The Tyranny of Money
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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.1 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*, 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. 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.


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. 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, 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 undeterminative. Granted that we mere mortals overreact to some things and underreact to others, but how can we tell which is what? 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” econom­
ics, and ends up pointing towards declining tax rates on upper-income
earners, even and maybe especially in the name of progressivity or re-
distribution.7

Frank’s arguments against “trickle down” theorists, moreover, are
inconsistent. He argues that we will not respond to an economic in­
centive 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) — lei­
sure being a classic nonpositional good. Frank does not close the loop
by explaining how, if we all respond to a “steeply progressive” con­
sumption tax by spending more time with our families, we would still
get the “trillions of dollars” in benefits from more savings (p. 250, pas­
sim), 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, gov­
erned 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, ev­
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 con­
spicuous 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)

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/FLATTAX 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,
— it has actually fallen precipitously since Frank, using data from the mid 1990s, sounded the alarm, although it is notoriously hard to measure. 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 elks (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. 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).


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.10 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.11 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.12

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).13 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).


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, they are reluctant to invoke interdependent preferences, because these destroy the firm conclusions of general equilibrium theory. This is akin to the need for welfare economics or rational choice theory to rule out envy, for otherwise Paretian norms are unavailing. 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." 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. 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


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 dol-

lars 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 de-
serves a great deal of credit. But one omission is particularly unfortu-
nate. 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 deduc-
tion for savings, as a cash-flow consumption tax such as Frank pro-
poses 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.19 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.20 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 deduc-
tion (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.21 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-

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.


gressive national sales tax, as I have independently called the idea in my own work.\textsuperscript{22}

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.\textsuperscript{23} 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.\textsuperscript{24} 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

\textsuperscript{22} See, e.g., McCaffery, Missing Links, supra note 3, at 250-51.

\textsuperscript{23} See, e.g., McCaffery, Hybrid, supra note 3, at 1152-55.

\textsuperscript{24} See generally id.; see also McCaffery, Real Tax Reform, supra note 3, at 47.
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

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.  

26. This is subjective cardinal welfarism, a strand of theory currently very much in vogue in the legal academy.  


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.
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,28 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.”29 Garry Wills describes Thomas Jefferson, perhaps America’s first great excessive consumer, as also being conflicted about his own possibly tragic lack of thrift.30 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.31 The fabulous scale of human

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. 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).

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 realisticus” 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 $15,000.33 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.

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. 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. 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. But the corre-

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. 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. 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. 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.

37. See McCaffery, Real Tax Reform, supra note 3, at 47.
38. VEBLEN, 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.40

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.41 Consider his analysis of “waste,” both the term and the concept, in *The Theory of the*


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

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.

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."

42. VEBlEN, 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. VEBlEN, 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.46

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.47 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

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. 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?" 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"

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

49. RAWLS, POLITICAL LIBERALISM, supra note 17, at liii.
This is an amorphous idea that has entered into the normative lexicon of legal theory of late.\(^{50}\) 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,

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.51 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.52 Rawls writes of "frugal capitalists as opposed to the spendthrift aristocrats," the former being those who uphold their "natural duties to society."53 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.54 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."

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.


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. 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.” If we drop the attempt to appeal to the “better angels of our nature” 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. 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

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,59 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.60 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.61 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.


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," 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. 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. 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.

62. See Rawls, Political Liberalism, supra note 17, passim.
63. See id.
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;65 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.66 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 VEBLEN, 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 welfareist 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.