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Evolutionary Jurisprudence: Prospects and Limitations on the Use of Modern Darwinism Throughout the Legal Process

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EVOLUTIONARY JURISPRUDENCE: PROSPECTS AND LIMITATIONS ON THE USE OF MODERN DARWINISM THROUGHOUT THE LEGAL PROCESS. By *John H. Beckstrom.* Urbana: University of Illinois Press. 1989. Pp. 142. $24.95.

In the wake of the legal realists and their successors, there has been a decline in faith in legal determinism — the view that judicial decisionmaking can be based on principles and rules that originate solely from within the legal discipline. This loss of faith has led scholars to look for legitimate bases of judicial and social policymaking in nonlegal disciplines, such as philosophy, economics, and sociology. These scholars hope to derive from these disciplines (preferably neutral) principles to guide authoritative decisionmaking. Theories of "natural law" and "popular consensus," grounded largely in philosophy and ethics, remain suspect as principled lawmaking guides, but have proved durable in some areas of the law.[1] Scholars have also debated (to death, perhaps) the contours, strengths and weaknesses of economic theory applied to law, debating both its descriptive powers and prescriptive legitimacy.[2]

The use of the natural sciences in the law is less well-established, at least if "established" can be defined as what students are exposed to in the law school curriculum. Nevertheless, in 1985, John H. Beckstrom[3] showed how a sociobiological theory of human behavior (mod-

1. For one example of the use of societal consensus to support judicial interpretation of the Constitution, see the various concurring and dissenting opinions in Furman v. Georgia, 408 U.S. 238 (1972). *Furman* held that Georgia's death sentencing statute violated the eighth and fourteenth amendments. Justice Brennan, concurring, argued that the death penalty itself is "cruel and unusual punishment," and based this conclusion in part on grounds that "[a]t the very least . . . contemporary society views this punishment with substantial doubt." 408 U.S. at 300 (Brennan, J., concurring). Justice Marshall would have struck down the death penalty as "cruel and unusual" because he believed "that the great mass of citizens would conclude on the basis of the material already considered that the death penalty is immoral and therefore unconstitutional." 408 U.S. at 363 (Marshall, J., concurring). At least three of the four dissenting opinions in *Furman* implicitly or explicitly agreed that consensus about moral principles provides a framework for policymaking. Two dissents, however, argued that the Court is not in a position to discern what the consensus, if any, *is* about capital punishment. In the absence of a clear consensus, the Court should defer to legislatures that, supposedly, reflect what consensus does exist. 408 U.S. at 383 (Burger, C.J., dissenting); 408 U.S. at 436-37 (Powell, J., dissenting). One dissent argued that consensus provides a basis for legislative, not judicial, action. 408 U.S. at 410-11 (Blackmun, J., dissenting). Thus, consensus was both a reason for the Court to intervene (for the majority) and a reason not to (for the dissenters).

2. For a thorough defense of the descriptive powers of economic analysis as applied to law, see R. POSNER, ECONOMIC ANALYSIS OF LAW (3d ed. 1986). For an argument in favor of the normative application of efficiency analysis to law, see R. POSNER, THE ECONOMICS OF JUSTICE (1981). For criticism of such an application, see Dworkin, *Is Wealth A Value?*, 9 J. LEGAL STUD. 191 (1980), and Dworkin, *Why Efficiency?*, 8 HOFSTRA L. REV. 563 (1980).

3. Professor of Law, Northwestern University.

ern Darwinism) might usefully be applied to legal problems.[4] Now, in *Evolutionary Jurisprudence,* Beckstrom builds on his earlier analysis, assessing more precisely the immediate and prospective powers of sociobiology to inform lawmaking.[5] The result is a provocative, often interesting essay. Nevertheless, the reader is left wondering whether sociobiology can really provide guidance in the formation of judicial rules, legislation, and social policy, even if its explanation of human behavior is accurate.[6]

Beckstrom begins by explaining the concepts and hypotheses of modern Darwinism that are relevant to the law. Most important is a basic tenet of modern Darwinism: "We human gene carriers are programmed to head toward a definite ultimate goal — optimum proliferation of our genetic package — and we must bounce off, adjust to, and utilize what we encounter in our particular environments as we head toward that goal" (p. 12).

Springing from this central thesis are two other hypotheses. They are particularly relevant to the law because they posit fairly specific human behavioral tendencies.[7] "Kin selection" is the idea that humans are programmed to give aid more readily to persons whose genetic package more closely resembles their own (pp. 8-9). For example, sociobiologists would predict that if I had to choose, I would save the life of a parent, fifty percent of whose genes are identical to my own, rather than an aunt or uncle of the same age, with whom only twenty-five percent of my genetic package is identical. "Reciprocal altruism" is the idea that some aid-giving activities that do not directly enhance genetic proliferation can nevertheless be explained by the expected return to one's own genetic package through future favors. So, we humans are programmed to give aid more readily to those who are more likely to give aid in the future to us and to our closest genetic replicas (p. 11).

In the middle chapters, Beckstrom explores how these and other sociobiological concepts might assist judges, legislators, and other social policymakers. Beckstrom seems most comfortable using sociobiology to help to identify areas in which methodical observation of

4. J. BECKSTROM, SOCIOBIOLOGY AND THE LAW (1985).

5. "Lawmaking" and "lawmakers" will be referred to frequently in this book notice. The terms are used in a general sense to include judicial decisionmaking, the enactment of laws by legislators, and social policymaking in general.

6. Beckstrom also seeks to demonstrate how legal opinions might provide a fruitful source of inquiry for sociobiologists, and identifies the need both law and sociobiology have for empirical research. P. 24. Chapter 7 is devoted to exploring the uses that might be made of legal materials in sociobiological research, Pp. 96-127. Because this book notice addresses the legal community, it only assesses the application of sociobiology to law.

7. Beckstrom describes sociobiology's relevance to the law this way: "The potential value to the legal process rests . . . in instructing all of us . . . on the *facts* of natural history that bear on the predictability of human behavior when knowledge of such predictability is important to the resolution of social problems." P. 4.

typical human behavior might better inform lawmakers and judges (pp. 19-24). In deciding cases (or enacting legislation), judges (and legislators) often rely, at least in part, on their own beliefs about typical human behavior. These judgments are based upon what may be inadequate information or upon methodologically suspect analyses of information that is available.[8] When these beliefs conflict with sociobiological predictions of human behavior, judges and legislators, as well as sociobiologists, should be interested in studies that will help to determine who is correct.[9] Beckstrom sees immediate value in using sociobiology "to prompt empirical research on actual typical behavior important to the law . . . . The theory would . . . be used as a signal, in a given case, that a study of actual behavior should be commissioned" (p. 24).

Beckstrom also sees immediate use for evolutionist theory in "exposing unconscious self-serving lawmaking" (pp. 76-95). Here the focus is on what sociobiology can tell us about the people who enact laws and social policies. Sociobiology can help us see when policymakers are serving their own interests because, Beckstrom says, it expands the concept of self-interest in two ways. First, the notions of kin selection (p. 78) and reciprocal altruism (p. 79) provide a working definition of self-interest. We can identify ulterior, self-interested motives on the part of a politician, for example, by showing that the choice of one policy will help proliferate that politician's genetic package (either directly or indirectly through reciprocal altruism) to a greater extent than the alternative policy. Second, Beckstrom adds a fascinating explanation of "evolved self-deception" — the idea that the most deceptive people are those who do not even realize they are being deceptive. According to Beckstrom, because "good" deceivers tend to survive and proliferate relatively well, and because self-deception is a characteristic of the most successful deceivers, self-deception has evolved as a genetically programmed human characteristic (pp. 80-82). This somewhat frightening idea expands our understanding of self-interested lawmaking by suggesting that the self-interest involved in judicial or legislative choices may be quite unintentional. Beckstrom concludes

8. The existence of these judicial or legislative "intuitions" is explicitly recognized in former Chief Justice Burger's comment that "[f]rom the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions." Paris Adult Theatre v. Slaton, 413 U.S. 49, 61 (1973). That case involved first amendment scrutiny of a Georgia restriction on showing pornographic films to consenting adults. The Chief Justice relied on "[t]he sum of experience," 413 U.S. at 63, to support the link drawn between pornography and antisocial behavior and thereby certify a legitimate state interest in the restrictions at issue. The example is not offered because sociobiological inquiry would be particularly useful in testing what the Chief Justice claims "[t]he sum of experience" actually tells us. It is offered rather to suggest that there has been a great deal of sociological and psychological research exploring the link between antisocial behavior and exposure to sexually explicit or violent material. This research, reflecting methods of inquiry that are far more sophisticated than are "intuition and experience," may aid our thinking, even if people cannot agree on what has been proved.

9. *See supra* note 6.

that this expanded concept of self-interest can serve as a basis for a more forthright and credible legal and political system. "Even if obscure self-interest of the lawmakers were first detected and alleged by others, avoidance or reform of the law might be facilitated if lawmakers generally become aware of sociobiology" (p. 82). At the least, lawmakers would be under greater pressure to justify laws that are self-serving under the expanded sociobiological definition (p. 83).

Beckstrom also suggests that sociobiology may have direct uses in the law — direct in the sense that the empirical foundation of the relevant sociobiological theory of human behavior is so well established that it can be assumed for lawmaking purposes. Here, however, Beckstrom is far more cautious. He warns that direct application of evolutionist principles must await the achievement of a substantial consensus among sociobiologists on concepts and hypotheses and empirical testing of those concepts and hypotheses. Only then may lawmakers rely on sociobiological theories to correct their intuitions about human behavior (pp. 24-25). He also points out that direct uses of evolutionism need not, and should not, be mistaken for normative statements about what the goals of society ought to be (pp. 35-36). Finally, Beckstrom devotes Chapter 5 to cautioning the reader that genetic input to behavior may be more difficult to detect than cultural input.[10]

Within these constraints, Beckstrom suggests that sociobiological models, applied to legal problems, might (1) facilitate the achievement of independently set societal goals and (2) help estimate the sociobiological "human costs" of various courses of action. Beckstrom demonstrates the "facilitative" function by explaining how sociobiological theory suggests that using DNA fingerprinting to test paternity might encourage broader compliance with child support orders even if such a test cannot "prove" paternity to a legal certainty. The sociobiological hypothesis here is that a man's willingness to provide child support will vary in direct relation to that man's belief that the child is actually his biological offspring. Empirical studies showing a statistical link between promiscuity and absence of paternal aid-giving behavior in the societies studied support that theory (pp. 48-53). If these and further observations lead to acceptance of this "paternity confidence" theory,[11] and if society's independently set goal is to encourage maximum compliance with court orders of child support, then sociobiology might be applied directly to argue for the use of DNA fingerprinting to prove paternity.[12]

10. Pp. 55-57. The concept of *biocultural* input, in which genetic and environmental explanations of behavior overlap and mix, is also explored. *See* pp. 30-33.

11. Beckstrom suggests that the theory might be tested by a study comparing support payments by men subject to "in-wedlock" and "out-of-wedlock" court orders. P. 52.

12. Beckstrom actually presents the idea of showing DNA tests to fathers as an optional solution that is brought to light through the use of sociobiological theory. It has been presented

Were Beckstrom's sole purpose in *Evolutionary Jurisprudence* to explore the *limitations* of sociobiology as applied to the law, it would have to be considered a success. Beckstrom makes the case against the use of "normative" evolutionism effectively (but I imagine this case is a fairly easy sell anyway). He also is persuasive in arguing that before using sociobiology to answer specific legal problems, lawmakers should accurately interpret relevant biological research and must cautiously assess the relative importance of genetic and cultural contributions to human behavior.

Beckstrom's stated goal, however, is to identify areas of overlap of law and sociobiology that might serve as bases of "cross-fertilization" (p. 3). Thus Beckstrom's point in exploring the limits of sociobiology in the law is probably to suggest areas in which it will be helpful, rather than to emphasize those areas in which it will not be.[13] In this endeavor Beckstrom's success is far more limited.

First, the immediate use for sociobiology that Beckstrom identifies — to suggest areas where empirical research of interest to lawmakers might be undertaken — says nothing about why sociobiology is uniquely suited, compared with other disciplines, to lend such aid to lawmakers. As Beckstrom implies, sociobiological theory need not be "correct" or accepted to perform this initial function.[14] One might envision myriad theories of human behavior — economic analysis, psychological analysis, even anecdotal intuition — that, when in conflict with a lawmaker's determination about how humans actually behave, should similarly evoke interest in further empirical analysis.[15] Beckstrom himself hints at this when, in the introduction to the essay, he mentions that, while his targeted readers are lawyers and natural scientists, "I hope the book will reach social scientists as well" (p. 2). The call, then, is not so much for the use of sociobiology as for more

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here as an example of the facilitative function of sociobiology identified earlier in the book, but, at least in the confines of the "paternity confidence" example, the two uses appear to merge.

13. Beckstrom states as much in the introduction to chapter 5:

> Here I will demonstrate how sociobiology may often, even when fully developed, fail to be of assistance in assessing or predicting typical behavior. That insight should serve as a caution, but also help us better appreciate the circumstances under which sociobiology *does* hold potential for predicting typical behavior.

P. 55.

14. Beckstrom does not state this explicitly, but the notion that sociobiological theory need not be correct in order to be useful in identifying areas for useful empirical research can be inferred, and follows logically, from his suggestion that such empirical research "could also serve as tests of the behavioral hypotheses that prompt the research . . . ." P. 24.

15. This is not to say that we could not or should not rank such theories based on how compelling they are in logic. There may be theories of human behavior with which we are uncomfortable because they have not been proved reliable, but which seem sensible and promising enough to warrant expenditure of resources for further empirical work when the research may help solve a legal or social problem. This may be what Beckstrom has in mind when he refers to the indirect uses of sociobiology. He does not say so explicitly, and even if he did, Beckstrom's lack of exploration of sociobiology *purely as a theory* would leave one wondering where Beckstrom thinks sociobiology should stand in ranking such theories.

empirical observation to inform decisionmaking. Very few would question the value of empirical observation of human behavior, but why does sociobiology provide a useful way to order those observations?

Second, Beckstrom's extensive attempts to downplay or deny the normative implications of sociobiology in the law are unsuccessful. That he would want to downplay the normative implications of sociobiology is understandable given the poor reputation of a very famous normative biological theory, social Darwinism. But Beckstrom's denial of sociobiology's normative thrust is unpersuasive. He admits that the uses he sees for sociobiology in social engineering may fall into the murky area between description and prescription, but responds that

> what social planners would take from natural science, and use in the evaluation process, is facts about the root causes of behavior and factual information on, or estimates of, human costs. The "logic, ethics, and aesthetics" needed to make tentative and ultimate goal choices would have to be found elsewhere. [p. 41; footnotes omitted]

This response may be plausible when we are speaking purely about how sociobiology might be used to facilitate the achievement of independently set societal goals. But Beckstrom's implicit contention that "human cost" estimation can be viewed for practical purposes as without normative implication is harder to swallow. To convert sociobiological theory about human behavior into estimates of "human cost" for purposes of policymaking implies not only the acceptance of the theory, which Beckstrom fairly assumes for purposes of this book, but also that there is a social value to these human costs that should not be ignored in determining policy. It is true that "is" and "ought" are not the same thing, but on some points their confluence is unavoidable: human costs, of which sociobiology would provide an accounting, are "facts" that have normative implications.

What is missing, then, is an explanation of how sociobiology offers an explanation of human behavior that is persuasive enough to compete with or complement other explanations. While it is easy enough to conceptualize areas in which that may be the case, this book purposefully avoids that issue. To be fair, Beckstrom does, in one paragraph, address the question "why sociobiology?":

> I would expect initial resistance to such direct use of substantiated sociobiology to come from members of the legal profession who have had experience in dealing with witnesses expert in what one might call "soft" science. Lawyers have found, for example, that expert opinions as to when someone should be considered insane and thus legally irresponsible have been based on shifting sands. From this and similar experiences, judges, in particular, have become wary of the social sciences, often preferring to rely on their own impressions or those of lay jurors. For good reason, they have generally been more receptive to information

> from "hard" sciences like mathematics and physics. Sociobiology is social science in that it addresses human interactive behavior; however, its foundations are in genetics, mathematics, and the economic logic of natural processes. Its way of looking at the world is congenial to those trained, as lawyers are, in logical analysis. . . . I suspect that as growing numbers of lawyers learn sociobiology, the problem will not be to convince them to use it in their profession, but rather to wait until it has been well tested. [p. 25; footnotes omitted]

Because no further exploration of these ideas is offered, it is difficult to assess the validity of Beckstrom's claims. It is unclear why congeniality "to those trained, as lawyers are, in logical analysis" is a virtue rather than a vice where, as seems to be the case here, the search is for principles that are not susceptible to legalistic manipulation. In any event, it is the exploration of these issues that is needed.

— *Steven Kasten*