to a strong, well-ordered society, not because such a distinction of metals existed but because those believing this to be the case would act accordingly. In the case of Plato’s society or any other going to war, the most crucial biological fact of life or death is not determined by genes but by hegemonic ideas, especially those expressed in laws.⁷⁴

Advocating a very active view of the role humans consciously play in shaping their destinies, Dawkins writes:

[E]ven if we look on the dark side and assume that man is fundamentally selfish, our conscious foresight — our capacity to simulate the future in imagination — could save us from the worst selfish excesses We can see the long-term benefits of participating in a ‘conspiracy of doves’, and we can sit down together to discuss ways of making the conspiracy work. We have the power to defy the selfish genes of our birth and, if necessary, the selfish

72. RICHARD DAWKINS, *THE SELFISH GENE* 191 (2d ed. 1990).

73. *Id.* at 192.

74. See PLATO, *supra* note 15.

memes of our indoctrination. We can even discuss ways of deliberately cultivating and nurturing pure, disinterested altruism — something that has no place in nature, something that has never existed before in the whole history of the world.⁷⁵

According to Dawkins, it is memes or ideologies prescribing selfish behaviors, not genes. When it comes to human possibilities of peace and altruism, even if a selfish gene exists, it has indeterminate consequences for what we decide to do. If the internal contradictions in sociobiological thought and its failure to predict obvious patterns of human behavior are not reason enough to pull away from the sway of seeing our institutions and behaviors as rooted in nature, perhaps authorization from someone viewed as an eminent authority on natural selection may urge us forward in a project demonstrating the contingencies of the past and future.

From just this brief sketch of change and debates about foundational practices and institutions we see the ebb and flow of history and the flux at any single moment dissipating any conceivable image of a single, timeless human nature shaping social events. For any issue on which observations about instincts are brought to bear there has been substantial disagreement in ideas and practices: slavery, despotism, hereditary kingdoms, the oppression of women, racial inequality, and the alleviation of colonialism, including in the British colonies of the Americas, were all at some point defended as expressions of a natural order whose violation would bring ruin and even damnation.

VI. THE LEGAL AESTHETICS OF FAMILY AND NATION

Hegel noted in his *Philosophy of Right* that while ideas may survive in several cultural media, the most effective method for materializing and extending the life of an idea is through law. In fact, if an ethical or moral belief is not a law, it quickly becomes just another passing fancy. Slavery is an excellent example of this. It is truly stunning to compare the ubiquity of slavery over the last several millennia, when it was rarely even questioned, with the virtually universal condemnation of this institution today. This radical shift

75. *Id.* at 200-01.

is not a result of aggregated individual opinions coincidentally changing at the same time, much less fast-paced changes in the means of production, as Marx and some historians of the Americas allege, but occurred soon after European states accepted the edict of the Catholic Church prohibiting the enslavement of people captured in just wars, an empty Papal proclamation until European kings acceded.

The slave trade to the Americas, while protected by law for between two and three centuries after being banned within Europe beginning in the mid-fifteenth century (depending on the country), was not integrated into the fabric of the state's existence in the same way as the earlier enslavement of prisoners of wars and captive populations. Though this is a topic deserving of far more extensive discussion, the bottom line is that once untethered from the logic of war and state survival, slavery came to a relatively quick legal, behavioral, and then ideological demise. While of course many media beyond our genes influence the shape of the human body and its possibilities, perhaps the most important is the law.

A. *Etymology of Law*

That even scientists choose to express their axiomatic observations as "*laws* of nature" suggests the primal force evoked by the concept of a law. It is rather interesting that the ultimate expression of certainty regarding a physical event is expressed in a vocabulary directly lifted from the language of specifically human affairs, not physical ones. Isaac Newton could have characterized gravity in many ways; there is nothing about consistent behavior which requires this be called a "law" and not something else such as a principle, axiom, or system. This legal nomenclature is not a casual decision but is one among several places where Newton's *Principia* draws heavily on political images of authority.

Not only does Newton call his statements about physical regularities "*leges*" (laws) but his concluding chapter, as well as Edmund Halley's dedicatory poem, repeatedly invoke images of the political order to establish and explain the authority of the natural order. "Behold Jove's calculation and the laws," writes Halley, "That the creator of all things, while he was setting the beginnings of the

world would not violate,”⁷⁶ and in a section titled *Mundi Systemati* Newton pursues a lengthy, arcane etymological discussion of the meaning of *deus* as opposed to *dominus deus* (“lordship God” is how Bernard Cohen and Anne Whitman translate this).⁷⁷ Newton elaborates on the implicit sense of political authority ‘*deus*’ contains: “Our fellow countryman Pocock derives the word ‘*deus*’ from the Arabic word ‘*du*’ (and in the oblique case ‘*di*’), which means lord. And in this sense princes are called gods, *Psalms* 82 and *John* 10:35. And Moses is called a god of his brother Aaron and a god of king Pharaoh (*Exod.* 4:16 and 7:1). And in the same sense the souls of *dead princes were formerly called gods by the heathen, but wrongly because of their lack of dominium.*”⁷⁸ The point of Newton’s etymological exegesis is to assert that the world’s order is not one of simple evident facts, but carries the same imperatives as a political order on which even God must depend to make his presence of significance. Though the text of the *Principia* appears to advance overt ideas of a world order that has its own logic that can be deduced but not affected by mortals such as Newton, the framing texts suggest something quite different — that the ultimate original template of knowledge is that power located in specifically human political affairs. The rule of kings is not like that of the physical imperatives willed by God, but God is only truly God when ruling like a king, like one with the supplemental *dominus* not contained in *deus* alone, or at least not in an idiomatic use that does not require Newton’s etymology.

By bringing this world kingdom to bear on interpreting the meaning of the cosmos, Newton suggests that it is willful power, not arbitrary events, that best characterize what makes the universe work and that if we want to understand how God does all this then there is no neutral religious vocabulary of God that evokes the right metaphor. Rather, Newton needs to resort to the political vocabulary of kings in order to make clear exactly who his god, the god of natural laws, really is.

76. Edmund Halley, *Ode on This Splendid Ornament of Our Time and Our Nation, the Mathematica-Physical Treatise by the Eminent Isaac Newton*, in ISAAC NEWTON, *THE PRINCIPIA. MATHEMATICAL PRINCIPLES OF NATURAL PHILOSOPHY* 12 (Bernard Cohen & Anne Whitman eds., 1999) (1867).

77. *Id.* at 140.

78. *Id.* at 941.

By referring to his generalizations about motion as “Axiomata, sive Leges Motus” and titling each of them “Lex” I-III, Newton self-consciously evokes the law of Moses, as Halley also infers in his poem comparing Newton’s laws to the work of “He who commanded us by written tablets to abstain from murder, Thefts, adultery, and the crime of bearing false witness,” and finds Moses “did less than our author for the condition of mankind.”⁷⁹ Even more than Moses’ laws, Newton’s have rendered unto humanity the outlines of God’s fierce power: “Nec fas est proprius mortal: attingere divos.”⁸⁰ Further suggesting the basic metonymic association of law and politics are carrying along the meanings of God and science is the fact that the Latin *lex* and its plural *leges* that Newton uses were especially prominent in Ecclesiastical Latin. Both Halley and Newton would have been very familiar with how *lex* “especially” referred to the “law of Moses.”⁸¹ When Newton announced the laws of motion he was placing himself in the footsteps of Moses, who also was informing people, on the highest authority in the universe, that certain laws existed.

That one could, even after the Ten Commandments, curse one’s parents did not detract one bit from the certainty and especially the authority which Newton sought for his laws by invoking those of Moses. While theorists emphasize the difference between natural law and positive law as the difference between what is inevitable and what is contingent, the very deliberate evocation of law and its overtly political context of dominion and conquest (what if the other side had prevailed?) suggests that the firmest foundation for regularities of existence is not a rock but the human artifice.⁸²

Either written or passed on through tradition and oral history, those ideas that have the formal imprimatur of political institutions exert an especially strong influence on our individual and collective actions, and can be described as having aesthetic as well as prag-

79. Halley, *supra* note 76, at 12.

80. Isaac Newton, *In Viri Praestantissimi Isaaci Newtoni Opus Hocce Mathematico-Physicum Feculi Gentisque Decus Egregium*, in *PHILOSOPHIAE NATURALIS PRINCIPIA MATHEMATICA* 14 (3d ed., Harvard Univ. Press 1972) (1720).

81. A Latin Dictionary (Charlton T. Lewis & Charles Short eds., Clarendon Press 1879), available at Perseus Project, <http://www.perseus.tufts.edu/cgi-bin/engreek?lang=LA> (last modified 2001).

82. John Seery, *Castles in the Air: An Essay on Political Foundations*, 27 *POL. THEORY* 460 (1999) (critiquing how post-foundationalists overlook the artifice of foundations).

matic causes and effects. One way to think about Newton's use of "lex" as the image for the regularities he had in mind is to contemplate its aesthetics for our period as well. Instead of the sociobiological instinct — to use nature as providing evidence for the form of law — Newton authorizes us to consult the form of law for understanding the (phenomenological) evidence of nature. What we think is nature is not only made by law, but has its very idea of inevitable patterns exemplified through law. To understand what this sort of law looks like requires understanding the aesthetics of this word-image.

B. AgoraXchange

To the realists — You sober people who feel well armed against passion and fantasies and would like to turn your emptiness into a matter of pride and ornament: You call yourselves realists and hint that the world really is the way it appears to you.

Only as creators! — This has given me greatest trouble and still does: to realize what things *are called* is incomparably more important than what they are. The reputation, money, and appearance, the usual measure and weight of a thing, what it counts for . . . all this grows from generation unto generation, merely because people believe in it, until it gradually grows to be part of the thing and turns into its very body.

What at first was appearance becomes in the end, almost invariably, the essence and is effective as such. How foolish it would be to suppose that one only needs to point out this origin and this misty shroud of delusion in order to *destroy* the world that counts for real, so-called '*reality*.' We can destroy only as creators. But let us not forget this either: it is enough to create new names and estimations and probabilities in order to create in the long run new 'things'.⁸³ In these passages Nietzsche is confronting social Darwinians, whom he saw as creating and not describing an especially debased sort of human being. Rather than accept the conventional division between scientists and artists, Nietzsche thought that all representations, including those of the moral psychologists whom he confronted, were a form of artistry. Insofar as the words and images being used were making us bad people — the passive, dull,

83. THE GAY SCIENCE, *supra* note 47, §58.

inert matter of natural selection — the problem with scientists was not that they were unobjective, but that they were bad artists. The words of these scientists were creating an undesirable kind of human and to the extent that such figures were accepted, these scientists would be right about us. To be clear, they would be right not because they had objectively observed us as we truly are, but because their words would materialize us to embody their images. To challenge these scientists it was not enough to simply critique their ideas, but rather, Nietzsche thought, writers needed to proliferate new images of humans in order to create new human beings.

The purpose of *agoraXchange* is to concretize Nietzschean insights about legal institutions in two ways: first by showing how current political institutions embody a dialectic of law's form and substance. While in form and content today's laws effect i.e., as in make efficacious, an organism restricted by hereditary laws of nature, the site proposes that this is not because of any deep truth about our nature, but due to the institutionalization of a very specific legal aesthetic. Second, the website's form and content provide a way of presenting an alternative legal aesthetic for decisions that are neither inevitable nor immutable. Gearey writes: "The aesthetic provocation to legal theory is thus to continue a will to power, to will a different way of thinking and feeling the law."⁸⁴ By providing a forum where people may participate in re-imagining our institutions toward the end of playing new games, those not based on the present materialism and nativism cultivated by the current political order's insistence of distinctions of birth, images of a new world come into being. This is not a naïve statement about the viability of a website to instantly make a new world, but an acknowledgement of the materiality and reality of this space in itself, where people not only work on designing a game, but also post and moderate forums on related projects, share information about political issues, and organize informally and more formally to work beyond the site as well. The site is to be hosted in art and media centers as well as universities globally — including India, China, Mexico, Turkey, and Japan — *agoraXchange* will have mirror sites in languages other than English.⁸⁵

84. GEAREY, *supra* note 11, at 76.

85. <http://www.agoraxchange.net> (last modified July 22, 2004).

Integrating with practices of collaborative communities online, on the streets, in the workplace, the arts, universities, and in formal and informal conversations, meetings, and conferences that cut across these lines, agoraXchange does not point toward new models of politics, but itself performs this alternative community, one where people participate because of a desire to create, not destroy, and where individuals are recognized for what they do and not who they are. The game that will draw on these ideas will then be an experiment showing the kinds of conflicts and resolutions that will emerge in a world without incentives of kinship and nationality.