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Making Progress?:
Change and the Common Law

Allan C. Hutchinson*

“Evolution is change, nothing more or less.”
- Carl Zimmer

It is a trite observation that time and tide and wait for no one. Canute learned this much to his chagrin. And every other would-be commander or commentator is well-advised to remember this mundane wisdom. Indeed, change is one of the few indisputable facts of life. In truly paradoxical fashion, it can safely be reported that change is a constant feature of the world. Whether considered locally or over vast eons of time, change is what makes the world what it is. The central challenge, therefore, for any one who wishes to understand or affect the world is to come to terms with change and incorporate its dynamics into any account of how the world or its constituent parts work. Consequently, any account of legal and biological life which does not offer an important role for the fact and effects of change will soon itself become a victim of historical change. Nevertheless, human attitudes to change are no less complex or perplexing than the phenomenon of change itself. Being part of the changing world, human views on the hows and whys of change are themselves constantly changing. At the heart of this intellectual challenge is the persistent effort to fathom the relation, if any, between ‘change’ and ‘progress’. While there is a wide, if often begrudging, acceptance that change is inevitable and inexorable, there is also considerable disagreement over both the pace and dynamics of such movement as well as its direction and putative destination.

This debate and controversy is as heated in law as it is in any other field of study. In a world in which law has a relatively privileged place in addressing and channelling political power, the issue of whether the common law is merely changing or making progress is of considerable moment. Indeed, much of the legitimacy and prestige of the common law and its juristic defenders depends on their being able to make a plausible defence that the common law is not merely changing, but is actually making progress.


To do this, there has been great reliance on the biological metaphor of ‘evolution’. However, my own view is that mounting any such defence, let alone one that mimics theories of change in the natural world, is a ludicrously tall order. A reasonable grasp of the common law’s own history and development provides ample evidence of the futility of such an endeavour. What counts as ‘progress’ is itself as much a matter of change as anything else. While the common law is always changing, it is only sometimes making progress in the sense of becoming more politically or morally just. Accordingly, in this paper, I will explore the scientific, legal, historical and political terrain on which the different accounts about when, what and how some changes might be counted as being more progressive than others take place. Indeed, the very notion of ‘progress’ is as problematic as it is central to the biological and jurisprudential community.

In the first section of the paper, I canvass the debate in biology and law over how evolutionary change might be interpreted as being ‘progressive’ and suggest the difficulties with such claims. Drawing on recent epistemological encounters over the nature of ‘scientific progress’, the second section demonstrates how a Darwinesque explanation of evolution jibes well with the common law’s historical development, but not in a way that mainstream jurists would prefer or recommend. In the third section, I explore the implications of recent bio-technology advances for efforts to understand evolution in biology and law. The fourth and final section looks at the common law’s potential for effecting good and bad changes as a measure of its moral and political valence. Throughout the paper, my overall ambition is to problematise the whole notion of ‘progress’ and demonstrate that what passes as progressive is as local and historical as any other idea. As the great Hibernian Robbie Burns put it, “Look abroad through nature’s range./ Nature’s mighty law is change.”

AN EVOLVING IDEA

In regard to the common law, the basic thrust of the jurisprudential challenge is to explain the tension between ‘stability’ and ‘change’. Whereas even the most reactionary theorist admits to some need for change, the most radical critic concedes that a degree of stability is desirable. However, despite the often robust disputes over the appropriate balance of these forces, there seems to be a shared commitment to the underlying idea that there is some elusive, but enduring method or measure by which to locate a workable proportion between stability and change or between tradition and transformation. Moreover, this algorithm must not only achieve such an equilibrium,

but also must ensure that any changes or transformations are always in the direction of normative improvement. In short, jurists and judges must be assured that, in spite of the occasional set-back or wrong turning, things are getting better and better by dint of the common law's own social discipline and historical development.

It is largely recognised that, while the legal past must and should play a central role in the law’s present and future development, that resort to the legal past need not be restricted to particular decisions made or a mechanical application of them. Incorporating, but not restricting itself to such decisions, the modern perception of common law development emphasises that the most appropriate use of the legal past is less about a formal and technical enforcement of precedential authorities and more a dynamic and expansive meditation on their underlying rationales and structure. It is accepted that the past matters, but there is considerable disagreement over why and how it matters. Accordingly, common law adjudication is viewed as an exercise in principled justification in which the body of previous legal decisions is treated as an authoritative resource of available arguments, analogies and axioms. Judges are considered to judge best when they distil the principled spirit of the past and rely upon it to develop the law in response to future demands. Nevertheless, in putting such a theoretical commitment into practical operation, the pressing challenge remains the same – how is it possible to balance stability and continuity against flexibility and change such that it results in a state of affairs that is neither only a case of stunted development nor a case of ‘anything goes’?

The traditional set of answers to this balancing conundrum is that, by and large, ‘the law evolves according to its own methodology’. Indeed, the evolutionary methodology of the common law is defended and celebrated by almost all traditional jurists and lawyers. Eschewing notions of revolution or stasis, most judges and jurists insist that law evolves incrementally rather than leaps convulsively or stagnates idly. Glossing its apparent messy, episodic and haphazard workings, they would choose to treat and defend the common law as a polished, integrated and teleological process which gives rise to a resourceful, flexible and just product. Although there is much disagreement among traditional scholars about the precise dynamics and thrusts of this process, there remains the unifying commitment to demonstrating that not only can the common law balance the competing demands of stability and change, but that it can do so in a legitimate way that respects the important distinction between law and politics. In doing this, jurists strive to move beyond a discredited formalism to a more sophisticated account of adjudication as a creative and disciplined practice, without turning it into an open-ended ideological exercise. Accordingly, although the extent of their confidence waxes and wanes, traditional jurists and judges maintain that it is possible to provide compelling answers to the questions about how to balance tradition and transformation, about how to justify creativity in a supposedly stable system, and about how to distinguish the common law from its informing political and social context.
This kind of account of the workings and development of the common law underpins most legal literature and is endemic in jurisprudential writings. For example, in an otherwise unexceptional judgment on personal injury damages, the Chief Justice of Canada gave expression to the common understanding about how the law evolves. So typical is her account and so uncontroversial is it in most legal circles that it deserves stating in full:

Generally speaking, the judiciary is bound to apply the rules of law found in the legislation and the precedents. Over time, the law in any given area may change; but the process of change is a slow and incremental one based on the mechanism of extending an existing principle to new circumstances. While it may be that some judges are more activist than others, the courts have generally declined to introduce major and far-reaching changes in the rules hitherto accepted as governing the situation before them.

There are sound reasons supporting this judicial reluctance to dramatically recast established rules of law. The court may not be in the best position to assess the deficiencies of the existing law, much less problems which may be associated with the changes it might make. The court has before it a single case; major changes in the law should be predicated on a wider view of how the rule will operate in the broad generality of cases. Moreover, the court may not be in a position to appreciate fully the economic and policy issues underlying the choice it is asked to make. Major changes to the law often involve devising subsidiary rules and procedures relevant to their implementation, a task which is better accomplished through consultation between courts and practitioners than by judicial decree. Finally, and perhaps most importantly, there is the long-established principle that in a constitutional democracy it is the legislature, as the elected branch of government, which should assume the major responsibility for law reform.

Considerations such as these suggest that major revisions of the law are best left to the legislature. Where the matter is one of a small extension of existing rules to meet the exigencies of a new case and the consequences of the change are readily assessable, judges can and should vary existing principles. But where the revision is major and its ramifications complex, the courts must proceed with great caution.3

In its relatively short span, McLachlin’s judgment encapsulates and highlights all the motifs of the traditional understanding of how the common law does and should work both as a general process and a particular undertaking for individual judges – slow growth, principled extension, institutional deference, professional competence, political neutrality, cautious revision and, most importantly, progressive development.

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3 Watkins v Olafson [1989] 2 SCR 750 at 760-761 per McLachlin J (as she then was).
It is entirely clear that, while she is attuned to the competing demands of tradition and transformation, she also is convinced that some satisfactory, principled and long-term trade-off is possible and recommended. On this view, the common law is a firmly grounded, finely balanced, ethically defensible, institutionally justified, politically legitimate and self-improving enterprise.

In championing an evolutionary methodology, common lawyers trade off the established theories of biological development and, most importantly, benefit from its scientific pedigree. It has been a constant worry of many common law judges and jurists that their discipline is treated as 'unscientific' and, therefore, second-rate or sub-standard by other scholars.4 By drawing striking parallels between nature's operation and common law development, legal theorists have been able to reduce that insecurity. In one fell swoop, they can both explain the common law's development and legitimate it as an objective and natural process – this is a powerfully seductive possibility for judges and jurists. Of course, the idea of 'evolution' is almost as old as society itself. It can be traced to the Greeks of whom Aristotle offered the most compelling ideas about the continuity and developing nature of all living things. In the many centuries before Darwin's mid-nineteenth century seminal contribution, 'evolution' appeared in many different incarnations. Yet the common thread to most offerings was that there was some notion of progress at work in which the world was not simply on the move, but heading towards some sophisticated end-point, be it theological in plan and purpose or not. The etymological roots of evolution are in the Latin evolvere which means 'to unroll' or 'to unfold'; it was generally used as a synonym for 'predictable progress'. Perhaps because of its own insecurities, jurisprudence jumped on the Darwinian bandwagon of the nineteenth century more quickly and more zealously than most other disciplines. Indeed, from the pioneering work of Maine, Holmes, Wigmore and Corbin through to more recent technical efforts, the evolutionary motif has always loomed large over jurisprudential efforts to explicate the nature of the common law. While the resort to an evolutionary methodology is well-nigh universal, it is deployed across the full range of uses from metaphorical through analogical and homological to even literal.5 Contributing to a general tendency in the humanities at large, jurists have utilised evolution not only to explain the past of the common law and its present dynamic, but also to predict and propose its future direction. Consequently, whether

4 It remains a constant jurisprudential refrain that the study of law can and should become more 'scientific' if it is to accorded sufficient scholarly respect. See, for example, Thomas Ulen, “A Nobel Prize in Legal Science: Theory, Empirical Work, and The Scientific Method in The Study of Law” (2002) University of Illinois Law Review 875 at 877 (“the move toward a more scientific study of law will have greater benefits than costs”). This seems a vain and unnecessary aspiration.

used in a casual or causal way, ‘evolution’ is an ubiquitous and persisting concept in jurisprudential discourse about the common law.

In this paper, I want to resist the traditional characterisation of the common law as a mythical or mystical enterprise which largely has an existence of its own, which is propelled forward in large part by dint of its own intellectual and moral integrity, and which is always fashioning itself into a better and more just system. As such, the common law’s development cannot be presented as an evolutionary stairway to juridical heaven in which the acolytes’ task is to adopt an appropriate frame of mind, locate the first step and then follow it to wherever it leads. Instead, the common law is better understood as a rutted and rough road that has innumerable twist-and-turns and no particular destination; any particular route taken has been chosen from among the countless and constantly proliferating possibilities for change. Efforts to provide maps or timetables for future development are simply wishful thinking and only have possible impact by that fact alone. Moreover, any comfort that traditionalists draw from the idea of evolution is cold and, therefore, misleading. There is no idea of progress that is inevitable or ingrained in the common law. A lingering belief that there might be only leads to a hubristic arrogance that masks a shallow and ultimately oppressive account of human development which subjugates ingenuity and compassion to conformity and acquiescence. Grand theories do not work whether they are generated from a moral-religious perspective or from a biological-scientific standpoint; there is no grand design or deus ex machina which helps in predicting what will or must happen next.

A BETTER FIT

One of the central issues that has dogged both scientific and jurisprudential debate has been the perennially controversial question of ‘progress’. It behoves any scientist or jurist who is serious about their discipline to take some stand on the freighted relation between the notions of change and progress. To frame this debate in terms most appropriate to the project of this article, the enduring line of division is fairly predictable. Is change in nature or law simply a shift from one state of affairs to another over time? – what I will call the ‘chronological thesis’. Or does that shift occur in the direction of a better from a worse state of affairs? – what I will call the ‘normative thesis’. There is obviously an intimate connection between this controversy and the question of whether nature and law is unfolding in line with some design or is moving closer to a more perfect approximation of its essential self: the capacious shadow of a pseudo-Creationist approach falls over most of the entanglements in both scientific and jurisprudential study. Notwithstanding this, many scientists and even more common lawyers subscribe to an evolutionary account that eschews a Creationist commitment, but still insists that there is a positive and progressive movement to nature or law’s development. However, it ought to come as no surprise to learn that I do not subscribe
to such a position. I maintain that nature and law are simply moving on largely in response to the demands and opportunities of their changing environmental situation. Neither always getting better (or worse) nor advancing in any particular direction, they are simply changing. While no one should be only taken at their word, I tend to agree with Darwin’s own assessment that, “after long reflection, I cannot avoid the conviction that no innate tendency to progressive evolution exists.”

The debate in biology over whether nature progresses is persistent. Since before Darwin’s time and now after, scientists have locked horns over whether there is in any normative direction to nature’s chronological development – Is there advancement or only alteration? Is there an evolutionary scale or order which measures the relative pace and development of particular organisms? Is the bear higher on the evolutionary scale than the beetle or birch? And has the bear progressed in evolutionary terms more than the beetle or birch? Despite the few explicit attempts to argue that there is evolutionary progress and the many implicit acceptances of such evolutionary progress, there are almost no cogent accounts of what the concept ‘evolutionary progress’ might mean and what valid inferences might be drawn from such a concept. Moreover, I would argue that there can be no explanation of evolutionary progress that does not smuggle specific prescriptive preferences into universal descriptive terms. The distinction between facts and values and between objective and subjective is by no means as clear as many scientists and lawyers would argue or assume.

The line is deceptively blurred and itself shifting between (a) accounts of progress in terms of the phenomena to be described or evaluated and (b) accounts of progress in terms of the methods or explanations that are used to describe or evaluate those phenomena. On a reasonably traditional account of Darwinian evolution, there is no reason to assume that evolution would move in a straight line at all. Indeed, there are many reasons to suggest that evolution would not move in a straight line. And, even if it did so move in a straight line, there is no reason to assume that it is constantly moving from ‘good’ to ‘better’.

The traditional ‘normative’ approach generally assumes that there is some upward movement to evolution. Whether evolution is thought of in gradualist terms (ie, through a relatively stable and incremental flow over time) or in punctuational terms

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(ie, by large saltations sandwiched between periods of stasis), it is claimed that there is over the long haul a sure and steady progress. However, the key challenge for proponents of this approach is to identify and define the elusive quality which evolution is supposedly embodying more and more over time. Although it was not always the case, there are few scientists who would insist that there was an overt ethical cast to this quality; the belief that evolution possesses an ethical quality is confined to the hard-line creationists. The two main candidates for the task of fleshing-out the quality are complexity and fitness. Yet their similar and related claims do not hold up to critical scrutiny. For instance, the connection between greater complexity and progress is far from clear. First of all, complexity is not an all-or-nothing quality, but can be a balance between more and less complex. The relative complexity of an organism is usually accountable more by reference to its rate of evolution than any definite assessment of its overall structure. While some organism change more quickly than others, this is hardly tantamount to them being more advanced or better. Moreover, it is unclear whether this measure of complexity is to apply to nature at large or particular organisms. While the overall system might be becoming more complex, this is not at all the same as claiming that all organisms are becoming more complex or that an increase in complexity is the same as progress in the sense of ‘getting better’.

Furthermore, there is little necessary correlation between becoming more complex and becoming more fit; the relatively less complex earthworm is no less fit than the relatively more complex emu in the sense of its environmental or reproductive success. In general, there are three general adaptive levels of organisms – the well-adapted, the ill-adapted and the adaptively-neutral. While their particular balance will likely shift and change, it is likely that they will all be present at any time. However, the adaptiveness of any organism is not absolute and intrinsic to the organism, but will itself vary relative to its local environmental context. To take any other position is to essentialise ‘adaptiveness’ which is a long way from the evolutionary ideas of Darwin. The tendency to local (ie, in specific historical and environmental circumstances) adaptation in individual organisms cannot be equated to any systemic tendency to universal progress. The animal that changes from being darker-furred to fairer-furred in response to changing environmental conditions is not by virtue of that fact becoming more fit in any universal sense. Indeed, the creature might well be relatively less adapted than its earlier darker-furred ancestor. Today’s well-adapted organism can become tomorrow’s ill-adapted organism if there is a significant enough change in environmental conditions. Consequently, while complexity might increase at certain times and in certain ways, it is neither an inevitable nor inexorable phenomenon. Progress is not about greater complexity. It is only about organisms changing in ways

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that are a better adaptive fit to the present circumstances of their life. Of course, this can occur by an organism becoming more simple than complex: the average survivor is better adapted than the average non-survivor.\(^9\) However, this only applies if the environment remains relatively stable. If there is a significant change, then previously well-adapted organisms will become less-adapted or even maladapted.

Against the ‘normative’ accounts of natural selection, therefore, it can be argued that evolution does not progress or result in perfect or optimal results; it is an entirely context-specific and relative process that picks the best of what may be an entirely bad lot. Indeed, mindful that over 99% of all species that have ever existed are now extinct, it can be stated with confidence that the failure to adapt is much more the rule than the exception. ‘Fitness’ is not equivalent to or synonymous with ‘better’, but simply a shorthand conclusion for the fact that an organism or one of its evolved features works well in the sense of being adaptively successful in particular geographic and historical circumstances. Indeed, it is highly unlikely that a process like natural selection, when properly understood, would move in a straight line, whether morally-enhancing or not. By and large, evolution will be generally asymmetrical in that organisms adapt to the environment, not vice-versa. Moreover, while some organisms will impact their local and immediate environment and which in turn will affect the evolution of the fittest organisms, there is no evidence to suggest or suppose that the environment itself changes in accordance with any set-plan or predictable logic. By assuming that such adaptation operates with some natural and unerring Whiggish tendency, Darwin’s central ideas are crassly ignored or shamelessly bastardised.

In light of these particular cautions about talk of ‘evolutionary progress’ in the natural world, it is possible to offer some general observations about progress in the common law’s development. The conclusions are far from encouraging to those committed to any kind of ordered or progressive movement: the ‘chronological thesis’ seems to have a considerable edge over the ‘normative thesis’. There is little basis for jurists’ tendency to maintain that evolution is weeding out the ethically bad from the ethically good. It is, of course, entirely sensible to talk about law in terms of its substance and merit; this is the standard fare of much jurisprudential work. However, if it is difficult to give a fixed and objective meaning to the quality in biological study, it is doubly so in the world of law. If it is intended to signify some moral standard, the debate over the criteria for substantive or ethical worth is as contested as any debate could be. Even if one could agree on such criteria, it is hard to imagine that the common law’s development would be moving in one advancing direction, whether by smooth gradations or by jerky steps. Even the most traditional scholar is prepared to concede that there are spurts and stalls in the law’s development. Moreover, it is also unlikely that the movement of the common law would be historically flat-lined, as the gradualist

\(^9\) See generally Ernst Mayr, *What Evolution Is* (Series/Basic Books; October 2001) 278
approach urges. No traditional jurists would seriously advance the claim that the law is always in exactly the same state of moral worth (whether it be high, low or middling). It is much more likely that, insofar as law could be measured by reference to one particular set of moral lights, it would rise and fall in its success as recommended by a punctuated equilibrium approach. Accordingly, if we are looking to locate some regimen or rule to describe and forecast the future development of either the common law or its social environment, then we can do no better than to subscribe to “the law of higgledy-piggledy.”\(^\text{10}\) As tantalising as it is, both the common law and the social environment only offer up the secrets of their development after the event. Jurisprudential wisdom, like most varieties, is always better in hindsight.

In both law and nature, ideas of progress quickly become confused with directionality; it is difficult to posit progress in any moral sense without positing a destination towards which such change is getting closer and closer. However, such a possibility remains attractive to the common lawyer as it holds out the promise of both predictability (\(ie\), knowing where we have been and where we are headed will tell us what comes next) as well as an authority (\(ie\), the basis for prediction is scientific as much as speculative) to the common law’s historical development. However, if there is no progress and there is no historical directionality, the acceptance of historical accident and contingency will perhaps persuade people to abandon claims to authority and predictability. Furthermore, people might also come clean on their own normative preferences and recognise that law does not give meaning to life, but that life gives meaning to law. In short, accepting that life is as much accidental as planned, it might be grasped that the ambition of total command is illusory. While it is true that law might “evolve in the direction of greater fit with its environment,”\(^\text{11}\) there will always be a productive tension between the law’s notion of fit and the changing social, political and cultural make-up of that environment. Like nature, the common law is a pragmatic and piecemeal response to changing social conditions over time. It is a historical and, therefore, political endeavour in which ‘anything might go’. That ‘anything’ rarely does ‘go’ is an indicator not of certain natural qualities to law, but of persistently constructed constraints that need examining for relevance and validity. Again, it is the common law’s tendency to stability rather than transformation that baffles. The fact that law changes is a given: the fact that it does so selectively and slowly is what should engage jurists’ attention and analysis.

REVOLUTIONARY ROUTINE

The historical record suggests that Kuhn’s well-known ideas and interpretation of Darwinian evolution have a definite salience for explaining the common law’s development. It will be remembered that, whereas Karl Popper maintained that scientific knowledge accumulates through a ‘falsification’ process akin to natural selection, Thomas Kuhn expanded on this by showing how science was an inescapably social undertaking and that it was, therefore, “difficult to see scientific development as a process of accretion.” Science occurs and was made possible by the existence of disciplinary matrices or ‘paradigms’ which are situated within history’s political currents, not apart from them. According to Kuhn, paradigms are essential to scientific inquiry because “no natural history can be interpreted in the absence of at least some implicit body of intertwined theoretical and methodological belief that permits selection, evaluation, and criticism.”

The typical developmental pattern of a mature science is not through a steady and cumulative acquisition of knowledge, but through the successive transition from one paradigm to another through a revolutionary phase. Moreover, in that paradigm shift, there is a degree of ‘incommensurability’ between past and present. Within an established paradigm, progress is obvious and largely uncontested in that a set of shared problems are answered in a mutually-agreed fashion so that there is an increase in articulation and specialisation: scientists work only for an audience of colleagues which shares values, beliefs and standards that can be taken for granted. However, this ought not to be treated as comparable to an inexorable closing-in on some ultimate truths. More solutions to more problems might be achieved, but this is not the same as an ever-closer approximation to a final and complete account of nature. Because there is a movement away from something does not mean that science is making an irresistible advance towards some fixed, objective and supreme destination.

The conceptual shift from a Kuhnian account of the scientific enterprise to the operations of the common law is very suggestive. In the same way that there is progress

13 Like Darwin on biological evolution, Kuhn did the same for the evolution of scientific knowledge in that he refused to accept the existence of any teleological or goal-directed account of evolution. At best, what occurs is that “successive stages in that developmental process are marked by an increase in articulation and specialisation.” Eschewing any internal or directional logic to evolution, Kuhn insisted that, in the same way that the interaction between organisms and changing environmental conditions determines the course of natural evolution, the resolution of scientific crises is effected by the conflict within the scientific community over the fittest way to practice future science. In short, for Kuhn, scientific progress is as much about professional values and institutional commitments as it is about neutral methodologies and objective knowledge. ibid, Structure, 170-72.
in ‘normal science’ (ie, within an accepted and established paradigm where there are a wide series of group commitments) in that puzzles are solved and facts accumulated, there will also be progress in law: rules will be refined and principles will be honed. This can be illustrated by numerous common law doctrines in which the court makes a breakthrough decision and then sculpts out the more detailed contours of the new rule over an extended period. For instance, having established the general concept of the ‘constructive trust’, the courts have worked to determine in what circumstances persons will have the obligations of a trustee imposed upon them; incursions into both the domestic and business realm have been sanctioned. Again, having in introduced the ‘reasonableness’ principle into administrative law, the courts have busied themselves with identifying which agencies and institutions are required to comply with its requirements; the scope and nature of administrative actors embraced by the rule have been slowly broadened. In both situations, however, it should be clear that, while the development of such doctrinal details may appear to be technical and uncontroversial, their elaboration is as political as the initial decision which made the original breakthrough, albeit it of a more modest and focused nature. Moreover, in the same way that the breakthrough decision (eg, Pettkus for constructive trusts and Wednesbury for administrative reasonableness) often occurred as a relatively revolutionary decision, so there will arise a subsequent doctrinal crisis in which what was once thought settled no longer meets contemporary demands or expectations. It is not so much that the developed doctrine will have run into internal difficulties in the sense of being found to possess latent illogicality or incoherence (although it well might). Rather, the doctrine will be seen to have outlived its substantive usefulness and be discarded for a more immediately well-adapted set of rules and principles. It is less that the doctrine has been found to be professionally wanting from an internal standpoint and more that it has lost its political salience from an external perspective. In short, law and its particular doctrines are seen to be thoroughly political in their rise, elaboration and demise; legal tradition demands political transformation.

However, while it is reasonable to talk about progress within a particular doctrine, it seems entirely wrong-headed to talk about overall progress in the common law in the sense that a particular doctrine reaches a level of sophistication, complexity or fitness that makes it somehow perfect or even simply better for all time. Like the biological organism, the fitness of the common law can only be assessed in terms of its informing environmental context. Lawyers too often mistakenly label a highly adapted doctrine as a universal legal good which can be relied on in all circumstances, in all places and at all times. Yet the history of the common law suggests that all such judgements about

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14 See Pettkus v Becker, [1980] 2 SCR 834 and Wednesbury Corporation v Ministry of Housing, [1965] 1 All ER 186 (CA)
doctrinal merit must be contingent and conditional. As the furry animal cannot be said to have the perfectly-coloured coat outside of a particular environmental milieu (ie, brown for temperate conditions and white for polar conditions), so a legal rule or principle cannot be said to be legally ideal outside of its environmental setting. Moreover, because there is a movement away from some particular legal doctrine toward a different one, it does not mean that the common law is becoming more pure or more close to its supreme form. Any particular doctrine must be assessed in local as opposed to universal terms. The fact that the doctrine of constructive trust was once thought to be rightly inapplicable to co-habiting couples or that it is later thought to be rightly applicable is evidence of prevailing views of political substance, not enduring attributes of legal form. Whatever else it is, the common law is a work-in-progress which is always on the move. As such, the history of the common law is as much one of discontinuity and contingency as anything else: lawyers struggle to deal with the socio-political forces, themselves beyond any simple or fixed elucidation, which impinge on their lives and to which they contribute to their activities. Like all histories, the ‘progress’ of the common law is best understood as a way of coping that is more or less successful in direct proportion to its capacity to achieve substantive justice in the contextual circumstances.

Much commentary on the common law’s development takes an entirely different tack. For example, in a recent historical foray into the common law, D.J. Ibbetson provides an informative and detailed tour of the law of obligations’ history. It is a fascinating and traditional trip; it is almost entirely descriptive and accepts most things at face-value. There is no real effort to capture the dynamics of the common law or its socio-historical setting; it is a formalistic and internalist account of law. Instead, he relies on an implicit and immanent logic in the common law which seems to thread together the eclectic efforts of multitudinous judges across vast time and varied contexts. There is a strong Popperian flavour to this process. For Ibbetson, the common law proceeds by way of an internal, mysterious and fixed logic which balances the pull of tradition and the push of transformation. In an admittedly untidy and apparently chaotic process, the common law manages to twist and turn itself through tried-and-tested manoeuvres (ie, inventive gap-filing, extensive exceptionalism, subtle distinction-drawing, etc) to meet fresh demands as it remains true to its controlling and enduring ideas; the price of flexibility is the cost of complexity. Informed by such an account, Ibbetson argues that there is a “structural continuity” which runs through the law of obligations from the twelfth century to the twenty-first. After a sweeping series of extravagant claims, he concludes that the virtues of ordered development, substantive betterment, and principled continuity are present:

whatever changes have occurred on the surface of the law, and whatever accretions have been incorporated into its fabric, at a deep level the structure of the common law has remained remarkably slow-moving.... Like an ancient building in continual use for centuries but readapted to satisfy the needs of each generation, the medieval
ground plan of the Common Law of obligations remains visible through all the
reordering of its internal features and change of use of its component rooms.¹⁵

There is so much that is wrong with Ibbetson’s analogy. It suggests that change has been
reluctant, that there is a steady decline in the common law, that the common law is a
relatively inorganic process, that the sources of change are mysterious, and that there is
a ‘structural continuity’ that transcends or underpins any changes effected by time. Most
importantly, this architectural analogy elides entirely the fact that the development of
the common law is not simply a neutral alteration by the ravages of time. Insofar as there
is any continuity over time, it is the combined work of particular actors and social
forces. Historical patterns and doctrinal trends are little more than medium-term effects
of local efforts at ‘the best thing to do’. What counts as ‘the best thing to do’ will change
as the political circumstances and social contexts shift. As Kuhn asserts, “part of the
answer to the problem of progress lies simply in the eye of the beholder.” I take this to
mean that perspective is important and that what counts as progress will not be a given
fact, but a matter of commitment to particular paradigms because “there is...no theory-
independent way to reconstruct phrases like ‘really there’.”¹⁶ Of course, there can be a
workable level of prediction at a very local level and in specific contexts, but the larger
and more general questions will never be resolvable in any final or persuasive manner.
The sheer complexity and richness of contingent social life ensure that confidence or
certainty in fixed solutions will remain elusive.

The only injunction that the common law seems to offer to its judicial and juristic
operatives is ‘go slowly’. The claim is made that the common law is not only a formal
process of argumentive growth, but that it is also a substantive framework which places
real constraints on the content and direction of common law development. Yet the
history of the common law recommends, contrary to what Ibbetson and his
jurisprudential clan propose, that ‘anything might go’ provided that you can persuade
others that such a doctrinal change is substantively desirable. Of course, if it is possible
to persuade an already institutionally predisposed audience of lawyers that such a
change is more a continuation of a doctrinal tradition that a radical break with it, then
so much the better. However, as the incidence and importance of great cases illustrates,
even a doctrinal and abrupt revolution will be accepted and the ‘go slowly’ injunction
ignored, if the proposed change is sufficiently palatable to the substantive political
appetites of the legal and, on occasion, public establishment. The legitimacy of the
common law is more dependent on the rate and style of doctrinal development than its
substantive content and direction.¹⁷

¹⁵ David J Ibbetson, A Historical Introduction to The Law of Obligations (Oxford University Press 1999)
¹⁶ Kuhn, supra note 13 at 163 and 206
¹⁷ I leave aside the central problem of whether the common law can ever be said to be constantly
improving over time in its moral or political worth.
Legal feathers are much more ruffled by sudden switches in direction than slow accretions over time: the snail is the chosen biological symbol of the common law, not the hare. Yet, such a traditional ‘go slowly’ account of the common law (even when its injunctions are actually being heeded) has nothing to say about what is ‘the best thing to do’, where to go slowly, or whether there are any substantive limits on change – it is all about the pace, not the direction of movement. Again, the common law is a work-in-progress whose progress is not channelled by law’s own logic, structure or extant values. On the contrary, the common law simply works itself in line with mediated pressures of its informing social, historical and political situation. Like so much else, as Kuhn said of scientific work (and I repeat), “part of the answer to the problem of progress lies simply in the eye of the beholder.”

OFF LAMARCK

While there are a number of similarities between movement and development in law and in biology, the operation of the common law has been different in that law is not as ultimately restricted in the short term as natural organisms or patterns of behaviour. In biology, what presently exists limits the extent of what changes that can be made over the immediately ensuing generations; the structure of existing organisms precludes certain changes and mutations. After all, bugs cannot become bears overnight, even if they might do so given enough time and with the appropriate range of environmental prods. The evolutionary trip from the primal soup to gourmet bouillabaisse is a very long one of over four billion years. In law, the transformative possibilities are more immediate and the trip is much shorter. Although the precedential traditions of law might well act as a kind of institutional check on doctrinal metamorphosis, its structural constraints are not as embedded and unavoidable as those necessitated by the mechanisms of Darwinian ‘descent by modification’ in the natural world. Yet, in the world of common law adjudication, it is quite possible for such dramatic transmogrifications to occur: common lawyers can create and select any solution they wish.

Indeed, not only are there ample real-world examples of such revolutionary interventions, but these so-called great cases, like Donoghue and Rylands, are often celebrated as defining moments in the life and process of the common law: “the point about the common law is not that everything is always in the melting pot, but that you never quite know what will go in next.” Consequently, as history reveals, the rate and control of change in the biological and legal worlds was very different. However,

18 Kuhn, supra note 13 at 163
whatever has been the case is now no longer as obvious or as uncontested. The relatively recent advent of biotechnology, especially genetic engineering, has put a change to all that – change might be as immediate and as controlled in biology as it has been in law.

Genetic engineering is not a new phenomenon. The ability to manipulate or modify organisms through controlled breeding and experimental matings has existed for centuries. What is new is the sophisticated advance of genetic engineering. Only a couple of decades ago, the innovative frontier was located around efforts to perfect artificial selection and reproductive intervention through a variety of bio-medical techniques (*eg*, *in vitro* fertilisation). This is now relatively old hat in that all the present commotion is about bio-chemical efforts to manipulate directly the genes themselves through recombinant DNA technology (*eg*, cloning). Scientists have developed the capacity not only to create new species, but also to interfere deliberately in the cellular constitution of existing organisms so that specific changes will persist as a particular cell multiplies. While there are many limits to the application of these techniques, it is likely that these will become fewer as scientific research continues: logic, physics, imagination and moral sensibilities will become the only restraints. Moreover, once it is appreciated that these techniques can not only be employed to breed desirable traits in plants and livestock, but also be utilised in re-engineering human chromosomes, the broader implications (*ie*, political, social, moral, *etc*) become readily apparent. As such, genetic engineering, as well as other bio-technological innovations (*eg*, cognitive neuro-science, neuro-pharmacology, *etc*) holds out immense promise as well as enormous peril for its future development and use – *human control over life’s processes*. There now exists the opportunity and responsibility to tamper with the very fundamental terms of existence. It is a challenge of Promethean proportions because now “a species is not merely a hard-bound volume of the library of nature, ...[but] it is also a loose-leaf book, whose individual pages, the genes, might be available for selective transfer and modification.”20

For all the improvements in medical treatment and agricultural production, there are likely to be dubious possibilities for human well-being from genetic engineering as well as unintended and malign consequences; the spectre of eugenics (a term originally coined by Darwin’s cousin, Francis Galton for the study of human biological improvement) hovers over bio-technology. There are as many Jeremiahs on the biotechnology scene as there are Polyannas; ‘genetically-transformed’ is not exactly a universally favoured moniker whether applied to pomegranates or people. While we seem to have cracked the code of life, it does not follow that we know what it means or what should be done with it. Like all other languages, the genetic code will not

speak for itself. Indeed, the biotechnology revolution not only changes what we can do, but threatens who we think we are; it challenges our moral and ontological sense of ourselves as much as our medical and social appreciation of ourselves. Yet there is no reason to assume that this colossal power will be exercised for the human good or that there will be developed concurrently a better critical faculty for discerning what that human good is. Foretelling some of the philosophical implications of the trend towards greater control over the future development of life, Julian Huxley wisely opined that humans will no longer be satisfied to understand the creative mysteries of life because they are fated to become the creators of those mysterious lives. As such, people become not merely the products of the evolutionary process, but also “the business managers for the cosmic process of evolution.”

In an important sense, the biotechnology revolution has introduced a Lamarckian-like dimension to evolutionary biology. It will be remembered that Jean Baptiste de Lamarck (1744-1829) laid the foundations for much of modern evolutionary biology. He explained convincingly the contested move across time from simple molecules to complex organisms. However, he made the unfortunate blunder of claiming that such development was brought about through the heritable effects of learned habit modifying the various parts to fit and adapt to changing environmental conditions. This notion of evolution through ‘the inheritance of acquired characteristics’ is in direct contrast to Darwinian’s thesis of ‘modification by descent’. Mindful that Lamarck was working even further before the discovery of Mendelian genetics than Darwin, his failure to understand the principles of mutation and transmission is hardly surprising. Nevertheless, not only has the Lamarckian implication that there is only an indirect effect of changed environmental conditions as the organism experiences new needs and adopts new habits been decisively rejected, but the related claim that variation and evolution was, therefore, more directed than random has also been abandoned. The presumed connection between growth and inheritance is no longer a part of accepted wisdom in that genetic research has demonstrated that inheritable DNA is not affected by the growth of the parental organism. Instead, it is now accepted that mutations occur independently of and are transmitted without recourse to the development process. While Darwin had conceded that habit, after sifting and repetition, might become instinctual over time and be duly inherited, he did not accept that such adaptations occurred through a conscious act of will by the organism. Consequently, while organisms have an inherent capacity to vary, a Darwinian account of evolution stands against the Lamarckian idea that there is an innate tendency to progressive perfection.


because such a concession would import an unsustainable teleological element into biology.

By suggesting that the biotechnology revolution has introduced a Lamarckian-like dimension to evolutionary biology, I do not mean that Darwinian ideas must be reconsidered or that Lamarckian insights are valid again. On the contrary, I simply mean that it is now possible for one species to obtain a degree of willed control over the evolutionary process not only of themselves, but the biological world in general. There is now the realistic possibility of the ‘nurture of nature’. Consequently, by ‘Lamarckian’, I simply make shorthand reference to the idea that some willed intervention in the Darwinian process of evolution is possible. However, I most certainly should not be taken to concede that an organism can will its own physiological and mental transformation such that they can become heritable through genetic transmission or in a gene-like memetic way as some commentators, like Daniel Dennett, recommend. In the same way that snakes did not lose their legs through prolonged lack of use and giraffes did not develop long necks by stretching them and passing on the ‘stretched neck trait’ to their offspring (as Lamarckians suggest), so a brown-furred creature cannot become a white-furred one by only a concerted exercise of its will, no matter how sustained and necessary such a change is to its continued existence. However, what genetic engineering does allow is for such feats to be performed quickly and clinically by the human species. Consequently, while the biotechnology revolution introduces a Lamarckian element to the evolutionary process, it does not replace the Darwinian dynamic. Genetic engineering must act within and in accordance with the accepted Darwinian framework. Humans can transform the snake and the giraffe, but the snake and giraffe still cannot transform themselves.

The modern capacity to re-engineer natural development, especially the ability of humans to transform other humans, has important and wide-reaching implications for any effort to understand law in light of evolutionary principles. In particular, the whole notion of ‘design’ must be revisited in light of the bio-technology revolution. In both science and law, it can be reported that people make plans and act upon them. After all, law has always been a rational activity in that people reflect upon what is best to do and how that might be achieved; it is not a game of chance or a blatant exercise of arbitrary action. Yet even though science has now developed the tools to ensure that biology is not only a random (i.e., change is dependent on unplanned and unpredictable genetic mutations) and necessitated (i.e., the surviving mutations are those that benefit the organisms’ adaptive fit) response to environmental situations, it still remains largely beholden to its environmental context. Even after the bio-technology revolution, currently well-adapted organisms (e.g., humans) can be devastated by substantial change in environmental conditions (e.g., global warming, galactic disturbance, etc). Even on a

smaller scale, in both biology and law, individual initiatives are often overwhelmed by a more general unplanned and aggregating dynamic which is response to external conditions. The whole does not discipline the parts in the way that jurists tend to believe, but instead tends to direct the parts in a way that is externally-explicable, even if not internally-rational. There is no ‘invisible hand’ that is working to co-ordinate the scattered efforts of judicial generations, except perhaps the erstwhile after-the-fact efforts of traditional jurists. Indeed, in contrast to legislation, the common law’s traditional appeal is found in its relatively uncoordinated and organic character. Contrary to the natural lawyers of the jurisprudential world, the common law’s whole is no greater than the sum of the parts, at least not on some consistent or moral basis. Over time, the quality of the common will occasionally move between being less and more than the sum of its parts, but it will usually be the total of its disparate parts. The common law is chaotic and coherent in relatively equal and contingently shifting measures.

Nevertheless, even though in both biology and law, design is a genuine possibility, it does not mean that either scientists or common lawyers are free to do or achieve whatever they wish. Technology has loosened the constraints on design, but it has not done away with them entirely. There are two specific constraints that warrant consideration – the ‘environmental’ and the ‘Frankenstein’ factors. The first flows from the general fact that any organisms’ individual development is as heavily influenced by their environmental conditions as it is by their genetic composition. This is particularly the case with human development which is plastic, but not indefinitely so. The connection between genetic engineering and social behaviour remains indistinct and tenuous. How a particular individual develops is historically contingent and will itself depend on environmental conditions and adaptation. Even clones will not be exactly alike as the identical genetic make-up will be differently expressed in varying environmental circumstances. Indeed, the possibility of isolating the molecular pathways between particular genes and particular behaviour is remote because of the complex interaction between genes and the environment: the genotype (ie, the DNA) does not determine exclusively the phenotype (ie, the actual organism) as this development is influenced by a host of different and interacting environmental factors and facts. It is a complex meld of nature and nurture in which “the genes lay down the ground rules, but in the end our upbringing and experience makes us what we are.” Accordingly, while genetic engineering increases the opportunities for human design, it does not dispense entirely with any limits to how bio-technological tools are utilised.

Indeed, common lawyers have always known this – the power to reshape the world in line with some desired vision, utopian or dystopian, is still conditional upon environmental factors. The pragmatic bent of the common law has made lawyers and judges understandably sceptical about such grand undertakings: the tentative probe is preferred to the systemic overhaul. This is largely because there is a recognition that whether a particular solution is viable or valuable will depend on the prevailing social and political milieu which is susceptible to unexpected change. Consequently, while it might be thought that the destiny of life and law is very much what we make it, what we make it will be a combination of what we wish to make it and what we manage to achieve in line with those wishes. Most importantly, the changing environment (political, historical, social, moral, etc) will impact on both processes – what we wish to do and what we are able to do. Insofar as many will maintain that what we wish for will be somehow tied to a particular notion of human nature, it must be remembered that there is no nature that somehow stands outside history or its environment that can helps us decide what values are and are not worth defending; human nature is to have no nature or, the same thing, many natures. Humans (including common lawyers) are not free to do whatever they want to do because what they want to do is affected by the wheres and whens of doing it. Lawyers are as much a product of the social environment as everyone else, albeit with a privilege and position to affect to some extent how that social environment changes; lawyers are what they are because of the society in which they live and to which they contribute. However, while we have increased control, we are not ‘in control’. Moreover, it is dangerous and misleading to leave the impression that humanity as a collective is in charge. The fact is that most people are not in control and never will be. Unless there are some massive changes to the extant political systems, it is the fate of many to be the playthings of the few. As recent history painfully reveals, the cloning daydreams of some can so easily become the chimerical nightmares of others.

As with scientists deciding what to do about bio-technology (ie, should there be human cloning?), lawyers cannot claim to resolve the future of the common law as though it were a technical matter. It involves matters of philosophy, politics, morality and even theology. There is a technical component, but it is much more limited and much less contained that lawyers or scientists would have us believe. And even technical matters are much less ‘technical’ than lawyers or scientists claim. In both science and law, the central issue becomes a political one. Having the power to impact and manipulate the broader physical environment and social landscape, the agenda of study and research must explicitly include questions like ‘what do we want to accomplish?’ and ‘what are we willing to do or give up to achieve that goal?’ And, in

26 See Paul Ehrlich, Human Natures: Genes, Cultures and The Human Prospect (Island Press, 2000)
addressing those questions, be it in law or science, viewpoint will matter – who are we asking? How do we decide who to ask? What criteria are they to use? And how do we decide between equally legitimate, but competing visions? No matter how scientists and lawyers seek to finesse these questions, they will underlie all the technical work that they do. Moreover, there are no easy or final answers to be discovered. As the general thrust of Darwin’s whole work insists, it will be a matter of historical timing as much as anything else because we are, at the most profound level, historical creatures whose faculties and fate are beholden to the changing historical context. There is no method, scientific or hermeneutical, which will rescue humanity from these heavy responsibilities. Effectively, life is a dare whose only resolution is to be found in the injunction to ‘keep on daring’. Although this will give cold comfort to most people, the real monster is the idea that, having cloned themselves, humans will believe that what they produce is deserving of admiration for that fact alone. In this sense, it is as much the spectre of hubris as that of eugenics that haunts present efforts at transforming the future in both science and law.

The second constraint on depicting nature and law as now amenable to direct and designing interventions is the ‘Frankenstein factor’. As with any mode of legal revision, genetic engineering will have unintended consequences and those consequences are in the longer-term as likely to be bad as good. The ecological interaction between nature and the environment is complex and sensitive. There is no entirely reliable way to predict the future consequences of present changes. Even small quantitative changes can wreak considerable qualitative havoc: the flutter of butterfly’s wing can begin a chain of events than can have massive consequences. This is evident in law: the effects of a decomposing mollusc in a Glaswegian’s birthday tipple and of an overflowing Mancunian mill-pond are still being analysed and assessed today across the common law globe.28 Because law is always on the move, fixing one problem will often produce problems elsewhere (eg, extending the circumstances in which tort recovery for pure economic loss is available undermined the limiting effects of contractual privity) and what was once a good or adaptive solution might soon become a bad or maladaptive one (eg, the fixed notion of property developed for a largely land-based economy is unsuited to the requirements of an e-commerce world). Similarly, there are many unanticipated or exaptive features of legal rules which can be put to better use than the purposes for which they were originally contrived (eg, the revival of trespass to chattels to prevent incursions into commercial web-sites). Again, as a work-in-progress, the common law is seen to have no inherent essence or tendency to progressive improvement: it is a constantly changing and contingent response to the constantly changing and contingent demands of its environment.

By understanding the common law as an organic process as much as a collection of fixed rules, it becomes possible to appreciate that good judging is about local

usefulness as much as global coherence. Being a work-in-progress, the judicial job is never done and must console itself by accepting that this is for the best, not the worst. Moreover, Mary Shelley's cautionary tale of the scientist-made monster who sets off a series of terrible occurrences is worth heeding. Although the chilling force of her original novel has been lost in the slew of derivative shock horror-movies, her message seems to be that it is not so much that we should do nothing for fear of disaster. Rather, we should be careful that, in doing something, we do not set off a train of events that we will not only regret, but be unable to halt. Nevertheless, as a work-in-progress, the common law dares its judicial participants to run that risk. After all, as both the best of life and law have shown, progress is what people make it. And, when it comes to the common law, what lawyers make of it will be both their responsibility and their legacy. Accordingly, in the last section, I will explore the common law's general potential for effecting both good and bad changes. In the process, I will again confirm the force and extent of the critical claim that 'law is politics'.

FOR BETTER AND WORSE

While there is a grain of wisdom to the insight that “genes are Darwinian, but civilization is Lamarckian,” it is exaggerated and misleading. If it is meant that people adapt to environmental conditions as much by choice as randomly (or, at least, as instinctive reactions to changing social conditions), it has some salience. To deny such modest claims would be silly. However, if it is meant that genetic make-up or the interaction between genetic material and environmental conditions has no relevance for civilised activities, like law, it is wrong. While people have considerable control over the development of civilisation (and, increasingly, the development of nature because biotechnology can achieve what previously took eons of environmental agitation), it is folly to suggest that such control is determinative or self-sustaining. The possibility of social engineering remains as much a conceit as it has ever been. Not only is there no guarantee that the best-laid legal plans of mice and men will not come to naught, but there are no historical grounds for confidence that such interventions will not do more harm than good. As with genetic engineering and legal efforts to regulate it, there is a tendency for lawyers to be asked to shut the institutional barn-door after the scientifically-modified horse has bolted. The most and the least that can be expected of lawyers and judges is that they do what is best, mindful that this can never be done in anything more than a conditional, contextual and modest way. Indeed, there is no better example of the common law's concurrent strength and weakness in tackling contemporary moral and political challenges than its halting and tentative efforts to

29 See Mary W Shelley, *Frankenstein* (1831).
confront the ethical challenges of the bio-technology revolution. Yet, the injunction for lawyers and judges to do what is best will seem at best platitudinous and at worst perilous. It will be protested that they need more specific and substantive advice. For better and worse, none can be offered.

The key difficulty is that ‘evolution’ is largely accepted in the biological sciences as being simply a synonym for change. Unlike in the social sciences generally and in the common law especially, there is no common supposition of improvement or advancement in any universally appealing sense. In short, evolution is an empirical phenomenon of alteration that has no necessary link to normative claims of value. Adaptation to changing conditions is the only standard of success and this metewand is itself only temporary and local in character. Once conditions change, an adapted feature can become maladapted to its circumstances. Because contingency is the order of the day, it has to be grasped that the quirky as much as the quotidian is the measure of development and change; yesterday’s peculiar is today’s prosaic and tomorrow’s passé. In a manner of speaking, ‘we are all mutations now’—who we are and what we do are functions of the vibrant dynamic between the constantly active environment and the constantly varying gene pool. In such a world, the common law’s fabled injunction of stare decisis et non quieta movere (let the decision stand and do not disturb things that have been settled) seems to be entirely the wrong sentiment or mandate. By relying too heavily on the past to resolve present disputes, common lawyers are likely destined to get the future wrong. It is necessary to cultivate an attitude that holds the push of tradition and the pull of transformation in some sort of balance. But that balance will not be found in nature because it has no moral quality. Nature is amoral and simply is: any attribution of moral worth to ‘nature’ is an entirely human projection. As such, any questions about the moral status of any particular natural state of affairs can only be asked and answered in moral terms. And this stricture applies to the ‘nature’ of the common law because it has none independently of its particular content and shape at any specific historical moment. Any balance between stability and change or between tradition and transformation will have to constantly be achieved and re-achieved in the maelstrom of history’s changes.

Accordingly, it is the main force of Darwinian evolutionary theory that biological creatures have no common or essential properties, particularly those that might be grouped together under the rubric ‘human nature’. If they did possess such an ahistorical or non-contingent quality, it would undermine much of evolutionary theory because the micro-dynamics of natural selection feed upon constant change. Variation, whether it is by genetic mutation, sexual couplings, hereditary drift or the like, is the sine qua non of evolution; species develop and originate from this fundamental process. Moreover, confronted by changing environmental conditions, these mutating

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organisms do the best they can to make the best of their situation. Indeed, those organisms that do best are the ‘approximate fitness-maximisers’. In environmental conditions that can change relatively quickly and often, it is better to be jacks of all trades because they are better able to adapt to new conditions than if they were masters of one trade. In a biological way of speaking, organisms that survive and thrive tend not to put all their varied eggs in the same adaptive basket. As for the common law, it is those doctrines and principles which are best able to adapt to changing social conditions that are more likely to persist and hold their own in the pressure-cooker of dispute adjudication. For instance, the fault standard in Anglo-Canadian negligence law has had such a relatively long and successful life because, at least in part, it has been malleable enough to adapt itself to a host of changing demands and expectations. While its political appeal has been crucial, its capacity to adjust its focus (from injurious acts to misleading statements), its reach (from physical damage to economic losses), and its standards (from novices to experts) has enabled it to be vital as well as reliable and to be directive as well as flexible. Of course, this is not to suggest that its adaptability is the perfect or pure manifestation of the common law’s enduring essence. It is simply to conclude that, for much of the twentieth century, Donoghue has been able to remain sufficiently well-adapted to the social and economic milieu such that its claims to allegiance are relatively better than its immediate doctrinal competitors. If conditions change or more fit competitors appear, there might well be a change of doctrine.

Some have gone so far as to argue that the common law works best when it pays scant attention to changing social circumstances. For instance, Richard Epstein offers a self-consciously static conception of the common law. He contends that the substantive principles of the common law not only can be evaluated as normatively good or bad in themselves without regard to extant social conditions, but also that they should be judged in such an ahistorical way: “in no way do [social changes] require, or permit, parallel changes in the legal order.” To put it mildly, this seems a huge over-statement of the common law’s operation as an enduring body of transcendent principles. It offers a formalist account that outdoes even the most devoted and fundamentalist of naturalist disciples. By making an outright rejection of the common law as any kind of work-in-progress, Epstein seems to elevate the virtue of stability to almost absurd heights and confound the opinions and commitments of almost all judicial artisans of the common law as to what they are and should be doing. Nevertheless, if such a static conception of the common law has any merit (and it is a big ‘if’), it is to act as a timely corrective to those who are minded to conclude that the role of the common law is and ought to

33 See, for example, Ernest J Weinrib, The Idea of Private Law (Harvard University Press 1995).
be exhausted in the effort to simply track and reflect prevailing and changing social circumstances. In other words, in recognising the common law as a work-in-progress, it is important to guard against the tendency to convert the need to be adaptive to change into a moral imperative in itself. Apart from the obvious fact that it would be a particularly foolish method by which to attempt a crossing of Hume's is/ought chasm, there is little redeeming by way of moral appeal to such an injunction. There is more to life and law than a "context-breaking brio" in which the ideal lawyer becomes Bruce Springsteen's rebel forever 'born to run'.35 Such freedom is illusory in that rebellion is not a way of life in itself, but a possible prelude to a different and better life. In social and political terms, there is a difference between the cure and the cured condition.

Mindful that change is not always for the better, it will occasionally be the case that doing nothing will be the best way to do what is best. However, it is entirely another thing to suggest that doing nothing will always (or more likely than not) be the best way to do what is best. For instance, after asserting that evolutionary change in the realm of ideas is not necessarily for the better, Judge Easterbrook concluded a judgment by stating that "most mutations in biology and law alike are inferior."36 By any lights, this is a colossal bastardisation of Darwinian thought. Mutations are neither good nor bad in themselves: a particular mutation will only be good or bad in relation to its immediate environmental context. In the same way that the utility of a darker/lighter-furred mutation will depend on the organism's natural and immediate environment, so the worth of a doctrinal mutation will also depend on the particular social and historical context within which the mutated rule is supposed to operate. For instance, it is mistaken to assume that long periods of evolutionary stasis are reflective of evolutionary excellence. Such stable periods of development usually reflect practical equilibrium rather than theoretical perfection. It simply indicates that organisms have achieved a suitable balance with and within the environment, not that the organism has somehow developed to such an extent that it is the pure realisation of its own immanent essence. What exists or what amounts to the so-called natural order has no necessary claim on people's conscience or moral faculty. While it is accurate to state that "the smallpox virus was part of the natural order until it was forced into extinction by human intervention,"37 it would be surprising to hear people argue that such a forced extinction was unnatural and, therefore, immoral. Whether it is the smallpox virus or contractual privity, its moral status is an independent assessment

36 Jansen v Packaging Corporation of America, 123 F.3d 490, 556 (7th Cir 1997) per Easterbrook, J
37 Lee Silver, Remaking Eden: Cloning and Beyond in a Brave New World (Avon Books, 1998) 257. Darwin himself was equivocal in his assessment of the natural world. While he sometimes often looked disapprovingly on "the clumsy, wasteful, blundering, low, and horridly cruel works of nature," he also spoke glowingly of the "grandeur" of nature which "from so simple a beginning endless forms most beautiful and most wonderful have been, and are being evolved." Darwin to JD Hooker, 13 July, 1856 in Letters, supra, note 4 and Darwin, Origin, supra, note 2 at 429.
rather than a related calculation of whether it is ‘part of the natural order’. As a work-in-progress, the merits of the status quo must be defended, not merely assumed.

However, in jurisprudence, it is contended that a bias in favour of the status quo is a natural feature of the common law: judges are required to give added weight to existing precedents and institutional allegiance in their decisions about how to do what is best. In this sense, common lawyers, much like their scientific counterparts, are not divine designers because they rarely give themselves permission to start from scratch. In both nature and even the laboratory, biological evolution has to work from the available genetic material. The same is generally true in the common law. Lawyers and judges do not (or are not supposed to) design doctrinal renovations off the top of their heads: they engage in a mode of bricolage or cobbled together over time of whatever is at hand to make the best contrivance that is possible. As such, it is about situational optimalisation, not absolute perfection.\(^{38}\) Moreover, even if they do wipe the doctrinal slate clean and treat it as if it were a legal tabula rasa (which is a task that most courts claim to shun in favour of legislative intervention), it must still be conceded that judges operate within a particular historical context which not only frames the problem to be addressed, provides the ‘fittest way to practice law’, and recommends the utility of any proposed solutions, but also helps to shape the values and commitments that they bring to those adjudicative chores. Accordingly, understanding the common law as a work-in-progress leads to the appreciation that adjudication is a subtle combination of freedom (judges can cobble together the broad range of available doctrinal materials into the artefacts of their choosing) and constraint (judges are historical creatures whose imagination and craft are bounded by their communal affiliations and personal abilities). In this way, ‘anything might go’. As their incidence and career suggest, ‘great cases’, like Donoghue and Rylands, are where a Lamarckian bio-technological dimension and a Darwinian evolutionary dynamic come together. A new doctrinal species can evolve not only by developing existing threads of legal argument, but also by engaging in the judicial equivalent of genetic engineering.\(^{39}\)

John Donne’s celebration of change as “the nursery of music, joy, life and Eternity” captures the kind of attitude which common lawyers should take (and the very best among them have) to their judicial duties.\(^{40}\) Rather than resist or resent change, they should recognise that the main attraction and strength of the common law are its invigorating willingness to keep itself open to change and to adapt as and when the circumstances require. Of course, when it is best to change and in what direction


\(^{39}\) See Allan Hutchinson, “The Importance of Leading Cases” in Eoin O’Dell Leading Cases of the Twentieth Century (Round Hall, 2001).

change should occur will be a matter of normative judgement because ‘law is politics’. Because the common law is a work-in-progress through and through, there is no manual or guidebook to follow in determining when to change or whether such change will be progressive. However, contrary to the reservations of many judges and jurists, the common law has shown that its capacity to adapt to changing circumstances is a vital feature of its historical struggle for both survival and success. Indeed, the common law seems to have been energised by recognising the force of the old adage that ‘when you are finished changing, you are finished’. It is a compliment to the political wit and institutional savvy of common law judges that, whatever they or their theoretical apologists might say, they have largely taken a pragmatic approach to their adjudicative responsibilities; they tend not to let abstract considerations get in the way of practical solutions. This is not to suggest that the solutions they choose or the changes they make are always the best or even the better ones; this is a matter for social evaluation and political contestation Accordingly, while they might mouth certain traditional platitudes about the need for predictability and stability in the common law, the judges tend to act on a quite different basis. As the iconoclastic William Douglas put it, “the search for static security, in the law and elsewhere, is misguided...[because] the fact is security can only be achieved through constant change, through the wise discarding of old ideas that have outlived their usefulness, and through the adapting of others to current facts.” Indeed, the success of the common law has been this ability to be flexible, open, experimental and adaptable. The knack is to intervene in such a way so as not to establish rigidities and ossification, but to maintain the capacity for change and alteration in the immediate interventions made. To the extent that it can do this, the common law will have gone some way to redeeming its performance and potential as a work-in-progress.

CONCLUSION

It can be reported, therefore, that the Kuhnian lessons of Darwinian evolution are that everything is always on the march, that changing one thing will likely affect everything else, and that progress is a temporary and contextual achievement. In terms of law, therefore, it is important to grasp that, whatever else it might or might not offer (and it might well have no application to law), an evolutionary perspective is not about generating a universal agenda for change or providing a justification for law’s particular development. Instead, it is about developing an attitude or approach to law that recommends, among other things, cultivating a healthy scepticism about formulaic recipes for legal success, about simplistic notions of legal progress, about the predictive power of rational planning, about the widespread tendency toward reductionist explanations, and about the sense that jurists are or can ever be entirely on top of things. If there is still to be talk about ‘evolution’, then it must be in a thoroughly

descriptive and morally neutral manner. Moreover, insofar as evolution talks in terms of natural selection as being about solving problems, it must not be forgotten that it has nothing to tell us about the problems that will require solutions – this is a crucial insight for common lawyers as well as evolutionists of all persuasions. In a jurisprudential manner of speaking, common law judges offer up what they believe to be the best answer to a pressing problem out of a varying series of possible good answers. However, there is no one right answer or perfect solution; the complexity and contingency of the social environment make that possibility fantastical and far-fetched.

Whether particular innovations work over time will be as much a matter of serendipitous accident as deliberate design. Because the environment will change (and the only question is how it will change), law will also have to change in order to adapt to those changes. The search for fixed foundations or constant equations to guarantee the common law’s progress is as mistaken as it is unrealisable. The best that can be hoped for is that, like nature itself, the common law remains supple, experimental, and pragmatic. While judges and jurists must forego the quest for a formal method to direct and sanction universal change, they must not abandon the pursuit of substantive solutions that might contribute to local justice. Indeed, in finding ways to improve the quality of the common law, critics and commentators might do well to heed Darwin’s conclusion about nature at large that “it is not the strongest of the species that survive, nor the most intelligent, but the one most responsive to change.” Nevertheless, in being alive to the possibilities of change, it is important for lawyers to resist the temptation to essentialise or deify change. There is no lasting or greater normative appeal to perpetual change as opposed to perennial stasis: the balance between the two will be local, variable and tentative. As the history of the common law amply demonstrates, it is often possible for there to be change without improvement, but it is rarely possible for there to be improvement without change – change might be constant, but progress is contingent.