Indiana Law Review

Volume 54 **2021** **Number 1**

ARTICLES

CRISIS AND CULTURAL EVOLUTION: STEERING THE NEXT NORMAL FROM SELF-INTEREST TO CONCERN AND FAIRNESS

ROBERT A. BOHRER*

Are we at a turning point in history? We are in the midst of the COVID-19 pandemic, and we face a threat to our health and well-being that has not been seen since the Great Depression and World War II. At the same time, the cold-blooded murder of George Floyd has transformed our national conversation about racism and justice in America—a preliminary signal that this is indeed a transformational moment. Life right now is changed in a way that is unprecedented. Both these extraordinary events raise "now" questions but also press us to imagine the world of our future. The pandemic questions of "now" are pressing: What testing do we need to begin to reopen our own economy? How do we help those most in need right now? When will we have a vaccine, and what level of antibodies indicates immunity? These questions and a multitude of others urgently demand answers. However, for those of us who are not epidemiologists, pharmacologists, immunologists, or infectious disease experts, whom we hope can give us answers to those "now" questions, it is not too soon to begin to think about life after COVID-19, when we will have effective vaccines and highly effective therapeutics. While it is likely that there will be a widespread call to restructure our healthcare system, we are called to imagine more broadly what we want our system of justice to be, from the way in which we compensate persons who are injured, to the way in which we interpret and enforce contracts, whether those contracts are contracts of employment, leases of apartments, or for the provision of cell phone services. If this is a turning point, what should justice look like? What will our next normal be?

There are many voices in the current period of crisis asking, "Are we all in this together?"[1] For better or for worse, we ARE all in this together— all of us are

* Professor of Law, California Western School of Law. I am grateful to the editorial board of the *Indiana Law Review* for their assistance with this article during this difficult time. I am indebted to Leslie Bender, Susan Bisom-Rapp, Sohail Inayatullah, Nancy Kim, John Noyes, Judith Resnick, and my California Western writing group: Emily Bezahdi, Tim Casey, Paul Gudel, Catherine Hardee, Ken Klein, Erin Shelley, and India Thusi for many helpful comments and suggestions. My research assistant Dakota Hickingbottom provided valuable assistance. The errors and omissions that remain are my own.

1. *See,* e.g., Michael J. Sandel, *Are We All in This Together?*, N.Y. TIMES (Apr. 13, 2020),

confronted by the risks of disease and economic decline, by our need to confront our country's history of racism and the ugliness of our political discourse. The question is not whether we are all in this together, but what do we want our next normal to be? What do we think a more just normal would be like? An answer to those questions requires us to look at the ideas that have brought us here as well as the ideas that may guide us in a new direction. This Essay provides a synopsis of the intellectual currents which drove us here over the past fifty years and offers a brief sketch of how our society and our law can evolve in response. Crises of this scale are evolution-forcing events, and I argue that the current moment can move us towards a fundamentally different vision of law and justice.

Part I is about some of the most powerful currents in twentieth-century ideas: classical free-market economics, behavioral economics, and sociobiology. Part II is a review, in an equally summary fashion, of how those ideas are reflected in two very different views of justice and fairness—that of John Rawls and that of his colleague Robert Nozick. Despite the great differences between the ideal Rawlsian state and the ideal Nozickian state, both belong squarely within the liberal tradition that is grounded in individual autonomy and the pursuit of self-interest. Both represent major threads in the political and social debates of the past fifty years. Part III provides a synopsis of a third, very different view of justice and fairness, as represented in the work of feminist scholars Carole Gilligan and Leslie Bender, to present a possible next normal that will be shaped by a sense of connectedness and empathy. Part IV briefly examines the way self-interest and caring are accommodated in tort law. Tort law, after all, reflects both our values and the compromises we make to accommodate our desire for economic growth and our concern for persons who have been injured, while contract law provides the basic framework for our economic lives. In deciding on the balance between freedom to act and freedom from harm, and between the often-conflicting demands of efficiency and autonomy,[2] we are forced to confront our sense of fairness and justice. It is possible, perhaps even likely, that in the next normal, we will have a new and different sense of what is fair, what is just, and what our responsibilities are to one another. If tort law balances resources and compassion, contract law provides the framework with which we order our work lives and our non-work transactions with others—from online purchases to cable service and travel. Part V provides examples of just a few ways that the law of torts could be reshaped to embody ethics of care and mutual respect, and contract law could find a better balance between sheer economic power and fairness.

A pandemic is an evolution-accelerating event on a biological level but also on a cultural level. The social forces created by the pandemic have brought us to a turning point. I conclude with an admittedly hopeful answer to the question of what we could become when the next phase of our history begins.

---

https://www.nytimes.com/2020/04/13/opinion/sunday/covid-workers-healthcare-fairness.html [https://perma.cc/R9GW-7SHV].

2. I do not list community as one of the competing values here because it is not part of the law that I have been teaching for so many years but will be a basis for the law as I hope it will be—*see infra* Part III.

I. TWENTIETH-CENTURY BIG IDEAS: CLASSICAL FREE MARKET ECONOMICS, BEHAVIORAL ECONOMICS, AND SOCIOBIOLOGY

Classical free market economics began well before the twentieth century, in 1776, with the publication of Adam Smith's *The Wealth of Nations*.[3] However, while Smith viewed prosperity and economic growth as deriving from individuals rationally pursuing their own self-interest, his book, *The Theory of Moral Sentiments*, recognized that humans were not exclusively selfish creatures of self-interest: "How selfish soever man may be supposed, there are evidently some principles in his nature which interest him in the fortune of others and render their happiness necessary to him though he derives nothing from it except the pleasure of seeing it."[4]

Nevertheless, in the twentieth century, the free-market essence of Adam Smith's theory took root in the United States and flourished, while his speculations on human morality were largely ignored. The intellectual center of free market economics was at the University of Chicago, where the "Chicago School" of Economics became synonymous with the superiority of free markets to markets that were disrupted by governmental intervention or regulation.[5] An anti-regulation position was inherent in the Chicago School's free-market theory, as represented in the work of Milton Friedman and George Stigler, both of whom were University of Chicago faculty awarded a Nobel Prize in Economics.[6] Their rational actor, free market views also became a basis for normative, ethical theories in the writings of Richard Posner and others who incorporated Chicago School economic theory into a theory of law and economics.[7] Posner argued that since transactions in free markets were founded on the consent of both parties to the transaction, and the transaction reflected their rational preferences, therefore free market transactions were wealth-maximizing because both parties were made

---

3. *Adam Smith (1723–1790)*, LIBR. ECON. & LIBERTY, http://www.econlib.org/library/Enc/bios/Smith.html (last visited Jan. 17, 2021) [https://perma.cc/FV7B-KFEJ] [hereinafter LIBR. ECON. & LIBERTY]; *see also* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Edwin Cannan ed., Oxford Univ. Press 1976) (1776).

4. LIBR. ECON. & LIBERTY, *supra* note 3 (quoting ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 1 (D.D. Raphael & A.L. Macfie eds., Oxford Univ. Press 1976) (1759)).

5. H. Laurence Miller, Jr., *On the "Chicago School of Economics"*, 70 J. POL. ECON. 64, 67 (1962).

6. *Id.* at 64; Rachel Rosenberg, *Papers of George Stigler, Harry G. Johnson to Deepen Understanding of Field-Defining Research*, UCHICAGO NEWS (Oct. 25, 2018), https://news.uchicago.edu/story/archives-two-giants-economics-donated-uchicago-library [https://perma.cc/3XZG-ZMCJ].

7. John J. Donohue III & Ian Ayres, *Posner's Symphony No. 3: Thinking About the Unthinkable*, 39 STAN. L. REV. 791, 793 (1987) (reviewing RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (3d ed.) (1986)). *See also* David Campbell, *The End of Posnerian Law and Economics*, 73 MOD. L. REV. 305 (2010) (reviewing RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION (2009)).

better off by the exchange.[8] Posner further argued that wealth maximization was an appropriate norm or foundational ethical principal.[9]

Although Posner's argument for wealth maximization as a norm drew significant criticism,[10] it is fair to say that efficiency, the central concept of his attempt at integrating law and economics, became one of the dominant modes of legal scholarly discourse from the 1980s to the present time. Major changes in governmental policy in that period were to a very large degree a result of the ideological dominance of the Chicago School in public discourse.[11] In the wake of the collapse of the financial markets in 2007, Posner acknowledged that his beliefs had been shaken, at least in terms of the efficiency of markets and the need for regulation.[12] "In a soft voice, he said, 'I think the challenge is to the economics profession as a whole, but to Chicago most of all.'"[13]

A. Behavioral Economics—Faulty Self-Interested Decision Making

The free market ideology of the Chicago School continued to influence public policy discourse throughout the period and still finds adherents in positions of power in the government.[14] However, within the field of economics as an academic and scholarly discipline, its foundational assumptions were being

---

8. Richard A. Posner, *Wealth Maximization Revisited*, 2 NOTRE DAME J. L., ETHICS & PUB. POL'Y 85, 88 (1985).

9. *Id.* at 95.

10. Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 512 (1980); *see also* Lucian A. Bebchuk, *The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice?*, 8 HOFSTRA L. REV. 671 (1980).

11. BUILDING CHICAGO ECONOMICS: NEW PERSPECTIVES ON THE HISTORY OF AMERICA'S MOST POWERFUL ECONOMICS PROGRAM XLVI (Robert Van Horn et al. eds., 2011).

12. John Cassidy, *After the Blowup: Laissez-faire Economists Do Some Soul-Searching—and Finger-Pointing*, NEW YORKER (Jan. 4, 2010), https://www.newyorker.com/magazine/2010/01/11/after-the-blowup [https://perma.cc/7M42-2QFL].

13. *Id.*; *see also* Richard A. Posner, *Uncertainty Aversion and Economic Depressions*, 52 CHALLENGE 25 (2009). For a rather hilarious critique of Posner's conversion to Keynesian economics and Posner's law and economics scholarship generally, see Campbell, *supra* note 7. Most recently, the *New York Times* published a special section of the Sunday *New York Times*, entitled "Greed Is Good. Except When It's Bad." The *New York Times* section is focused on Milton Friedman's 1970 article in the *New York Times Magazine*, "The Social Responsibility of Business," and includes reflections on the Friedman article by a number of contemporary economists. A major portion of the Supplement highlights changes in the distribution of income and wealth from 1970 to the present. For example, the ratio of average CEO's compensation to typical workers' compensation skyrocketed from 24:1 in 1970, to 320:1 in 2019. *Greed is Good. Except When It's Bad.*, N.Y. TIMES: DEALBOOK NEWSL. (Sept. 13, 2020), https://www.nytimes.com/2020/09/13/business/dealbook/milton-friedman-essay-anniversary.html [https://perma.cc/6EL7-KSGZ].

14. *President Trump's Historic Deregulation Is Benefitting All Americans*, WHITE HOUSE (Oct. 21, 2019), https://www.whitehouse.gov/briefings-statements/president-trumps-historic-deregulation-benefitting-americans/?utm_source=link [https://perma.cc/W3FY-3MSG].

challenged even before the 1980s, when it was in ascendancy as a political movement.[15] The scholarly assault on the assumptions and models of classical, Chicago School economics actually has its origins in the work of two psychologists, Amos Tversky and Daniel Kahneman.[16] The significance of the work of these two outsiders to the field of economics led to Kahneman receiving the 2002 Nobel Prize in Economics (sadly, Tversky had died before the Prize was awarded, and Nobel Prizes are never awarded posthumously).[17]

Why and how did two academics trained in psychology and members of the psychology department at Hebrew University transform the field of economics? Tversky and Kahneman studied how people actually make decisions, particularly under conditions of uncertainty.[18] To quote one of their early seminal works:

> How do people assess the probability of an uncertain event or the value of an uncertain quantity? . . . [P]eople rely on a limited number of heuristic principles which reduce the complex tasks of assessing probabilities and predicting values to simpler judgmental operations. In general, these heuristics are quite useful, but *sometimes they lead to severe and systematic errors*.[19]

Of course, virtually all significant investment decisions are made under uncertainty (or there would not be both buyers and sellers in every financial market), so the implications of Tversky and Kahneman's work for free market economics is clear. Markets, far from being perfect, efficient engines of resource allocation, are driven by investors whose cognitive biases and imperfect information lead to markets that can fail.[20] Richard Thaler, who collaborated with Tversky and Kahneman, pushed the field of economics even further from the assumptions of rational actors interacting to maximize their individual wealth.[21]

> We then discuss three important ways in which humans deviate from the standard economic model. Bounded rationality reflects the limited cognitive abilities that constrain human problem solving. Bounded

---

15. *See* Timothy J. Muris & Jonathan E. Nuechterlein, *Chicago and Its Discontents*, 87 U. CHI. L. REV. 495 (2020).

16. Elizabeth Kolbert, *What Was I Thinking?*, NEW YORKER (Feb. 25, 2008), https://www.newyorker.com/magazine/2008/02/25/what-was-i-thinking [https://perma.cc/DS74-TCBN].

17. Daniel Altman, *2 Americans Awarded Nobel for Economics*, N.Y. TIMES (Oct. 9, 2002), https://www.nytimes.com/2002/10/09/business/2-americans-awarded-nobel-for-economics.html [https://perma.cc/44W7-DNSY].

18. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1124 (1974).

19. *Id.* (emphasis added).

20. *See* Brigitte C. Madrian, *Applying Insights from Behavioral Economics to Policy Design*, 6 ANN. REV. ECON. 663 (2014).

21. Sendhil Mullainathan & Richard H. Thaler, *Behavioral Economics* (Nat'l Bureau of Econ. Research, Working Paper No. 7948, 2000), https://www.nber.org/papers/w7948 [https://perma.cc/3TTU-H78L].

> willpower captures the fact that people sometimes make choices that are not in their long-run interest. Bounded self-interest incorporates the comforting fact that humans are often willing to sacrifice their own interests to help others.[22]

Thaler received the Nobel Prize in Economics in 2017 "for his contributions to behavioural economics."[23] Thaler became a collaborator with Cass Sunstein, the law professor who spearheaded the incorporation of behavioral economics in legal academia, much the way Posner had led the legal academy into the field of classical law and economics.[24] However, while behavioral economics may have exposed the faults in the foundation of classical, Chicago School economics, they share one foundational assumption: economic actors are generally self-interested actors who seek to maximize their own self-interest, although that self-interest may, at times, be "bounded."[25] Tversky, Kahneman, Sunstein, and Thaler, among others, point to the ways in which those actors inevitably base their decisions on imperfect knowledge and cognitive biases that distort reality, but their *homo economicus*, however irrational and imperfect, is still nevertheless autonomous and self-interested.[26] Sunstein and Thaler's twist in law and economics was to simply assume that those actors' biases require a gentle "nudge" to guide them towards the decisions that they would make from self-interest if only those actors were aware of the errors in their assumptions and perceptions.[27]

"Sociobiology" is, as its name suggests, an effort to explain human behavior, individually and collectively, through biological mechanisms.[28] When looking at intellectual history, it is often difficult to understand fully the relationship between diverse intellectual movements, and almost certainly even more difficult in an abridged, condensed intellectual history such as this one. However, it hardly seems coincidence that as the Chicago School of Economics was gaining ascendancy in popular thought in the 1970s, sociobiology began as an attempt to demonstrate how evolutionary biology explained human behavior and social

---

22. *Id.*

23. Press Release, Nobel Prize, The Prize in Economic Sciences 2017 (Oct. 9, 2017), https://www.nobelprize.org/prizes/economic-sciences/2017/press-release/ [https://perma.cc/L3KW-FKSS].

24. *See* Anuj C. Desai, *Libertarian Paternalism, Externalities, and the "Spirit of Liberty": How Thaler and Sunstein Are Nudging Us Toward an "Overlapping Consensus"*, 36 L. & SOC. INQUIRY 263, 265 (2011).

25. *See* Tversky & Kahneman, *supra* note 18; *see also* Mullainathan & Thaler, *supra* note 21.

26. Kolbert, *supra* note 16.

27. Desai, *supra* note 24, at 265. I do not mean to imply that "nudging" individuals to make choices that are in their best interest is always, or even often, not the appropriate policy, but rather that it is not always the optimal policy when their individual self-interest may not manifest an ethos of concern for others.

28. Michael Boyles & Rick Tilman, *Thorstein Veblen, Edward O. Wilson, and Sociobiology: An Interpretation*, 27 J. ECON. ISSUES 1195, 1208 (1993).

interactions in a way that is jarringly parallel to the classical economic view.[29] If, in the Chicago School of Economics, individuals acted in a rational manner to maximize their self-interest, the sociobiologists posited that the behavior of organisms from stickleback fish to humans was designed, or more literally impelled, by biological principles to maximize the likelihood that their genome would survive.[30] While sociobiology may have originated in the work of E.O. Wilson, it found its most extreme expression in the work of Richard Dawkins, whose 1976 book was aptly entitled *The Selfish Gene*.[31] The impact of Dawkins's book might be reflected in the fact that it was voted the most influential science book of all time in a 2017 British Royal Society poll![32]

While a full exploration of Dawkins's theory and the debates that it has engendered would require many pages, for the purpose of this Essay it is sufficient to say that it found eager acceptance among the proponents of the politics of individualism and opponents of collective action through the state, or in terms of American politics, the conservative movement.[33] The idea that humans, like all other organisms, are biologically driven to behaviors that maximize their own self-interest and, in decreasing degrees of concern, their biological kin, had obvious appeal for those who favored individual choices in the marketplace as inherently preferable to regulation and for those who viewed governmental taxation and wealth redistribution as contrary to the public good.[34] In the words of a recent article:

> At this point, it is evident that Wilson's sociobiology has become a species of political ideology. Certain political and ideological objectives are said to be impossible to achieve because the human biological and genetic structure will not permit their attainment.[35]

There are numerous serious critiques of Dawkins's individual organism-centered view of sociobiology.[36] On one level, Dawkins's view flies in the face of our own experience of heroism and self-sacrifice for complete strangers: for example, the

---

29. *See* Miller, *supra* note 5.

30. Manfred Milinski, *TIT FOR TAT in Sticklebacks and the Evolution of Cooperation*, 325 NATURE 433, 433-35 (1987).

31. *See* RICHARD DAWKINS, THE SELFISH GENE (1989).

32. Claire Armitstead, *Dawkins Sees off Darwin in Vote for Most Influential Science Book*, GUARDIAN (July 20, 2017), https://www.theguardian.com/books/booksblog/2017/jul/20/dawkins-sees-off-darwin-in-vote-for-most-influential-science-book [https://perma.cc/82LG-D865]; *The Selfish Gene Tops Royal Society Poll to Reveal the Nation's Most Inspiring Science Books*, ROYAL SOC'Y (July 19, 2017), https://royalsociety.org/news/2017/07/science-book-prize-poll-results/ [https://perma.cc/9SDU-TZ6P].

33. Joshua S. Goldstein, *The Emperor's New Genes: Sociobiology and War*, 31 INT'L STUD. Q. 33, 39 (1987).

34. *Id.*

35. Boyles & Tilman, *supra* note 28, at 1208.

36. *See, e.g.*, Stephen Jay Gould, *Exaptation: A Crucial Tool for an Evolutionary Psychology*, 47 J. SOC. ISSUES 43, 49 (1991).

September 11th first responders and the healthcare workers who moved cross-country to work at New York City hospitals in the COVID-19 pandemic.[37] It is not merely our intuitive rejection and numerous counterexamples that point us away from Dawkins's sociobiology and the political expressions of its tenets. Evolutionary science has moved significantly away from the selfish gene,[38] without a comparable shift in theories of how we ought to structure our society.

II. COMPETING VISIONS OF A JUST SOCIETY: RAWLS AND NOZICK

Economists do not claim to describe what is good or just; rather they claim only to be interested in describing how the world works, or at least the economic world in which property and labor are bought and sold. Part I described how the Chicago School of Economics purported to explain how the world works while assuming that the persons who operate in that world are rational actors whose actions are guided by their desire to maximize self-interest.[39] The Chicago School model of the economic world was ultimately displaced by a more realistic school of behavioral economics, in which the actors in the economic world are recognized as flawed decision makers, both by their internal cognitive biases and the difficulty of decision making in a world of complex and uncertain information.[40] However, despite the differences in the fundamental assumptions of both schools of economics, they share one very significant fundamental assumption, which is that economic behavior is driven primarily by the desire to maximize self-interest, whether or not that desire is expressed in rational decision making or in biased and often flawed decision making.[41] At the same time, the sociobiologists posited that the self-interested behavior assumed by the economists was based on fundamental principles of evolutionary biology.[42] In contrast to these supposedly "positivist" accounts of human behavior, it has long been the domain of the philosophers to put forth theories of what is good or just, rather than simply describing what is. In the second half of the twentieth century, while the classical economic theories of Chicago's Friedman and Stigler competed with the new behavioral economics propounded by Tel Aviv's Kahneman and Tversky, and as Dawkins and Stephen J. Gould battled over

---

37. Mike Freeman, *These San Diego Nurses Took Jobs in COVID-19 Hot Zones. Here Are Their Stories*, SAN DIEGO UNION TRIB. (May 17, 2020), https://www.sandiegouniontribune.com/business/story/2020-05-17/a-tale-of-three-traveling-nurses-in-the-time-of-covid-19 [https://perma.cc/27Y8-HB7Y]; s*ee also* Soumya Karlamangla, *A Nurse Without an N95 Mask Raced in to Treat a 'Code Blue' Patient. She Died 14 Days Later*, L.A. TIMES (May 10, 2020), https://www.latimes.com/california/story/2020-05-10/nurse-death-n95-covid-19-patients-coronavirus-hollywood-presbyterian [https://perma.cc/A4KV-Z73P].

38. *See* Martin A. Nowak et al., *The Evolution of Eusociality*, 466 NATURE 1057 (2010).

39. *See supra* Part I.

40. *Id.*

41. *Id.*

42. *Id.*

biology and evolution,[43] a parallel intellectual battle was being waged by two of the era's leading political philosophers, Robert Nozick and John Rawls, both members of the Harvard faculty. A central point of conflict between the two was over the distribution of the rights and benefits that result from the marketplace.

Rawls began the debate with the 1971 publication of his widely acclaimed *A Theory of Justice*.[44] It is a lengthy, detailed exposition of Rawls's theory of a just state. The theory of justice that Rawls articulated would be based on the organizing principles of a just society, which could best be deduced by imagining the rules that would be agreed to by persons behind the veil of ignorance.[45] These bargainers behind the veil would be without any knowledge (i.e. ignorant) of their own individual talents or afflictions but would be fully aware that the society in which they would live would be comprised of persons who varied in significant ways that were largely beyond their own control.[46] The real world is comprised of persons with great talents and health and also persons with less talent or significant disability or poor health, as well as persons who were born into wealth and persons born into poverty.[47] Rawls posited that if bargainers were not aware of their own advantages or disadvantages, they would wish to assure themselves both that society would sufficiently reward the talents of the most advantaged (as they might be fortunate and occupy that position) to induce them to exercise their talent fully, while assuring themselves that the additional surplus generated by the most talented would be allocated to minimizing the disadvantage of the least fortunate (as that might also be their position).[48] Rawls termed this resulting principle of fairness the "maximin criterion."[49] Thus, some redistribution of wealth from the most advantaged to the least advantaged is fundamental to Rawls's vision of a just society.

Nozick responded to Rawls in his *Anarchy, State, and Utopia*.[50] Nozick developed an elegant argument for a minimal libertarian state, with no redistribution of goods or rights whatsoever, so long as those goods or rights had been originally acquired in accordance with justice, and any subsequent transfers of those goods or rights were freely made.[51] Nozick grounded his anti-redistributive position in Kantian principles, arguing that to take what is rightly A's to make B better off is to violate Kant's categorical imperative: "So act that you treat humanity, whether in your own person or in the person of any other,

---

43. *See* Roger Lewin, *Punctuated Equilibrium Is Now Old Hat*, 231 SCI. 672, 672-73 (1986). As Lewin's article recognizes, Gould was central to a major debate over the nature of evolution. *See* Gould, *supra* note 36.

44. *See* JOHN RAWLS, A THEORY OF JUSTICE (1971) [hereinafter RAWLS, THEORY].

45. *See id.*

46. *See id.*

47. *See id.*

48. *See id.*

49. *See* John Rawls, *Some Reasons for the Maximin Criterion*, 64 AM. ECON. REV. 141 [hereinafter Rawls, *Maximin Criterion*] (author providing a concise summary of his argument).

50. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

51. Robert Nozick, *Distributive Justice*, 3 PHIL. & PUB. AFF. 45, 47 (1973).

always at the same time as an end, never merely as a means."[52]

While Nozick and Rawls have diametrically opposing views on distributive justice, both philosophers root their arguments in the liberal Contractarian tradition.[53] Rawls posits that the individuals who bargain for the governing rules of their society would wish to protect themselves against any misfortune due to brute luck, while Nozick builds his Lockean case for a minimalist state on Kantian respect for the autonomy of others.[54]

Their common roots in the Lockean liberal tradition mean that both Rawls and Nozick choose as a starting point individual autonomy and a state founded on actors pursuing their individual self-interest, despite their opposing views of distributive justice. Neither posits a model of justice or a just society in which the primary governing rules are not merely equal rights but equally requires concern for others. In Rawls's description of the original position, he first asks us to "imagine that everyone is deprived of certain morally irrelevant information."[55] Rawls continues with, "They do not know their place in society, their class position or social status, their place in the distribution of natural assets and abilities, their deeper aims and interests, or their particular psychological makeup."[56] Rawls, unlike Nozick, is concerned with the inequality that is self-perpetuating or the result of bad brute luck, but his social contract, like Nozick's, is built on a foundation of self-interest.[57] So, where in the currents of intellectual and political theory can we begin to "imagine" the rules that would be agreed upon if everyone was imbued with the knowledge that they would feel concern for other persons? What would be the rules for the society that we would create if we acknowledged that we care about and feel pain at the suffering of other persons and the deprivations endured by others? There may be other answers, but certainly a primary source of a model of justice built on concern, caring, and empathy can be found in the work of feminist scholars Carol Gilligan and Leslie Bender.

---

52. Samuel Kerstein, *Treating Persons as Means*, STAN. ENCYCLOPEDIA PHIL. (Apr. 13, 2019), https://plato.stanford.edu/entries/persons-means/ [https://perma.cc/X5RC-BXQF] (citation omitted).

53. *See* RAWLS, THEORY, *supra* note 44; *see also* Leif Wenar, *John Rawls*, STAN. ENCYCLOPEDIA PHIL. ARCHIVE, https://plato.stanford.edu/archives/spr2017/entries/rawls/ (last updated Jan. 9, 2017) [https://perma.cc/J2ZZ-49H8] ("The move to agreement among citizens is what places Rawls's justice as fairness within the social contract tradition of Locke, Rousseau and Kant."); Justin P. Bruner, *Locke, Nozick and the State of Nature*, 177 PHIL. STUD. 705, 706 (2018).

54. Julian Lamont & Christi Favor, *Distributive Justice*, STAN. ENCYCLOPEDIA PHIL. ARCHIVE, https://plato.stanford.edu/archives/win2017/entries/justice-distributive/ (last updated Sept. 26, 2017) [https://perma.cc/Z7FP-BTQA].

55. Rawls, *Maximin Criterion*, *supra* note 49, at 141 (footnote omitted).

56. *Id*.

57. Lamont & Favor, *supra* note 54.

III. A FEMINIST PHILOSOPHY OF JUSTICE: A WORLD OF CARING AND CONNECTION

In classical and behavioral economics, in twentieth-century evolutionary biology, and in liberal political philosophy, whether libertarian or Rawlsian, humans are self-interested at their core. However, at the same time that those major forces in twentieth-century intellectual history were working out visions of the world based on self-interest, a very different vision of the world was being developed in a major branch of feminist theory by, among others, Carol Gilligan in social science and Leslie Bender in law.[58] Carol Gilligan's book, *In a Different Voice: Psychological Theory and Women's Development*, has generated an enormous body of literature, discussion, and criticism.[59] The book is a rich exploration of the moral reasoning of men and women. The voices of Gilligan's research subjects, as they spoke to her during the course of her research, are the primary data for her book.[60] While Gilligan herself points out that gender is not

58. Since some readers of this Essay may be unfamiliar with feminist theory, it is worth clarifying that there are a great number of different and even conflicting "feminist" approaches to social theory, law, and politics. Feminist social theory and feminist legal scholarship have many strands, with feminist scholars in literature, sociology, psychology, political science, and law each looking at issues in their discipline through a variety of lenses that explore gender identity in culture, and society. For a brief discussion of the range of feminist theory and the significant differences among them, see, e.g., JANET HALLEY ET AL., GOVERNANCE FEMINISM: AN INTRODUCTION 24 (2018). For a brief discussion of the broad outlines of feminist legal scholarship, see GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END 128-48 (1995). My effort here is not to provide an overview of or guide to feminist social or legal theory but simply to draw on the works of two significant feminist scholars that inform my own understanding of the world in general and in relation to our current world in crisis.

59. A search of JSTOR's online database of scholarly literature performed on June 1, 2020, found that the book had been reviewed or cited in over 18,000 publications, in fields ranging from Art & Art History (275 articles or chapters) to Science and Technology Studies (142 articles or chapters).

60. Ann Manicom, Book Review, 165 J. EDUC. 217 (1983) (reviewing CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982) [hereinafter GILLIGAN, IN A DIFFERENT VOICE]). For a thoughtful critical response to Gilligan, see Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 STAN. L. REV. 1547 (1993). I think that Rohde's own contribution to the discussion of feminist legal theory in that article is eloquent and persuasive; however, I think that her criticism of Gilligan misses Gilligan's most important contribution to the discussion of moral reasoning, which is the opposition of reasoning based on connection and relatedness and reasoning based on deductions from a hierarchy of axioms. For an excellent analysis of Gilligan's different voices in the context of legal education, see Paul J. Spiegelman, *Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web*, 38 J. LEGAL EDUC. 243 (1988).

an absolute determinant of a person's style of moral reasoning, she finds that the two approaches to moral reasoning that she identifies are associated with gender:

> The different voice I describe is characterized not by gender but theme. Its association with women is an empirical observation, and it is primarily through women's voices that I trace its development. But this association is not absolute, and the contrasts between male and female voices are presented here to highlight a distinction between two modes of thought and to focus a problem of interpretation rather than to represent a generalization about either sex. In tracing development, I point to the interplay of these voices within each sex and suggest that their convergence marks times of crisis and change. No claims are made about the origins of the differences described or their distribution in a wider population, across cultures, or through time.[61]

These two alternative forms of reasoning need not be tied to gender in order to be recognized as representing significantly different approaches to moral reasoning, and it is for that purpose that I draw on Gilligan's work in this Essay. In a later article, she describes those opposing styles of moral reasoning:

> The values of justice and autonomy, presupposed in current theories of human growth and incorporated into definitions of morality and self, imply a view of the individual as separate and of relationships as either hierarchical or contractual, bound by the alternatives of constraint and cooperation. In contrast, the values of care and connection, salient in women's thinking, imply a view of self and other as interdependent and of relationships as networks created and sustained by attention and response. The two moral voices that articulate these visions, thus, denote different ways of viewing the world.[62]

Central to Gilligan's description of a different conceptualization of justice or moral choice is her ethics of care, which is founded on the values of care and connection and can best be described in her own words: "The ethics of care starts from the premise that as humans we are inherently relational, responsive beings and the human condition is one of connectedness or interdependence."[63] Gilligan's ethics of care is, in turn, a focus of Leslie Bender's work on a feminist approach to tort law.[64] Bender states this succinctly, "Perhaps we have gone

---

61. GILLIGAN, IN A DIFFERENT VOICE, *supra* note 60, at 2.

62. Carol Gilligan, *Mapping the Moral Domain: New Images of Self in Relationship*, 39 CROSSCURRENTS 50, 55 (1989).

63. Interview with Carol Gilligan, Professor, New York University, ETHICS OF CARE (June 21, 2011), https://ethicsofcare.org/carol-gilligan/ [https://perma.cc/9GKE-D9QJ].

64. *See e.g.*, Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 30 (1988) ("Our legal system must learn from Gilligan's study; it must attend to the relationships between people, our interdependencies and interconnectedness, to our responsibilities for and toward one another, and to the need to be responsive and caring. It must also recognize that it has been formulated in one voice, the masculine voice, and that it must listen to the meanings of

astray in tort-law analysis because we use 'reason' and caution as our standard of care, rather than focusing on care and concern."[65]

In her *A Lawyer's Primer on Feminist Theory and Tort* ("*Feminist Theory*"), Bender begins by explaining how she drew on feminist theory to begin the task of reimagining a very different system of tort law:

> Feminist insights and methodology have guided my thinking in the area of tort law, especially in examining negligence law to see how it perpetuates traditional male values and perspectives. Tort law needs to be more of a system of response and caring than it is now. Its focus should be on interdependence and collective responsibility rather than on individuality, and on safety and help for the injured rather than on "reasonableness" and economic efficiency.[66]

Much of Bender's *Feminist Theory* explores how tort law developed entirely within a world in which women's values, voices, and even worth were ignored or diminished.[67] For example, the central concept that traditionally determined the obligation to compensate others for their injuries was whether or not the person who caused the injury took the care that the "reasonable man" would have taken to avoid the injury.[68] While that wording has now been almost universally reworded as the care of the "reasonable person" or simply "actor," the change only succeeds in avoiding a gender-specific label but does not change the standard itself.[69] Bender persuasively argues that the reasonable person, of whatever gender identity, still has the legal culpability of her actions judged by the same common law standard of the reasonable man: "Today we are taught to consider women reasonable when they act as men would under the same circumstances, and unreasonable when they act more as they themselves or as other women act."[70]

---

different voices and reconstitute itself accordingly.").

65. *Id.* at 25; *see also* Jennifer Nedelsky, *The Practical Possibilities of Feminist Theory*, 87 NW. U. L. REV. 1286 (1993). In this article, Professor Nedelsky focuses on the concept of relationship, which has a significance that is somewhat different from concern and caring, as a superior principle for legal rules. Yet another major approach to feminist theory and law is focused on the ubiquity of vulnerability and its normative significance for law. For an introduction to this approach, see Anita M. Superson, Book Review, 125 ETHICS 1210 (2015) (reviewing VULNERABILITY: NEW ESSAYS IN ETHICS AND FEMINIST PHILOSOPHY (Catriona Mackenzie et al. eds., 2014)).

66. Bender, *supra* note 64, at 4.

67. *See id.*

68. RESTATEMENT (SECOND) OF TORTS § 283 (AM. LAW INST. 1975).

69. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 (AM. LAW INST. 2010).

70. Bender, *supra* note 64, at 25. For a wonderful illustration of the way in which tort law embraces a male cultural norm in the context of recovery for emotional distress, see Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990).

The reasonable care required by tort law embodies a largely male world vision of autonomous persons acting to pursue their own ends, who are only obligated to pay for those injuries when in their actions they fail to take those precautions that are justified by a marketplace norm of "efficiency."[71] Both the actor and the injured person's loss are viewed through a disconnected, economic lens. As Richard Posner succinctly stated: "As we shall see, a negligence standard of liability, properly administered, is broadly consistent with an optimum investment in accident prevention by the enterprises subject to the standard."[72]

After Bender deftly critiques the values of the liberal tradition and the tort system that embodies those values, she turns to the task of developing an alternative vision of a tort system.[73] Bender envisions a system in which compensation is required when a person who could have prevented the loss failed to act in a way that adequately manifested his connection to and concern for the losses of others.[74] Bender struggles to formulate it in more general terms but ultimately frames the issue this way: "If we are wedded to the idea of an objective measure, would it not be better to measure the conduct of a tortfeasor by the care that would be taken by a 'neighbor' or 'social acquaintance' or 'responsible person with conscious care and concern for another's safety'?"[75] This "responsible person with conscious care and concern for another's safety" is the most general embodiment of Bender's suggested reformulation of tort law.[76]

In one of her examples of doctrinal reform, Bender discusses the "no duty to rescue" doctrine, which is often referred to in torts as the "drowning stranger" problem.[77] In my own class, I have long begun the discussion of the "no duty to rescue" doctrine using a hypothetical where I am in Balboa Park in San Diego, near a large circular fountain known to almost all my students. If I saw a toddler, seated on the low ledge encircling the fountain's basin, fall into the fountain and struggle unsuccessfully to surface, I would be under no duty to reach over the ledge and pull the child out. I summarize the rule with this—if it is not my baby and not my fountain, absent any relation to the child or the risk, I would not be liable for damages if I simply and calmly watch the child drown.[78] In Bender's

---

71. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

72. Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 30 (1972). For example, suppose an enterprise estimated the economic/damages value of a truck driver's index finger at $75,000, because her earning capacity is largely undiminished and the medical bills and physical "pain and suffering" would not exceed that. In that case, the reasonable person, in this longstanding view of the duty of reasonable care, should not be required to invest anything more than $75,000 in safety measures to avoid such an injury. And as long as the enterprise made an economically "optimum" investment in safety, the loss of the finger would be borne by the injured person.

73. *See* Bender, *supra* note 64, at 30.

74. *Id.* at 37.

75. *Id.* at 25.

76. *Id.*

77. *Id.* at 33.

78. *See* RESTATEMENT (SECOND) OF TORTS § 314, cmt. c, illus.1 (AM. LAW INST. 1965)

"Restatement" of torts, the reasonable person who cares appropriately for the well-being of others would certainly be liable for failing to reach over the ledge to pull a drowning child from the water.[79] Clearly, the "no duty to rescue" doctrine in American law answers the question, "Are we all in this together?", with a resounding, "No." However, a slightly more nuanced approach to the question of collective responsibility and the law of rescuers can be found in admiralty law and in cases in which rescuers themselves are seeking compensation.

IV. SELF-INTEREST AND CARING IN TORT LAW: OF TEMPESTS AND RESCUERS

The COVID-19 pandemic is a new threat, but the problem of sudden threats to the life and property of a community is a very old one in the law of torts. *Mouse's Case*, an English admiralty case decided in 1609, was a suit brought by a passenger on a ferry that had been caught in a sudden tempest.[80] The boat was in danger of being lost.[81] To save the ship, cargo was thrown overboard by another passenger in order to lighten the load.[82] The court held that if the loss of the cargo was caused by the ferryman's decision to take on too heavy a load, then the ferryman was liable, but if the threat to the boat was due to an Act of God, then the passenger who hastened to lighten the load and tossed the plaintiff's goods into the sea was not liable for the plaintiff's loss.[83] However, the economic cost of saving the vessel and its cargo and passengers did not fall entirely on the passenger whose goods were jettisoned.[84] Since at least the time of the Romans, the law of the sea has provided that when cargo is jettisoned to save a ship, all aboard share the loss equally under the rule of general average contribution.[85]

The rule at sea that all share equally in the losses occasioned by the forces of nature conflicts with the common law rule for analogous emergencies on land. For takings on land, when public necessity requires the destruction of one person's property to save the lives or property of others, there is no obligation to compensate the person whose property was taken.[86] The question that these two opposing rules confronts us with is: At what point, in the face of forces beyond our control, do we no longer recognize that we are, at least metaphorically, all in

---

(illustrating the rule with a slightly different scenario: A sees B, a blind man, about to step into the street in front of an approaching automobile. A could prevent B from so doing by a word or touch without delaying his own progress. A does not do so, and B is run over and hurt. A is under no duty to prevent B from stepping into the street and is not liable to B.).

79. *See* Bender, *supra* note 64, at 33.

80. Mouse's Case (1609) 77 Eng. Rep. 1341; 12 Co. Rep. 63.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. J. Lowell, *Qui Sentit Commodum Sentire Debet et Onus*, 9 HARV. L. REV. 185, 187 (1895).

86. Bowditch v. Boston, 101 U.S. 16, 18 (1879).

the same boat? The narrow legal distinction is between necessity on land and necessity at sea, but of course that begs the question of whether there is any possible satisfactory moral distinction between exigency at sea and ashore.[87]

While general average contribution and the common law rule of public necessity govern compensation for property sacrificed in an emergency, a rather different issue is raised when a would-be rescuer voluntarily risks her own life and is killed or injured in the effort.[88] In *Eckert v. Long Island Railroad Co.*, Henry Eckert saw a young child, of three or four years of age, standing on a railroad track, with a train heading towards the child with no apparent effort to stop.[89] Eckert rushed forward and managed to throw the child to safety, but was struck by the train and died that night.[90] His estate brought a suit against the railroad.[91] The question before the New York Court of Appeals was simply whether Eckert should be barred from recovery by the doctrine of contributory negligence.[92] The defendant urged that Eckert's death was a result of his own lack of care, since the reasonable person would take care to avoid an oncoming train.[93] The court rejected the railroad's argument, ruling that in an emergency, where a human life is in danger, the impulse and actions of a would-be rescuer cannot be judged by the standards of normal times.[94] Thus, the *Eckert* court recognized the human impulse to care for others and allowed that impulse to override the usual self-interested, wealth-maximizing negligence standard.

In *Wagner v. International Railway Co.*, the plaintiff/rescuer fell from a railway bridge, which he was walking on in an effort to save his cousin, who had been jarred from the train as it was crossing the bridge.[95] Justice Cardozo's analysis on the issue of the rescuer's risk-taking and the railway's risk-creation is among his most often-quoted opinions:

> Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within

---

87. My colleague Paul Gudel has suggested that the reason for the distinction might be that it is easier to identify those whose property was saved in the case of the cargo on a ship that was likely to have sunk than it is to define the boundaries of those whose property is saved when an out-of-control fire is threatening a city. However, while that may be a practical difficulty, the moral issue remains, and the practical solution to that is simply to pay compensation from the same local jurisdiction's funds that would have been used to acquire the property by eminent domain.

88. Eckert v. Long Island R.R. Co., 43 N.Y. 502, 505 (1871).

89. *Id.*

90. *Id.* at 503.

91. *Id.* at 503-04.

92. *Id.* at 505; *Contributory-Negligence Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The principle that completely bars a plaintiff's recovery if the damage suffered is partly the plaintiff's own fault").

93. *Eckert*, 43 N.Y. at 505.

94. *Id.* at 506.

95. Wagner v. Int'l Ry. Co., 133 N.E. 437, 437 (1921).

> the range of the natural and probable. The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer.[96]

While *Wagner* is usually cited as support for the "rescue doctrine,"[97] Cardozo's timeless words have a much broader significance, which is that humans are capable and even prone to acts of heroism, of risking their own lives to save the lives of others. The first responders at the World Trade Center and the healthcare workers in our COVID-19 wards are widely recognized examples of this aspect of ourselves. *Eckert* and *Wagner* provide at least a bit of doctrinal support for our better natures, although the "no duty to rescue" doctrine remains a monument to our traditional reverence of autonomy, separation, and wealth maximization.[98] While it is true that liability in negligence limits autonomy to serve efficiency, it is a limit that necessarily places the burden of "efficient losses" on the victims of self-interested actors who contribute to an increase in overall social wealth through efficient precautions, without regard to the distributional consequences that result.[99] Neither our interdependence nor our extraordinary willingness to sacrifice for was recognized by the major currents of twentieth-century intellectual or political theory in the United States.

V. RECONCEPTUALIZING TORT LAW AND CONTRACT LAW

A. An Ethics of Care for Tort Law

In Justice Traynor's famous concurrence in *Escola v. Coca Cola*, he struggled to bridge the efficiency norm that shaped tort doctrine with his own empathic understanding of what injuries are:

> Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.[100]

---

96. *Id.*

97. *See* RESTATEMENT (THIRD) OF TORTS § 32 (AM. LAW INST. 2010).

98. *See Wagner*, 133 N.E. at 437; *see also Eckert*, 43 N.Y. at 505.

99. *But see* Kenneth S. Abraham, *Strict Liability in Negligence*, 61 DEPAUL L. REV. 271, 283 (2012). Abraham is among those who argue that the current tort system can be normatively justified in a corrective justice framework. I would argue, as above, that limiting compensation to instances where precaution taking was less than that justified by the risk is corrective justice that is blind to those injured when precaution taking was efficient in risk/benefit terms. For a similarly critical view of major normative torts theorists, see Robert L. Rabin, *Law for Law's Sake*, 105 YALE L.J. 2261 (1996) (reviewing ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995)).

100. Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring). I think it is fair to say that Traynor's express willingness to fundamentally reshape tort doctrine to better reflect empathy is a giant step past the not uncommon instances where empathy clearly plays a role in a particular decision. *See* PETER KARSTEN, HEART VERSUS HEAD: JUDGE-

While Traynor wrestled to justify this seedling of strict liability in economic terms, it is easier to see Traynor's empathy for the injured Gladys Escola as justifying his proposed strict liability regime for product liability than to prove its economic superiority.[101] It is not difficult to see in his opinion a conception of torts where those who are injured are taken care of, where enterprise liability is founded not on efficiency grounds but a notion of fairness based on caring.[102] If losses are best distributed "among the public as a cost of doing business," then we would be, at least metaphorically, all in the same boat.[103] If our activities or our products injure someone, our sense of connectedness and relation should move us—or legally obligate us—to assist him in dealing with the consequences of those injuries.[104] Further, in a reimagined tort law, the concept of enterprise in "enterprise liability" should be more broadly construed than simply "that business enterprises ought to be responsible for losses resulting from products they introduce into commerce."[105] Rather than an economic or cost-shifting conceptualization of the obligation to compensate for injuries as it has been defined, in a tort law founded on an ethics of care, we might understand "enterprise" to embrace any of the activities that we undertake, even as individuals, that might result in harm to others. It is strict liability that is based on the notion of empathy and care: I unintentionally have caused harm to someone—I am obligated to help him.

B. Contract Law Through a Caring Lens

While a full description of the way our laws can reflect the values of caring

---

MADE LAW IN NINETEENTH-CENTURY AMERICA (1997) for an at-length exploration of the subject of empathy in judging.

101. *See Escola*, 150 P.2d at 441.

102. *See id.*

103. *Id.*

104. I am not the first to argue for enterprise liability on the basis of fairness. In his article, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266 (1997), Gregory C. Keating argues for enterprise liability on fairness grounds. However, Keating attempts to do so within a classic liberal framework, postulating "a family of principles embraced by a social contract conception of accident law as a realm of equal freedom and mutual benefit. . . . Enterprise liability thereby establishes more favorable conditions for free and equal persons to pursue their conceptions of the good on mutually beneficial terms." *Id.* at 1273. Thus, Keating, like Traynor, struggled to join autonomy and enterprise liability. However, Keating rested his argument not on a general notion of concern or caring but in contractarian terms. "[E]qual freedom and mutual benefit" allows Keating to posit that enterprise liability represents an arrangement that is justified by liberal social contract theory: "When the enterprise liability principle of fairness reconciles the competing claims of liberty and security more fairly and favorably than negligence liability, social contract theory calls for its adoption in place of the reciprocity of risk criterion traditionally embraced by social contract scholars." *Id.*

105. George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 463 (1985).

and empathy is beyond the scope of this Essay, one more brief example of the reimagining of another of the great common law subjects can further illustrate what our next normal might be. Perhaps no subject is more grounded on a conception of autonomous individuals freely pursuing their ends than contract law.[106] The principles of limited government, individual autonomy, and the value of free markets are the foundation on which binding compulsory arbitration is imposed in virtually all consumer contracts, from car rentals to mobile phone service and the use of social media. Similarly, a great many other prominent features of adhesion contracts determine the rights and liabilities of ordinary individuals in their dealings with corporations. For most individuals, their job is the determinant of how they spend much of their time, where they will be able to afford to live and, for a great many, how healthy they will be and, as a result, how long they might expect to live.[107]

The notion that the terms and conditions of employment were the product of individual autonomy in a free market was recognized as transparently absurd more than a century ago by no less a scholar than Roscoe Pound. Pound's critique was succinct and scathing. Pound quoted a sociologist: "Much of the discussion about 'equal rights' is utterly hollow. All the ado made over the system of contract is surcharged with fallacy."[108] Further:

> To everyone acquainted at first hand with actual industrial conditions the latter statement goes without saying. Why, then do courts persist in the fallacy? Why do so many of them force upon legislation an academic theory of equality in the face of practical conditions of inequality? Why do we find a great and learned court in 1908 taking the long step into the past of dealing with the relation between employer and employee in railway transportation, as if the parties were individuals—as if they were farmers haggling over the sale of a horse? Why is the legal conception of the relation of employer and employee so at variance with the common knowledge of mankind?[109]

---

106. The linkage between classical liberal philosophy, free-market economics, and contract law was elegantly expressed by the great Roscoe Pound in his seminal article *Liberty of Contract*, 18 YALE L.J. 454 (1909): "The idea that unlimited freedom of making promises was a natural right came after enforcement of promises when made, had become a matter of course. It began as a doctrine of political economy, as a phase of Adam Smith's doctrine which we commonly call *laisser faire*. It was propounded as a utilitarian principle of politics and legislation by Mill. Spencer deduced it from his formula of justice. In this way it became a chief article in the creed of those who sought to minimize the functions of the state, that the most important of its functions was to enforce by law the obligations created by contract." *Id*. at 456-57 (citations omitted).

107. *See* M. G. Marmot et al., *Inequalities in Death—Specific Explanations of a General Pattern?*, 323 LANCET 1003 (1984), for a classic study of the inequalities in health and life expectancy between employees in higher grade positions and those in lower grade positions.

108. Pound, *supra* note 106, at 454 (quoting LESTER F. WARD, APPLIED SOCIOLOGY 281 (1906)).

109. *Id.* (citation omitted).

While this passage in Pound's article is directed at Justice Harlan's opinion in *Adair v. United States*,[110] the enshrinement of liberty of contract into a substantive due process right protected by the Fifth and Fourteenth Amendments was begun three years earlier in the infamous *Lochner v. New York* decision.[111] *Lochner* invalidated a New York statute that prohibited bakeries (and similar businesses) from requiring their employees to work more than sixty hours in a week.[112] As Justice Peckham reasoned:

> The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the *14th Amendment of the Federal Constitution*.[113]

The short, unhappy life[114] of *Lochner's* enshrinement of liberty of contract as a constitutionally protected right was succinctly summarized in the joint opinion of Justices O'Connor, Kennedy, and Souter in *Planned Parenthood of Southeastern Pennsylvania v. Casey*:

> The *Lochner* decisions were exemplified by *Adkins v. Children's Hospital of District of Columbia*, 261 U.S. 525, 43 S. Ct. 394, 67 L. Ed. 785 (1923), in which this Court held it to be an infringement of constitutionally protected liberty of contract to require the employers of adult women to satisfy minimum wage standards. Fourteen years later, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703 (1937), signaled the demise of *Lochner* by overruling *Adkins*. In the meantime, the Depression had come and, with it, the lesson that seemed unmistakable to most people by 1937, that the interpretation of contractual freedom protected in *Adkins* rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare.[115]

The "demise" of *Lochner* during the Great Depression and the collapse of the United States economy ushered in numerous social reforms that aimed to strike a more just balance between employers and employees, and between the most

---

110. *See* Adair v. United States, 208 U.S. 161 (1908) (holding unconstitutional a federal statute prohibiting interstate carriers from discriminating against employees on the basis of membership in a union).

111. Lochner v. New York, 198 U.S. 45 (1905).

112. *Id.* at 64-65.

113. *Id.* at 53 (citing Allgeyer v. Louisiana, 165 U.S. 578 (1897)) (emphasis added).

114. I reference here the well-known Ernest Hemingway story, "The Short Happy Life of Francis Macomber." While Macomber met his demise at a high-point moment in his life, *Lochner*'s demise came during the misery of the Great Depression. Ernest Hemingway, *The Short Happy Life of Francis Macomber*, in THE FIFTH COLUMN AND THE FIRST FORTY-NINE STORIES (1938).

115. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 861-62 (1992).

fortunate members of society and the least fortunate. Chief among these was the Fair Labor Standards Act of 1938, which provided a minimum wage, a forty-hour standard work week, the end of child labor, and the enactment of the Social Security Act to provide a minimum income for the disabled and elderly.[116] However, while statutes have eliminated some of the most abusive workplace conditions, the current pandemic reveals how much further we need to go. A recent article in *The Journal of the American Medical Association* studied the characteristics of "essential" workers who continued to work in situations that put them at risk, either through continuous exposure to the public (e.g. healthcare, transportation, or grocery workers) or exposure to their coworkers (e.g. manufacturing, meat processing, or construction).[117] According to the study, "25% of essential workers were estimated to have low household income, 18% to live in a household with at least 1 uninsured person, and 18% to live with someone 65 years or older."[118] Similarly, a Centers for Disease Control and Prevention study of COVID-19 infections in the poultry industry found both a high rate of infection and working conditions that were likely to put workers at continued risk.[119]

For most people, the world of contracts is divided into two major categories: the contracts between them and their employer (employment contracts) and contracts for the goods and services they buy (consumer contracts). In the category of employment contracts, reforms may be provided in the way that previous reforms have been delivered—by comprehensive statutes that impose limits on the terms and conditions of employment and increase the bargaining power of workers. In the wake of the Great Depression, major changes were statutorily created in child labor and statutes governing wages and hours, marking the beginning of an effort to ensure safe working conditions.[120] The Great Depression also provided the impetus for the enactment of the National Labor Relations Act to protect workers' rights to organize and bargain collectively.[121] However, these United States labor reforms were piecemeal efforts to solve particularly egregious problems, while the essential framework for employer-employee relations in the United States remains anchored by an assumption that free market negotiations between employers and employees are the optimal way

---

116. Alan Brinkley, *The New Deal Experiments*, *in* THE ACHIEVEMENT OF AMERICAN LIBERALISM: THE NEW DEAL AND ITS LEGACIES 7-8 (William H. Chafe ed., 2003).

117. Grace McCormack et al., *Economic Vulnerability of Households with Essential Workers*, J. AM. MED. ASS'N 388, 388-89 (2020).

118. *Id.* at 389.

119. Michelle A. Waltenburg et al., *Update: COVID-19 Among Workers in Meat and Poultry Processing Facilities — United States, April–May 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 887 (July 10, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6927e2-H.pdf [https://perma.cc/B3E8-CHJF].

120. Anna P. Prakash & Brittany B. Skemp, *Beyond the Minimum Wage: How the Fair Labor Standards Act's Broad Social and Economic Protections Support Its Application to Workers Who Earn a Substantial Income*, 30 ABA J. LAB. & EMP. L. 367, 373-74 (2015).

121. 29 U.S.C.A. § 151 (West 1947).

to deal with everything from wages to sick leave.[122] The time has come for a new statutory foundation for employment contracts in the United States that provides a much fairer balance between the interests of employers and employees than the marketplace has achieved. While the details of such a statutory foundation far exceed the scope of this Essay, there are models from Europe that can be a starting point for assuring that workers are paid a living wage with reasonable job security and benefits.[123]

In the world of consumer contracts with which we are now all too familiar, transactions generally involve lengthy documents containing many pages of fine print that we either sign or "click to agree," whether it is in order to rent a car, buy a cell phone plan, book a room at a hotel, or buy anything from Amazon. Traditionally, the primary limit that the law of contracts places on the ability of the drafters of those contracts to impose whatever conditions they choose is the doctrine of unconscionability.[124] Comment b to the Restatement (Second) of Contracts § 208 cites *Hume v. United States* for the historical and traditional definition of unconscionability:

> That an agreement to pay $1.200 a ton [for goods], actually worth not more than $35 a ton, is a grossly unconscionable bargain, defined in Bouvier's Law Dictionary to be "a contract which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept on the other," nobody can doubt. Such a contract, whether founded on fraud, accident, mistake, folly, or ignorance, is void at common law. . . . Courts of law will always refuse to enforce such a bargain, as against the public policy of honesty, fair dealing, and good morals.[125]

The problem with that standard of unconscionability is that on its face, it allows the stronger party to draft contracts that impose conditions that are onerous, one-sided, and are simply a reflection of the relative bargaining power of the parties; such conditions go right up to the line of terms that "no man in his senses" would

---

122. *See* JOSEPH E. STIGLITZ, FREEFALL: AMERICA, FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY 261 (2010).

123. *See* Cathie Jo Martin & Kathleen Thelen, *The State and Coordinated Capitalism: Contributions of the Public Sector to Social Solidarity in Postindustrial Societies*, 60 WORLD POL. 1, 1-36 (2007). Martin and Thelen examine a variety of factors contributing to the results of state and labor models in Germany and Denmark, as well as examples from several other European countries. Their analysis seems particularly relevant to our current time of crisis and transition. *See also* Henry Hansmann, *Worker Participation and Corporate Governance*, 43 U. TORONTO L.J. 589 (1993).

124. RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981); U.C.C. § 2-302 (AM. LAW INST. & UNIF. LAW COMM'N 2020). There are other limits as well (for example, illegality); however, the most general way that contract law limits parties' ability to contract is unconscionability.

125. Hume v. United States, 21 Ct. Cl. 328, 330 (Ct. Cl. 1886).

accept.[126]

This problem with the standard is a serious issue for virtually everyone. I am writing this document in Microsoft Word, which I acquired as part of my purchase of Microsoft Office 365. The Microsoft Services Agreement that covers my use of Word in writing this Essay is approximately thirty-three pages long.[127] As a lawyer, it is easy for me to read and understand it, although it might not be easy for other users. For example, here is the clause limiting the damages I might recover if a bug in the software were to trash my hard drive, causing me to lose approximately 450 hours of work product[128]:

> 13. Limitation of Liability. If you have any basis for recovering damages (including breach of these Terms), you agree that your exclusive remedy is to recover, from Microsoft or any affiliates, resellers, distributors, Third-Party Apps and Services providers, and vendors, direct damages up to an amount equal to your Services fee for the month during which the loss or breach occurred (or up to $10.00 if the Services are free). You can't recover any other damages or losses, including direct, consequential, lost profits, special, indirect, incidental, or punitive. These limitations and exclusions apply even if this remedy doesn't fully compensate you for any losses or fails of its essential purpose or if we knew or should have known about the possibility of the damages. To the maximum extent permitted by law, these limitations and exclusions apply to anything or any claims related to these Terms, the Services, or the software related to the Services.[129]

Is a limit of $8.33[130] on my damages for the loss of several thousand hours of work an agreement which "no man in his senses" would make? Was I not in my right mind when I clicked "agree"? Or, more likely, did I simply click "agree" without reading all of the agreement (prior to writing this), knowing that I did not have any power whatsoever to negotiate the terms? Perhaps Microsoft's lawyers

---

126. *Id.*; *see generally* Robert Kuttner & Katherine V. Stone, *The Rise of Neo-Feudalism*, AM. PROSPECT (Apr. 8, 2020), https://prospect.org/economy/rise-of-neo-feudalism/ [https://perma.cc/8B42-YXUS] (arguing that the mid-twentieth-century was a time in which there was a movement towards incorporating a duty of good faith and fair dealing into contract law, specifically with U.C.C. §§ 1-201(20) and 2-314, and describing the subsequent retreat from that movement and other efforts at law reform: "The trend in contract law took a U-turn in the 1980s, as the law and economics movement began to permeate the judiciary. The new 'efficiency' theory of contract law held that all contracts should be enforced, notwithstanding either deception or vast power inequalities between the parties.").

127. *Microsoft Services Agreement*, MICROSOFT, https://www.microsoft.com/en-us/servicesagreement (last updated Aug. 1, 2020) [https://perma.cc/C7D9-9YXT].

128. I do have a cloud backup that is current but let us assume that I back up only once every two or three months, and that my documents in that period represent about 150 "billable hours" of law professor work per month resulting in the loss of two months of work, or 300 hours.

129. *Microsoft Services Agreement*, *supra* note 127, § 13.

130. This amount is based on one month's cost of Office 365 with an annual cost of $100.

were also knowingly overreaching and willing to take their chances in arbitration or small claims court. In California, the small claims court can hear cases involving disputes up to $10,000,[131] which still does not seem like fair compensation for my three hundred hours of work. Such overreaching clauses are popular in online contracts in part because of their *in terrorem* effect, discouraging consumers from pursuing an adequate remedy.[132]

The *Hume* standard of unconscionability finds a new expression in Section 5 of the most recent tentative draft of the Restatement of the Law of Consumer Contracts ("Draft RCC"), which defines unconscionability as: "(1) substantively unconscionable, namely fundamentally unfair or unreasonably one-sided, and (2) procedurally unconscionable, because it results in unfair surprise or results from the absence of meaningful choice on the part of the consumer."[133] Notice the conjunction "and," which requires that the clause be *both* substantively unreasonably one-sided and procedurally unconscionable. Is Microsoft's limitation on damages unconscionable under the Draft RCC? Microsoft's limitation is a fraction of the cost of the product. Are limits that are a small multiple of the cost of the product, such as $1,000 rather than $10, reasonable? Should such limits instead reflect a balance between the gross profits on the sale of the product over time in relation to the total losses that could result from the use of said product? The Draft RCC does not attempt to provide clear answers to these questions, nor does it aim at writing a law of contracts that has fair contracts as its goal. Rather, the Draft RCC, which may be an admirable effort to reflect "the law as it is" rather than as it should be, simply entrusts the adversarial process and future court decisions to work out when a contract becomes so totally one-sided and unreasonable as to cross the unconscionable line.[134] Making such determinations a matter of judicial decisions on an *ad hoc*, contract-by-contract basis simply adds uncertainty and cost to the process of contracting and dispute resolution.

What we need is not a Restatement of Consumer Contracts that reflects "the law as it is" but a Model Code of Contracts that embraces contract law as it should be.[135] A clause that attempts to relate any limit on the seller's potential liability to the seller's profits would at least consider the fairness of the agreement

---

131. *If You're the Plaintiff ... Filing Your Lawsuit*, CAL. DEP'T CONSUMER AFF., https://www.dca.ca.gov/publications/small_claims/file.shtml (last visited Jan. 17, 2021) [https://perma.cc/2XEQ-VSFY].

132. Colin P. Marks, *Online Terms as in Terrorem Devices*, 78 MD. L. REV. 247, 285 (2019).

133. RESTATEMENT OF CONSUMER CONTRACTS § 5 (AM. LAW INST., Tentative Draft No. 1-5, 2019).

134. Steven O. Weise, *The Draft Restatement of the Law, Consumer Contracts Follows the Law*, ALI ADVISER (Apr. 5, 2019), http://www.thealiadviser.org/consumer-contracts/the-draft-restatement-of-the-law-consumer-contracts-follows-the-law/ [https://perma.cc/N79H-VGBF].

135. *See generally* Nancy S. Kim, *Ideology, Coercion, and the Proposed Restatement of the Law of Consumer Contract*s, 32 LOY. CONSUMER L. REV. 456 (2020) (criticizing the Draft RCC); *see also* NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS (2019) (providing a powerful and comprehensive critique of contract law in our age of vast power inequality).

to both parties. A Model Code could be negotiated and drafted by representatives of businesses and consumers given a mandate to achieve fairness. While it is not my purpose in this Essay to provide a detailed proposal for contract law reform, I do believe that specific statutory reforms for employment law are very much a possibility in the near future and that a Model Code of Contracts is also possible. It is hard to envision that a Model Code of Contracts premised on respect and concern would provide a limitation on damages that does not reflect both the possible harm to the buyer as well as the capacity of the seller to foresee and insure against such losses by adequately pricing the goods or services being sold. In the next normal, such a Model Code could be rapidly adopted by state legislatures, creating a marketplace that is shaped more by fairness than relative economic power.

VI. CONCLUSION

It may be coincidence that the great recession of 2007, which shook the belief of numerous economists in Chicago School market theory,[136] was also followed by a revolution within sociobiology. E.O. Wilson, who began the field of sociobiology, moved away from Dawkins's position to an acknowledgement that there are differing behavior patterns in different groups, and that there is an evolutionary selection process that occurs at group-level.[137] When groups compete, Wilson's revised account of sociobiology acknowledges the interplay of culture and genes and can, at least in part, be best summarized by this short quote: "Human beings are prone to be moral—do the right thing, hold back, give aid to others, sometimes even at personal risk—because natural selection has favored those interactions of group members benefitting the group as a whole."[138] Wilson's departure from a vision of humans as biologically driven by a principal of individual genetic "selfishness" to a vision of humans with a drive to contribute to the good presents a paradigm shift in a major social scientist's understanding of evolution and human society. The pandemic and the death of George Floyd are disruptive events in the American society of a scale not seen in generations. They are evolution-accelerating events.[139] How will American society evolve following this period of disruption?

---

136. *See* Cassidy, *supra* note 12; *see also* Robert Skidelsky, *The Relevance of Keynes*, 35 CAMBRIDGE J. ECON. 1, 5 (2011) ("When the financial system crashed in 2008, dragging down the real economy with it, governments stepped in everywhere with 'stimulus packages' made up of a mixture of bailing out insolvent banks, printing money, providing tax rebates or subsidies for private spending and big increases in loan-financed public spending. This was all according to Keynesian prescription. Even Robert Lucas, high priest of Chicago economics, admitted that 'we are all Keynesians in the foxhole.'").

137. EDWARD O. WILSON, THE SOCIAL CONQUEST OF EARTH 247 (2012).

138. *Id.*

139. I borrow here from the theory of punctuated equilibrium espoused by Niles Eldredge and Steven J. Gould that holds in part that "once a species has arisen it remains essentially unchanged for most of its history, but when change occurs it does so swiftly." Lewin, *supra* note 43, at 672.

The primacy of self-interest or selfishness was at the heart of biological, economic, legal, and political theory throughout much of the twentieth century.[140] However, with the primacy of self-interest now questioned by scholars across a variety of disciplines, ranging from Edmund Wilson (biology) to Kristen Renwick Monroe[141] (political science), there is now the potential for a major shift in our cultural and legal norms. The global pandemic has been an unplanned and awful experiment in which differing cultural responses to the threat are being tested. It is becoming clear that our culture, in which individual autonomy has been widely elevated over collective responsibility and concern, has failed in its response. While numerous countries across Europe and Asia have brought the rate of infections under control and have significantly lower per capita deaths from COVID-19 than the United States,[142] death rates in the United States are again rising.[143] A recent research report concluded that the rate of death from COVID-19 correlated very strongly with one simple factor—wearing masks.[144] The assertion that compulsory mask wearing is an infringement on individual autonomy and freedom[145] is simply an assertion that individual choice and perceived self-interest trump (no pun intended) responsibility and concern for others. Our culture can adapt or else slip further and further into decline. The national mood makes the time ripe for change—a recent Pew survey found a stunning 87% of Americans dissatisfied with the way things are going in this country today, while 71% describe themselves as angry and 66% as fearful.[146] But

---

140. *See generally* Kristen Renwick Monroe, *A Fat Lady in a Corset: Altruism and Social Theory*, 38 AM. J. POL. SCI. 861 (1994).

141. *See id.*

142. *Mortality Analyses*, JOHNS HOPKINS U. MED. CORONAVIRUS RESOURCE CTR., https://coronavirus.jhu.edu/data/mortality (last visited Jan. 17, 2021) [https://perma.cc/8GKD-4DDH].

143. *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html (last visited Jan. 5, 2021) [https://perma.cc/WT7X-NDFS].

144. *See* Daisuke Miyazawa & Gen Kaneko, *Face Mask Wearing Rate Predicts Country's COVID-19 Death Rates: With Supplementary State-by-State Data in the United States*, MEDRXIV (July 14, 2020), https://www.medrxiv.org/content/medrxiv/early/2020/07/14/2020.06.22.20137745.full.pdf [https://perma.cc/P3R5-XWPA]; *see also* John T. Brooks et al., *Universal Masking to Prevent SARS-CoV-2 Transmission—The Time Is Now*, 324 J. AM. MED. ASS'N 635 (2020).

145. *See,* e.g., Press Release, Freedom Foundation Lawsuit Alleges Mask Order Violates Free Speech, FREEDOM FOUND. (July 7, 2020), https://www.freedomfoundation.com/press-release/freedom-foundation-lawsuit-alleges-mask-order-violates-free-speech/ [https://perma.cc/7U6U-JVL2]; *see also* Morgan Chalfant, *Trump Says He Won't Issue National Mask Mandate*, THE HILL (July 17, 2020), https://thehill.com/homenews/administration/507908-trump-says-he-wont-issue-national-mask-mandate [https://perma.cc/HT6Z-AWJ8] ("President Trump says he will not issue a national mandate requiring Americans to wear masks in order to slow the spread of the novel coronavirus. 'I want people to have a certain freedom and I don't believe in that, no,' Trump said in an interview with Fox News's Chris Wallace that will air in full on 'Fox News Sunday.'").

146. *Majorities Feel Anger, Fear with State of Nation; Few Feel Proud*, PEW RES. CTR. (June

this dark mood makes the desire for change stronger. There is hope. The rate of mask wearing has increased,[147] while public support for universal healthcare has also increased.[148] We can imagine tort law building on the empathy of Justice Traynor and embracing an ethics of care articulated by Leslie Bender. Consumer contract law could be guided by fairness rather than by the extreme standard of unconscionability. As the pandemic increasingly forces us to recognize our interdependence, reforms in healthcare, childcare, and the workplace become possible. If selfishness is no longer viewed as a biological imperative or economic necessity,[149] then we are not only free to transform our society—we must.

30, 2020), https://www.pewresearch.org/politics/2020/06/30/publics-mood-turns-grim-trump-trails-biden-on-most-personal-traits-major-issues/pp_06-30-20_public-mood-trump-00-0/ [https://perma.cc/2YY2-NGZB].

147. Press Release, CDC Calls on Americans to Wear Masks to Prevent COVID-19 Spread, CTRS. FOR DISEASE CONTROL & PREVENTION (July 14, 2020), https://www.cdc.gov/media/releases/2020/p0714-americans-to-wear-masks.html [https://perma.cc/MN7B-Z8KA].

148. Yusra Murad, *As Coronavirus Surges, 'Medicare for All' Support Hits 9-Month High*, MORNING CONSULT (Apr. 1, 2020), https://morningconsult.com/2020/04/01/medicare-for-all-coronavirus-pandemic/ [https://perma.cc/UM7Y-F6VQ].

149. For the biological recognition of altruism, *see* WILSON, *supra* note 137. For the economic recognition of altruism and cooperation, *see* STEVEN G. MEDEMA, THE HESITANT HAND 197-99 (2009).

EPILOGUE

This article was completed in August of 2020. Since that time, a great deal has occurred that reinforce the thesis of this article: "A pandemic is an evolution-accelerating event on a biological level but also on a cultural level. The social forces created by the pandemic have brought us to a turning point." At the same time, much that has occurred has shown how difficult it is for our society to respond to the need for social change. For possibly the first time in our nation's history, or perhaps the first time since the election of Abraham Lincoln and the subsequent Civil War, a presidential election did not result in a peaceful transfer of power, as a mob used force in an attempt to prevent the certification of the election of President Joe Biden. While ultimately democracy prevailed, blood was shed in protecting that democratic process, and conspiracy theories concerning both the election and questioning the reality of the pandemic are widely shared.[150] We are indeed at a turning point, and the need for our culture to evolve is more apparent than ever. Whether we will remains to be determined.

150. Thomas B. Edsall, *The QAnon Delusion Has Not Loosened Its Grip*, N.Y. TIMES (Feb. 3, 2021), https://www.nytimes.com/2021/02/03/opinion/qanon-conspiracy-theories.html [https://perma.cc/A5Q5-8FX8].