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The Use of Evolution Theory in Law

M.B.W. SINCLAIR*

"Law, ... like Janus, is two faced."¹

Evolution as an approach to understanding law has recently undergone a substantial renaissance. Especially in the work of Professors Hovenkamp,² Elliott,³ and Clark,⁴ one can find extremely useful guidance in the history and method of this approach. Basically, one takes the ideas of evolutionary theory as developed in biological, geological, and social sciences and applies them to law or aspects of it.⁵ If all goes well this will throw a new light on the development of an area of the law, how it reached its present state, and how it might change in the future.⁶

But one has to be careful: law is not biology or geology, and so the same considerations do not necessarily apply. It is all too easy to get locked into a particular position on, say, biological evolution and lose sight of important peculiarities of legal evolution, or, worse, to miss the evolutionary aspects of law altogether. For example, Priest criticized Clark's use of evolution theory as Lamarckian,⁷

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¹ Picard, "Facts of Legal Evolution, in III EVOLUTION OF LAW 163, 177 (Kocourek & Wigmore eds. 1918).

² Hovenkamp, Evolutionary Models in Jurisprudence, 64 TEX. L. REV. 645 (1985), a thorough history and analysis of the impact of Darwinian thought on jurisprudence.

³ Elliott, The Evolutionary Tradition in Jurisprudence, 85 COLUM. L. REV. 38 (1985), provides a history and analysis of the use of evolutionary concepts in jurisprudence from pre-Darwinian beginnings through an early popularity in the works of Holmes (see also Elliott, Holmes and Evolution: Legal Process as Artificial Intelligence, 13 J. L. STUD. 113 (1984); Vetter, The Evolution of Holmes, Holmes and Evolution, 72 CALIF. L. REV. 943 (1984)), Wigmore, and Corbin and, after a hiatus of some fifty or more years, to its recent and vigorous revival.


⁵ See Elliott, supra, note 3; Clark, supra note 4; see also Rubin, Why is the Common Law Efficient?, 6 J. L. STUD. 51 (1977) and Priest, The Common Law Process and the Selection of Efficient Rules, 6 J. L. STUD. 65 (1977) for an interesting example of the notions of selection and adaptation in action.


⁷ Priest, The New Scientism in Legal Scholarship: A Comment on Clark and Posner, 90 YALE L.J. 1284 (1981). In the jargon, "Lamarckian" is a code word for the inheritance of acquired characteristics. This was only one aspect of the very rich evolutionary theory propounded by Jean Baptiste Pierre Antoine de Monet, Chevalier de Lamarck,—see, e.g., PHILOSOPHIE ZOOLOGIQUE (1809)—but it is the one for which it is best remembered.
a clear failing if found in a biological explanation. But it is obvious that legal evolution will involve the inheritance, by one "legal generation" (state of the law) from its predecessor, of characteristics acquired by the predecessor. It is absurd to think otherwise. The evolution of any social system requires the inheritance of acquired characteristics. But law is not biology and so we should not expect it to meet the same theoretical conditions.

"Evolution" is a word that has a very wide range of meanings. Stein, for example, means by it only "theories which claim to explain legal change not merely in historical terms but as proceeding according to certain determinate stages, or in a certain pre-determined manner." It would be quite misleading to restrict the meaning of the word as applied to law when no similar restriction applies elsewhere: biological evolution is not thought to proceed in "certain determinate stages" or in a "pre-determined manner." On the other hand, as Hovenkamp has shown, it is equally unproductive to call "evolutionary" any legal theory for which one can find an analogue in biology. "Evolutionary' theories of jurisprudence are more than merely theories that law changes.

Just what evolution in law is, and how it might work, is the basic subject of this investigation. Nevertheless, a definition of the word "evolution" as it is used in jurisprudence should be possible neither at its beginning nor its conclusion. What is at stake is not the definition of a word, but the usefulness of a theory in explaining sequential change in the state of the law.

To date, the most detailed and general statement of a theory of legal evolution is Clark's "seven-step method for the construction and validation of a full, formal study of a line of legal evolution." Clark's steps are:

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8. Priest, supra note 7, at 1288.
10. Priest also argued that as biological evolution must occur uniformly, Clark's analysis was deficient because of the nonuniform development it contemplates; Priest, supra note 7, at 1289. He thus misses both significant recent developments in biological evolutionary theory—"punctuated equilibrium," see, e.g., Gould, Is a New and General Theory of Evolution Emerging?, 6 Paleobiology 119 (1980); P. Bowler, Evolution: The History of an Idea 322-26 (1984)—and the significant differences between law and biology.
15. Hovenkamp, supra note 2, at 683.
16. Legal Evolution, supra note 4, at 1256.
1. Define the trend. Describe the shift from rule (or rule complex) A to rule B ... identify and document the relevant common elements in the shift from stage to stage ....

2. Identify starting points ... this will mean identifying the sources, whether in persons or institutions, of the generation of new rules or of the variations in old ones ....

3. Identify principles of development ... that is, describe the "motor" of change ... some evolutionary mechanism that selects the rules in question over rival or alternative rules ....

4. Identify relevant conditions of development ... specify those environmental conditions that bear on how the mechanisms of selection actually operate on the starting points ....

5. Put the explanation together. Tie together the results of following the second, third, and fourth guidelines into an explanation of the trend identified at the first stage ....

6. Consider contrary facts and arguments. ... Ideally one should state explicitly what data would disconfirm the explanation ....

7. Do thought experiments on the explanatory factors, and when feasible, test the results against the evidence. This step is critical, for unless it is taken, it will be very difficult for the method to produce explanatory patterns and lawlike generalizations ... that might be combined with others into something that could responsibly be called a "theory" of evolution.17

This pattern omits one element critical to a theory of evolution, namely, a theory of retention. Unless it can be shown that the legal development in question is constrained to variations of the previous state of the law, the historical analysis thus developed is not evolutionary, but merely adaptationist.

This deficiency in Clark's model and the limitations in explanatory value that result from it are developed further in section I of this Article. Section II is devoted to a brief account, for illustrative purposes, of the evolution of the tort of seduction. Section III returns to the theory of evolution and its application to law. Section IV is about explanatory content and testability: how it is that an evolutionary theory can enhance our understanding of the law and its development.

17. Id. at 1256-59. The ellipsis in the quote from step 7 covers "that begin to look like true science, or;" it is omitted because I believe the criteria for "true science" should be governed by the subject matter, and not by some alien "paradigm science" such as physics. The value of evolutionary theories of law is in their power to explain law, not in their appearing scientific.
I. Evolution Theory in Law

Theories of evolution typically have three basic components: a theory of variation, a theory of selection, and a theory of transmission or retention.\(^{18}\) The theory of variation describes the mechanism by which potential new organisms are generated. The theory of selection describes how, from the variations generated, the successful are selected, and the unsuccessful rejected. The theory of retention/transmission describes how the characteristics of the successfully selected entity are retained by the system or transmitted to subsequent generations. In biological sciences the theory of selection is now well developed, and the theory of variation is the source of most problems. The theory of transmission/retention is relatively uncontroversial as a component of evolutionary theory. Neither the evolutionist nor the creationist\(^{19}\) dispute that the initial properties of a member of one generation are controlled by properties of members of prior generations.\(^{20}\)

In law, the theoretical hurdles are reversed. Variation, at least in the United States, is relatively straightforward. There are no shortages of candidate laws and advocates of them. Lawyers, in representing clients, commonly have an incentive to formulate and argue for new variations on old law. Further, with the gaping maws of two hundred student edited law reviews ever hungry, especially for something new, and the demands of tenure and promotion committees ever increasing, the system of legal academia generates ample variety and rhetorical support to boot.\(^{21}\)

Selection addresses the problem of how replacements of present laws get selected from the variants. Theories of selection are a standard product of legal scholarship, merely described differently. Positivists, realists, economists, and critics all offer theories of selection. They differ only as to what it is, or ought to be, that law adapts to and how the adaptive mechanism works. Furthermore, a theory of selection, whether it purports to be descriptive\(^{22}\) or normative,\(^{23}\) is a theory of adaptation. This is so even when the adaption is one

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\(^{18}\) Campbell, *Variation and Selective Retention in Socio-Cultural Evolution*, in *Social Change in Developing Areas* 19, 29 (H. Barringer, G. Blanksten & R. Mack eds. 1965).

\(^{19}\) I mention creationism only to indicate that acceptance of this position covers the spectrum, from science to mythology.

\(^{20}\) However, the theoretical possibility of lateral transfer of genetic material between species is now regarded as a possibly significant empirical phenomenon for some biological domains (fungi and bacteria are the suggested examples). See Gould, *Linnaean Limits*, 95 Nat. Hist. #8 16-23 (August, 1986).

\(^{21}\) There may thus be socio-legal profit in sheer proliferation.

\(^{22}\) As for example did realist theories.

\(^{23}\) As for example do law and economics theories.
of which the author disapproves. It is a mistake to think that evolutionary selection, by being adaptive, necessarily generates improvement. Clark's seven-point method of analysis makes explicit these aspects of theories of law; but there is nothing peculiarly evolutionary about it.

The third element of an evolutionary analysis, the theory of retention/transmission, while not a major issue in the natural sciences, is of peculiar significance to law. Given that a particular candidate law has at some time past been chosen for enactment, why does it tend to remain in place when conditions for selection change?

When the lawmaker considers the possibility of a change in a particular area, she has before her, potentially at least, the full panoply of possible variants generated by the system, including those produced by dissident, as well as mainstream thought. She can select the law best designed to suit the needs of society at that time and as best projected into the future. Why then should the lawmaker confine her choices to variations on the old law rather than adopt a new one designed specifically for present and anticipated circumstances? Why adopt an evolutionary rather than a revolutionary lawmaking position? This Article focuses on these questions. Unless they can provide answers, evolutionary theories of law have no distinctive explanatory power.

Stephen Jay Gould, in his beautiful essay, The Panda's Thumb, makes the point that if you want to illustrate evolution you should do so, not with an organism that is optimally fitted to its environmental niche, but rather with "odd arrangements and funny solutions." An optimally adapted organism is better evidence for a theory of design by an omnipotent creator than it is for evolution. By contrast, "[o]dd arrangements and funny solutions are the proof of evolution—paths that a sensible God would never tread but that natural process, constrained by history, follows perforce." The

26. Pure adaptionist analyses, such as Clark's, are also subject to attack as tautological; see Kennedy, Cost-Reduction Theory as Legitimation, 90 YALE L.J. 1275, 1278-81 (1981) (commenting on Clark, Legal Evolution); Gordon, Historicism in Legal Scholarship, 90 YALE L.J. 1017, 1028-36 (1981); text infra at notes 119-22.
27. "[T]he absence of an effective retention system would be grounds for rejecting the notion of socio-cultural evolution." Campbell, supra note 18, at 34.
29. Id. at 20.
30. Id. at 20-21. Hence the topic, the panda's thumb. The panda, being a bear and originally a carnivore, does not have a thumb but uses instead an elongation of the radial sesamoid bone. "[T]he panda must use parts on hand and settle for an enlarged wrist bone and a somewhat clumsy, but quite workable, solution. The
importance of this distinction to arguments about legal evolution was noted long ago, but now seems too readily forgotten.

Evolution has always been opposed to design. A system designed by a rational agent is not the product of evolution. The distinction is especially significant in the evolution of law. Change in law would seem, prima facie, to result from "the action of the human mind, creating, modifying, discarding ideas of that class collectively denominated law." As criticism this is misguided. That the variation or selection mechanisms in a developing system involve rational agency does not preclude an evolutionary explanation. It may, however, greatly diminish the value of such explanation.

In biological systems variations can only be generated from organisms already in existence; "[a]n engineer's best solution is debarred by history." Without a similar constraint, an evolutionary explanation of law avails us not at all; design offers the better explanation. As noted, Clark's seven-point plan for evolutionary explanations of law omits this constraint. He thus provides the form for a theory of selection and adaptation, but not for a full theory of evolution in law.

Oliver Wendell Holmes saw this problem clearly. In his evolutionary explanations, he offered a host of reasons for judges' limiting themselves to tinkering with the law already in place rather than redesigning it: The past captures and limits our imaginations; the paucity of new ideas limits apparent options; the charismatic power of the original judge inhibits the present judge; judges tend to be set in their ways and following the old course is an easy route sesameoid thumb wins no prize in the engineer's derby. It is, to use Michael Ghiselin's phrase, a contraption, not a lovely contrivance." Id. at 24.

32. Gager, Book Review, 28 Yale L.J. 617, 618 (1918) (reviewing Formative Influences of Legal Development, in Evolution of Law Series (Kocourek and Wigmore eds.)).
33. It was clearly and convincingly refuted at the time by an Australian judge. W. Jethro Brown, Law and Evolution, 29 Yale L.J. 394, 397-99 (1920).
34. Campbell, supra note 18, at 28.
36. Legal Evolution, supra note 4, at 1257-59.
37. For example: "[J]udges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say I think the doctrine of consideration is a bit of historical nonsense and shall not enforce it in my court." Southern Pacific v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).
38. Holmes, Law in Science and Science in Law, 12 Harv. L. Rev. 443, 444 (1899).
39. Id. at 446.
40. Id. at 453. Holmes uses the example of Lord Hale, but the same might be said of some of his own opinions, for example Moore v. Bay, 284 U.S. 4 (1931), an opinion that, despite its many critics, survived perhaps only because of its author.
to peace of mind; old catch-phrases captivate us and delay serious analysis. We could also add the force of tradition, except that this is among the things to be explained, and not itself an explanation. Judicial inertia, the seemingly unwillingness of judges to match their decisions to the needs of a developing society, has long been a source of criticism.

The explanations Holmes offers all pertain to the judges themselves. When the phenomenon is so pervasive, however, one is forced to suspect that it is structural features of the institutional role and not merely accidental features of the occupant that are to blame. A judge can decide only the case before her. From the point of view of the trial judge willing to adopt a new variant, it is a matter of accident whether a suitable case will ever come her way. Conversely, when a suitable dispute does arise it is a matter of accident whether it will come before a judge with an interest in developing that particular law. At the appellate level, opportunities for change are further reduced by the tremendous cost to the litigants. It will be only in areas litigated by parties with a great deal at stake and large budgets that appeals courts will be presented with sufficient opportunities to develop a new strain from the old law.

Judges are people, with normal human foibles. Most are heavily burdened with decisional responsibilities that they are not likely to try to increase. They will tend to follow the old rule, especially when it emanates from a superior court, rather than take up a new, unestablished line. The lawyer who unsuccessfully advocates a new rule has a convincing explanation for his client that the lawyer who unsuccessfully relies on an old rule does not. The latter and his


41. Holmes, supra note 38, at 455.
42. Id.
43. As does Keller, Law in Evolution, 28 YALE L.J. 769, 779-80 (1919).
44. Also appropriately called the “handicap of inertia.” Brown, Law and Evolution, 29 YALE L.J. 394, 397 (1920).
45. Campbell, supra note 18, at 41.
46. Arch-positivist John Austin wrote:
But it is much to be regretted that Judges of capacity, experience and weight, have not seized every opportunity of introducing a new rule (a rule beneficial for the future) . . . . [T]he Judges of the Common Law Courts would not do what they ought to have done, namely to model their rules of law and of procedure to the growing exigencies of society, instead of stupidly and sulkily adhering to the old and barbarous usages.

2 J. AUSTIN, LECTURES ON JURISPRUDENCE 647 (5th ed. 1885).
47. Judges are understandably reluctant to invite the possibility of appeal and overruling. See Lehman, How to Interpret a Difficult Statute, 1979 Wis. L. Rev. 489, 501-07; and Lehman, The Pursuit of a Client’s Interest, 77 MICH. L. REV. 1078 (1979). This is not to say that judges are not courageous individuals, only that they are unlikely to act courageously in all cases whatever the field.
client will thus be the more likely to appeal. Even the highly organ-
ized lawyers' social system—the bar—can have the effect of promot-
ing stability of rules. As a social system, the legal profession acts so 
as to reduce internal exchanges that are punitive (losses) in favor of 
exchanges that are not; the system favors settlements. Pressures in-
ternal to the social group can thus produce results having little rele-
vance to current adaptiveness. In this way the system can 
minimize personal costs to lawyers without necessarily passing them 
on to clients: the settlement can always be justified by the "state of 
the law." Overall, in common law, change must run more gaunt-
lets than stasis.

All these are reasons why old rules will tend to survive of their 
own momentum, with only minor adjustments from time to time to 
prevent their becoming too maladaptive. Tinkering with old rules is 
a common judicial game; replacing old rules is not.

But all this is about lawmaking by the common-law judge only; 
legislatures are responsible for an increasing amount of lawmak-
ing. The legislator’s view of a societal development calling for a 
change in law is very different from that of the judge. He does not 
depend on the accident of having a suitable case brought before 
him, but can take the initiative in calling for change. In deciding the 
shape and content of the new law the legislator, unlike the judge, is 
not confined to a narrow set of facts, but may range as broadly as he 
sees fit. In the data on which he bases his decision the legislator, 
unlike the judge, is not limited to a narrow range of legally admissi-
ble historical evidence, but may seek expertise on all past and pres-
ent facts, and on projections of the future. And, unlike the judge, 
the legislator does not have to worry about saddling his professional 
colleagues with the uncertainty of the indefinite generality of impact 
of a decision made on narrow, precise facts. Unlike the judge-made 
common law, the legislatively created law is expressed in a determi-
nate string of words of intelligible scope and communicable 
content.

Both the judge and the legislator have an incentive to adapt the 
law to social needs, to respond to changes in societal mores. Legis-
latures are forced by the democratic process to react to develop-
ments in popular morality. Judges are limited by the force of the

48. "Bureaucratic rigidity and inefficiency is one end product of a process in 
which internal selective criteria have operated without the curb of external rele-
vance." Campbell, supra note 18, at 33.

49. Within a social group altruism can play a significant role as a selection cri-
terion. H. Simon, Reason in Human Affairs Part 2 (1985); D. Wilson, The Natu-
ral Selection of Population and Communities (1980).


51. Obviously this is not to suggest that there are no problems of scope and 
meaning in statutory construction; it is merely to emphasize the contrast between 
the nature of legislative and judge-made laws.
arguments they can make in their opinions. An argument based on values not accepted by society is not likely to be persuasive, few courts will follow it, and so no "new rule" will result. As a force for change, the legislator's incentive would seem the more acute, the more constant, and the more directly evident.

For all these reasons one would expect that of the two kinds of lawmaker, the legislator would be the more likely to take a revolutionary position when law reform is called for, and the judge the more evolutionary. But this is a question to be answered not by theory, intuition, or casual empiricism, but by seeing what actually happens in the course of the development of a body of law by legislative and judicial action. How seriously we should take evolutionary explanations of law, and how illuminating they will be in each sphere of lawmaking, will depend on the frequency of occurrence of evolutionary lawmaking behavior. In this respect, legal evolution is similar to biological:

The issue is not plausibility but relative frequency . . . natural history is such a hard science because most of its key questions are debates about relative frequency, not matters of logic or mechanism. In our immense and multifarious world, issues of relative frequency are particularly difficult to resolve.

By way of illustration the next section gives a brief account of the evolution of the tort of seduction. In the course of the last three hundred years the tort, like society, has been through periods of radical change. As the changes have come through both common law and legislative action, their record provides a useful data set for testing the speculations set forth above.

II. SEDUCTION

The earliest version of the modern tort of seduction grew out of the writ of *per quod servitium amissit*. It was an action by a father for the loss of the services of his daughter through pregnancy caused by

52. It has been argued that on controversial issues the reverse is true. See Conkle, Nonoriginalist Constitutional Rights and the Problem of Judicial Finality, 13 Hastings Const. L.Q. 9, 32 n.97 (1985) (quoting Justice Traynor: "Legislators have become astute at turning a deaf ear to highly visible issues on which they do not wish to gamble their professional lives." Traynor, The Limits of Judicial Creativity, 63 Iowa L. Rev. 1, 8 (1977)). In such a situation the judge still must decide; the legislator can wait. But controversy is by definition not the situation demanding an immediate specific change; a wide range of variants to choose from once the situation has settled is the evolutionary ideal.


The origins of the tort appear to have been constrained mainly by the range of available forms of actions. Basing seduction on loss of services was, then, "a reasonable fiction . . . merely to bring the matter into court." In this form the tort crossed the Atlantic to the United States where the common-law courts meddled with it only marginally.

When a woman was essentially a servant in her father's household, working at his command and for his benefit, any interruption of her ability to work would be an injury to her father. Thus a pregnancy, the result of seduction, appropriately begot a civil remedy for the father against the seducer for that injury. Virtue was not involved, nor the father's honor; nor was the woman's willingness or prior promiscuity a defense. The injury was essentially economic and was to the father, who lost the services of a valuable economic object—his daughter. As she suffered no loss, the seduced daughter could not herself have a cause of action. She, and not her father, could however recover for breach of promise to marry: marriage was a young woman's highest aspiration; given that she might have some choice in this change of master, it was also her main chance of advancement.

In the new United States, women, although still valued for their services, were accorded higher status and more respect than they were in England at that time. Here they were not merely of economic value; shortness of supply in pioneering communities made women much sought after as wives and accordingly more highly es-

57. E.g., Stout v. Prall, 1 N.J.L. 93 (1791).
58. E.g., VanHorn v. Freeman, 6 N.J.L. 322 (1796); Martin v. Payne, 9 Johns. 387 (N.Y. 1812).
60. Wallace v. Clarke, 2 Tenn. (2 Overt.) 93 (1807); Akerley v. Haines, 2 Cai. R. 291 (N.Y. Sup. Ct. 1805); Drish v. Davenport, 2 Stew. 266 (Ala. 1830). However if the evidence of "prior unchastity" were offered solely to reduce special damages for emotional distress then it might be admitted, Wallace v. Clarke, Akerley v. Haines, but such evidence would have to be of reputation rather than actual promiscuity, Drish v. Davenport.
61. Not until 1977 did a common-law court without statutory or constitutional assistance uphold an action by the seduced woman. See Breece v. Jett, 556 S.W.2d 696 (Mo. App. 1977). As late as 1966 the Texas Court of Appeals refused to take the step: "The Courts of this state seem committed to the rule that the seduced female may not maintain a civil action against her seducer for the seduction alone." Robinson v. Moore, 408 S.W.2d 582, 583 (Tex. Civ. App. 1966).
The common-law tort was preserved in all its elements, but the element of services was diminished virtually to a token, and damages clearly based on injury to honor became normal. "He [plaintiff] comes into the court as a master—he goes before the jury as a father."\(^6\) Still the woman could not sue for her own seduction; only the father or a person in his position could be plaintiff.\(^6\)

By the middle of the nineteenth century the ideal conception of women had changed. Now the young woman of middle to upper class society was believed to be frail, incapable of working, an essentially decorative companion of the financially aggressive male.\(^6\) Virginity was highly prized: in the popular literature of the time its loss other than in marriage led to moral and physical collapse—even death.\(^6\) The ideal Victorian woman performed no valuable services for her father; on the contrary her role led her to dissipate rather than generate wealth.\(^6\)

Clearly the common-law tort was utterly inappropriate when women were thus conceived.\(^6\) Seduction may cause injury to the

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64. Briggs v. Evans, 27 N.C. 16, 20 (1844). A similar trend also developed in England, but in the United States judges tended to be more forthright in dealing with the irrational aspects of the tort. See, e.g., McLure v. Miller, 11 N.C. 133 (1825).

65. The earliest and most acceptable plaintiff, other than the father, was a widowed mother. See Coon v. Moffitt, 3 N.J.L. 169, 175-83 (1809) (Justice Pennington's opinion is a textbook of the law of seduction at that time.); Keller v. Donnelly, 5 Md. 211 (1853). Also accepted were a brother, Millar v. Thompson, 1 Wend. 447, 9 N.Y.C.L. Rep 976 (1828) (but plaintiff failed to prove that he lost actual services of his 22-year-old sister); a cousin, Davidson v. Goodall, 18 N.H. 423 (1846); and a brother-in-law, Wilson v. Sproul, 3 Pen. & W. 49 (Pa. 1831).

66. "The attributes of True Womanhood, by which a woman judged herself and was judged by her husband, her neighbors and society could be divided into four cardinal virtues—piety, purity, submissiveness and domesticity." Welter, The Cult of True Womanhood: 1820-1860, 18 Am. Q. 151, 152 (1966); see also Lerner, supra note 63; Vicinus, supra note 63; Smith-Rosenberg, Beauty, the Beast, and the Militant Woman, 25 Am. Q. 562 (1971); Cott, Passionlessness: An Interpretation of Victorian Sexual Ideology, 1790-1850, 4 Signs 219 (1978).

67. Welter, supra note 66. This oft-cited article is a fascinating documentation of the morality prevailing in the popular magazines and books of the period.

68. Woman's primary function was to consume, conspicuously, the household's wealth—"to put in evidence her economic unit's ability to pay." T. Vebлен, The Theory of the Leisure Class 70-71 (1899). See also Smith-Rosenberg & Rosenberg, The Female Animal: Medical and Biological Views of Woman and Her Role in Nineteenth-Century America, 60 J. Am. Hist. 332 (1973) and the works cited at supra note 66.

69. It should be emphasized that this is the popular conception, realized in only the wealthier American families; the lot of the poor woman was quite different.
honor of the victim's father, but it certainly did not cause an economic loss of consequence. Yet the young woman, morally impeccable but intellectually and motivationally inferior, could so easily fall victim to the seductive wiles of man. Her injury, the loss of "that priceless jewel that is the peculiar badge of the virtuous unmarried female," was catastrophic to her, but noncompensable. Not surprisingly, the tort then began to be modified.

Between 1846 and 1913 nineteen legislatures revised the common-law tort of seduction. Typically these statutes eliminated the requirement of alleging and proving the loss of services and/or expressly extended the right of action to the seduced woman. Seduction thus became, in these states, a tort primarily involving virtue, not economics. Virtue, not services, was the primary value of the young Victorian woman. Accordingly the woman's prior lack of chastity became a defense in seduction actions. Damage awards too were freed from their old supposed economic basis.

At common law the tort made no such strides. There were no judicial extensions of the right of action to the woman herself, although quite clearly it was recognized that she, and not her father, suffered the injury. A new rationale more in tune with the morality of the times justified this stasis. No longer was the seduced woman the servant whose services were lost rather than the one who lost those services; now she was barred because she had consented to the act. Being in pari delicto she was precluded by the doctrine of

Yet it was the middle-to-upper class conception that formed the ideal: poverty of course forced a mode of life that was less than ideal.

70. Gover v. Dill, 3 Iowa 337, 344 (1856).

71. ALA. CODE tit. I, ch. 1, § 2133 (1852); ALASKA COMP. LAWS tit. XII, ch. 3, § 804 (1913); CAL. CIV. PROC. CODE § 375 (1872); GA. CODE § 2951 (1861); IDAHO REV. STAT. § 4097 (1887); IND. STAT. ch. 1, §§ 24, 25 (1852); IOWA CODE tit. 19, § 1696 (1851); KY. STAT. ch. 1, § 2 (1873); MICH. COMP. LAWS §§ 6195-97 (1946); MISS. CODE §§ 1508, 1509 (1880); MONT. CIV. CODE §§ 11, 12 (1877); NEV. CODE CIV. PRAC. §§ 52, 53 (1911); OR. CODE CIV. PROC. tit. III, ch. 1, §§ 35, 36 (1887); S.D. CIV. CODE §§ 2801, 2802 (1858); UTAH CIV. CODE CIV. PROC. tit. 1, §§ 231, 232 (1884); VA. CODE ch. 148, § 1 (1849); WASH. CODE §§ 10, 11 (1881); W. VA. CODE ch. 148, § 1 (1860).

72. In some states (Idaho, Indiana, Iowa, Montana, Nevada, Tennessee, and Utah) this was restricted to adult women, minors still being dependent on parent or guardian.

73. Gover v. Dill, 3 Iowa 337, 343 (1856).

74. Fourteen states (Alabama, Alaska, California, Georgia, Idaho, Indiana, Iowa, Montana, Nevada, Oregon, Tennessee, South Dakota, Utah, and Washington) expressly provided in their statutes for damages assessed independently of the value of services lost.

75. See supra note 61. In North Carolina courts, reform was achieved, but only with the aid of a state constitutional ban on "feigned issues." N.C. CONST. art. IV, § 1; Hood v. Sudderth, 111 N.C. 215, 16 S.E. 397 (1892).


77. "[She cannot] maintain an action for such seduction, because the person
volenti non fit injuria.  

This new rationale could be used effectively to vary other aspects of the tort.  

Whereas the woman’s consent was previously irrelevant, now judges began allowing evidence of it and of her prior lack of chastity in defense.  

Whereas the defendant’s promise to marry, as a seductive artifice, was previously inadmissible as irrelevant, now it became a commonplace part of plaintiff’s case.  

Clearly judges were finding a way to fit the dominant moral themes demanded by society into the structure of the tort derived from precedent. Historical forms, such as a showing of services lost, had to be satisfied, but present values had to determine the result. The strain on the classical theory was readily apparent in damage awards: little attempt was made to tie them to loss of services (the supposed basis of the damage) and evidence of the defendant’s wealth along with the plaintiff’s (and the woman’s) loss of honor and emotional suffering were admissible to help the jury determine punitive damages.

seduced assents thereto.” Hamilton v. Lomax, 26 Barb. 615, 617 (1858). This idea, however nonsensical, has been remarkably long lived. See Oberlin v. Upson, 84 Ohio St. 111, 95 N.E. 511 (1911); Colly v. Thomas, 99 Misc. 158, 163 N.Y.S. 432 (1917); Hutchins v. Day, 269 N.C. 607, 153 S.E.2d 132 (1967).


79. Clearly judges were struggling to find a way to justify a decision fitting the cause of action as it had come down to them in the precedents; now, however, the original rationales no longer applied. So long as one does not have to juxtapose too many contradictory elements in the one opinion, expediency is effective, at least for a reasonable time. This is the essence of the evolutionary process in law.

80. Lawyer v. Fritcher, 130 N.Y. 239, 29 N.E. 267 (1891); White v. Nellis, 31 Barb. 279 (N.Y. App. Div. 1859), aff’d, 31 N.Y. 405 (1865); White v. Murtland, 71 Ill. 250 (1874); Finch v. Gibson, 140 Mich. 134, 203 S.W. 759 (1918); Owens v. Fanning, 205 S.W. 69 (Mo. App. 1918).

81. Bell v. Rinker, 29 Ind. 267 (1868); Smith v. Young, 26 Mo. App. 575 (1887); Franklin v. McCorkle, 84 Tenn. 609, 1 S.W. 250 (1886); Falkner v. Schultz, 160 Wis. 594, 150 N.W. 424 (1915); Rockwell v. Day, 101 Wash. 580, 172 P. 754 (1918); Comer v. Taylor, 82 Mo. 341 (1884). Confusion of seduction and breach of promise to marry also became common. Litchliter v. Russell, 89 Ill. App. 62 (1899); M. Grossberg, Governing The Hearth 45-49 (1985).


83. Lavery v. Crooke, 52 Wis. 612, 9 N.W. 599 (1881); Graham v. Smith, 46 Tenn. App. 549, 330 S.W.2d 573 (1959); Marshall v. Taylor, 8 Cal. 55, 32 P. 867
It was not until the 1920s that the social conception of the ideal woman changed again in any relevant way. The campaign for suffrage of the first two decades of this century was based not on women's equality but on the value of those very differences that so dominated Victorian sex roles. The 1920s wrought an unprecedented transformation in American social behavior. Most of all it was a decade of revolution in sexual mores. By the end of the decade the Victorian morality of "sexual purity and sacrifice" for women had been abandoned in favor of a new equalitarian view. Women sought and, to a marked extent, achieved substantially the same sexual freedom that had previously been enjoyed only by men.

Such a sexual revolution had to have an impact on seduction along with the other heart balm actions. A person, fully autonomous sexually, could scarcely be victimized by the seductive wiles of men. Yet it was not until 1935 that this effect took hold of the tort of seduction, and even then it did so remarkably ineffectually. Only ten states enacted statutes abolishing the tort of seduction prior to the end of World War II, although more than double that number

(1893); Haessig v. Decker, 139 Minn. 422, 166 N.W. 1085 (1918); Dwire v. Stearns, 44 N.D. 199, 172 N.W. 69 (1919); Eller v. Lord, 36 S.D. 377, 154 N.W. 816 (1915).


86. "Students of modern sexual behaviour have quite correctly described the twenties as a turning point, a critical juncture between the strict double standard of the age of Victoria and the permissive sexuality of the age of Freud." Id at 260. This was a period of "immense preoccupation with sex," in literature, conversation, and behavior. W. Lippman, A Preface To Morals 285 (1929). See also W. Chafe, The American Woman: Her Changing Social Economic and Political Roles, 1920-1970 94-95 (1972); R. Lynd & H. Lynd, Middletown 138 (1929). It was also the period during which contraception was successfully introduced to the American woman. D. Kennedy, Birth Control in America: The Career of Margaret Sanger (1970). Walter Lippman argued that contraception was a prime cause of the sexual liberation of women in the 1920s. W. Lippman, supra at 288. Margaret Sanger argued that the role of contraception in "free[ing] the mind of sexual prejudice and taboo [was] . . . most important of all." M. Sanger, Pivot of Civilization 244 (1922).


88. S. Rothman, supra note 84, at 177; W. Chafe, supra note 86, at 94-95.

entertained such bills.90 Four of the statutes that were enacted preserved the tort for minor women, persons still considered not fully capable.91

What prevented a more general abolition to match the newly achieved sexual equality of women? Women may have achieved equality in some specifically sexual respects, but in other respects they had made no progress.92 They still depended economically and socially on men, and their diminished status was reinforced by the difficulties of the depression.93 Unless and until women were seen as fully equal to men in other respects, they would not be seen as fully equal sexually. In the 1930s women were not seen as generally equal. This is exemplified by the language with which the Florida Supreme Court justified its denial of the cause of action to the woman: she had failed to allege "undue influence, force, duress or other overpowering influence or dominating or fiduciary control over her by the defendant, and there is no direct allegation that the defendant promised to marry the plaintiff."94 All these factors pertain to ways that, in the popular conception, women were thought to be inferior to men. Seduction by promise to marry95 was still differentially heinous: to woman marriage was a primary goal, by manipulation of which she might easily be exploited; to man it was a part,
but just a part, of the normal life. Thus the very limited effect of the sexual revolution of the 1920s on the law of seduction is hardly surprising. The acknowledgement of normal sexuality did very little, on its own, for the popular conception of women as inferior to men.

After World War II the intensive and deliberate efforts to reverse women's progress had a predictable effect on the law of seduction. Nothing happened except a slight increase in litigation. The success of this atavism was well illustrated in 1950 by a New Jersey Supreme Court decision allowing a seduction action notwithstanding its legislative abolition in 1935.96

The period from 1965 through 1975 saw women take giant strides toward equality.97 By the late 1970s women were generally viewed as independent, sexually, socially and economically autonomous, and quite the equal of men.98 Predictably another round of legislation began in the mid-1970s and by 1983 nine more states had abolished seduction as a cause of action.99 Although the cause of action remains theoretically available in more than thirty states, it

98. "The woman of today is not the woman of yesteryear. She has a new-found freedom. The modern adult woman is sophisticated and mature. The former notion that women belong to the weaker sex has long been abandoned. The modern woman is not 'easily beguiled' and does not easily fall to the 'wiles' of man. Women desire and should be held to a reasonable responsibility." Breece v. Jett, 556 S.W.2d 696, 708 (Mo. App. 1977). See also S. Rothman, supra note 84, at 241-42.
seems at present to have atrophied, perhaps even to extinction. Yet common law judges have shown a remarkable reluctance in this respect. Even while making the revolutionary (100 years overdue) extension of the right of action to the woman and acknowledging that "an action for seduction is socially unwise in modern society," Chief Judge Simeone of the Missouri Court of Appeals could not see his way clear to the final step of abolition.  

III. SEDUCTION AND EVOLUTION

The preceding section explained the tort of seduction as a function of the social conception of the ideal woman. In evolutionary terms, the myth of the ideal woman prevailing at a given time generates the selective criteria for adaptive development in the law of seduction.

This myth is not an underlying principle of morality compelling or inhibiting behavior; rather it is an ideal, an image, with which the concept of seduction—and who suffers injury thereby—may or may not be compatible. It is determined by the general social mores of a society. Accordingly one would expect, and finds, a systematic relationship between the conception of women and the perceived necessities of the time. Courts and legislatures both acted so as to effect the necessary adaptation, but they acted in strikingly different ways.

In the mid-nineteenth century when the ideal conception of women changed from the economically useful possession to the angelic and decorative, but frail, princess, legislatures were able to react by completely changing the tort. The right of action was extended to the seduced woman herself, and for the critical injury: loss of virtue. In short, the legislatures were able to revolutionize the tort. The courts, on the other hand, only tinkered with the elements of the old cause of action; they reduced the quantum of services that plaintiff father had to prove, but did not eliminate it altogether; they permitted damages quite unrelated to actual services lost, but did not abandon the fiction that the damages were based on services lost; they permitted plaintiff to explain defendant's seductive artifice, but only to avoid the defense of in pari delicto; conversely, they entertained, as a defense, a showing of the woman's prior lack of chastity. Thus the courts transformed the details of the tort to make it work adequately enough in the new environment, but they never took the whole step of redesigning it. This was a truly evolutionary process.

A similar bifurcation of adaptive processes occurred in the twentieth century. With the emerging equality of women, the patronizing protection of seduction law became increasingly offensive. Nineteen legislatures reacted by abolishing the cause of action, but some six of these preserved it for minors and mental incompetents.

who still might need protection. No court to date has followed these legislatures in abolishing the tort. It took until 1977 for a court to follow the nineteenth century legislatures in extending the right of action to the seduced woman. Again the legislatures were able to make revolutionary—designed—adaptations while the courts, in the few opportunities available to them, continued their evolutionary tinkering.

From the history of seduction we can deduce some features of our lawmaking mechanisms that tend to promote evolutionary rather than revolutionary processes. First a court must await a suitable opportunity to make a change. Trial courts obviously get the most opportunities and, equally obviously, are the least likely to take advantage of them. Even when they do make changes, trial court opinions are usually not recorded and disseminated, so they have little impact unless appealed. In causes like seduction where the stakes are seldom very high, the number of cases to reach a state supreme court is likely to be small. A supreme court is likely to respond to appellate activity as indicative of a need for change; a paucity of chances to make a change indicates exactly the opposite. The small value and the appearance of a settled state of the law is also likely to have an impact on the bar: clients are not going to be encouraged to make appeals against apparent odds for small stakes. In these ways, the structural features of the courts and access to them create an inertia of their own in causes of action like seduction.

The system of state law in the United States presents a further inhibition to overt development of common law. As societal values changed and seduction became more implausible as a cause of action, not only did reported appellate cases become less frequent, but many state legislatures abolished the tort. Oddly enough, while one common-law jurisdiction might take seriously a judicial development in another, if that development comes by way of legislation it tends to be ignored. Had the legislature not stepped in, the courts of New York might well have eliminated seduction as a cause
of action, and thus persuaded many other courts to follow suit. But the action of the New York and other state legislatures prevented such a course, leaving the common law development to those states generating fewer cases and consequently less felt tension.105 In all these respects legislatures contrast with courts. It would thus appear much easier for a conceptual change in law, responding to a development in society, to come through a legislature than through common-law courts. The history of seduction bears out this contention.

The subject matter of the law in question should also have a strong influence on whether the old law will be perpetuated with minor adjustments or replaced by new law. In areas in which a person is likely to plan actions carefully and with legal advice, there is a strong incentive for lawmakers to maintain, as nearly as possible, the status quo ante. For example, Lord Mansfield wrote: "In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon."106 Thus we would expect the law governing negotiable instruments to be precise and stable,107 but the law governing transactions in goods to be variable according to the context.108 This expectation is born out in the prevailing law.109 Presumably, one does not consult one's lawyer before committing a tort such as battery or seduction. Notice of the law in such areas of behavior comes from prevailing social standards, and accordingly the law can more freely adapt to changes in those standards. That the common law of seduction was so slow to adapt is indicative of the strength of the retentive pressure exerted on judges by precedent.

It would seem that social systems are capable of absorbing a considerable amount of stress110 before they precipitate a need for change. Legislatures seem to act only when such needs become, or

105. The practical effect of this inertia built into our common-law system is contrary to the arguments of Rubin, supra note 5, and Priest, supra note 5. See infra text accompanying notes 115-18.
107. It is of critical importance that a negotiable instrument be easily and indubitably recognizable as such.
108. Most transactions in goods—the purchases of newspapers, ice creams, groceries, etc.—are between persons who neither know of nor care about Article 2 of the Uniform Commercial Code, and surely do not consult it.
109. Compare the sections of the U.C.C. defining negotiable instruments, U.C.C. 3-104 to 3-122, with those defining transactions in goods, U.C.C. 2-102 to 2-107.
110. This felicitous expression was used by Stephen Jay Gould in a television interview, "This View of Life," Nova #1118, first broadcast December 18, 1984, Transcripts at 8.
appear to have become, comparatively urgent. Courts are less pressured because society is able to absorb a wide difference between its prevailing values and the extant "common law rule" simply by not bringing suits, or by limiting damage awards when such suits are brought. As dissemination of overt changes in common-law rules comes only through reported appellate opinions, the chances for public acknowledgement of such changes are commensurately reduced.\textsuperscript{111}

Again, the evolution of the tort of seduction is illustrative. Legislatures responded reasonably quickly and appropriately to the changes in society by designing a new tort or completely abolishing the old one. Common-law courts did not. The judges stretched and distorted the old tort where they could, but did not abandon it. This can be seen most clearly in the refusal of the courts to allow the seduced woman a right of action. Despite the shift in basis from the economics of services to the morality of virtue and honor, despite the actions of legislatures in other jurisdictions, the courts refused to modify the traditional seventeenth and eighteenth century parties to the tort. Even those courts, such as Florida's, that flirted with an extension\textsuperscript{112} stayed safely within the ancient boundaries.\textsuperscript{113} Absent a statutory or constitutional boost, only one court could see its way clear to according the right of action to the seduced woman, and that was not until 1977.\textsuperscript{114}

This history is an apparent counter-example to the evolutionary theory of Priest\textsuperscript{115} and Rubin.\textsuperscript{116} They argue that common-law cases brought under rules that do not accord with societal demands will be appealed more often, thus forcing the more frequent revision of those rules.\textsuperscript{117} Yet here we see an old and relatively maladapted rule remaining solidly in place through the period of greatest activity, only to be changed long after the cause of action had fallen into disuse. Apparently the forces of precedent hold more sway with the judiciary, even in relatively active times, than do the less tangible

\textsuperscript{111} Thus as an "intermediate appellate court," the Missouri Court of Appeals, did not feel empowered to abolish the tort in Breece v. Jett, 556 S.W.2d 696, 708 (Mo. App. 1977); had the value of the judgment warranted a further appeal, perhaps we would have seen a common law abolition.

\textsuperscript{112} Kirkpatrick v. Parker, 136 Fla. 689, 187 So. 620 (1939).

\textsuperscript{113} See also Van de Velde v. Colle, 8 N.J. Misc. 782, 152 A. 645 (Union County Ct. 1931); Shaw v. Fletcher, 138 Fla. 103, 189 So. 678 (1939); Collis v. Hoskins, 306 Ky. 391, 208 S.W.2d 70 (1948); Whitman v. Sarmento, 10 Chest. 27, 22 D. & C.2d 384 (Pa. Comm. Pl. 1960).

\textsuperscript{114} Breece v. Jett, 556 S.W.2d 696, 708 (Mo. App. 1977).

\textsuperscript{115} Priest, supra note 5.

\textsuperscript{116} Rubin, supra note 5.

\textsuperscript{117} Rubin and Priest, being economists, argue that this will be when the rules distribute burdens inefficiently—that is, fail to maximize total profit. The argument is the same for noneconomic social mores.
demands of social mores. Stare decisis, especially in the face of possible legislative action, has been a very powerful force in the common law development of seduction. An evolutionary theory is thus very apt: the processes of variation and selection occur responsively to environmental pressures but always constrained by the shape of the old organism, the classical common-law tort of seduction.\footnote{118}

IV. EXPLANATORY VALUE OF EVOLUTION THEORY IN LAW

To be of value a hypothesis must be capable of being falsified.\footnote{119} The point is especially pertinent to evolutionary theories of law. If you identify that to which the law adapts only by the light of the variant selected by the lawmaker, you will always be right. On such grounds, Gordon\footnote{120} has demonstrated that adaptationist theories in general are likely to be tautological. Kennedy\footnote{121} has argued that Clark’s use of cost reduction as the explanation of corporate form in particular is an example of this.\footnote{122} The problem has to be taken seriously.

Biological evolution does not produce organisms perfectly adapted to or maximally efficient in their environments.\footnote{123} Nor does evolution in law produce states of law that are optimally suited

\footnote{118. Thus the common-law tort of seduction provides a striking legal example of the “odd arrangements and funny solutions” that best illustrate evolution. S. Gould, supra note 25, at 20.}

\footnote{119. Legal Evolution, supra note 4, at 1258. The point is a standard one in the philosophy of science; E. Nagle, The Structure of Science 52-56 (1961); K. Popper, The Logic of Scientific Discovery 32-39 (English Edition, 1958). It is easy to construct deceptively powerful looking but empty explanations of case law. For example, suppose we hypothesize that all judging is a matter of cost benefit analysis with the society’s priorities measured, say, in utiles; the judge is the representative of society charged with doing the analysis, including the assignment of utile values. This will always work—the hypothesis will never be falsified. Similarly, the notion of “gene-culture coevolution” as used, for example, by J. Beckstrom, Sociobiology and the Law 52 (1985), is so ill-contained that it explains everything, and so nothing.
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\footnote{120. Gordon, supra note 26, at 1028-36.}

\footnote{121. Kennedy, supra note 26, at 1278 (commenting on Clark, Legal Evolution, supra note 4.)}

\footnote{122. Id. at 1279.}

\footnote{[Clark] suggests that if merging businesses chose the corporate form, that is evidence that the corporate form reduced costs. But that is good evidence only if we define “utility” so that everyone always does what they do in order to maximize utility. If Clark is not using a tautological definition, then I’d like to hear him formulate some other possible explanation of the choice of the corporate form, and then present some evidence that the non-tautological cost-reduction hypothesis is more plausible than the alternatives.
}

\footnote{123. S. Gould, supra note 25, at 19-26.}
to social requirements. Legislation—a process of design—has the potential to do so, but common law does not. The common-law judge has only the old law to work with and can only stretch it so many ways at a given opportunity. Common law thus works in an evolutionary fashion to produce states of law that achieve most of what is required, but in an indirect and less than perfect fashion.

This is the key to seeing that Gordon's and Kennedy's criticisms of adaptationist theories do not apply to evolutionary theories. The evolutionary process produces states of law that are predictably mal-adaptive, but not necessarily in a predictable or systematic way. Common-law seduction and its evolution is an example. It is not possible to deduce a given state of common-law seduction from the state of societal mores (or the conception of women in particular); nor is it possible to deduce societal mores (or the conception of women) from the state of common-law seduction. Too many of the features generated to suit the requirements of a previous age remain with the cause of action. In this respect the analogy to biological evolution is especially apt.

Clark, however, seems to have in mind finding factual data of a kind that would falsify the particular candidate theory. The proponent of an evolutionary theory of a particular body of law should show what kind of data would falsify it, thus forestalling the charge of tautology. With the evolutionary explanation of the tort of seduction this is rather easy.

In the recent history of seduction law we have two clear pieces of data that do not fit the general explanation. In 1888 Maryland enacted a statute expressly recognizing the common law cause of action for seduction, just when other states were eliminating its more anachronistic elements. This oddity remains in effect to this day. The other outstanding anomaly is Wisconsin's enactment in 1959 of a statute abolishing all heart balm actions except seduction. The timing and the omission of seduction cannot be explained

124. *See supra* sections II and III.
125. Legislation could achieve optimal adaptation (to some environment, on some criterion of optimality) at the time of enactment, although in the tort of seduction it tended to lag behind the times. However, in changing times, statutes can and do very easily become dated, and ill fitted to social needs. *See G. Calabresi, supra* note 50, at 1-7.
126. Legal Evolution, *supra* note 4, at 1258-59. For example, he writes: "[T]he person that formulated the particular explanation or theory is not in a good position to look for and to see conflicting data." *Id.* at 1258.
by the analysis offered here. Thus there is no need to imagine what kind of data would falsify the evolutionary explanation of seduction: the data exists. But does this mean the explanation must, ipso facto, be rejected?

Such a limited failing is not fatal to a theory of human social behavior; human organizations tend not to work with mathematical precision. Relative frequency of occurrence, not theoretical impeccability, is at issue. If there were many more such falsifying examples, we would need to reassess the adequacy of this explanation. And, of course, an explanation that accounted for these two states' laws as well as all the other data would be superior.

With evolutionary explanations of other areas of law, the requirement of potential falsifiability may not be as readily disposed of as with seduction. The problem is not just one of providing a description of the sort of facts that would be contrary to the theory; that is usually quite easy for all but the more superficial verbal theories. Rather, the falsifying phenomena must have a plausible potential for occurring with significant frequency. Potentially falsifying facts of very little probability of actuality need not be taken seriously. But how do we determine such probabilities, and how do we tell whether a speculative frequency of occurrence is significant?

These are problems that are not unique to evolutionary theories of law. In many branches of science it is possible to use a theory to make predictions and then to test those predictions by laboratory experiment or statistical survey. So endemic is this procedure that it is sometimes called "THE scientific method." But it is not a method of any relevance to biological, geological, or legal evolution. Darwin saw this very point:

[H]e also deeply understood that the testing of historical hypotheses could not always proceed by canonical methods

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130. Yet it is inescapable that the Wisconsin legislature intended it: the most recent amendment occurred in 1983 and provides that a seduction plaintiff who prevails shall be awarded costs! 1983 Wis. Laws ch. 447, § 52 (presently codified at Wis. STAT. ANN. § 814.01 (West Supp. 1986)).

131. Molliere provided the classic example with the explanation of the fact that opium induces sleep in terms of its having a "dormative virtue."

132. Gould, supra note 20, at 18: "The issue is not plausibility but relative frequency."

133. For example if gender roles in our society were reversed, the evolutionary explanation of common law seduction would fail.

134. It has to be speculative: if counter-examples had already occurred with significant frequency, the proposed theory would be simply wrong.

of direct experiment and repetition. After all, historical events occur over millions of years, and their complexity confers uniqueness with no possibility for repetition (we cannot re-create dinosaurs in the laboratory to test various ideas about their extinction).\(^{136}\)

Legal evolution does not take millions of years; in some areas we can observe it in process.\(^{137}\) However, the complexity and variety of inputs into the selective process, the variety of lawmaking mechanisms that can be used, and the variety of ways the law can be adapted to changing conditions preclude predictive testing.

Of course it is still necessary that a formulation of an evolutionary explanation of law be falsifiable: this is simply a requirement of its having empirical content. But it is not by formulating falsifiable predictions and empirically testing them that we primarily evaluate evolutionary theory. Rather, such a theory is evaluated by the range of otherwise disparate data that it explains in a simple and unified manner. Darwin saw this point also:

In scientific investigations it is permitted to invent any hypothesis, and if it explains various large and independent classes of facts it rises to the rank of a well-grounded theory. . . . Now this hypothesis may be tested,—and this seems to me the only fair and legitimate manner of considering the whole question,—by trying whether it explains several large and independent classes of facts; such as the geological succession of organic beings, their distribution in past and present times, and their mutual affinities and homologies. If the principle of natural selection does explain these and other large bodies of facts, it ought to be received.\(^{138}\)

The present action of natural selection may seem more or less probable; but I believe in the truth of the theory, because it collects under one point of view, and gives a rational explanation of, many apparently independent classes

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137. In the last thirty years we have seen dramatic changes in sexual and related domestic morality, but have not yet seen a new, stable, and generally accepted position in society. The decisions of the Supreme Court reflected this change, adapting to the new morality, for many years: *Loving v. Virginia*, 388 U.S. 1 (1967) (striking a miscegenation statute); *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (guaranteeing contraception to all); *Roe v. Wade*, 410 U.S. 113 (1973) (guaranteeing freedom of abortion). But any thought of a general adaptation to the new morality was scotched in *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986) (upholding Georgia’s anti-sodomy statute). Here we can observe legal evolution in process.

of facts.139
So it is in biology, so too in law.
An important consequence is that particular examples of evolutionary processes in law, such as that described in section II, above,140 cannot be taken alone as confirming or falsifying the theory in general. What is required is a number of examples from quite diverse areas of law.141
It is not difficult to find the kind of data that illustrate legal evolution. Whenever one finds a legal fiction,142 one has found the kind of jury-rigged adaptation that characterizes evolutionary phenomena. Traditional legal devices143 that survive despite their lack of relevance in modern society similarly evidence evolutionary development of law. Conversely, clever schemes devised to avoid undesirable restraints on operations144 illustrate practical adaptations that leave the inherited rule unchallenged. It would seem that examples do, in fact, abound in all areas of the law.

V. CONCLUSION

Evolution theory has a useful role to play in explaining present states of the law. A fully developed evolutionary analysis, including a theory of retention/transmission as well as theories of variation and selection, explains not just the adaptive features of the common law but also the continued presence of maladaptive historical features and, unlike simple adaptation theories, it does this without tautology. In this it sharply distinguishes judicial lawmaking from legislation in a perspicuous and productive way.

139. Id. at 25-26. Gould quotes a letter from Darwin to Hooker: "Change of species cannot be directly proved . . . . The doctrine must sink or swim according as it groups and explains phenomena. It is really curious how few judge it this way, which is clearly the right way." Gould, supra note 136, at 25-26.
141. Thus it is of value that Clark's analysis is of tax law, and the above analysis of seduction is of a relatively remote area of tort.
142. Legal fictions are evolutionary devices that have been in use for centuries. Mitchell, The Fictions of the Law: Have They Proved Useful or Detrimental to its Growth?, 7 Harv. L. Rev. 249 (1893). Blackstone described an example as follows:
[T]hey are fictitious proceedings, introduced by a kind of pia fraus, to elude the statute de donis, which was found so intolerably mischievous, and yet which one branch of the legislature would not then consent to repeal: and, that these recoveries, however clandestinely introduced, are now become by long use and acquiescence a most common assurance of lands

145. Such as the splitting of legal and equitable title in real property law.
144. Such as banks' use of standby letters of credit when suretyship is ultra vires.
Evolution theory in law is a theory of history, but it is also more. It provides a framework that integrates the traditional analytic method of *stare decisis* (retention/transmission) with the adaptation/selection theories of the various "law and..." movements. In this way it provides explanations of current states of the law with all their faults as well as their virtues. Evolutionary explanations also account for states of the law and changes in law as contingent; the law could have developed in different ways to states of comparable merit.

It follows that to understand fully a given state of the law, it is not sufficient to know why it was selected and to what present social phenomena it is adapted. We need to know as well why it is that the development of the present law was constrained by prior states and how that constraint worked. Without an understanding of the "genetic inertia" in the lawmaking process it is not possible to understand the present shape of any given body of law. It is this last point which is the key to an evolutionary explanation of law.

The history of the common-law tort of seduction is a good example of the evolutionary process at work. The process is highlighted by the contrast with the legislative redesigning of the cause of action at critical points in history, points that coincide with the establishment of revisions in the ideal image of women and their role in middle to upper class society. As the myth of true womanhood changed, the cause of action was forced gradually to adapt. Just as in the biological world no organism can survive unchanged in conflict with its environment, so also it seems to be with law.

In the history of seduction, the response of law to change has been more immediate, direct, and accurate when it comes from legislatures. At each major shift in the myth of femininity, legislatures, where they did respond, did so with statutes recreating or eliminating the tort. Not so with common-law courts. It took more than a hundred years after legislatures first began to recognize the seduced woman as plaintiff for a common-law court finally to make that leap. While the courts could stretch the old rules and add variations to adapt to new conditions, they could not give up the original basic structure no matter how maladaptive.

Lord Mansfield's famous claim that the common law "works itself pure" and in this is superior to statutory law is not borne out

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146. "[A] statute very seldom can take in all cases, therefore the common law, that works itself pure by rules drawn from the fountain of justice, is for this reason superior to an act parliament." Omychund v. Barker, 1 Atk. 21, 33, 26 Eng. Rep. 15, 23 (1744) (argument of Mr. Murray, then Solicitor-General of England, later Lord Mansfield).
by this historical evidence. Common-law judges have been slow in- deed to match the demands of the "fountain of justice." 147 Legislatures have shown greater adaptability, rewriting the requirements of the tort or eliminating it entirely as the circumstances required. 148 By contrast the judiciary, while willing to stretch the historical cause of action to its limits in an effort to meet society's needs, proved incapable of the radical response called for by radical changes in society.

It is exactly this inability to make revolutionary revisions that characterizes evolutionary processes, distinguishing them from the revolutionary process of design. Legislatures can make revolutionary sweeps in their designs. The common-law courts have only the old form of action to work with and cannot design a new, perfectly adapted one. Judges tinker with the boundaries of the inherited law, but seldom redesign it. Thus common law adaptations will tend to be less than perfect, and although they may work well enough, will tend to carry with them extraneous maladaptive features. So it is in biological evolution, and so it is with common law.

147. Id. Society, notwithstanding the voracity of the bar, has adapted more quickly by ignoring the available cause of action.

148. This is not to suggest that legislatures are perfect adaptive mechanisms; in reality they are far from it. Calabresi argues strenuously that courts should be given the power to "sunset" statutes because of the inability or unwillingness of legislatures to react to change. G. Calabresi, supra note 50. The limited scope of expectable adaptivity of any statute was expressed eloquently by Maynard Keynes:

We cannot expect to legislate for a generation or more. The secular changes in man's economic condition and the liability of human forecast to error are as likely to lead to mistake in one direction as in another. We cannot as reasonable men do better than base our policy on the evidence we have and adapt it to the five or ten years over which we may suppose ourselves to have some measure of prevision; and we are not at fault if we leave on one side the extreme chances of human existence and of revolu-
tionary changes in the order of Nature or of man's relations to her. J. Keynes, The Economic Consequences of The Peace 204 (1920). Whether Calabresi is right to think the courts more actively adaptive is, as noted above, an empirical question of relative frequencies; the seduction data suggests that he is wrong.