

To: Participants in the NYU Colloquium

From: Mark Kelman

Subject: A brief overview of the project I will present a portion of on September 6

I understand that it would ordinarily make most sense to present a discrete, smaller, relatively complete project for the workshop. I have a tremendous (selfish) stake, though, in getting feedback on at least some aspects of the large project I am working on this coming fall while on teaching leave, so I am going to do something that is doubtless less conventional and almost surely less tractable for my audience. I am going to condense (quite radically) the large, preliminary portion of the book I am working on, and then condense (considerably, but less radically) a single chapter from the last part of the book that is in part free-standing, but draws significantly on the material I will have radically condensed.

The book (tentatively titled “The Heuristics Debate: Its Nature and Its Implications”) begins with a series of chapters that fundamentally attempt three things: First, I set out to describe distinctions in the way that those associated with the “heuristics and biases” school and two competing schools “(the fast and frugal heuristics school” and, to a lesser degree – in fact to a degree that will be of almost no moment in the September workshop -- those who treat all cognition as massively modularized) look at what heuristics are, how and why they are used, and what advantages and problems their use poses. Broadly speaking, those associated with the “heuristics and biases” school (derived initially in significant part from the work of Amos Tversky and Danny Kahneman and now also associated in law school with “behavioral economics”) will be at least modestly familiar to many, if not most, legal academics. The work associated with the “fast and frugal school” (associated most with Gerd Gigerenzer) will be less familiar or wholly unfamiliar to most legal academics. Second, I attempt to describe in some modest depth why proponents of each viewpoint think the other school significantly misguided, despite significant overlap in their views. Third, I attempt to note some of the ways in which work associated with the heuristics and biases school (especially) and the fast and frugal school (to a lesser extent) has already been incorporated by legal theorists and policymakers.

This section of the book is at core meant to be a descriptive guide (with an edge!) for legal academics and policy wonks; I suspect that many readers who are already quite familiar with this literature might well find this section of the book both somewhat needless and, in many places, too truncated. (I frequently describe aspects of debates to illustrate conceptual points, but deliberately don’t follow up on all of the experimental data that has been brought to bear on the controversies.) Still, I think it is an important task to work through this descriptive material, in part because I think legal audiences are largely unaware of the depth and nature of the debate and tend to an undue degree to treat the “heuristics and biases” literature as “defining” the field. While it proves relatively time-consuming to work through even the simplified description that I provide (the current text is roughly 180 pages), what I will provide you all for the workshop is a hyper-condensed version of the material (roughly the first 23 pages of the attached paper.) I think that those of you with some familiarity with the debates will follow where

I am going pretty readily; I hope that even those of you who are wholly unfamiliar with the debates may come away with a modest sense of what these debates are about.

In the last two sections of the book, I try to demonstrate that a number of controversies that we see in legal theory and in policy formation rely (sometimes explicitly, sometimes without any self-awareness) on the distinct views of cognition that the distinct participants in the “heuristics debate” adopt. One of the debates that I discuss is the debate over whether it is more helpful to describe people as making undue use of generally-apt but frequently misfiring “moral heuristics” (as Cass Sunstein does) or to view moral reactions as heavily constrained by a Universal Moral Grammar that is far more universal, unbending, and unproblematic than Sunstein implies (as John Mikhail does.)

I excerpt portions of my discussion of this debate in the second portion of this handout. My hope, in terms of our session, is that the Sunstein/Mikhail dispute is both intrinsically interesting (and that I can get some of your reactions both to the debate itself and to my reading of the debate) *and*, perhaps more importantly, that the controversy is significantly illuminated by reflecting on the broader debate over the nature of heuristics. (I hope as well, then, to get your reactions to my claim that the “heuristics debate” indeed sheds new light on aspects of familiar discussions of moral realism and “natural law”.)