

Evolutionary legal theories— the impact of Darwinism on western conceptions of law

Augusto Zimmermann

The traditional Western legal idea that human laws are subject to higher or natural laws began to be more deeply challenged when jurists and intellectuals perceived Charles Darwin's theory of biological evolution as somehow endorsing a materialistic worldview in which law becomes a mere product of human will and/or social struggle. This is why Darwinism may be considered to be one of the major forces leading to the discrediting of natural law theory, particularly during the late nineteenth and early twentieth centuries. This article aims to analyse the wide-ranging impact of Darwinian evolution on Western conceptions of law.

How one defines law depends greatly on what one believes. The definition of law varies from culture to culture, religion to religion, and from philosophy to philosophy. It is important therefore to consider how different worldviews affect the way people think about law. Darwin's theory of evolution is said to have generated a materialistic worldview that has had a significant impact on Western conceptions of law. Under the direct influence of Darwinism a profound transformation of legal studies took place in the nineteenth century. It is the main purpose of this article to reveal some of the philosophical implications of Darwinism and to explore how this particular worldview affected the general perception of law in Western societies. In so doing, this article focuses on legal theory and cultural conceptions of law, rather than on specific laws and rules.

Darwinism as worldview

The idea of evolution is often associated with the English biologist Charles Darwin (1809–1882), particularly his work *On the Origin of Species*, published on 24 November 1859. Darwin was an English naturalist who believed that the world is not constant or recently created, but rather very old and changing steadily so that all organisms are transformed in time. Thus he assumed that every organism descends from a common ancestor and that humans are highly evolved animals.

Following the publication of *On the Origin of Species*, many intellectuals and free-thinkers raised the argument that evolution disproved God's existence on the basis that, as E.O. Wilson puts it, “if humankind evolved by Darwinian natural selection, genetic chance and environmental necessity, not God, made the species.”¹ The consequences were twofold: the challenge to the notion of nature as a divine creation and the undermining of the confidence in the presumption of objective moral standards common to mankind as a whole. This so being, Francisco Ayala of the University of California comments that “Darwin's greatest accomplishment was to discover that all living beings can be explained as a result of a natural process—natural selection—without resorting to a Creator.”²

The consequences of Darwinism had profound ramifications for the construction of social and political theories in that they endorsed a naturalistic worldview that called into question fundamental facts about God and the human nature. Because Darwinian evolution fills the place of traditional religions, it is possible to suggest that the real conflict taking place in liberal-democratic societies is not so much between religion and science, but between two diametrically opposed worldviews: naturalism and theism.³ According to the Oxford professor of Mathematics and Philosophy of Science John C. Lennox, naturalism stands theoretically opposed to any belief in the supernatural, “insisting that the world of nature should form a single sphere without incursions from outside by souls and spirits, divine or human.”³ Lennox thus explains that a statement that God created the universe and its physical laws is a statement of belief, not a statement of science, in exactly the same way as naturalistic assertions about the origin of the universe are not statements of science, but of personal beliefs.

In this sense, as Lennox points out, “the key issue is not so much the relationship of the discipline of science to that of theology, but the relationship of science to the various worldviews held by scientists in particular to naturalism and theism.”⁴ And since Darwinism is primarily an attempt to explain some of the deepest questions of life, such as where we come from, why we behave as we do, and the roots of morality itself, Lennox concludes that Darwinism can be fairly described as a naturalistic worldview that “regards everything that exists or occurs to be conditioned in its existence or occurrence by causal factors within one all encompassing system of nature”.⁵

Evolutionary social theories

The second half of the nineteenth century has been called the Darwinian Age. During this period, many social theorists (Ammon, Grant, Gumpłowicz, Le Bon, etc.) borrowed evolutionary theories and transplanted them from the realm of biology to the social and economic realms.⁶ Even those who wrote prior to Darwin were actually

benefited by his largely successful effort to popularize evolution as the dominant scientific account of origins.

Among these pre-Darwinian social evolutionists was the French sociologist Auguste Comte (1798–1857), the founder of positivism as well as the inventor of the term *sociology*. Comte was one of the many intellectuals of his time to have been deeply impressed by the strides that had been made by the physical sciences. This led him to believe in the limitless capacity of science to effect improvements in the human condition. As the late Irish jurist J.M. Kelly pointed out,

“[Comte] was writing at a time when biological evolution was in the air; and, although he was dead before Darwin’s greatest work was published, he proposed the view that society developed and changed in response to certain laws, analogous to the great biological principles governing the development of individual species. To the understanding of society’s development no ideology, no transcendent law, could contribute anything, but only the observation of empirical facts. A science of society, thus conducted ... could, he thought, reach a point of perfection such that law itself would become redundant, or rather that the function it now discharged would be subsumed in a sort of scientific social management.”⁷

Comte despised metaphysics and advanced the idea that empirical science would lead humanity to higher levels of social progress and economic development. He possessed an unshakable faith in the view that progress is achievable by a science-based manipulation of human societies, thus developing a comprehensive and influential theory of social science (and progress) that was based on the empirical method of the natural sciences. According to Dr Mike Hawkins, who is professor of social and political thought at Kingston University in London,

“Comte’s ambition, realised in his massive *Cours de philosophie positive* and *Système de politique positive*, was to forge a science of society—he coined the neologism ‘sociology’—which was both linked to and a completion of the natural sciences. Biology was an important foundation for this project, partly for methodological reasons (e.g. the use of the comparative method) and partly because he believed humans and animals shared many biological attributes (*Cours*, III, 832–5). This was true even for human psychological propensities. Comte maintained ‘that animals,

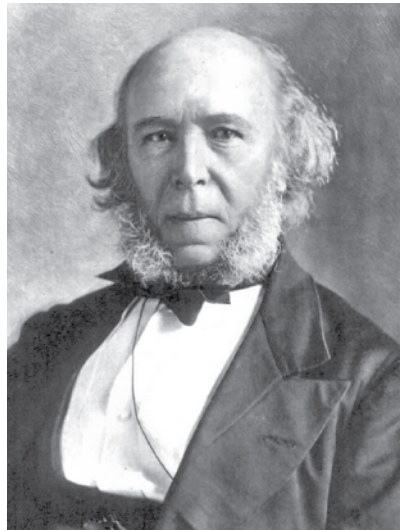
at least in the higher part of the zoological scale, in reality manifest most of our affective and even intellectual faculties, with simple differences of degree’ (*Cours*, III, 774).”⁸

The belief in the exclusive value of scientific facts Comte called positivism. It was also this belief that led him to introduce a cohesive *Religion of Humanity*⁹, which he associated with the “promised blessings” of empirical science, “not just as a source of material benefits but as providing in its devotees a new and more exalted type of human being”.¹⁰ Comte’s *Religion of Humanity* was the result of his later years when, rejecting the traditional religions based on dogma and revelation, he constructed his own positivist religion with humanity occupying the place of the Deity, and with an organization and ritual patterned after that of the Catholic Church.¹¹ Such a positivist religion included a whole panoply of ‘saints’ drawn from the so-called *Benefactors of Mankind*, such as Diderot, Rousseau and Voltaire. Comte’s disciples exalted the Republic in the image of the Virgin Mary, in exaltation of the feminine image as a representation of the ideal of purity and perfection to every republican government.¹²

An important Darwinist during the nineteenth century was the English philosopher and political theorist Herbert Spencer (1820–1903). The relevance of Spencer to evolutionary theory lies in his vision of law’s progressive development in human societies. In sharp contrast to the Marxist theory, in which law is just an armament of the bourgeoisie in class conflict, Spencer believed that social

perfectibility could be achieved by a science-based manipulation of the natural evolutionary process.⁷ Spencer’s vision of such a process reinforced his conviction that people must be left alone by their government, to be treated as free and responsible individuals. In almost every sense, he was an authentic libertarian who championed private property, personal charity, women’s suffrage, and civil liberties in general.¹³

Curiously, Spencer was the first to coin the phrase ‘survival of the fittest’ to explain the evolution of human societies. The phrase has ever since been used to describe a naturalistic law showing such things as co-operation, love and altruism to be unreal; a law which both demands and predicts that these values must always give way to self-interest. This sort of Social Darwinism coincided with the era in the United States, which is broadly perceived as based on the glorification of free enterprise and laissez faire economics.¹⁴ The principal exponent of this doctrine was Andrew Carnegie (1835–1919), one of the



Photograph courtesy www.wikipedia.org

Herbert Spencer (1820–1903) was an English philosopher and political theorist who believed that social perfectibility is achievable by a science-based manipulation of the natural evolutionary process. Spencer coined the phrase ‘survival of the fittest’, which has been used to justify a mechanism of natural selection entailing such things as racism, eugenics, euthanasia and forced sterilisation.



Sir Henry Maine (1822–1888) was a British jurist, historian and anthropologist who proposed a legal theory claiming a pattern of evolutionary growth to which all legal systems could be shown to conform. This growth would lead to “the gradual dissolution of family dependency, and the growth of individual obligation in its place”.²²

which applies in the ongoing competition of different species to adapt to their existing environments, was held to ensure that only the fittest should be allowed to survive in society. Starting from Francis Galton’s eugenic proposals “to weed out the lower classes by selective breeding”, those social thinkers would invoke the name and prestige of Darwinism to advocate the idea of ‘fitness’ as entailing such things as eugenics, euthanasia and racism.¹⁶

In a certain way these scientists were only trying to be consistent with the philosophy of Darwinism. In 1859, Darwin published his seminal work, *On the Origin of Species by Means of Natural Selection*. An aspect of that work less well known is its subtitle: *or the Preservation of Favoured Races in the Struggle for Life*. While Darwin in *Origin* defined the word *race* as a synonym of *species*, applying the term to plants and pigeons, the implication that his observations could be applied to describe human races was quite evident, later to be explicitly elaborated in his *Descent of Man* twelve years later.

Since Darwinism posits that humans develop from lower life forms through natural selection, responding to environmental stimuli, many Darwinists have believed that it follows from this that the different human races have developed at different rates and to different degrees, because their evolution would have occurred in response to differing environmental stimuli. Darwin, extrapolating on this evolution of humans and their different races, opined: “At some future period, not very distant as measured by centuries, the civilised races of man will almost certainly exterminate, and replace, the savage races throughout the world.”¹⁷ He continued:

captains of industry of nineteenth-century America. Carnegie regarded himself as a positivist who preferred to analyse things in what he claimed were scientific terms, once stating: “Not only had I got rid of the theology and the supernatural, but I had found the truth of evolution.”¹⁵

It is undeniable that some of the leading social thinkers of that period adopted the ideas of natural selection and survival of the fittest to justify racist and inhumane policies like eugenics, anti-miscegenation laws, and forced sterilization. The idea of natural selection,

“At the same time the anthropomorphous apes will no doubt be exterminated. The break between man and his nearest allies will then be wider, for it will intervene between man in a more civilised state, as we may hope, even than the Caucasian, and some ape as low as a baboon, instead of as now between the negro or Australian and the gorilla.”¹⁷

With the advent of Darwinism, the dominant scientific view in the late nineteenth-century was that of “the law of the preservation of favoured races in the struggle of life”. This hypothesis served to sanction the extinction of the “low and mentally underdeveloped populations with which Europeans came into contact”.¹⁸ Although this view is no longer accepted in our pluralistic societies, they actually flow out of an evolutionary worldview which perceives humans as nothing but higher animals who may therefore be treated as mere animals or machines. This is why Darwinism led, among other things, to the Nazi argument that eugenics possessed a scientific basis, and that the betterment of the German race was a result of biological principles articulated by Darwin himself. As a matter of fact, all the three greatest genocidal regimes of last century—Nazi Germany, Soviet Russia and Communist China—were firmly grounded on the scientific materialism of Darwinism.¹⁹

Evolutionary legal theories

Throughout Western history until the second half of the nineteenth century, the idea of a higher moral law dominated European and American law.²⁰ This mainstream tradition lasted as the main school of legal thought until the rise of evolutionary thinking in the nineteenth century. In particular, the idea that human law must be subject to some objective moral standards started to be more deeply challenged when Darwin’s theory of biological evolution was interpreted as implying the non-existence of God and, accordingly, of God-given law and rights.

In relation to evolutionary accounts of law, the British jurist, historian and anthropologist Sir Henry Maine (1822–1888) was one of the first to apply empirical methodology to a subject that had until then been generally dominated by metaphysics. Maine’s most significant work of legal theory, *Ancient Law* (1861), was published during a time in which the principal intellectual excitement had been provided by Darwin’s recently published *On the Origin of Species*. At any rate, Maine’s *Ancient Law* reflected the contemporary interest in the idea of evolution, “propos[ing] something like an evolutionary theory of law, complete with a pattern of growth to which all systems, though geographically or chronologically so distant from one another as to exclude the possibility of extraneous inspiration, could be shown to conform.”²¹

The most celebrated of Maine’s insights was his idea concerning the general direction up to which ‘progressive’ societies had been taken in his time. Maine contended that such movement would lead to “the gradual dissolution of family dependency, and the growth of individual obligation

in its place". Thus he advanced: "The Individual is steadily substituted for the Family, as the unit of which civil laws take account... [so] that the movement of progressive societies has hitherto been a movement from Status to Contract."²² But even as Maine was writing this passage the process which he so confidently discerned was curiously starting to reverse. In the late nineteenth century, a huge volume of social legislation began to reduce considerably the 'freedom of contract' in Western countries, giving ground in his native England to the sort of collectivism which the celebrated jurist A. V. Dicey would criticise so much.

Maine presented in his legal work the notion that societies of all kinds tend to develop by passing through certain stages of law that did not vary so much from place to place. He sought to demonstrate how our legal concepts are rooted in earlier times, such as during the Roman Empire or before. This was quite speculative, starting with his description of the six phases through which the form of law in 'progressive' societies passed.²³ Later scholars have found such a scheme to rest on evidence that is too meagre to support the gross generalizations he had assumed.²¹ Even so, Maine's evolutionary legal theory remains relevant from a historical point of view as it helped lay the groundwork and change general sentiment towards law.²⁴

The impact of Darwinism on American jurisprudence

The nineteenth century marked what may be called a period of 'hibernation' for natural law theories. At that time, argued the jurist Hans Kelsen (1881–1973) in his celebrated *Pure Theory of Law* (1934), "the changeover of [mainstream] legal science from natural law to positivism went hand in hand with the progress of empirical natural sciences and with a critical analysis of religious ideology."²⁵ Hence, no law was assumed to contain absolute or universal value, but presupposed to stay "subject to historical change and that as positive law it is a temporally and spatially conditioned phenomenon".²⁵

This reality would affect even the United States, a nation that had been firmly founded upon principles of natural law. In the second half of the nineteenth century, particularly after the Civil War, American legal writers began gradually to abandon the idea of natural law, which initially had so much guided and inspired the American Founding Fathers, as well as important judges like John Marshall²⁶ and Joseph Story²⁷. Even so, until the second half of the nineteenth century American jurisprudence was still very much dominated by the belief in God-given unalienable rights, such that a single, correct solution for legal disputes was perceived as reachable in every case by means of applying natural, self-evident principles of law.

In the second half of that century, however, particularly after Darwin's *Origin of the Species* was published in 1859, many American legal writers began to modify their approach so as to infer that all the suffering and misery in the world acted as evidence against the idea of inalienable rights, and in their place substituted natural selection and

its correlating understanding of the survival of the fittest. As a result, they gradually abandoned natural-law theory and were essentially divided into two kinds of legal school: the analytic and the historicist. This demarcation remains valid even today, regardless of the relative renewal in more recent times of the natural law tradition in American juridical circles.²⁸

With respect to the analytic school, its principal model of analysis derived from the legal theory of John Austin (1790–1859), an English positivist who defined law as the command of a sovereign who requires the full obedience of its subjects. Austin's 'command theory', as it is called, does not recognise as a 'law properly so called' any norm derived from natural law and customary law, unless it is made the subject of a normative command by the political sovereign.²⁹ On the basis of Austin's attempt to separate law from morality, American analytic jurists developed an approach to law that completely ignored any metaphysical considerations and instead analysed legal concepts empirically, according to more practical implications.²⁸

The American legal historicists, by contrast, preferred to interpret law in terms of an evolutionary process that manifested itself through the customs of a people. As positive laws were growing increasingly complex, they contended that *legal scientists* should assume a 'special role' not only in tracing the history of legal doctrines but also in inferring legal principles that lay behind them.²⁸ Although the historicist methodology differs considerably from that employed by members of the analytic school, so that the latter often criticized the former for not being sufficiently 'scientific' in their legal analysis, both schools of legal thought were united in their revolt against the American natural-law tradition.²⁸ Whereas these schools differed in some important aspects, they were not so dissimilar that influential jurists such as Christopher Columbus Langdell³⁰ and Oliver Wendell Holmes, Jr. were unable to comfortably employ both theories without any apparent contradiction.

It has been argued that during the later decades of the nineteenth, and the beginning of the twentieth centuries, the United States was in many respects the country *par excellence* of social Darwinism. What this implied for American law was revealed by Oliver Wendell Holmes Jr. (1841–1935), when he in 1897 advised his audience of law students to put aside any notions of morality and instead view the law as a science of coercion. Holmes, a Harvard law professor and later judge of the US Supreme Court, believed that if Darwinian evolution is true, then there is no transcendent moral order and laws are merely a codification of political policies judged to be either socially or economically convenient or both.³¹

Under the influence of Darwinism, Holmes conceived the idea of legal realism that reduced law to a tool for identifying and manipulating the existing social factors so as to create more harmony and progress. As Richard Posner observes, "Holmes was a social and biological Darwinian, and hence a sceptic who believed that the good and true, in any sense that people could recognize, was

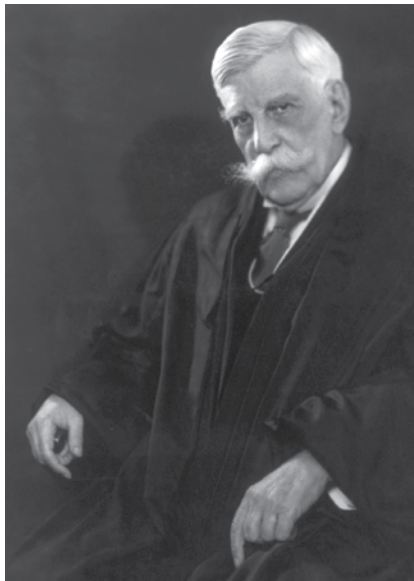
whatever emerged from the struggles of warring species, nations, classes, and ideas.”³² Holmes’s biographer, Liva Baker, describes his achievements as follows:

“[Holmes’ work] shook the little world of lawyers and judges who had been raised on Blackstone’s theory that the law, given by God Himself, was immutable and eternal and judges had only to discover its contents. It took some years for them to come around to the view that the law was flexible, responsive to changing social and economic climates, and amenable to empirical methods of analysis. But Holmes had ... broken new intellectual trails, using history to guide him. He had given the law a vitality it never before had possessed. He had wrested legal history from the aridity of syllogism and abstraction and placed it in the context of human experience, demonstrating that the corpus of the law was neither ukase from God nor derived from Nature, but, like the little toe and the structure of the horse, was a constantly evolving thing, a response to the continually developing social and economic environment.”³³

Holmes’ legal realism interpreted the law in terms of predictions about how courts will decide a dispute. After all, argues John W. Whitehead, “if there is not fixity in law and no reference point, then law can be what a judge says it is. If, however, there is fixity to law, there is some absolute basis upon which judgement can be made.”³⁴ But for Holmes, law was not a product of logic or any metaphysical assumptions but a process that merely reflects society’s adaptation to an evolving world. As law professor Suri Ratnapala explains,

“Holmes’s central point is: Law is the product of social and economic forces. Law adapts and acquires new meanings to suit the convenience of the times. Holmes saw in the law’s progression one of the most important features of evolution, whether biological or cultural. It is that adaptation is never perfect. The world does not stand still, so by the time a thing adapts to the world the world has moved on. This also means that the law can never be fully logical.”³⁵

Curiously, Holmes also did not see much difference between human beings and animals, arguing that nearly every assertion about values and ethical questions can be reduced to a matter of dominance, power, death and survival.³⁶ According to him, “might makes right” even if



Photograph courtesy www.wikipedia.org

Oliver Wendell Holmes, Jr. (1841–1935), an associate justice on the Supreme Court of the United States from 1902 to 1932, was a Darwinian who believed that human beings differ from other animals only by a matter of degree. He despised the idea of inalienable right and argued that all ethical questions could be reduced to a mere issue of dominance, power, death and survival.

this leads to the suppression of human rights. “All my life I have sneered at the natural rights of man”, he said.³⁷ The dilemma Holmes faced goes as follows: “What is there that’s different about humans that dictate their right to life... where most people acknowledge no such right in other animals?”³⁸

Holmes was led by his materialistic worldview to believe that a human right has no metaphysical foundation; that such right is just “what a given crowd ... will fight for”.³⁹ Thus he told Felix Frankfurter, one of his colleagues on the US Supreme Court, that “a law must be called good if it reflects the will of the dominant forces of the community even if it will take her to hell.”⁴⁰ His scepticism about human rights also led him to a broad toleration of legislative struggles regardless of constitutional implications.⁴¹ Although Holmes considered any law to be ultimately dependant for its concrete efficacy on the judiciary, he generally viewed the legislative process in terms of an “unprincipled battlefield” in which judges “should not deprive the victors of their spoils”.⁴¹ In an article published in 1873, Holmes stated:

“Legislation should easily and quickly modify itself in accordance with the will of the *de facto* supreme power in the community ... The more powerful interests must be more or less reflected in legislation, which, like every other device of man or beast, must tend in the long run to aid the survival of the fittest ... [I]t is no sufficient condemnation of legislation, which, like every other device of man or beast, must tend in the long run to aid the survival of the fittest ... [I]t is no sufficient condemnation of legislation that it favors one class at the expense of another; for much or all legislation does that ... [Legislation] is necessarily made a means by which a body, having the power, put burdens which are disagreeable to them on the shoulders of somebody else.”⁴²

Since Holmes believed the traditional concept of natural rights was a “conceptual mistake” and a “mere illusion”, he was in actual fact at the forefront of a movement that was far more than just a mere “revolt against formalism”.⁴³ Holmes assumed that evolutionary science made the idea of God unnecessary, and that morality is only a matter of personal choice that lacks any external foundation. Above all, his so-called *legal realism* amounted to an unambiguous revolt against any objectivity in law, not to mention a revolt against the whole tradition of *self-evident rights* in American constitutionalism.⁴³

Evolutionary libertarian jurisprudence

The idea of evolution has been quite influential among libertarian circles since Maine and Spencer adopted this to promote the advantages of economic liberalism. Undoubtedly one of the leading libertarian figures of all times is the Austrian-born Friedrich A. Hayek (1899–1992), who was a prolific writer on a broad range of topics, including law, economics, politics and sociology. His best known book, *The Road to Serfdom* (1944), argues that the world has little to gain from socialist ideologies except oppression and tyranny. With respect to his legal theory, Hayek's most significant contributions are *The Constitution of Liberty* (1960) and the impressive *Law, Legislation and Liberty*, published in three volumes between 1973 and 1979.

Hayek expressed the opinion that human authorities must abstain from and guard against any pretension to having achieved any perfection concerning knowledge.⁴⁴ This line of thought rests on the realization that we are not gods, so that it is beyond our mental capacity to achieve a perfect knowledge of anything. This is in practice a powerful objection to any “special providence model of human law”.⁴⁴ As such, the Hayekian insight that humans must not act as if they possessed divine knowledge adds “a special force to the warning to humans not to play God”.⁴⁵

The argument introduced by Hayek that fallible authorities of a finite knowledge are incapable of knowing for themselves all that is usefully known in the general community, leads to the conclusion that better results might be achieved by the self-correcting judicial process of developing law from precedent to precedent. This preference for law as *spontaneous order* led Hayek also to favour a legal system whereby norms change gradually rather than suddenly. Such legal norms change according to judicial adaptation, not radical legislative change. And this, he concludes, can bring more stability to the legal system and make it far more predictable.⁴⁶

Hayek's legal analysis in many ways coincides with the common-law tradition of *government under law*.⁴⁷ But he appears nonetheless to have failed to consider that the spontaneous order can either be in the pursuit of virtue and the good or the pursuit of selfishness and evil.⁴⁷ Arguably, Hayek was so preoccupied with preserving individual autonomy that he seems to have failed to realise that the world cannot be understood only in the ‘state vs individual’ terms. As law professor Douglas Kmiec points out, “the individual is located within social groups such as family, church, school and the workplace community. Cultural order depends greatly upon each person being situated in the midst of such intermediary associations, and in so far as these associations are far from spontaneous, Hayek appears to understate their importance.”⁴⁸

Hayek's legal theory is therefore congenial but not identical to the common-law tradition, which is founded upon the belief in laws which, according to Sir Edward Coke (1552–1634), “God at the time of creation of the nature of man infused into his heart for his preservation

and direction.”⁴⁹ This amounts to saying that a spontaneous order without God's natural law is not liberty, but licence. Such distinction between liberty and licence was one commonly made by natural rights theorists such as John Locke (1632–1704). In describing the “state of nature”, or world without government, Locke contended that “though this be a *State of Liberty*, yet it is *not a State of License*”.⁵⁰ In this passage, law professor Randy E. Barnett explains, “[b]y liberty is meant those freedoms which people ought to have. License refers to those freedoms which people ought not to have and thus those freedoms which are properly constrained.”⁵¹

In his famous *Commentaries*, Sir William Blackstone (1723–1780) asserted that “God, when he created man, endued him with freewill to conduct himself in all parts of life. He laid down certain immutable laws of human nature whereby freewill is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.”⁵² Blackstone believed that authentic liberty is defined and regulated by eternal or natural laws, which everyone is able to discover by “right reason”. In contrast to this, Hayek sought the judiciary not so much in pursuit of ‘reason’ but in the improvement of “[an] going order which nobody has designed, an order that has formed itself without the knowledge and often against the will of authority.”⁵³ However, if there is no reference point to law there is also no absolute basis upon which judgement can be made. The result is a noticeable lack of *objective moral standard* holding fast for all individuals and in all circumstances. At worst, law becomes merely what a judge (or a dictator) arbitrarily says it is.³⁴

Evolutionary legal interpretation

The main effect Darwinism appears to have had on legal philosophy is in the challenge it posed to traditional beliefs in Western societies concerning the “superiority of the fixed and final”.⁵⁴ Change, in Darwinian terms, is the essence of the good, this identified with organic adaptation, survival and growth. Accordingly, the goal of legal interpretation no longer becomes the search for absolute principles or objectives but rather the search for the processes that generate the ‘right kind’ of change. As a result, Bradley C.S. Watson explains,

“What *materially* is becomes more important than what ought to be, because only the former can be observed by the new empirical science. In the absence of fixity, morals, politics, and religion are subject to radical renegotiation and transformation. Essences are no longer the highest object of inquiry, or indeed any object of inquiry. Rather, science concentrates on particular changes and their relationship to particular useful purposes ... Philosophy is reduced from the ‘wholesale’ to the retail level, from the realm of general ideas to the realm of particular effects ... Instead of concentrating on metaphysics, or even politics in the full Aristotelian sense, we are in effect freed to

concentrate on policy—or in Dewey’s language, ‘the things that specifically concern us’.⁵⁵

Contemporary political and judicial actors have borrowed from Darwinism to construct a legal philosophy that is increasingly divorced from any sense of constitutional restraint, which they have actually replaced with “an organic conception of a state unlimited in principle”.⁵⁶ In this way the constitution is no longer the basic structure of society, to be conceived as a limit to the exercise of governmental powers, but analysed in the light of a ‘progressive’ view whereby even our most basic laws grow organically through history. Under such circumstances,

“Constitutional interpretation therefore involves perceiving and clearly articulating the direction of evolutionary change for an organic document that serves the needs of an organic state. Those who possess an insight into History—namely, those sitting on the Supreme Court—must redefine outdated notions of liberty, justice, and equality. Their aim is to aid a process that is outside the full control of any one individual or institution. The historical process is an immense struggle for survival..., and good fortune is indispensable to a proper unfolding of History.”⁵⁷

As a direct result of the idea of *legal evolution*, many judges and legal scholars have postulated that their countries’ constitutions must be interpreted as if they are *living documents*, instead of interpreting these documents according to their original (or literal) meaning.⁵⁸ This apparently ‘progressive’ view regards the written constitution of liberal democracies such as Australia and the United States as old-fashioned documents that must be constantly ‘revised’ and ‘updated’. The small juridical elite is therefore called on to provide a ‘contemporary’ meaning to the constitutional text, “as its words are perceived by succeeding generations of people, reflected in [the] court”.⁵⁹

These ‘progressive’ jurists would probably be surprised to know that one of the earliest advocates of their ‘living-constitution’ approach was the pro-slavery leader Alexander H. Stephens (1812–1883), who was a barrister from Georgia and Vice-President of the Confederate States during the American Civil War. In his most famous political speech, in 1861, he described the pro-slavery confederated states as progressive societies, “the very antithesis of a traditional society”.⁶⁰ To Stephens, the idea of progress implied the regular reinterpretation of the ‘old constitution’, to bring it up to date with the ongoing, evolutionary needs of society.⁶⁰

In actual fact, even the Nazis themselves developed a concept of ‘living constitution’. According to Nazi jurists the German legal system should not be based on fixed rules but evolve in a continuous flow as a *living document*.⁶¹ From the very beginning, those Nazi jurists placed great stock in the introduction of new principles of legal interpretation as a symbol of their ‘new thinking’.⁶² Since what mattered for them was not the influx of new legislation, but the

ongoing interpretation of the existing ones (and its resulting adaptation to the alleged needs of community), the Weimar Constitution was never formally abrogated by the Nazi regime. Rather than overruling the old legal system *en bloc*, the Nazis opted for adopting a method of interpretation that deliberately distorted the original nature of legal norms. The Nazi approach to legal interpretation is summarised by the German jurist and legal historian Michael Stolleis as follows:

“Disregard of original legislative intent by ideologically guided judges became far more significant in everyday legal life of National Socialism than injustice directly commanded by the lawmaker ... Already during the Weimar Republic, wide segments of the judiciary had chosen to oppose the democratically legitimized legislative body. That is why the Nazis’ call to ‘overcome narrow normativism’ through legal interpretation no longer posed any problems of method ... Both during the period of the seizure of power and during the war, interpreting the old law under the guidance of ... ideology proved a superior approach than legislating new law. It was faster and more flexible, and in individual cases it could be more easily criticised and invalidated.”⁶³

Conclusion

To be consistent with Darwinism, jurists may need to embrace a materialistic worldview that denies any external or metaphysical source of rights and laws. In this worldview, the only stable thing in an evolving universe is *change* itself. The whole Western tradition of ‘inalienable rights’ is dismissed as a mere superstition by individuals who inhabited a less evolved age. After all if humans evolve so must also their laws, including the most ‘fundamental’ ones, because these laws are neither immutable nor based on universal principles.⁶⁴ This new paradigm helps explain why the *high esteem*, in which some of the greatest jurists of the common law such as Fortescue, Coke and Blackstone were once held, seems to have almost entirely vanished, along with their teachings which are not even properly taught in most of our law schools.

References

1. Wilson, E.O., *On Human Nature*, Harvard University Press, Cambridge, MA, p. xiii, 1978. Of course, this gave them a powerful justification for their choices and lifestyles, serving the purpose of ‘liberating’ people from the constraints of Judeo-Christian morality.
2. Ayala, F., Darwin’s Greatest Discovery, *American Scholar*, Winter 2006, p. 131.
3. Lennox, J.C., *God’s Undertaker: Has Science Buried God?* Lion, 2nd edition, London, p. 29, 2009.
4. Lennox, ref. 3, p. 30
5. Sterling, P.L., *The Metaphysics of Naturalism*, Appleton-Century-Crofts, New York, p.160, 1960; cited in Lennox, ref. 3, p. 29.
6. See: Hawkins, M., *Social Darwinism in European and American Thought: 1860–1945*, Cambridge University Press, Cambridge, UK, 1997.

7. Kelly, J.M., *A Short History of Western Legal Theory*, Oxford University Press, Oxford, UK, p. 332, 1992.
8. Hawkins, ref. 6, p. 52.
9. See: Zimmermann, A., Constitutions without constitutionalism: the failure of constitutionalism in Brazil; in: Sellers, M. and Tomaszewski, T. (Eds.), *The Rule of Law in Comparative Perspective*, Springer, New York, 2010, forthcoming. See also: Freire, G., *Order and Progress: From Monarchy to Republic*, Alfred A. Knopf, New York, p. 40, 1970.
10. Midgley, M., *Evolution as a Religion: Strange Hopes and Stranger Fears*, Routledge, London, p. 17, 2002.
11. Claudio Véliz, *The Centralist Tradition of Latin America* (Princeton/NJ: Princeton University Press, 1980), p. 195.
12. Though largely unsuccessful, Comte's *Religion of Humanity* was deeply influential in the development of numerous humanist organizations in the 19th century. In Latin American nations like Brazil, his positivist disciples embraced the concept of 'enlightened authoritarianism', which denigrated parliamentary institutions as being inefficient and archaic; a waste of time and energy. Positivism provided a scientific justification for their illiberal and anti-democratic behaviour, making it possible "to rationalize and make respectable the idea of an enlightened dictatorship aimed at the attainment of the common good". See: Véliz, ref. 11, pp. 197–198.
13. Goldberg, J., *Liberal Fascism: The Secret History of the Left from Mussolini to the Politics of Meaning*, Penguin Books, London, p. 258, 2009.
14. See: Koyzis, D.T., *Political Visions and Illusions: A Survey and Christian Critique of Contemporary Ideologies*, InterVarsity Press, Downers Grove, IL, p. 57, 2003. See also: Bergman, J., Darwin's critical influence on the ruthless extremes of capitalism, *Journal of Creation* 16(2):105–109, 2002.
15. Carnegie, A., *Autobiography*, Penguin Books, New York (1920), p. 339, 2006. See also: Lambert, F., *Religion in American Politics: A Short History*, Princeton University Press, Princeton, NJ, p. 82, 2008.
16. See: Midgley, ref. 10, pp. 1–10. Regarding evolutionary ideas in Germany see also: Weikart, R., *From Darwin to Hitler: Evolutionary Ethics, Eugenics and Racism in Germany*, Palgrave Macmillan, New York, 2006; *Hitler's Ethic: The Nazi Pursuit of Evolutionary Progress*, Palgrave Macmillan, New York, 2009; see review, this issue, pp. 17–20.
17. Darwin, C., *The Descent of Man*, A.L. Burt Co., 2nd edition, New York, p. 178, 1874.
18. Wallace, A.R., *Natural Selection and Tropical Nature*, Macmillan, London, p. 177, 1891.
19. See: Zimmermann, A., Marxism, law and evolution: Marxist law in both theory and practice, *Journal of Creation* 23(3):90–97, 2009; Zimmermann, A., Legislating evil: the philosophical foundations of the Nazi legal system, 13 *International Trade and Business Law Review* 221:228–230, 2010; Zimmermann, A., The Darwinian roots of the Nazi legal system, *Journal of Creation* 22(3):109–114, 2008; Weikart, R., *From Darwin to Hitler: Evolutionary Ethics, Eugenics, and Racism in Germany*, Palgrave Macmillan, New York, 2004; Muehlenberg, B., On Celebrating Darwin', *Quadrant Online*, 14 January 2009, www.quadrant.org.au/blogs/muehlenberg/2009/01/on-celebrating-darwin.
20. See: Alschuler, A.W., *Law Without Values: The Life, Work and Legacy of Justice Holmes*, University of Chicago Press, Chicago, IL, p. 9, 2000.
21. Kelly, ref. 7, p. 327.
22. Maine, H.J.S., *Ancient Law: Its Connection With the Early History of Society, and its Relation to Modern Ideas*, John Murray, London, UK, pp. 173–174, 1861.
23. See: Wacks, R., *Understanding Jurisprudence: An Introduction to Legal Theory*, 2nd edition, Oxford University Press, Oxford, UK, p. 241, 2009.
24. Kelly, ref. 7, p. 383.
25. Kelsen, H., The pure theory of law—part 1, *Law Quarterly Review* 517(II):50, 1934.
26. John Marshall (1755–1835) was the fourth Chief Justice of the US Supreme Court, serving from 4 February 1801 until his death in 1835. Although judicial review of legislation on constitutional grounds is advocated by Alexander Hamilton in *The Federalist Paper No. 78*, Marshall CJ was the first to apply the doctrine in order to invalidate a federal legislation, in *Marbury v Madison* (1803).
27. Joseph Story (1779–1845), the first Dane Professor of Law at Harvard University and Associate Justice of the United States Supreme Court, linked the natural law to the rights of conscience, which "are given by God, and cannot be encroached upon by human authority, without a criminal disobedience of the precepts of natural, as well as revealed religion."—Story, J., *Commentaries on the Constitution of the United States*, p. 1399, 1833.
28. Alschuler, ref. 20, p. 86.
29. Although Austin was a Christian, he found it proper to exclude the natural law from the category of laws properly so called. According to him, "to say that human laws which conflict with the Divine law are not binding, that is to say, are not laws, is to talk stark nonsense." Austin suspected that such an appeal to divine law was not only wrong but even pernicious as it could lead to anarchy. He argued, rather arbitrarily, that the investigation of positive law must be the exclusive concern of jurisprudence, with the laws of God to be treated as a matter reserved only for Theology. Since Austin was 'only' a jurist, not a theologian, he contended that the main focus of his jurisprudential work needed to be the notion of positive law, not divine law. He defined jurisprudence as follows: "The matter of jurisprudence is positive law: law, simply and strictly so called: or a law set by political superiors to political inferiors . . . A law, in the most general and comprehensive acceptance in which the term, in its literal meaning, is employed, may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power over him."—See: Austin, J., *The Province of Jurisprudence Determined*, Hart, H.L.A. (Ed.), pp. 9–10, year?
30. Christopher Columbus Langdell (1826–1906) has been widely credited as the creator of the 'Case Method' to the study of law. In 1870, he was appointed Dean of Harvard Law School and the essence of his legacy is his influence on the teaching of law, which he argued to be a science akin to the natural sciences, and that the empirical material of the 'science of law' are court decisions or judge-made law. Since he tried to derive the law only from basic axioms and logical deduction, "real world consequences and moral evaluations were excluded from this process".—Bix, B., *Jurisprudence: Theory and Context*, Sweet & Maxwell, London, UK, p. 192, 2009. In one discussion involving a certain issue related to contract law, Langdell's response to the argument that the application of a particular rule "would produce . . . unjust and absurd results" was: "The true answer to this argument is, that is irrelevant"—Langdell, C.C., *A Summary of the Law of Contract*, Little, Brown and Co., Boston, MA, pp. 20–21, 1880. Langdell's approach can be summarised as follows: "Langdell argued that the primary data of the law is decided cases, and that a scientific understanding of law could be gained by a detailed examination of such cases in isolation from other aspects of the law. Some decades later in the United States the Realists, many of whom were very critical of Langdell's method, broadened the category of observable data in law by insisting that the law must be studied in its social and political dimensions [only]."—Davies, M., *Asking the Law Question*, Lawbook, Sydney, p. 140, 2008.
31. Hofstadter, R., *Social Darwinism in American Political Thought*, Beacon Press, Boston, MA, 1955; cited in Watson, B.C.S., Progressivism and the New Science of Jurisprudence, *First Principles Series*, No. 24, Heritage Foundation, Washington/DC, February 24, 2009.
32. Posner, R., Book review, *George Washington Law Review* 870(53):872, 1985.
33. Baker, L., *The Justice from Beacon Hill: The Life and Times of Oliver Wendell Holmes*, Harper Collins, New York, pp. 257–258, 1991.

34. Whitehead, J.W., *The Second American Revolution*, Crossway Books, Westchester, IL, p. 80, 1988.
35. Ratnapala, S., *Jurisprudence*, Cambridge University Press, Cambridge, UK, p. 99, 2009.
36. Alschuler, ref. 20, p. 6.
37. Howe, M.DeW. (Ed.), Holmes to Harold Laski, 15 September 1916; in: 1 *The Holmes Laski Letters: The Correspondence of Mr Justice Holmes and Harold J. Laski*, 1916–1935, at 716, 762, Harvard University Press, Cambridge, MA, 1953; cited in Alschuler, ref. 20, p. 26.
38. Storer, M.B. (Ed.), *Humanist Ethics*, Prometheus Books, Buffalo, NY, p. 156, 1980.
39. Howe, M.DeW. (Ed.), Holmes to Harold Laski, 23 July 1925; in: 1 *The Holmes Laski Letters: The Correspondence of Mr Justice Holmes and Harold J. Laski*, 1916–1935, at 716, 762, Harvard University Press, Cambridge, MA, 1953; cited in Alschuler, ref. 20, p. 6.
40. Howe, M.DeW. (Ed.), Holmes to Frankfurter, 24 March 1914; in: 1 *The Holmes Laski Letters: The Correspondence of Mr Justice Holmes and Harold J. Laski*, 1916–1935, at 716, 762, Harvard University Press, Cambridge, MA, 1953; cited in Alschuler, ref. 20, p. 59.
41. Alschuler, ref. 20, p. 58.
42. Holmes, O.W., Jr., The Gas-Stoker's Strike, 7 *American Law Review* 582, pp. 583–584, 1873; cited in Alschuler, ref. 20, p. 58.
43. Alschuler, ref. 20, p. 10.
44. MacCormick, N., Spontaneous order and rule of law: some problems; in: *Jurisprudence of Liberty*, Ratnapala, S. and Moens, G.A. (Eds.), Butterworths, Sydney, p. 69, 1996.
45. MacCormick, ref. 44, p. 70.
46. See: Hayek, F.A., *Law, Legislation and Liberty*, vol. 2, Routledge, London, pp. 17–24, 1982.
47. Kmiec, D.W., Liberty misconceived: Hayek's incomplete theory of the relationship between natural and customary law, in: *Jurisprudence of Liberty*, Ratnapala, S. and Moens, G.A. (Eds.), Butterworths, Sydney, p. 132, 1996.
48. Kmiec, ref. 47, p. 130.
49. Sir Edward Coke, *Calvin's Case* (1608) 7 Coke Rep 12 (a); 77 Eng rep 392.
50. Locke, J., *Two Treatises of Government* (1690), Mentor, Cambridge, UK, p. 311, 1963.
51. Barnett, R.E., *The Structure of Liberty: Justice and The Rule of Law*, Oxford University Press, Oxford, p. 2, 1998.
52. Blackstone, W., Of the nature of laws in general; in: *Commentaries on the Laws of England*, vol. I, Macmillan, London, pp. 29–30, 1979.
53. Hayek, F.A., Rules and order; in: *Law, Legislation and Liberty*, vol.1, Routledge, London, p. 119, 1973.
54. John Dewey, *The Influence of Darwinism in Philosophy and Other Essays* (New York/NY: Henry Hold & Co., 1910), p. 1.
55. Watson, ref. 31, pp. 4–5.
56. Watson, ref. 31, p. 11.
57. Watson, ref. 31, p. 13.
58. US Justice Antonin Scalia: "The Great Divide with regard to constitutional interpretation is not that between Framers' intent and objective meaning, but rather that between original meaning (whether derived from Framers' intent or not) and current meaning. The ascendant school of constitutional interpretation affirms the existence of what is called the Living Constitution, a body of law that (unlike normal statutes) grows and changes from age to age, in order to meet the needs of a changing society."—Scalia, A., *A Matter of Interpretation*, Princeton University Press, Princeton, NJ, p. 38, 1997.
59. *Brownlee v The Queen* (2001) 207 CLR 278, by Michael Kirby J. In *Eastman v The Queen* (2000) 29 HCA 242, Justice Kirby stated: "The Constitution is to be read according to contemporary understandings of its meaning, to meet, so far as the text allows, the governmental needs of the Australian people." In *New South Wales v Commonwealth (WorkChoices Case)* [2006] HCA 52 Kirby J declared: "[B]eing a Constitution that contains grants of legislative power to a national legislature, it is appropriate to construe each of the heads of power expressed in s 51 'with all the generality which the words used admit'. The words must also be interpreted remembering their constitutional function. They must reflect the fact that the Constitution is a 'living instrument', intended to respond to the needs of changing times. Merely because of the existence of one provision having a 'more particular scope', one should not infer a limit on the deployment of other powers in ways that also affect the nominated subject." See also: Kirby, M., *Constitutional Interpretation and Original Intent—a Form of Ancestor Worship?*, Speech delivered at the 1999 Sir Anthony Mason Lecture, University of Melbourne Faculty of Law, 9 September 1999. Of course, as Robert H. Bork points out, "The values a revisionist judge enforces do not ... come from the law. If they did, he would not be revising. The question, then, is where such a judge finds the values he implements. Academic theorists try to provide various philosophical apparatuses to give the judge the proper values ... A judge inserting new principles into the Constitution tells us their origin only in a rhetorical, never an analytical, style. There is, however, strong reason to suspect that the judge absorbs those values he writes into law from the social class or elite with which he identifies. An elite moral or political view may never be able to win an election or command the votes of a majority of a legislature, but it may nonetheless influence judges and gain the force of law in that way. That is the reason judicial activism is extremely popular with certain elites and why they encourage judges to think it the highest aspect of their calling. Legislation is far more likely to reflect majority sentiment while judicial activism is likely to represent an elite minority's sentiment. The judge is free to reflect the 'better' opinion because he needs not to stand for re-election and because he can deflect the majority's anger by claiming merely to have been enforcing the Constitution. Constitutional jurisprudence is mysterious terrain for most people, who have more pressing things to think about. And a very handy fact that is for revisionists."—Bork, R.H., *The Tempting of America*, Touchstone, New York, p. 16–17, 1991.
60. Jaffa, H.V., What were the original intentions of the framers of the Constitution of the United States?; in: *Original Intent and the Framers of the Constitution*, Jaffa, H.V., Ledewitz, B., Stone, R.L. and Anastaplo, G. (Eds.), Regnery Gateway, Washington/DC, p. 48, 1994.
61. See: Zimmermann, A., The Darwinian roots of the Nazi legal system, *Journal of Creation* 22(3):109–114, 2008
62. See: Zimmermann, A., Legislating evil: the philosophical foundations of the Nazi legal system, 13 *International Trade and Business Law Review* 221:228–230, 2010; p. 239.
63. Stolleis, M., *The Law under the Swastika: Studies on Legal History in Nazi Germany*, The University of Chicago Press, Chicago, IL, pp. 14–15, 1998.
64. Rushdoony, R.J., *Law and Liberty*, Ross House, Vallecito, CA, p. 40, 1984.

Augusto Zimmermann is a Law Lecturer at Murdoch University, Western Australia. He holds a Ph.D. from Monash University (Australia) as well as a L.L.B. and a L.L.M. *cum laude* from the Pontifical Catholic University of Rio de Janeiro.