



SOCIETY  
FOR  
EVOLUTIONARY ANALYSIS  
IN LAW

2006 Scholarship Roundtable

at

Vanderbilt University Law School

April 1-2, 2006

## DAY ONE - SATURDAY, 1 APRIL 2006

8:00 to 8:45 Breakfast

8:45 to 9:00 Welcome

9:00 to 9:30 **Intertemporal Divergence in the Regulatory State: Short Term, Long Term, or the Next Generation?**

J.B. Ruhl, Matthews & Hawkins Professor of Property, Florida State University College of Law

This topic examines the problem of "intertemporal divergence," which I define as a societal-level pattern of resource trade-offs that favor the current generation's short term interests over long term and next generation interests. I explore rational choice theory, cognitive psychology, evolutionary biology, and their associated legal theories as explanations for this phenomenon and rationales for state response. I conclude that, while these models are useful, complex adaptive systems theory suggests they will have limited value for the design of long-term, high-stakes legal instruments; rather, they should be used to guide the use of short-term, small-stakes approaches.

9:30 to 10:00 **Time-Inconsistent Preferences and Group Dynamics**

Manuel A. Utset, Professor of Law, University of Utah College of Law

*How does accounting for time-inconsistent preferences help explain the formation, evolution, and survival of groups over relatively long periods of time?* This paper shows that the time-inconsistent preferences of actors can make it more difficult to overcome collective action problems than traditional collective action theory predicts; moreover, once a group has been formed to provide a public good, the group will be more cohesive than traditional theory predicts. The paper applies these insights to help explain institutional path-dependence and repeated time-inconsistent misconduct, giving special attention to the environmental law and criminal conspiracy contexts.

10:00 to 10:15 15 Minute Break

10:15 to 10:45 **Foster Care Safety and the Kinship Cue of Attitude Similarity**

David Herring, Professor of Law, University of Pittsburg School of Law

*Can child welfare officials, judges, and legislators use the behavioral biology research addressing the kinship cue of attitude similarity to enhance the safety of foster care placements?* This paper brings the findings of a series of studies on attitude similarity as a kinship cue to bear on the laws, policies, and practices surrounding the placement of children in foster care. More specifically, this paper explores how public actors may be able to construct a kinship cue that elicits beneficial treatment by matching foster parents with children who share their attitudes.

10:45 to 11:15 **Examining the Biological Bases of Family Law: Lessons to Be Learned for the Evolutionary Analysis of Law**

Naomi Cahn, Professor of Law, George Washington University Law School &  
June Carbone, Professor of Law, Santa Clara University

*What insights does the biology of attachment (including evolutionary analysis and neuroscience data) offer for understanding the relationship between family law and family stability and what are the limitations of this analysis?* The first part of the paper will consider evolutionary analysis, comparative anatomy, and neuroscience data to conclude that while the pair bond appears to be a universal feature of human sciences, long term fidelity is not. The second part of the paper consider the benefits and limitations of evolutionary analysis concluding, first, that evolutionary analysis, without connection to modern neuroscience or sociological data, remains highly speculative; second, that where the evolutionary analysis is borne out by modern neuroscience and/or sociological data, it is more persuasive, but often obvious; and third, that undertaking this type of examination nonetheless leads to new insights or new questions that should prompt productive research.

11:15 to 11:30 15 Minute Break

11:30 to 12:00 **Westermarck Rulings: The Influence of Evolved Mechanisms for Inbreeding Avoidance on Judicial Decisions Involving Incest**

John Lanou, Attorney &  
Debra Lieberman, Assistant Professor of Psychology, University of Hawaii

*In cases involving incest, does the severity of punishment imposed by a judge depend on whether that judge grew up with opposite-sex siblings?* Recent empirical investigations have shown that moral judgments of 3rd party incest are a function of the same systems regulating the development of a sexual aversion toward one's own close genetic relatives. Specifically, the cues (e.g., childhood co-residence duration) found to mediate sibling detection and, consequently, the development of a sexual aversion toward a sibling, have also been found to predict the strength of one's moral opposition to the idea of sibling incest in general. If exposure to the cues signaling siblingship influences moral sentiments regarding sibling incest, then an interesting question arises as to whether judges that grew up with opposite-sex siblings allocate greater punishments than do judges that did not grow up with opposite-sex siblings when ruling on cases involving sibling incest.

12:00 to 12:30 **The Genetic Discrimination Paradox**

Gaia Bernstein, Associate Professor of Law, Seton Hall University School of Law

*What is the appropriate legal reaction where a new technology is under-utilized due to a distorted risk perception resulting from the technology's diffusion characteristics?* The public is greatly concerned about genetic discrimination. In this paper I examine empirical data that reveals that genetic discrimination is rare and is in fact on the decrease. Yet, I show that paradoxically, individuals continue to fear genetic discrimination and are reluctant to test. I propose that certain technological characteristics: the preventability of the technology and the inability to try it on an experimental basis made it susceptible to this paradox. I suggest that a comprehensive nondiscrimination statute could resolve the paradox by changing the perception of risk. I further propose that another characteristic of the technology - its centralized process of diffusion - points to the need to target legislation and educational measures at the medical professionals who control the diffusion process.

12:30 to 1:45 Lunch

**1:45 to 2:15**      **Intuitions of Justice**

Paul H. Robinson, Colin S. Diver Distinguished Professor of Law, University of Pennsylvania

*Are Intuitions of Justice the Product of Human Evolution?* Contrary to the common wisdom among criminal law and policy scholars, the empirical evidence suggests that people's intuitions of justice are specific, nuanced, and widely shared. Indeed, with regard to the core harms and evils to which criminal law addresses itself - physical aggression, takings without consent, and deceit in exchanges - the shared intuitions cut across not only demographics but cultures. What could explain this striking result: the existence of a nearly universal intuition that serious wrongdoing should be punished and of the relative relation among different wrongdoings? The authors describe the evolutionary advantage of shared intuitions of justice in promoting cooperative action and its accompanying survival benefits. They speculate that over the 250,000 generations of homo sapiens it should be no surprise that those who shared these intuitions would be more likely to survive, to reproduce, and to pass on the capacity and predisposition to form such intuitions. The authors argue that this new perspective on intuitions of justice as being an inherent part of being human has implications for criminal law and criminal justice policy. Paper is co-authored with Rob Kurzban.

**2:15 to 2:45**      **Just (and Efficient) Compensation, Could Science Help?**

Jeffrey Stake, Professor of Law, Indiana University School of Law, Bloomington

*Why might science be useful in reforming the law of just compensation?* *Kelo v. City of New London*, decided by the Supreme Court in the summer of 2005, was covered heavily by the press and has generated substantial public concern. Interest has been so high that legislative reforms have been proposed in a number of jurisdictions. Although the focus of the outrage has been on the interpretation of "public use," we might more helpfully focus on "just compensation." When compensation is wrong, takings will result in injustice and possibly inefficiency. But determining how much to pay someone for property taken is problematic. Fair market value is the current standard, but there are reasons to think that the market undervalues the property. Perhaps behavioral economics or brain science could help set a more "just" and efficient level of compensation.

**2:45 to 3:00**      **15 Minute Break**

**3:00 to 3:30**      **Equality in Exchange Revisited: Why Some Unequal Bargains Are (Somewhere) Considered as Unfair and Others (Elsewhere) Not**

Bart Du Laing, Postdoctoral Fellow of the Research Foundation - Flanders (FWO - Vlaanderen), Katholieke Universiteit Brussel, Center for Legal Theory

*How can (gene-culture co-) evolutionary theory regarding human strong reciprocity advance our understanding of the structure of contracts and their laws?:* Modern (western) contract theory manifests a considerable tendency to expect mutual performances in isolated exchanges to be more or less equal (or substantively fair). Recent research on human prosociality and human strong reciprocity not only shows that the economists' canonical assumption that individuals are entirely self-interested is incorrect, but also indicates that there is a considerable amount of cross-cultural behavioral variability. This presentation addresses the legal relevance of this research and the explanations it offers regarding the existence and scope of a "sense of fairness", by (1) examining this universal feature of human contracting behavior through the lens of legal contract theory and (2) investigating the relationship between this universality and the diversity encountered in various cultures through a comparison of a sample of ethnographic data on contracts and their laws.

**3:30 to 4:00**      **Therapeutic Forgetting**

Adam Kolber, Assistant Professor of Law, University of San Diego School of Law

*What are the legal and ethical implications of pharmaceuticals that dampen memories?* Neuroscientists have made surprising advances in the development of drugs to dampen the emotional intensity of traumatic memories. Some ethicists, including members of the President's Council on Bioethics, have questioned the merits of such drugs, suggesting that they may interfere with our moral and legal obligations to remember and will upset the natural balance of our abilities to remember and forget. I will argue that the Council's concerns are overstated. While memory is an essential component of personal identity and we do sometimes have obligations to remember, the Council does not adequately appreciate the level of pain that some traumatic memories can cause and unjustifiably privileges our status quo cognitive abilities.

**4:00 to 4:15**      **15 Minute Break**

**4:15 to 4:45**      **How Does Empathy Matter for Law?**

Claire Hill, Professor of Law, University of Minnesota Law School

*How might the existence of a neurological basis for empathy (and lack thereof) affect the formulation and application of 'the reasonable person standard' and other like constructs?* When law attempts to influence behavior, it necessarily assumes a model of human behavior -- and, less visibly, a model of human cognition. Intuition suggests people differ enormously in their capacity for empathy. I want to argue that a) empathy has a significant cognitive component, in that people who have a great deal of empathy assume others are like them in many respects and b) how people decide what to do, what people are motivated to do, and how people predict what others will do is enormously influenced by their capacity for empathy.

**4:45 to 5:15**      **Evolutionary Biology as a Foundational Discipline**

Oliver Goodenough, Professor of Law, Vermont Law School

*Can Evolutionary Biology Become a Foundational Discipline in the Study of Law?* For some years, a growing number of scholars have used evolutionary analysis to inform their understanding of law. Nonetheless, the interaction has been far less compelling than its practitioners have hoped. Evolutionary analysis has not yet become a foundational discipline for the study of law. It has failed to provide an overarching framework, informing the field as whole. Rather evolutionary biology has made important, but essentially marginal contributions. How could this change? This talk will examine the important role of biology in human behavior, and the opportunities and limits which that understanding brings to legal scholarship. Law is, after all, a cultural construct; even advances like Jones' "law of law's leverage" essentially put law and biology into opposition, not conjunction. Evolutionary analysis has the potential to become foundational, but only when it embraces not only genetic inheritance but also the extension of genes into cultural and personal learning. A more encompassing view of human evolution will put it directly in contact with legal processes, and allow its power as an analytical tool to achieve foundational importance for the law.

**7:00**      **Dinner: Amerigo's – 1920 West End Ave. (615) 320-1740**

## DAY TWO - SUNDAY, 2 APRIL 2006

8:00 to 8:45 Breakfast

8:45 to 9:00 Announcements

9:00 to 9:30 Legal Memetics

Christopher Guzelian, Searle Scholar, Northwestern School of Law; London School of Economics (starting Summer term 2006)

*Can and should memetics (the evolution of human ideas) be deterministically influenced through legal mechanisms?* American law has generally assumed a laissez faire approach to memetics. But significant exceptions exist (or could exist if settled legal precedent were followed to its logical limits). Evolutionary theory and evidence suggests that humans often modify "idea environments" and deterministically alter the path of idea evolution. Some initial, crude speculations will be offered on the issue of whether law – either directly or indirectly – can and should be used to deliberately influence the evolution of ideas.

9:10 to 10:00 A General Theory of Normativity

Theodore Seto, Professor of Law, Loyola Law School

*Why have we evolved the capacity to internalize learned behaviors and what does this imply for normative legal analysis?* This paper uses evolutionary theory to explore why we might have acquired an ability to internalize behaviors - that is, an ability to feel that we should or should not perform specific actions or types of action. My purpose is to offer a single descriptive account of a wide variety of observed phenomena: why we want to be good; why we respect liberty, equality, democracy, and the rule of law. If we better understand why we hold the core legal values that we do, we may be more effective in implementing those values.

10:00 to 10:15 15 Minute Break

10:15 to 10:45 The Evolutionary Bases of Legal Resistance to the Teaching of Evolution

Jim Chen, Associate Dean for Faculty & James L. Krusemark Professor of Law, University of Minnesota Law School

*How can evolution explain (and perhaps counteract) the durability and power of legal and political campaigns against the teaching of evolution in American public schools?* A militant movement to ban the teaching of evolution in public schools, or at least to dilute its impact by injecting so-called "intelligent design" into the public school curriculum, has sparked controversy across the United States. These controversies persist because creationist beliefs appear to serve adaptive purposes, as though a creationist heuristic has been embedded in human psychology over the course of the species' evolutionary history. The indisputably correct public policy of teaching evolution and only evolution as part of the scientific curriculum therefore depends on the ability of courts and educational policymakers to exploit behavioral psychology in this war between legally significant memes.

10:45 to 11:15 The Politics and Possibilities of Single Sex Education

Cheryl Hanna, Professor of Law, Vermont Law School

*Does emerging biological research on gender differences in education justify gender specific government policies such as publicly-funded single-sex education?* This talk will explore the data on the feminization of education in the Western world, and compare the gains women have made in education with their continued disadvantage in the job market, especially in math and science related fields. One current policy being promoted to close both the education and the employment gap is to segregate the sexes in public education. This talk will explore the biological as well as the social justifications for single sex education, and argue that gender specific education, while not the only answer to the gender differences in education and employment, offers an exciting opportunity for both boys and girls to achieve their full potential. This talk will also explore the legal landscape for offering such programs and suggest that current analyses concerning gender-based policies under the Equal Protection Clause may have to be re-examined.

11:15 to 11:30 15 Minute Break

11:30 to 12:00 Levels of Explanation, Again, in the Regulatory Arena

Daniel Gilman, Visiting Professor of Law, University of Maryland School of Law

*How might lessons from biology and the behavioral sciences, regarding levels of organization in complex systems, help us clarify notions of regulatory implementation and equivalence?* There has been much discussion in biology, the cognitive and brain sciences, and philosophy of science, about identifying multiple levels of organization or explanation for complex systems, and the ways in which such levels may constrain each other. I suggest that such discussion may be useful for administrative law, where notions of implementation and functional equivalence may often be unclear. In particular, I want to suggest that thinking about levels and implementation helps to highlight significant problems in the international harmonization of regulatory regimes. The paper will consider particular efforts in international pharmaceuticals regulation as examples or models of the problem.

12:00 to 12:30 Behavioral Biology, Economics, and Law

Owen Jones, Professor of Law & Professor of Biological Sciences, Vanderbilt University

*How does the intersection of law and behavioral biology compare with the intersection of law and economics?* This talk will examine how the promise, limitations, and history of the law and economics movement compares with the promise, limitations, and probable future of approaches that would link law and behavioral biology. Because natural selection is the most relentlessly economizing force in the history of life, there are a number of thematic similarities between economics and behavioral biology. Yet the long-term reception of the two fields among legal thinkers will likely be dissimilar in important respects.

12:30 to 1:45 Lunch

END of Scholarship Roundtable