

Introduction

Once we begin to look at the discussions pursued within legal philosophy, we shall notice that rarely are attempts made to connect – either directly or indirectly – claims about the nature of law and evolutionary–anthropological assumptions (with a few exceptions, such as the works of Friedrich August von Hayek or Mauro Barberis, who was developing Hayek’s cultural-evolutionist approach). This state of affairs does not seem to be satisfactory. Arguably, reflection on human nature inspired by evolutionary biology may substantially enrich discussions about the law. This book is intended to be a modest contribution in this direction. Its main purpose is twofold: to reconstruct an evolutionary view of human nature and to examine through the prism of this view two legal–philosophical problems, viz. the problem of the (historical) evolution of law and the controversy between *ius*-naturalists (the adherents of natural law doctrine) and legal positivists. The title of this book – *Law and Evil* – is justified by the fact that in my reconstruction of the evolutionary view of human nature I shall put special stress on the problem of the sources of human propensity for evil-doing.

Since the term ‘evil’ lacks clarity, some disambiguation is necessary at the outset. In its narrower sense this term is applied only to the most extreme, most serious forms of intentional wrongdoing (evil in a broader sense). They can be understood in three different ways. First, extreme evil (that is, evil in a narrower sense) may consist in doing evil just for the sake of doing evil. This is the so-called ‘absolute evil’. On this understanding, the harm done need not be very serious for a wrongdoer to be called ‘absolutely evil’; it suffices that he is doing an evil act, even a relatively minor one (such as stealing pears – St Augustine’s famous autobiographical example), just because this act is evil. He is indifferent to the suffering of other people involved, that is, he does not share the suffering but also does not derive any pleasure from it; what may give him pleasure (as a side effect) is the very fact of violating moral rules, and this violation becomes for him an end in itself.

Second, extreme evil may consist in sadistic wrongdoing, that is, deriving pleasure from making the other person suffer. In this case an agent does not commit evil for the sake of evil but in order to derive

pleasure from the sight of the other person's – the victim's – suffering. One can call this variety of extreme evil 'sadistic evil'.

On the third understanding, an act is extremely evil if it causes 'considerable harm to a victim' and 'is done for no intelligible reason', and as such (that is, being done without any intelligible reason) is found by people to be 'extremely perplexing' (Feinberg 2002: 144). Each of the above three forms of extreme evil – absolute, sadistic and, as one may call it, 'unintelligible' – can be dubbed 'demonical' or 'pure'. These definitions are, of course, sketchy. But they are sufficient for the purpose of formulating one of the important theses of this book, viz. that human nature, as it was shaped by biological evolution, is free from proclivities to extreme (absolute, sadistic, or unintelligible) evil. However, it is not free from proclivities to less extreme forms of wrongdoing. It is with respect to them that I shall use the term 'evil'. Its meaning in this book is therefore general: it is, basically, equivalent to 'intentional wrongdoing'. However, I propose to distinguish within this broad category more specific kinds of evil, viz. primary and secondary. I shall clarify their sense in the course of the following summary of the book's content.

In Chapter 1 I shall argue for the claim that (Darwinian) evolutionary theory leads to the view of human nature which I call 'doubly ambivalent'. The *first ambivalence* of human nature is that it comprises immoral, neutral and moral tendencies. The *second ambivalence* is that our natural (shaped by natural selection) moral tendencies are far from being *genuinely* moral. They embrace, in broad outline, the tendency to feel empathy, kin altruism, tribalism and reciprocal altruism (tendency to act in accordance with the tit-for-tat strategy). In other words: evolutionary ethics is fourfold – it is composed of ethics of empathy, family (kin altruism) ethics, tribal ethics and tit-for-tat (reciprocal altruism) ethics. By evolutionary ethics I understand a set of moral rules expressive of (or correlated with) moral tendencies shaped by natural selection, and by genuine ethics a set of moral rules which impose much stronger requirements of impartiality than evolutionary ethics (a more precise account of genuine ethics will be provided in the course of my analyses). Accordingly, I defend the claim that biological evolution endowed us with moral tendencies, but there is a discontinuity between these tendencies and genuine ethics. I shall also use a distinction between primary and secondary evil. By 'primary evil' I shall understand evil actions which flow from our immoral tendencies, and by 'secondary evil', evil actions which flow from our neutral or moral tendencies. Secondary evil can be viewed as an undesirable (from the perspective of genuine ethics) consequence of our evolutionarily shaped neutral and moral tendencies;

the notion of secondary evil therefore makes sense only on the assumption that there is some more 'pure' type of ethics than the one 'built into' our biological nature. It should be stressed that the distinction between 'primary' and 'secondary' evil only points at the main source of a given immoral action. It does not imply that secondary evil is less evil – is a less serious form of wrongdoing – than 'primary' evil; it may indeed be true that, as a rule, primary evil is more reprehensible, but, certainly, there are many exceptions. It should also be noticed that the same immoral action (for example, killing) can be caused by immoral tendencies (for example, envy or egoism), neutral ones (for example, hierarchical propensities) or moral ones (for example, group or kin altruism).

Chapter 2 provides an interpretation of the history of law from the anthropological perspective offered in this book: it is argued that the history can be interpreted as a process of overcoming evolutionary ethics and moving closer to genuine ethics. In the early stages of the history of law, legal rules had a twofold character: (1) they counteracted our immoral tendencies; (2) and they were almost fully expressive of our moral tendencies shaped by natural selection. Accordingly, even though they counteracted primary evil, they generated (and also constituted) secondary evil, because the moral tendencies of which they were expressive are, as mentioned, morally ambivalent, and as such give rise to an inferior form of ethics. The core of legal systems which appeared in the course of the history has not substantially changed: all, or almost all, of them have contained rules against murder, theft, fraud, and so on, which are necessary for the stability of social orders. But both the form of these rules and the other (noncore) rules underwent a serious change, which can be interpreted as a radical departure from evolutionary ethics. The progress of law can therefore be viewed as reflecting a transition from rudimentary – evolutionary – ethics to genuine ethics. This general account of the progress of law is developed in Chapter 2 in two stages. In the first stage I present a progression towards moral egalitarianism, and in the second stage I discuss more specific progressive tendencies of criminal and civil law.

Chapter 3 deals with the implications of the evolutionary view of human nature for the controversy between *ius*-naturalists and legal positivists. The argument I propose proceeds in two steps. In the first step I argue that the deep divergence between evolutionary ethics and genuine ethics may be plausibly interpreted as an argument for metaethical (moral) realism, that is, for the thesis that ethical (deontic and axiological) judgements possess truth values. In the second step I argue that even though metaethical realism is not contradictory to legal positivism, it better harmonizes with *ius*-naturalism than with legal positivism.

This book deals with the problem of the implications of the evolutionary view of human nature for questions of legal philosophy – a problem which I previously tackled in my 2009 book for the same publisher, *Evolutionary Theory and Legal Philosophy*. On the one hand, the present book can be viewed as a continuation of the analyses pursued in the earlier one, since it tackles *different* legal–philosophical questions: of the relevance of the evolutionary view of human nature for the understanding of the historical development of law and for the controversy between theories of natural law and legal positivism. On the other hand, it departs from the earlier book in an important point – that of understanding human nature: the picture I defend in this book is less optimistic than the one I outlined in *Evolutionary Theory and Legal Philosophy*. This fact explains the perspective assumed in this book, which is focused on the origins and varieties of human evil. The two pictures are, in fact, not mutually contradictory; in my opinion, the new one is simply more complete and, as such, enables one to tackle *new* questions, which my previous (more optimistic) view of human nature made rather difficult to answer. In particular, I previously argued that law is an expression of our cooperative tendencies, and thereby should not be viewed as counteracting human nature. This overly sweeping claim, however, is difficult to reconcile with the profound changes that legal systems have undergone since the dawn of human history. The picture offered in this book, as I hope to show, allows a plausible analysis of these changes. It does not deny the claim that large parts of legal systems can be regarded as expressions of human nature (its moral – cooperative – tendencies) but implies that this is only a part of the truth; one gains a more nuanced account of law (and of its evolution) if one assumes a more ambivalent view of human nature, especially if a distinction is made between evolutionary ethics and genuine ethics (which I have already drawn in *Evolutionary Theory and Legal Philosophy*, but not sharply enough). Needless to say, the problem of philosophical interpretation of the results of evolutionary theory is a complex one; other reconstructions of the evolutionary view of human nature than the one proposed here are possible (given, so to say, the philosophical indeterminacy or open-endedness of scientific theories). My goal was to provide an interpretation which is consistent with scientific knowledge and philosophically fruitful, that is, capable of shedding light on our everyday experiences and on the history of moral and legal systems.

One final remark is in order. At the beginning of this Introduction I mentioned that Friedrich August von Hayek invoked evolutionary theory in his analyses of law. I do not examine his theory in this book, however, as much of *Evolutionary Theory and Legal Philosophy* dealt with its

evaluation, and especially with critical evaluation of his scepticism regarding the usefulness of evolutionary biology in the context of the social sciences (his approach, as already mentioned, was cultural-evolutionist, not biological-evolutionist). I do not wish to repeat my conclusions, which remain unchanged and which need not be invoked in the context of problems I examine in this book.

Some of the ideas proposed in this book (respectively, in Chapter 1, section 4.1., Chapter 1, section 2.1., and Chapter 2, section 3.1.) have already been presented in the form of three articles: 'On Three Types of Empathy: The Perfect, the Truncated, and the Contaminated' (2007), *Logos i Ethos*, 2(45), 1–16; 'The Varieties of Egoism. Some Reflections on Moral Explanation of Human Action' (2016), in: B. Brożek, M. Heller and M. Hohol (eds), *The Concept of Explanation*, Krakow: Copernicus Center Press, Krakow, 263–77; 'The Psychological Bases of Primitive Egalitarianism. Reflections on Human Political Nature' (2016), in: J. Stelmach, B. Brożek and Ł. Kurek (eds), *The Emergence of Normative Orders*, Krakow: Copernicus Center Press, 83–106. I have drawn some materials from these articles, with substantial modifications.