Evolutionary Theory and Legal Positivism: A Possible Marriage

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The tactic of “joining forces” is certainly not one of the more popular maneuvers in the strategic portfolio of legal thinkers. Even if the combination of two (or more) theoretical approaches can be helpful in order to better understand a certain legal phenomenon, the very idea of combining different legal theories usually gives rise to conflicting feelings among the followers of each respective school or movement involved. 1 Besides the usual conservative

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1 See, e.g., Richard Delgado, The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?, 22 Harvard Civil Rights-Civil Liberties Law Review 306 (1987)(as to the often conflicted relations between Critical Legal Studies and Critical Race Theory, despite the fact that the latter is considered as having
tendency typical for most legal scholars, the thoughts shared by legal scholars engaged in such a process are somewhat reminiscent of those couples face on the eve of their wedding.\(^2\)

Leaving aside obvious sentimental components, if one looks at the marriage from a pragmatic perspective, two conflicting evaluations can be discerned. On one hand, both spouses are well aware of, or at least perceive, the possible advantages arising from combining the forces and strengths of the respective parties. This combination usually is complementary, for example, the groom’s weaknesses in one area can be compensated by the bride’s strengths in that or another area, and vice versa. On the other hand, both parties fear that they will somehow be fundamentally changed by the compromises necessitated by two persons living under the same roof. These compromises can go so far that in the end, both spouses lose their personal identities, i.e. the individual qualities making them who they are, and therefore instead of stronger, become weak on all fronts.\(^3\)

\(^2\) As used in this context, the term “conservative” does not denote any moral, political, or social connotation: “conservative” is simply used in order to point out the tendency of legal scholars for being path-dependent. See, e.g., Philip M. Nichols, Forgotten Linkages - Historical Institutionalism and Sociological Institutionalism and Analysis of the World Trade Organization, 19 UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL ECONOMIC LAW 500 (1998). As to the conservative nature of academic thinking in general, see THOMAS GREEN, THE ACTIVITIES OF TEACHING 47 (New York: McGraw-Hill, 1971)(“[W]e tend to order our beliefs in little clusters encrusted about, as it were, with a protective shield that prevents any cross-fertilization among them or any confrontation between them”).

\(^3\) See William Ewald, Comparative Jurisprudence (I): What Was It Like to Try a Rat?, 143 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1955-1956 (1995). See also Dennis Gioia and Evelyn Pitre, Multiparadigm perspectives on theory building, 15 ACADEMY OF MANAGEMENT REVIEW 588 (1990). As to the advantages of
The basic idea of this work is to arrange a possible marriage of the evolutionary approach to the law with legal positivism, in particular in order to reinforce the position of evolutionary theory within the legal world and, at the same time, to retain those features that make evolutionary theory what it is. While the general focus is on what the evolutionary approach can gain by adopting certain aspects of legal positivism, the underpinning goal is to demonstrate how, by combining these two theoretical movements, it is possible to overcome some of the difficulties that both movements have suffered, albeit in different areas. In particular, the evolutionary approach to the law, once integrated with certain of the basic ideas of legal positivism, can remedy its lack of a normative side as to law-making, i.e. the absence of a clear message explaining to the addressees why and how the law should change (or not).  

4 See Hasso Hofmann, From Jhering to Radbruch: On the Logic of Traditional Legal Concepts to the Social Theories of Law to the Renewal of Legal Idealism, in E. PATTRAO, D. CANALE, P. GROSSI, H. HOFMANN, AND P. RILEY (EDS.), A TREATISE OF LEGAL PHILOSOPHY AND GENERAL JURISPRUDENCE, VOL. 9: A HISTORY OF THE PHILOSOPHY OF LAW IN THE CIVIL LAW WORLD, 1600-1900 310-315 (Berlin: Springer, 2009), as to a historical precedent of a possible combination of evolutionary theory and legal positivism, namely in Rudolph von Jhering’s Law as a Means to an End (in German, “Der Zweck im Recht,” 1877-1883) and The Struggle for Law (in German, “Der Kampf ums Recht,” 1872). For reasons of clarity, it should be stressed that this work considers the more general evolutionary approach to the law, and does not take into consideration the more specific constitutional law debate (in particular in the US) as to an evolutionary interpretation of the meaning of fundamental statutory texts, though it is possible to trace some connections between the two issues. See, e.g.,
This lack, in its turn, also offers a partial explanation for the fact that the use and debate concerning evolutionary theory has typically been confined to legal scholars, while ignored by the vast majority of “lawyers in action.” At the same time, and though not the main focus of this work, marriage to the evolutionary approach can possibly offer legal positivism a well-established and functioning theory as to change in the legal system, a theory also compatible with the basic positivistic hypotheses as to the nature of law and legal thinking.


6 As to the meaning of “legal system” in this work, one should point out the clarification mentioned by Lewis A. Kornhauser, *A World Apart? An Essay on the Autonomy of Law*, 78 *Boston University Law Review* 749-755 (1998). According to Kornhauser, there are two components (always present and irreducible one to the other) of a legal system: the legal order and the legal regime. While the legal order consists of “the norms that prescribe, proscribe, or permit actions”, the legal regime consists of “the institutions… that create, execute, and apply the legal order” (479). Cf. the Hartian idea of legal system as interpreted by Neil D. MacCormick, H. L. A. Hart 20-24 (Stanford: Stanford University Press, 1981).
In order to reach this goal, Part One starts with some clarifications as to certain general terms used in this discussion (e.g., legal positivism or evolutionary theory). Part Two focuses more specifically on the definition of the main target of the investigation, namely the evolutionary approach to the law. This part aims at explaining what evolutionary is from a legal perspective, in particular in terms of a contribution for a better understanding of how and why legal changes take place. Part Three then moves on to identify the lack in the evolutionary approach of an explicit normative component. How this absence has most likely contributed to the marginalization of evolutionary theory from the legal discourse, which requires both descriptive and normative components, will also be demonstrated. To fill this gap, Part Four explores several well-established contemporary legal theories in order to retrieve a normative message compatible with the basic hypotheses of an evolutionary approach to the law. Based on their ideas as to how and why the law changes through time, these contemporary legal theories will be divided into two ideal-typical groups: “Creationist” and “Darwinist” legal theories. Once “Darwinist” legal theories, such as legal positivism and procedural natural law, are shown to offer certain contributions compatible with an evolutionary approach to law, Part Five focuses in particular on legal positivism (and its emphasis on the sources of law) as the theory whose normative component can better complement the evolutionary theory. In the final Part Six, transnational corporate law and its making will be investigated as a possible concrete field for legal investigation by the “newly married” evolutionary approach, i.e., the one integrated with a normative side borrowed from legal positivism.

1. THE PRENUP – SOME CLARIFICATIONS

Prenuptial agreements are usually advanced at the early planning stages of marriages likely to raise certain conflicts, in particular due to the levels of interests of the parties involved. Similarly, this work aims at combining two quite “strong” approaches to the law, and
therefore, some clarifications are needed already before beginning to plan the wedding, in particular as to the objectives of the marriage and the theories facing the ceremony.

First, it should be stressed that the goal of this work is to marry the evolutionary approach to legal positivism, not to create a sort of legal theoretical Frankenstein’s monster generating more problems than it solves. By this metaphorical expression is meant that the task of this article definitely is not the creation of a sort of “evolutionary legal positivism” or “legal positivistic evolutionary theory,” i.e. a new hybrid legal theory made of parts of different legal theoretical movements. Instead, as in a marriage, the objective is to add certain strong points of one theory (legal positivism) to another theoretical approach to the law (evolutionary theory): The goal then is to improve the evolutionary theory by strengthening certain weaknesses while retaining its identity as a specific way for understanding and describing the law and its making. In computer science terminology, the goal of this work is simply to “extend” a theory rather than merging two theories. The finish line is not the creation of something new, but more modestly rendering the evolutionary theory into a better approach usable by legal actors, an improvement mainly done by inserting some of the normative claims offered by legal positivism.

The second clarification required concerns the very labeling of “evolutionary theory of law.” As pointed out in Part Two (What is An Evolutionary Theory of Law-making?), many

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established legal theories have been defined as evolutionary in their description of changes in law. Classical examples are some of the streams of Law and economics, which have been strongly criticized for their very focus on the evolutionary processes of the law. In this work, however, the definition of “evolutionary theory of law” (or synonymously, “evolutionary approach to law”) has been attached to those different theories based more on how the schools and legal scholars define their positions as to changes in legal issues than on how they have been categorized by their critics. In other words, while many legal theories have snippets of evolutionary thinking in their depictions of the law and its making, when talking about an “evolutionary theory of law”, this work focuses on those theories that explicitly set at the center of their renditions explanations as to changes and the stability in the legal phenomenon according to different stages of variation, selection, and retention.


10 See Elliott, *The Evolutionary Tradition in Jurisprudence*, supra at 62-71; and Ruhl, *The Fitness of Law*, supra at 1433-1434 (“The Law and Economics view of sociolegal evolution… is expressed in words that could have been written a century ago by the most ardent Darwinian Formalist, with an increased dose of economics to help ground the theory in ‘real world’ experience”).


The third term to be clarified before proceeding into the discussion is the one of “legal positivism.” The legal positivism taken into consideration in this work is that defined as “modern legal positivism,” i.e. the one developed after Herbert L. A. Hart’s departure from his predecessors, such as Jeremy Bentham and John Austin, the developers of classical legal positivism. Modern legal positivism (hereinafter simply legal positivism) is then, as described by John Gardner, that theoretical movement whose followers advance and endorse the proposition that “[i]n any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits (where its merits, in the relevant sense, include the merits of its sources).”

Obviously, this definition (as those of all the other legal theories presented in this work) can be considered restrictive and limited, since legal positivism is actually an extremely articulated movement and therefore the expression “legal positivisms” would be more

Law and economics can be considering as explicitly embracing this mechanism of variation, selection, and retention (or self-assembly, selection, and emergence, using Hornstein terminology).

13 See Herbert L. A. Hart, Positivism and the Separation of Law and Morals, 71 HARVARD LAW REVIEW 600-606 (1958). Compare Morris R. Cohen, Positivism and the Limits of Idealism in the Law, 27 COLUMBIA LAW REVIEW 238 (1927)(as an example of an extremely misleading and outdated, though somehow resistant, conception of legal positivism as the idea that “the law is a complete and closed system, and that judges and juries are mere automata to record its will”). See also RAYMOND WACKS, UNDERSTANDING JURISPRUDENCE: AN INTRODUCTION TO LEGAL THEORY 46, 68-70 (Oxford: Oxford University Press, 2005).

14 See John Gardner, Legal Positivism: 5½ Myths, 46 AMERICAN JOURNAL OF JURISPRUDENCE 201 (2001). See also NEIL D. MACCORMICK, LEGAL REASONING AND LEGAL THEORY 239-240 (1st ed., Oxford: Oxford University Press, 1978)(where legal positivism can be “characterized minimally as insisting on the genuine distinction between description of a legal system as it is and normative evaluation of the law which is thus described”). In this way, as for Gardner, this work also implicitly rejects the misconception that the common denominator for all modern legal positivists is the idea that there is no necessary connection between law and morality. See Gardner, Legal Positivism, supra at 222-223.
correct.\(^{15}\) As stated some years ago by Andrei Marmor, “[t]here are many versions of legal positivism; perhaps as many as there are legal positivists around.”\(^{16}\) However, the restriction here first is due to the fact that the focus of this investigation is not on legal positivism (or all the other legal theories), but on relating evolutionary theory to legal positivism (or contemporary legal theory in general). This choice of perspective implies that, by axiomatically assuming that a certain legal theory has a unique and “stable” meaning, it then is possible to position evolutionary theory in relation to such “fixed” legal theory. This is done to stress the points of strength and weakness of the evolutionary approach, and, hopefully, to improve the latter.\(^{17}\)

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\(^{17}\) This methodology is loosely based on Max Weber, The Methodology of the Social Sciences 95-108 (Glencoe, Ill.: Free Press, 1949), and his idea of comparing different realities by using one ideal-type. As to a more legal application of this ideal typical methodology, see, e.g., Alf Ross, Why Democracy? 87 (Cambridge, Mass.: Harvard University Press, 1952); and, more recently, Oliver Brand, Conceptual Comparisons: Towards A Coherent Methodology of Comparative Legal Studies, 32 Brooklyn Journal of International Law 438-439 (2007). The same Weberian methodology is used (i.e. to fit different realities into one ideal-typical model) in this work, but in the opposite (quantitative) direction: here one “imperfect reality,” namely the unsuccessful evolutionary theory, is evaluated against various “perfect” ideal-typical models of
This methodological choice, of affixing the definition of legal positivism into a very narrow range of meanings, is also reinforced through observation of the ideas that the different contemporary legal theories have when it comes to the law-making, i.e. the center of attention for the evolutionary approach to law. If it is true that internal variations can become quite broad when dealing with other aspects of the legal phenomenon (e.g. the role of morals in law), it is also true that the different streams of each legal theory tend to unify themselves around some basic propositions when it comes to the creation of law. ¹⁸ For instance, as to the issue of the role of morals, the positions of legal positivists can be found on a spectrum beginning with soft-liners (or “inclusive legal positivists”), allowing moral considerations into the law when permitted (explicitly or implicitly) by social conventions, and ending with hard-liners (or “exclusive legal positivists”), where a certain norm can acquire a status of being legally valid only through the sources of law and never because of its moral content. ¹⁹

successful legal theory, such as legal positivism, which are then used with a unique meaning and by overlooking their internal differences and nuances.


¹⁹ See ANDREI MARMOR, POSITIVE LAW AND OBJECTIVE VALUES 50-51 (Oxford: Oxford University Press, 2001)(as to the distinction between exclusivist and inclusivist legal positivists based on their position of morals
However, when it comes to the law-making, the vast majority of legal positivists circle around a vision of a law-making operated by its own rules and mechanisms, i.e. an idea of a law-making tending to closedness towards non-legal discourses.20

As a fourth clarification, the basic task of evolutionary theory, at least when applied to the legal phenomenon, is to offer a middle-range theory concerning the law-making process leading to the creation of legal categories. As far as it concerns the “middle-range” nature of the evolutionary theory of law, this expression means that it is a theory that takes as its starting point the assumption that the entirety of a phenomenon cannot be explained by


recourse to one theoretical system giving (or assuming) one specific definition.\textsuperscript{21} Therefore, the efforts of evolutionary scholars are mainly directed at the explanation and analysis of only segments of the legal phenomenon, namely the making of law, leaving aside (at least explicitly) the macro-dimensions of the legal phenomenon (\textit{e.g.} the nature of law in general).\textsuperscript{22}

Despite being outside the scope of this work, and its goal of creating a middle-range theory of law-making (and therefore leaving aside questions such as “what is law?”), one should however keep in mind that stated by Lewis A. Kornhauser: “[o]ne’s answer to the question of how law changes depends on what one considers.”\textsuperscript{23} Consequently, the compatibility between evolutionary theory and legal positivism as to understanding the mechanism of changes in law, is derived most likely from the fact that these two theoretical

\textsuperscript{21} This concept of “middle-range theory” was developed within sociology, \textit{see e.g.}, Robert K. Merton, \textit{The Role-Set: Problems in Sociological Theory}, 28 \textit{BRITISH JOURNAL OF SOCIOLOGY} 108 (1957). \textit{See also} William Twining, \textit{A Post-Westphalian Conception of Law}, 37 \textit{LAW AND SOCIETY REVIEW} 224 (2003)(“Many jurists and legal scholars have adopted a similar approach in relation to ‘law.’ In ordinary usage, the word ‘law’ has so many different meanings, and is applied to such varied phenomena, that attempts to construct a satisfactory general concept of law, even of state law, seem doomed to failure and to have very limited utility. One can orient one’s field of inquiry and delimit its scope without resort to an abstract definition or conception of law. Or one can stipulate how law is being conceived for a particular purpose”).

\textsuperscript{22} \textit{See, e.g.}, Donald E. Elliott, Bruce A. Ackerman, and John C. Millian, \textit{Toward a Theory of Statutory Evolution: The Federalization of Environmental Law}, 2 \textit{JOURNAL OF LAW, ECONOMICS, AND ORGANIZATIONS} 313 (1985). \textit{See also}, as another example of a theory of law-making without explicit roots into a broader theory of law, the work of Rudolph Jhering as interpreted by Roscoe Pound, \textit{The Scope and Purpose of Sociological Jurisprudence}, 25 \textit{HARVARD LAW REVIEW} 145-146 (1911).

\textsuperscript{23} Kornhauser, \textit{A World Apart?}, \textit{supra} at 748.
approaches share the same answer (or at least have compatible replays) as to the issue of “what the law is.”

As to the final result of the law-making, the evolutionary approach to law does not focus its attention on single rules, either judicial decisions or statutes; instead, the targets are “legal categories” (or synonymously, legal concepts) such as, for instance, “good faith” or “the best interest of the child,” i.e. a group (often scattered) of rules and normative regulations that aim, through their coordination and combination, at building an interaction responding to the criteria required by the rationality of the law. This product of the evolutionary process,

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namely the legal category, forms a theoretical matrix with the primary classificatory and normative functions of helping mostly legal actors (but also often all actors dealing with the law) in diagnosing and systematizing legal problems occurring in both the creation and interpretation of the law. For example, a hypothetical target of an evolutionary approach is neither the investigation of the function of corporate law in the US nor the backgrounds and outcomes of one single decision by the US Supreme Court as to “what a corporation is.” Instead, the targets of evolutionary scholars are the highly intricate, chronologically and

\[\text{Interests of the Child in Critical and Comparative Perspective, 14 International Journal of Law, Policy and the Family 187-199 (2000). It should also be stressed that, for several factors (e.g. legal system under consideration or theoretical assumptions of the observer), legal thinkers and practitioners take different positions as to which are the criteria for determining the legal rationality around which to construct the various legal categories; they range, for instance, from formal criteria, e.g. with the idea of consistency or coherence, to more substantial criteria, e.g. economic efficiency or justice. See, e.g., Hans Kelsen, The Pure Theory of Law 89-91 (2nd ed., Berkeley: University of California Press, 1970); John Finnis, Natural Law and Natural Rights 276 (Oxford: Clarendon Press, 1980); Aleksander Peczenik, Why Shall Legal Reasoning Be Coherent?, XVIII Indian Socio-Legal Journal 105-106 (1992); or Richard A. Posner, Economic Analysis of Law 182 (5th ed., New York: Aspen Publishers, 1998).}\\]


\[\text{27 See, e.g., the seminal works by Ronald H. Coase, The Nature of the Firm, 4 Economica 390-392 (1937); or Morton J. Horwitz, The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy 74-78 (1992)(though the landmark Supreme Court’s decision in County of Santa Clara vs. Southern Pacific Railroad was embedded in a broader historical and ideological analysis).}\\]
diachronically, processes producing a coordinated (either by the same law-making authorities, both in legislative or judicial formats, or by doctrine) complex of rules, under the category of “corporation,” imposing several duties and rights on shareholders, boards of directors, corporate management and supervising public agencies.28

Finally, the position adopted as to the term “legal theory” as used in this work is that of considering it a part of a broader “jurisprudence.”29 The term jurisprudence has a very broad meaning; it has being endorsed by scholars claiming that jurisprudence also includes evaluations of the social impact of the law (Roscoe Pound or William Twining).30 For others, jurisprudence is simply synonymous with the philosophy of law (Jeffrie G. Murphy and Jules L. Coleman).31 Finally, for some legal scholars, it is possible to separate jurisprudence (as least as intended in the Anglo-Saxon legal culture), legal philosophy, and legal theory (Mark Van Hoecke).32 In this work, however, jurisprudence is used as identifying that part of the legal discipline investigating the nature of law, its production, and its working.33 Consequently, legal theory is that part of jurisprudential studies that focuses on and questions,

from the standpoint of rationality typical of Western legal cultures, the “prevailing patterns of argumentation and interpretation” both in law-making and law-applying.34

2. THE BACHELOR – WHAT IS AN EVOLUTIONARY THEORY OF LAW-MAKING?

When considering the evolutionary approach to the legal phenomenon, it is fairly easy to see how this theory is characterized as infused by a general attitude of skepticism by legal actors, both practitioners and scholars.35 Such a feeling is mainly based on the misperception that having an evolutionary approach to the law means having a deterministic underpinning ideology as to what the law is and what the law will be, i.e. an idea that the law necessarily has come into existence in order to fulfill certain goals and, despite all contrary efforts, the law in the end will accomplish them.36 This erroneous perception is mostly due to some fundamental terminological confusion by the legal audience.37

34 T UORI, CRITICAL LEGAL POSITIVISM, supra at 320. In this sense, legal theory is part of a broader (legal) culture. See Henry Plotkin, Culture and Psychological Mechanisms, in R. AUNGER (ED.), DARWINIZING CULTURE: THE STATUS OF MEMETICS AS A SCIENCE 74 (Oxford: Oxford University Press, 2000). It should also be pointed out that, in general, this work has its focus on the Western legal systems, due to the fact that, as pointed out by Katharina Pistor and Philip A. Wellons, the evolutionary approach is typical of the Western legal cultures. See K ATHARINA PISTOR AND PHILIP A. WELLONS, THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT 1960-1995 34-35 (Oxford: Oxford University Press, 1998).


36 See J OHN H. BECKSTROM, EVOLUTIONARY JURISPRUDENCE: PROSPECTS AND IMITATIONS ON THE USE OF MODERN DARWINISM THROUGHOUT THE LEGAL PROCESS 34 (Urbana, Ill: University of Illinois Press 1989); and
First, it is necessary to distinguish between a general theory of legal evolution and a more specific evolutionary theory of the law.\textsuperscript{38} From the perspective of legal actors, a theory of legal evolution is a general label attached to all legal thinking aimed at discovering and explaining general patterns of continuity and change in the law. The works of Henry James Sumner Maine, Oliver Wendell Holmes, or more recently of the economic approach, Friedrich A. Hayek, and Alan Watson, can be considered, for example, as presenting a theory

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\textsuperscript{37} See \textit{Luhmann, Law As A Social System}, supra at 230. As to the political roots behind the use of metaphors in the contemporary legal discourse in general and in particular from a “visual” (i.e. as figurative help in the legal debate) to an “aural” use of them (i.e. constitutive of the very legal debate), \textit{see} Bernard J. Hibbitts, \textit{Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse}, 16 \textit{Cardozo Law Review} 238-300 (1994).

\textsuperscript{38} See Sinclair, \textit{Evolution in Law}, supra at 32; and Elliott, \textit{The Evolutionary Tradition in Jurisprudence}, supra at 90-91. As an example of this confusion, \textit{see} Alan C. Hutchinson, \textit{Work-in-progress: Evolution and Common Law}, 11 \textit{Texas Wesleyan Law Review} 254-255 (2005), where the author points out that “almost all traditional jurists and lawyers” operate based on a theory of legal evolution, while he directly afterwards identifies this theory with a (biological) evolutionary approach to the law (\textit{id.}, 256-257).
of legal evolution. Among the different theories of legal evolution, one can find a specific subgroup that can be defined as an evolutionary theory of law.

The evolutionary theory of the law is a specific way of perceiving the law-making, characterized for offering more than a theory about the evolution of law, i.e. more than simply attention to points of change and stability in the law through the centuries and among various legal systems. The evolutionary theory of the law distinguishes itself because it evaluates these aspects of change and stability in the legal phenomenon from a point of view that can be defined, in Hartian terminology, as typical of theories external to the law and its system: Luhmann’s sociological theory on law (in Europe) and biological evolutionary theory as a metaphor for explaining the evolution of the law (in the United States).


40 See PETER W. STRAHLENDORF, EVOLUTIONARY JURISPRUDENCE: DARWINIAN THEORY OF JURIDICAL SCIENCE 23-25 (mimeographed copy, 1993)(though the author uses the concept of “evolutionary jurisprudence” instead of “evolutionary theory of law”). See also Allan C. Hutchinson and Simon Archer, Of Bulldogs and Soapy Sams: The Common Law and Evolutionary Theory, 54 CURRENT LEGAL PROBLEMS 31 (2001); and Hovenkamp, Evolutionary Models in Jurisprudence, supra at 646 (“Not every theory of jurisprudence that includes a theory of legal change qualifies as ‘evolutionary’

The second misperception generally shared by legal actors is the confusion between “evolutionary” and “evolutionistic” theories of law-making and, in particular, the fact that when talking about an evolutionary theory of the law, one aims at a theory explaining changes in the law and legal system, but not necessarily in an evolutionist way. From an evolutionist perspective, as can be attributed to Marxist legal theory or certain Law and economics scholars, the central point of investigating changes in law is both in the mechanisms of legal evolution and the directions to which the law or some of its parts are unavoidably bound.

The “evolutionary” approach to the law coincides here with Elliott’s “doctrinal” theories of legal evolution. See id., 50-62. But see Deakin and Wilkinson, The Law of the Labour Market, supra at 28 (stressing how “an evolutionary study of the law requires us to take a dual approach,” i.e. “internal understanding of internal juridical modes of thought” and “external perspective on the law as a social institution or mechanism”). As an example of similar application of non-legal methodology in order to better understand the legal phenomenon, see Douglas C. Baird and Robert H. Gertner, Game Theory and the Law 24-31 (Cambridge, Mass.: Harvard University Press, 1994).


For instance, some Law and economics scholars put under scrutiny not only the process of changes in tort law in modern times, but also attempt to identify the types of goals this branch of the law is (more or less) necessarily going to fulfill.\(^4\)

At least explicitly, the evolutionary theory of the law instead proclaims to focus its attention exclusively on the explanation of the mechanisms underlying the changes and continuities of a certain legal system (or part of it). As recognized by one critique, evolutionary theories typically involve nothing more than “a set of developmental stages and a mechanism for moving from one to another.”\(^4\) In other words, while the focus is on the “how” and “why” the law evolves, this approach does not also explicitly designate the points of arrival to which such a system (or its parts) is somehow obliged to aim. As repeatedly stressed by Gunther Teubner, (his) evolutionary theory focuses on the “mechanisms of development” rather than the “direction” of such developments, the latter being more the focus of attention for evolutionist functionalist theories.\(^4\)


Once the sky has been cleared of all possible terminological confusions, attention can now be given to identifying that which characterizes an evolutionary theory of law-making: the very possibility of organizing the creation of legal concepts or categories around three fundamental moments, the processes of variation, selection, and stabilization or retention. The process of variation is the moment in the life of a legal system when new and alternative legal categories are created. The reasons for this variation can be several. Niklas Luhmann, for instance, stresses the importance (though not monopoly) of the “ambivalence of a norm” as an endogenous factor allowing legal actors to produce different (and often opposite)


Though investigating the application of the law from an evolutionary perspective is not a task of this work, this picture of law-making as developing according to three stages also makes possible an evolutionary theory of legal interpretation, as exemplified by Justice Oliver Wendell Holmes in his opinion in Towne v. Eisner, 245 U.S. 425 (1918). Compare Erhard Oeser, Evolution and Constitution: The Evolutionary Selfconstruction of Law 108-109 (Dordrecht: Kluwer Academic Publishers, 2003). In particular, Oeser sketches the basic ideas of the “developmental theory of law,” a theory of legal evolution which is similar in many respects to the evolutionary theory of law (e.g. anti-evolutionist approach). However, Oeser’s developmental theory differs substantially from the evolutionary approach since it does not organize the law-making according to the three moments of variation, selection, and retention.
meanings. The American versions of the evolutionary theory of the law underscore instead the importance of exogenous pressures coming directly from the surrounding environments and forcing the body of law to offer alternatives to “out-dated” existing regulations. Regardless of which position is taken (endogenous or exogenous), the results are similar for both the European and American evolutionary theories: due to an interaction of external (social) conditions and internal (legal) structures, the legal system has now produced several possible available legal concepts.

However, all these legal concepts tend by and large to be mutually exclusive due to the very nature of the legal phenomenon: since the latter reasons in terms of “either-or,” the coexistence in the same legal system of a legal concept stating A and, simultaneously and for the same situation, a legal concept stating non-A, is often impossible. For example, due to the increasing importance of multinational corporations in host countries, a group of NGOs develops the legal concept of corporate social responsibility as a legal duty (i.e. a possible base for future liability actions) “embedded” in each form of economic organization falling under the definition of “public corporation.” At the same time, in-house attorneys of large

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48 See, e.g., LUHMANN, LAW AS A SOCIAL SYSTEM, supra at 252, 243 (speaking of “unexpected normative expectations” as triggering factor).

49 See, e.g., Elliott, The Evolutionary Tradition in Jurisprudence, supra at 38 (“Law is a scavenger. It grows by feeding on ideas from outside, not by inventing new ones of its own”).

50 See, e.g., LUHMANN, LAW AS A SOCIAL SYSTEM, supra at 244-245; and DEAKIN AND WILKINSON, THE LAW OF THE LABOUR MARKET, supra at 32. The dualism, American/exogenous vs. European/endogenous, as sketched in this work should however be considered as a pretty rough and ideal-typical (and therefore fairly relative) categorization.

51 See LUHMANN, LAW AS A SOCIAL SYSTEM, supra at 244; and Oliver W. Holmes, Law in Science and Science in Law, 12 HARVARD LAW REVIEW 448 (1899).
corporations produce standard contracts to be used in host countries where corporate social responsibility is excluded unless in cases explicitly accepted by both parties.\textsuperscript{52}

A process of selection is therefore required, either mainly according to criteria determined by the very legal system (as for Luhmann and Teubner) or by the actors using the legal system (as for the American versions of evolutionary theory).\textsuperscript{53} In both cases, legal and non-legal actors propose, mostly under the pressures coming from the surrounding environments (e.g. the business world), which legal concept is to prevail and, implicitly, which one is to disappear.\textsuperscript{54} For example, there is a formation within the international

\textsuperscript{52} See, e.g., JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW 17-20 (Cambridge: Cambridge University Press, 2006)(as to an actual example of this clash, taking place at the international level, between different legal conceptions of corporation and its duties). As to another example coming from the evolutionary approach to the law, see, e.g., Robert C. Clark, \textit{Abstract Rights versus Paper Rights under Article 9 of the Uniform Commercial Code}, 84 YALE LAW JOURNAL 449-464 (1975).

\textsuperscript{53} See, e.g., DEAKIN AND WILKINSON, THE LAW OF THE LABOUR MARKET, \textit{supra} at 277; and LUHMANN, LAW AS A SOCIAL SYSTEM, \textit{supra} at 248 (where the author defines the selection phase as the one attending “to the task of defining which opinion is in accordance with the legal system”). But see Donald E. Elliott, \textit{Holmes and Evolution: Legal Process as Artificial Intelligence}, XIII JOURNAL OF LEGAL STUDIES 140-142 (1984)(where the author points out how in Holmes’ evolutionary theory it is possible to discern two selective processes taking place and interacting with each other: one external to the legal system, the other internal). See also Ruhl, \textit{The Fitness of Law}, \textit{supra} at 1434-1435 (pointing out the selection phase as the original contribution coming from Darwin’s work); and Hutchinson and Archer, \textit{Of Bulldogs and Soapy Sams}, \textit{supra} at 30-31, and Sinclair, \textit{Evolution in Law}, \textit{supra} at 57 (as to the focus of the evolutionary approach to the law on the selection phase).

\textsuperscript{54} See, e.g., Skeel, \textit{An Evolutionary Theory of Corporate Law and Corporate Bankruptcy}, \textit{supra} at 1356 (as an example of central role played by non-legal actors in the selection phase); and Gunther Teubner, \textit{Altera Pars Audiatur: Law in the Collision of Discourses, in} R. RAWLINGS (ED.), LAW, SOCIETY AND ECONOMY: CENTENARY ESSAYS FOR THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE 1895-1995 165 (Oxford: Clarendon Press, 1997)(as to the role played by legal actors in selecting the “surviving” legal concept). But see Marc
community (also due to UN documents) of a “shared-by-all” basic value, that corporations have to exercise their economic activities in the spirit of promoting the general welfare of the community of the host country, and not only of their shareholders. Therefore, major corporations adopt a series of standard codes of conduct manifesting the concept of social responsibility as an essential part of corporate activities.55

After this selection, a process of stabilization or retention takes place: the surviving legal concepts are then imbedded in the legal system as fully operative, or, in legal theoretical terms, they become the valid law and in force as the addressees perceive them as binding and (in the vast majority of cases) operate accordingly.56 This process of embodiment into the legal system can, for instance, take place through a hypothetical convention drafted by the World Trade Organization and ratified by the required number of its members in order to become binding. As a consequence of such a ratified convention, a series of constant and

Amstutz, Andreas Abegg, and Vaios Karavas, Civil Society Constitutionalism: The Power of Contract Law, 14 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 257 (2007)(for whom the selection function’s role “is not to structure the evolving system in such a way that it adapts to its environment, but rather, like a sort of search engine, to guide the (already adapted) system to where its evolutionary prospects can be improved”).

55 See, e.g., PETER MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 100-102 (2nd ed., Oxford: Oxford University Press, 2007). For instance, non-legal actors also play a fundamental role by using a certain concept such as “corporate interest” regardless of whether it is formally sanctioned as legal; this law-like use of a certain concept is simply done because it helps to protect “the public interest in profitability of the enterprise.” Gunther Teubner, Company Interest: The Public Interest of the Enterprise “In Itself”, in R. ROGOWSKI AND T. WITTHAGEN (EDS.), REFLEXIVE LABOUR LAW –STUDIES IN INDUSTRIAL RELATIONS AND EMPLOYMENT REGULATION 50 (Deventer: Kluwer, 1994).

56 See, e.g., DEAKIN AND WILKINSON, THE LAW OF THE LABOUR MARKET, supra at 32 (though the author uses the label of “inheritance”). See also Sinclair, The Use of Evolution Theory in Law, supra at 453 (as to the central role of retention phase in order to distinguish the evolutionary theory of law from a “merely adaptionist” approach); Hutchinson and Archer, Of Bulldogs and Soapy Sams, supra at 26; and LUHMANN, LAW AS A SOCIAL SYSTEM, supra at 232, 247.
uniform practices takes place, both by state-based authorities (e.g. courts) and non-state based organizations (e.g. international professional associations). All these practices are directed in considering as the beneficiary of the legal status of “corporation” only those forms of organizations promoting their economic activities in the full respect and fulfillment of the stakeholders’ rights.

One can immediately notice how this very process of stabilization is that which can be defined as the proper law-making process, at least from a Hartian legal actors’ perspective, as this phase coincides with either the legislative measures or judicial activism imposing the “surviving” legal concept upon the entire (international) legal system.\(^{57}\) In order to stress this coincidence between the process of retention and the proper “law-making,” one should consider the fact that in the evolutionary literature, the retention phase sometimes goes under the name of “selective retention.” This terminology is used in order to stress the very fact that legal concepts are retained not spontaneously by the legal system, but through an explicit and planned act such as law-making (by a legislator or a judge).\(^{58}\)

Moreover, this identification of the selection phase with the first step of a “real” law-making, at least from a legal perspective, is also confirmed by the fact that the new legal

\(^{57}\) See Martina Eckardt, Explaining Legal Change from an Evolutionary Economics Perspective, 9 GERMAN LAW JOURNAL 440-449 (2008).

\(^{58}\) See, e.g., Suri Ratnapala, Eighteenth-Century Evolutionary Thought and its Relevance in the Age of Legislation, 12 CONSTITUTIONAL POLITICAL ECONOMY 54 (2001)(interpreting Commons’ “Legal Foundations of Capitalism”). See also Sinclair, The Use of Evolution Theory in Law, supra at 455, 467-468 (identifying the “true” evolutionary process mostly in the judicial law-making, while being the legislative law-making more expression of a “design”); Hutchinson, Work-in-progress, supra at 254; and Jill E. Fisch, Retroactivity and Legal Change: An Equilibrium Approach, 110 HARVARD LAW REVIEW 1118 (1997)(pointing out how the “adjudicative lawmaking is typically evolutionary”). But see LUHMANN, LAW AS A SOCIAL SYSTEM, supra at 259; and TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM, supra at 51 (where the proper law-making is more identified with the selection process).
concept to be stabilized is often constructed by actors (e.g. in-house attorneys) located outside the traditional institutional channels enjoying the law-making authority. The effect of this process of stabilization ultimately is that a new category, such as a new type of corporation “inclusive per default of social responsibilities,” becomes fully binding for an entire community. This authoritative character is given to the concept by those legal actors traditionally attributed the legal power and legitimization of imprinting certain models of behavior as legal (e.g. national and international assemblies).

As it can be seen from this brief and necessarily rough sketch of the main claims by the evolutionary theory, the skepticism that this approach encounters in large sectors of legal theory and legal world is largely unfounded, or at least, is grounded on the wrong ideas. To immediately connect evolutionary theory to a sort of social Darwinism explanation of the law and its making, i.e. an explanation justifying the dominant legal cultures and their paradigms


60 See, e.g., Elliott, Holmes and Evolution, supra at 133. See also Sinclair, The Use of Evolution Theory in Law, supra at 457-458; and LUHMANN, LAW AS A SOCIAL SYSTEM, supra at 256-257 (as to the central role played by legal dogmatics (or traditional legal scholarship) during this retention phase of the evolutionary process of the law).
(or principles) as being *per se* the best in a sort of deterministic way, paradoxically neglects
the very evolution that the evolutionary theories have gone through.\(^{61}\)

If one considers the basic ideas behind the modern evolutionary approaches to the legal
phenomenon, there are only two things they still have in common with Charles Darwin’s
original evolution theory and its subsequent distortions as a social theory. Both aim at finding
some general explanatory model to clarify how complex phenomena, such as an animal
species or a legal system, change.\(^{62}\) Moreover, both Darwin and contemporary evolutionary
approaches to law aim at pointing out that such changes always occur in multiple phases. The
law and its parts, like the animal species and its parts, have continuous relations both with the
surrounding environments and with their internal structures, and these interplays between
environment and structures in the end are as determinative for the shape of the law as for the
animal species.\(^{63}\)

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\(^{61}\) As pointed out by Fried, “the enormous change in sophistication over time suggests that the literature on
evolution and the law may itself be as susceptible to an evolutionary analysis as its subject.” Fried, *The
Evolution of Legal Concepts*, supra at 303-304. See also Hovenkamp, *Evolutionary Models in Jurisprudence*,
*supra* at 656. In particular, Hovenkamp identifies actually three versions of evolutionary theory in the legal
thinking, all inspired by Darwin’s theory: Social Darwinism (*e.g.* William Graham Sumner), but also Apolitical
Darwinism (*e.g.* John Henry Wigmore) and the dominating Reform Darwinism (*e.g.* Roscoe Pound and
Holmes).

\(^{62}\) See *STEPHEN JAY GOULD, BULLY FOR BRONTOSAURUS: REFLECTIONS IN NATURAL HISTORY* 455 (1991).

\(^{63}\) See, *e.g.*, Sinclair, *The Use of Evolution Theory in Law*, supra at 471; or Jan M. Smits, *Scotland as a Mixed
Jurisdiction and The Development of European Private Law: Is There Something to Learn from Evolutionary
(last accessed: June 30, 2010). *But see LUHMANN, LAW AS A SOCIAL SYSTEM*, *supra* at 233, where the author
distances himself (and in general the modern evolutionary approach to law) from the historical antecedents (*e.g.*
Friedrich von Savigny) pointing out that “[e]volution is not a gradual, continuous, seamless increase in
The basic feature characterizing the evolutionary approach to the law as “Darwinian” eventually is the same as that characterizing many legal theoretical approaches to the law-making process: the attempt to explain the processes of law-making by taking into consideration not only the internal structures and different parts of a legal system, but also how these internal aspects relate and somehow “survive” the confrontation with the external realities in which the results of the evolution (e.g. a new statute) are to exist.\footnote{See Deakin and Wilkinson, The Law of The Labour Market, supra at 30. See also David Jabbari, From Criticism to Construction in Modern Critical Legal Theory, Oxford Journal of Legal Studies 526-530 (1992); and Holmes’ evolutionary model of judicial law-making as reconstructed by Elliott, Holmes and Evolution, supra at 139-145. But see Gordon, Critical Legal Histories, supra at 60-61 (criticizing the possibility to speak in general of relations between something called “law” as to something different and external defined as “society”).}

As pointed out by Herbert J. Hovenkamp:

“Jurisprudence was also ‘evolutionary’ long before Darwin, and it continues to be evolutionary. Like most other intellectual disciplines, jurisprudence needs a theory of change…. Today every theory of jurisprudence worth contemplating incorporates a theory of change.”\footnote{Hovenkamp, Evolutionary Models in Jurisprudence, supra at 645-646 [footnotes omitted]. See also Stein, Legal Evolution, supra at ix; Julius Stone, Social Dimensions of Law and Justice 36 (Stanford: Stanford University Press, 1966); and Deakin, Evolution for Our Time, supra at 41-42 (talking in particular of “a very tenuous link” between Darwinian thought and established evolutionary approaches to the law).}

These being the major features of the evolutionary theory and its idea of legal evolution, the relevance and potential this approach can have in becoming a theory of law-making turns out to be quite evident. One should in particular pay attention to Hart’s idea of legal theory as that part of the legal discipline aimed at generally seeking “to give an explanatory and clarifying complexity but a model… compatible with radical erratic changes… and with long periods of stagnation.” See also Deakin, Evolution for Our Time, supra at 39.
account of law as a complex of social and political institutions” from the perspective of legal actors or, as expressed by the English legal philosopher, the “internal point of view of a legal system.”66 Reducing changes in the law into the three major ideal-typical phases of variation, selection, and retention can help the legal scholar in the typical task of legal theory: the clarification and explanation of how and why the law-making has taken place, i.e. how and why a certain concept has become the prevailing one (i.e. the “only and true” legal) within a certain legal system.67

The evolutionary approach can help legal scholars clarify the evolution of a certain legal concept by not dismissing, based on ex ante theoretical assumptions, the complexity of law-making. The evolutionary theory offers instead a way to approach legal changes, taking into


consideration, all with the same level of attention at least *ab initio*, possible factors (both legal and non-legal) contributing to the creation, selection, and retention through time of a certain legal concept.\(^{68}\) In other words, the evolutionary theory helps legal scholars avoid falling into offering overly plain and general, and therefore useless, clarifying stances, where legal changes are reduced to either purely non-legal factors (such as “it is all politics”) or merely mechanisms internal to the legal system under consideration.\(^{69}\) For example, the establishment at the international level of a form of corporation that legally embedded certain responsibilities towards the community, can be ascribed neither to a “pure” technical construction by some law professors nor exclusively to the lobbying work by some powerful NGOs. Instead, an evolutionary approach can help legal scholars find a solution in the complex interaction between the dominant idea of what a corporation is among legal actors

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\(^{68}\) See, e.g., Smits, *The Harmonisation of Private Law in Europe*, supra at 89-90; Skeel, *An Evolutionary Theory of Corporate Law and Corporate Bankruptcy*, supra at 1350-1353. See also Kornhauser, *A World Apart?*, supra at 770-771. In particular, Kornhauser points out the difficulty of identifying the factors affecting the changes in law. In order to overcome such a complexity, he too makes use of an ideal-typical construction, which, instead of being focused on the processes and their stages, is more oriented towards possible model of relations between legal and non-legal factors influencing the legal phenomenon.

and the living and working of the latter in an environment affected by also the political, economic, and social discourses.\textsuperscript{70}

The evolutionary approach and its focus on processes (rather than results or actors) allows simplification, to a certain extent from an explanatory perspective, as to the entire picture of the course of creation of a new legal category.\textsuperscript{71} The legal scholar using an evolutionary approach can articulate the explanation of the process of change and stabilization around three main phases, in each of which legal and non-legal factors can simultaneously play a more (or less) important role. In this way, and fulfilling the fundamental postulate for a middle-range theory in order to be useful, the explanation can simplify (in three phases) the process of creation of legal concepts taking place in reality, but without losing the capacity of showing its articulate nature (the mixed role of legal and non-legal factors).\textsuperscript{72} For example,

\textsuperscript{70} See, e.g., Gunther Teubner, Corporate Fiduciary Duties and Their Beneficiaries: A Functional Approach to the Legal Institutionalization of Corporate Responsibility, in K. J. Hopt and G. Teubner (eds.), Corporate Governance and Directors’ Liabilities: Legal, Economic and Sociological Analyses on Corporate Social Responsibility 149-177 (Berlin: Walter de Gruyter, 1985); or Thomas McInerney, Putting Regulation Before Responsibility: Towards Binding Norms of Corporate Social Responsibility, 40 Cornell International Law Journal 176-183 (2007)(where the author points out the sources of the Corporate Social Responsibility discourse within an extremely complex interaction among social, legal, political and economic discourse).


\textsuperscript{72} See Hart, Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer, 5 University of Pennsylvania Law Review 961-962, 972-974 (1957); Waluchow, Inclusive Legal
the evolutionary approach can show how the creation of the legal concept of “corporation with social responsibilities” binding multinational corporations is neither the product of an unique planning master mind (e.g. a sort of multinational NGO) nor the unexpected fruit of a chaotic series of independent and separate micro-creative processes, both of legal and non-legal nature. Instead, the legal scholar using the evolutionary approach can explain the birth of the legal concept as the result of a process where different actors have interacted in a more or less rational way and have followed, more or less, certain patterns in creating alternative possible solutions and in “selling” these solutions as the best fitting for improving the relations between the multinational corporations and the environments in which the corporations operate.73

As the potential contributions of evolutionary theory are fruitful both in clarifying and explaining the law and its processes of change, understanding why legal theories, and the

POSITIVISM, supra at 19-21; and Stanley Fish, Almost Pragmatism: Richard Posner’s Jurisprudence, 57 UNIVERSITY OF CHICAGO LAW REVIEW 1448 (1990)(as to the most important goal of legal theory as the one of “offering an account of the law that is at once comprehensively abstract, strongly normative, and predictive of judicial outcomes, that is, of decisions and holdings”). See also ROBERT K. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 151-153 (2nd ed., New York: Free Press, 1968); and a recent empirical study by Ronald J. Allen and Ross M. Rosenberg, Legal Phenomena, Knowledge, and Theory: A Cautionary Tale of Hedgehogs and Foxes, 77 CHICAGO-KENT LAW REVIEW 683 (2002)(where the authors show how “judges apparently, and not surprisingly, are looking for answers to discrete questions, not solutions grounded in grand theory”).

legal discourses shared by legal actors in general, have somehow left this kind of approach at the borders of their attention is fairly difficult. However, this is not a “miss” by all contemporary legal theories and all legal actors, but, as the following Part Three (The Missing Part in The Evolutionary Theory of Law-making) shows, this choice of somehow ignoring the evolutionary theory and all its possible contributions can be traced back to a fundamental lack characterizing this very approach.

3. WHY MARRY? –THE MISSING PIECE IN THE EVOLUTIONARY THEORY OF LAW-MAKING

Once it is accepted that the evolutionary approach can potentially contribute in several ways to the major tasks required in a theoretical investigation of the law-making, the question remains open as to why the evolutionary theory needs to marry, and cannot enter as a single, i.e. as it is, into the many contemporary legal theories dealing with the creation of law. As seen above in Part Two (What is An Evolutionary Theory of Law-making?), legal theory is an intellectual enterprise with clarifying and explicatory purposes; therefore the first step is to point out what an evolutionary approach has to clarify and explain if it aims to be included in this group of legal theories.

A legal theory can traditionally be categorized as either a descriptive legal theory, when directed at explaining what the law is (and the reasons and effects of this definition), or a normative legal theory, in case it has as its main target what the law ought to be. However,
this separation has progressively disappeared in recent decades, due in particular to the criticism of the idea of “description” as developed by legal realists, critical legal theories, and Ronald Dworkin.\(^5\) For instance, Dworkin points out how all legal theories in the end present

a normative component as all legal scholars carry in their purposively neutral depictions of law an ideal model of the society they want to force upon the addressees, implicitly or explicitly.\textsuperscript{76}

Nowadays, at least all the major legal schools incorporate in their theoretical frameworks both a description of what the law is (descriptive component) and a prescription of what the law ought to be (normative component).\textsuperscript{77} Contemporary legal theory varies considerably of course as to the types of ideal-models the law ought to aim for (e.g. economic efficiency, consistency, justice); moreover, differences remain as to the goal of the legal theory, the description of “normative” proposals legal actors ought to follow (as for the exclusivist legal positivism or Hart’s legal theory) or the prescription of those proposals (as for Critical Legal Studies).\textsuperscript{78} In any case, normative proposals in general are a necessary

\textsuperscript{76} See Ronald Dworkin, \textit{Law’s Ambitions for Itself}, 71 \textit{VIRGINIA LAW REVIEW} 173 (1985). See also Tuori, \textit{CRITICAL LEGAL POSITIVISM}, supra at 300-304 (showing the necessity for each legal-theoretical approach to begin with the explicit or implicit acceptance of a certain evaluative social theory).


component of every legal theory, either in the form of identifying or sponsoring them since, as admitted by Gardner, lawyers and law teachers “expect the philosophy of law to be the backroom activity of telling front-line practitioners how to do it well, with their heads held high.”

This being the situation, one can see that the evolutionary approach, despite being a suitable instrument for better understanding the evolution of a legal concept, lacks a fundamental component in order to be utilized within a broader legal theoretical investigation:

JURISPRUDENCE, supra at 3 (where the author identifies only the description of normative proposals as part of legal theory, while the prescription of such proposals is more part of what he defines as “philosophy of law”); and George Pavlakos, Normative Knowledge and the Nature of Law, in S. COYLE AND G. PAVLAKOS (EDS.), JURISPRUDENCE OR LEGAL SCIENCE? A DEBATE ABOUT THE NATURE OF LEGAL THEORY 101-102 (Oxford: Hart Publishing, 2005) and his idea of legal theory either as scientia (descriptive of normative propositions) or as prudentia (prescriptive of normative propositions). But see Blanco, The Methodological Problem in Legal Theory, supra at 27 (where the author defines the “description of the normative proposals” as part of the descriptive component of a legal theory).

79 Gardner, Legal Positivism, supra at 203. See also DWORKIN, LAW’S EMPIRE, supra at 110; and Schlag, Normativity and the Politics of Form, supra at 808 (“The key verb dominating contemporary legal thought is some version of ‘should’… ‘shoulds’ and ‘oughts’ dominate legal discourse. And the question of whether any given ‘should’ is a true moral ‘ought’ or another instrumental ‘should’ turns out to be just another internecine squabble among competing normative perspectives”). See also Brian Bix, Joseph Raz and Conceptual Analysis, 6 AMERICAN PHILOSOPHICAL ASSOCIATION. NEWSLETTER ON PHILOSOPHY AND LAW 3 (2007)(speaking of “inclination, quite strong among American legal academics –less so among theorists from continental Europe... to want always to know the normative… consequences for any theory they consider”). In the end, as highlighted also by MacCormick, there is always a value choice (i.e. a normative perspective) in choosing a descriptive perspective. See MACCORMICK, LEGAL REASONING AND LEGAL THEORY, supra at 63-64, 139-140 [2nd ed.]; Fredrik Schauer, Positivism as Pariah, in GEORGE (ED.), THE AUTONOMY OF LAW, supra at 34; and Dyzenhaus, The Genealogy of Legal Positivism, supra at 50 (where the author defines the “Identification Thesis” as the legal positivist political, or normative, assumption that “the best way to understand law is as positive law”). Cf. RAZ, THE AUTHORITY OF LAW, supra at chaps. 12-13.
an explicit normative component. By “normative component” is then meant the second step of a legal theoretical investigation where, once it has been understood how and why a certain legal concept has evolved, the legal scholar is also able to offer legal actors (either in descriptive or prescriptive terminology) criteria according to which to decide future hard cases or law-making in general on the issue. For example, it is not sufficient for legal actors

80 See, e.g., Arthur J. Jacobson, Autopoietic Law: The New Science of Niklas Luhmann, 87 MICHIGAN LAW REVIEW 1652 (1989)(as to a critique to Luhmann’ neglecting of individuals’ role and their preferences and ideologies in the law-making process); or Hutchinson, Work-in-Progress, supra at 260 (“It is not so much the past that animates the common law, but a selective account of it… [according to] the specific values and commitments that inform the process of distillation” made by the judges and lawyers”). As stressed by many critics, it is possible however to detect in most of the evolutionary approaches to the law some hidden normative components. See, e.g., Erhard Blankenburg, The Poverty of Evolutionism: A Critique of Teubner’s Case For “Reflexive Law”, 18 LAW AND SOCIETY REVIEW 279, 281, 284-285 (1984). But see Gunther Teubner, Autopoiesis in Law and Society: A Rejoinder to Blankenburg, 18 LAW AND SOCIETY REVIEW 294 (1984). For example, when using statements such as “legal uniformity… should to a large extent come about in an organic way,” evolutionary scholars implicitly assume a normative proposal (i.e. that “the organic way ought to be pursued”), at the same time as they hide the criteria according to which this proposal is preferable over another (if the “organic way” is to be chosen, is it because it is more economically efficient or because it is more just?). Smits, The Harmonisation of Private Law in Europe, supra at 81. As other examples of hidden normative proposals, see LUHMANN, LAW AS A SOCIAL SYSTEM, supra at 233 (as to the stabilizing role of the legal evolution); STEIN, LEGAL EVOLUTION, supra at 122 (pointing out the goal of conserving the status quo as embedded in each evolutionary theory); Teubner, Substantive and Reflexive Elements in Modern Law, supra at 273; or Teubner, Autopoiesis in Law and Society, supra at 330. In particular in this last work, Teubner promotes the “quality of the legalization process” by making the actors participating in it aware of its specific and differential nature in respect to the social system. However, even assuming that Teubner’s analysis of contemporary law is correct, he fails to indicate the reasons why future law-makers, for example, ought to continue in keeping the legal system’s differential nature.

81 See Holmes, The Path of the Law, supra at 474. See also Owen D. Jones, Law and Evolutionary Biology: Obstacles and Opportunities, 10 JOURNAL OF CONTEMPORARY HEALTH LAW AND POLICY 272-273 (1993)(as to
the explanation and clarification of both the reasons (why) and the modalities (how) through which the concept of corporation has developed so that it does not include among its basic features the one of operating according to social responsibility standards. The legal actors always expect from a theory an explanation, e.g. in terms of justice or economic efficiency, as to why and how social responsibility should be included (or not) in future law-making and decision-making as a fundamental (and therefore *per default* embedded) component in the legal concept of corporation. As stressed by one evolutionary scholar:

“[I]f law is to be more than the record of commands backed by superior force, a jurisprudential theory is needed which explains why there is an obligation to obey law, and which gives meaning to arguments that law is right or wrong (rather than simply *is*).”

If one looks at the evolutionary theory of law in its present form, it appears to explain the changes in the law and therefore can be useful for lawyers, judges and scholars. However, this use by legal actors is heavily restricted by the fact that this approach tends to limit its attention to what has already happened. At the precise moment a lawyer working for a drafting committee needs a general theory for some guidelines, *i.e.* in order to face a legal

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the “Naturalistic Fallacy” taking place whenever one draws “ought” conclusions from “is” statements). In this sense, the evolutionary approach to law becomes in the end what David Lyons describes as a *genetic* theory of law: “an historical, causal account of legal development… And a theory that explains why decisions have been made neither promises to justify them nor clearly offers guidance for interpretation.” DAVID LYONS, *MORAL ASPECTS OF LEGAL THEORY: ESSAYS ON LAW, JUSTICE, AND POLITICAL RESPONSIBILITY* 214 (Cambridge: Cambridge University Press, 1993).

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82 See Kellye Y. Testy, *Capitalism and Freedom –For Whom?: Feminist Legal Theory and Progressive Corporate Law*, 67 LAW AND CONTEMPORARY PROBLEMS 89 (2004)(stressing the “failure to articulate normative values against which corporate law and policy might be judged” also among the vast majority of progressive corporate legal scholars).

83 Elliott, *The Evolutionary Tradition in Jurisprudence, supra* at 92 [italics in the text].
dilemma caused either by a change in the surrounding environment or by a development internal to the legal world, evolutionary theory as a possible legal theoretical first-aid kit fails, focused instead on explaining what and why the change has happened instead of how to “remedy” to it. As a critique of the evolutionary approach has pointed out:

“[L]aw ultimately is driven not solely by impersonal pressures to achieve greater functionality, but at least to some degree also by the intelligent design of human creators. In that fundamental respect, the analogy to evolutionary theory breaks down.”

In order to become an approach useful for legal actors, an evolutionary approach to law-making therefore needs not only to explain the past, but also to somehow influence the design the law-making actors have in mind for the law that “ought-to-be.” At the end of the day, “[l]egal innovations require legal innovators. No theory of legal change can afford to neglect the forces that animate lawyers.” The evolutionary studies must then be directed into the

84 See Ratnapala, Eighteenth-Century Evolutionary Thought and its Relevance in the Age of Legislation, supra at 71; and Herbert J. Hovenkamp, The Marginalist Revolution in Legal Thought, 46 VANDERBILT LAW REVIEW 344 (1993)(“The few occasions when [Holmes] made reference to evolutionary theory in his legal writings were concerned entirely with the descriptive question of how legal rules evolve, not with the policy question of what evolution has to say about the nature of legal policymaking.”). See, e.g., JOHN H. BECKSTROM, SOCIOBIOLOGY AND THE LAW: THE BIOLOGY OF ALTRUISM IN THE COURTROOM OF THE FUTURE 58-59 (Urbana, Ill.: University of Illinois Press, 1985)(not giving any reason why law-making actors should opt for a conservative line instead of a more liberal orientation on the issue of succession law); or LUHMANN, LAW AS A SOCIAL SYSTEM, supra at 265 (where the author points out the birth and development of a certain legal concept (self defense), at the same time failing to offer to future law-making or law-applying actors possible criteria on where to draw the line where the legal/illegal border ought to be drawn). See also Duxbury, Evolutionary Jurisprudence, supra at 575; and Gordon, Critical Legal Histories, supra at 68, 71 (as to the “hidden” political agenda behind this lack of indication for the future law-making by evolutionary approach to the law).


86 Horowitz, The Qur’an and the Common Law, supra at 250-251.
future of possible laws, in particular by elaborating a normative theory capable of helping law-making actors create, select, and stabilize future legal concepts adapted to changed circumstances.87

As to the historical reasons for such a limitation of the evolutionary theory as to investigating only the why and how a certain legal concept has become the dominate one, one can begin by considering that the evolutionary theory was born in order to explain phenomena different from the law, or at least to explain the legal phenomenon from a non-legal perspective.88 The evolutionary approach started as a metaphorical or analogical reproduction of the results reached in the natural sciences and biology (as to some American versions of evolutionary theory) or as a (more or less) direct transposition into legal analysis of methodologies created for social and economic sciences (as for the European side of the story).89 As stressed, for instance, by Luhmann:

87 See Elliott, The Evolutionary Tradition in Jurisprudence, supra at 93 (stressing the necessity of evaluating evolutionary theory on the basis of its “usefulness”); and, more generally as to the success of the legal theories placing their normative proposals at the front door (e.g. Dworkin), Schlag, Normativity and the Politics of Form, supra at 843-852. This necessity of supporting legal theoretical descriptions also with normative propositions is rooted in the general fact that there is an ontological gap between descriptive and normative statements, referred to as Hume’s guillotine. See DAVID HUME, A TREATISE OF HUMAN NATURE 469-470 (2nd ed., Oxford: Clarendon Press, 1978 [1739-1740]).

88 See, e.g., STRAHLENDORF, EVOLUTIONARY JURISPRUDENCE, supra at 26-27, 574 (where the author points out his goal of developing an “evolutionary theory of law” in order to evaluates change in the law from an external perspective, i.e. a point of observation grounded in socio-biological findings). See also the critique in Michael B. W. Sinclair, Autopoiesis: Who Needs It?, XVI LEGAL STUDIES FORUM 81-86 (1992).

89 See TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM, supra at 52-53, pointing out the different roots between the European evolutionary approach (in the socio-cultural theories of evolution) and some fringes of the American evolutionary approach (in the socio-biological theories of evolution). As to the American version of evolutionary approach to the law, see, e.g., Elliott, The Evolutionary Tradition in Jurisprudence, supra at 38-39; or
“Legal knowledge is concerned with a normative order. Sociology is concerned with…

social behaviour, institutions, social systems –that is, with something that is what it is, and which, at best, calls for a prognosis or an explanation.”90

As a consequence, evolutionary theory tends to disregard, when applied to the legal phenomenon, both the specific nature of its object of investigation (the law), and especially

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90 *Luhmann, Law as a Social System*, supra at 57. See also Linda Hamilton Krieger and Susan Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 *California Law Review* 1007 (2006)(“[E]ven the best insights from the empirical social sciences cannot supply the normative principles needed for substantive lawmaking or resolve the conflicts between competing norms and interests so often implicated in the legislative and judicial processes. Law, at root, is normative. Empiricism, at root, is descriptive”).
the fundamental role played in the very formation of this object by the (internal) perspective adopted by the legal players, among which legal scholars should be included.91

For example, some of the evolutionary approaches to the law stress the idea of “organicity” as underpinning criterion behind the description of legal evolution in Western legal systems.92 This criterion of organicity is used in particular to stress the importance in the legal development of “spontaneous” judicial law-making (as to the American version of the evolutionary theory approach) or the non-state based law-making (as in the case of Smits) against the “creationist” legislative law-making. However, this idea tends to disregard the fact that there never is any spontaneous law-making, the latter always being the creation of institutional actors with their own ideas and plans as to “what is best” for the law and the


community at large, either as a national assembly, a judicial body, or as a conglomerate of business organizations.\textsuperscript{93}

In other words, the evolutionary approach fails to take into consideration one of the basic points for law-making in modern capitalistic societies (at least according to Max Weber): its instrumental rationality (in German, \textit{Zweckrationalität}), both in its substantive and more formal meaning.\textsuperscript{94} According to Weber, instrumental rationality can be defined as the criteria leading to getting the result one is aiming to achieve by using the best means available, \textit{i.e.} relative to the circumstances in a certain time and space.\textsuperscript{95} It often is the very changes in the circumstances (internal or external to the legal system) in which the law operates that force legal, political, and social actors to activate law-making.\textsuperscript{96} One feature of

\textsuperscript{93} See Sinclair, \textit{Evolution in Law}, supra at 39; and Jeff L. Lewin, \textit{The Genesis and Evolution of Legal Uncertainty about “Reasonable Medical Certainty”}, 57 \textit{Maryland Law Review} 391 (1998)(“When a judge, legislator, or administrator is ‘making’ law, any contemplated change necessarily must be the product of human design, and it is not obvious how a decision maker benefits from perceiving the change in evolutionary terms”).


\textsuperscript{96} \textit{See, e.g., Weber, Economy and Society, supra} at 669. \textit{But see} Gordon, \textit{Critical Legal Histories, supra} at 36.
the legal discipline in the legal phenomenon, as pointed out by Alf Ross among others, is its capability of changing (either intentionally or unintentionally) the very object of observation, i.e. the law. In contrast to most natural sciences, and to a more direct and higher degree than for most of the social and economic sciences, legal scholars can actually directly influence the patterns of future development of the law. For example, law professors, by claiming the existence of a certain legal principle of efficiency inside family law as an established “fact,” can actually force future generations of law-makers and law-applying actors to introduce this principle, even if the original claim was false. Using an


epistemological vocabulary, it can be said that Karl Popper’s criteria of falsification, at least when applied to legal theories, can (and often tends to) leave room for Robert K. Merton’s idea of theory as capable of being a self-fulfilling (or self-destroying) prophecy.100

This quality of the legal discipline in its turn has to do with the specific nature of the law in modern Western societies: Law is a human product aimed at regulating the relations of human beings with each other and with the surrounding environment.101 As many legal scholars have pointed out, legal reasoning most of the time is a type of common sense

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101 “[B]y the nineteenth century, at latest, a new kind of society has developed in the West: the society of technology, industry, science, machines… Each advance in science and technology seemed to increase the possibility of control –over nature, over the conditions of life. But control always required regulation, rules, implementation; control was, and had to be, vested in law, legal process, and the state.” LAWRENCE M. FRIEDMAN, TOTAL JUSTICE 42 (New York: Russell Sage Foundation 1985). See, e.g., LON L. FULLER, THE MORALITY OF LAW: REVISED EDITION 30-31 (New Heaven, CT: Yale University Press, 1969). Because of this very nature of the law, i.e. its “being” binding as a normative system because of and according to its understanding by human beings (legal culture), one cannot accept the basic assumption of one spin-off school of the evolutionary approach to the law, namely the theory of legal memetics. According to the latter, the evolution of the law is based instead on a tri-partite relation, where legal concepts (as to the “genotypes” in natural selection or “replicator”) take a middle position between the law (“organism” or the system under consideration or “interactor”) and the surrounding context (“environment” or legal culture). See Deakin, Evolution for Our Time, supra at 7-8, 30-32.
reasoning, *i.e.* it often incorporates and uses moral, political, economic, or other kinds of values as criteria for regulating human behaviors.102

However, legal reasoning, which incorporates such “forces,” has special requirements, due specifically to its normative and conflict resolution roles.103 The regulation of human behavior is not based, for instance, on statements directed at convincing the addressees (as in politics). Legal reasoning is based instead on the use of specific language which, once it has transformed certain religious, cultural, moral, or economic values into legal categories, indicates to the addressees (legal actors and/or the community at large) not models of behaviors they will “probably” embrace, but models of behaviors that the addressees “ought” to embrace.104


104 See KELSEN, THE PURE THEORY OF LAW, *supra* at 4. See, e.g., Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 51-53 (2001)(as to the social sciences often being in a biased position when investigating the law due to their “failure,
As already seen above, if one considers legal theory as that part of the legal discipline
directed at explaining the law and the functioning of a legal system, legal theory necessarily
carries with it a normative component, i.e. a complex of statements made by legal
theoreticians indicating the direction in which legal actors “ought” to proceed in order to
fulfill certain goals that “ought to be” in the legal system. The indication of the “ought-to-
be” goals then is made by using descriptive terminology, i.e. “by looking at situation A, the
addressee ought to behave as y” (as for some modern legal positivists). The normative
component can also be expressed in prescriptive terms, i.e. “value α is good, and therefore the
addressee ought always to behave as y” (as for some critical legal theories).

or refusal, to attach independent importance to legal doctrine, statutory language, and the details of
administrative regulations”).

See Coleman, The Practice of Principle, supra at 178, 199-201. In particular, Coleman points out how
scholars alleging that every legal theory is normative are correct as long as the term “normative” defines the
feature of each theory of being “responsive to the norms governing theory construction.” This meaning of
normative, however, is not the (narrower) one that has been used throughout this work nor embraced by
Coleman himself, i.e. normative theory as a theory defending a specific “ought” of the law. See Jules L.
Coleman, Incorporationism, Conventionality, and the Practical Difference Thesis, in Coleman (Ed.), Hart’s
Postscript, supra at 108 n. 22. See also Edward L. Rubin, Law and the Methodology of Law, 1997 Wisconsin

As an example of “descriptive terminology” of normative components, see Coleman, The Practice of
Principle, supra at 179-186; Kelsen, General Theory of Law and State, supra at 163-164; or Hans
Kelsen, What is the Pure Theory of Law?, 34 Tulane Law Review 269, 270 (1960). See also the criticism in
Herbert L. A. Hart, Kelsen Visited, in S. L. Paulson and B. Litschewski Paulson (Eds.), Normativity and

As an example of “prescriptive terminology” of a normative component, see Mark Tushnet, Constitutional
Interpretation, Character, and Experience, 72 Boston University Law Review 774-777 (1992); or Caroline
Morris, “Remember the Ladies”: A Feminist Perspective on the Bills of Rights, 33 Victoria University of
Wellington Law Review 29 (2002). See also Robert W. Gordon, New Developments in Legal Theory, in D.
In both cases, due to the very normative nature of the law, legal theory is always expected to contribute not only through its descriptive component to a better understanding of the past and present law. In addition, modern legal theory is always expected to offer a normative component, *i.e.* a component by which directions for future law and law-making are not only indicated, but also “justified” as the ones that “ought-to-be” taken, for instance because they retain the consistency and therefore the legitimacy of the legal system, or because by following them, welfare will be maximized or gender discrimination will be eliminated.\(^\text{108}\)

At this point, certain followers of the evolutionary theory could reply that the evolutionary approach, based on the investigations of how the law became what it is, actually devotes a relevant part of its analysis to future law and law-making. One fundamental aspect of evolutionary theory is its “predictivist” component: by explaining how a certain legal category has been created, chosen, and “stabilized” in a certain legal system, evolutionary theory aims at being also able to predict possible alternative patterns for the creation of other

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legal categories. In other words, by explaining how a certain legal category has established itself, evolutionary theory can predict how the latter will probably evolve and/or become obsolete. For example, by looking at the history of corporate law and its economic underpinnings, evolutionary theory can predict that in the future, the economic factors (in primis the idea of a corporation as an organization to increase the wealth of the shareholders) ultimately will always outweigh other types of considerations (e.g. respect for the

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environment). However, “predictions” are not “normative propositions,” at least not explicitly.\footnote{See JOHN DEWEY, THEORY OF VALUATION 51-52 (Chicago: University of Chicago Press, 1939). But see, as to the relative nature of this distinction, Rudolf Carnap, Inductive Logic and Rational Decisions, in R. CARNAP AND R. C. JEFFREY (EDS.), STUDIES IN INDUCTIVE LOGIC AND PROBABILITY 7-9 (Berkeley: University of California Press, 1971)(where one of the axioms of a predictivist perspective, namely probability, is ultimately treated as a normative claim). See further DWORKIN, LAW’S EMPIRE, supra at 154-155.}

The directions each legal theory offers legal actors are not predictions (at least not directly) of what will happen; they are “normative” directions, \textit{i.e.} patterns that lawyers, judges and law-makers ought to follow because they are (morally, politically, culturally, legally, and so on) “the right thing” to do, often regardless of the surrounding legal, political, social, or economic environment.\footnote{See HART, THE CONCEPT OF LAW, supra at 132-137. See, e.g., SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY, supra at 12 (where the author points out the often clashing relations between predictivist vision and normative nature when dealing with the concept of “valid law”). But see Michael Abramowicz, Predictive Decisionmaking, 92 VIRGINIA LAW REVIEW 70-73 (2006).} Moreover, normative propositions can have a direct performative force.\footnote{For instance, “[t]he modern legal discourse of civil rights is as much a cause as an effect of civil rights thinking within liberal ideology at large.” DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (\textit{FIN DE SIECLE}) 152 (Cambridge, Mass.: Harvard University Press, 1997). See also ROGER COTTERRELL, LAW’S COMMUNITY: LEGAL THEORY IN SOCIOLOGICAL PERSPECTIVE 250-252 (Oxford: Clarendon Press, 1995); SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT, supra at 191; and Niklas Luhmann, Law as a Social System, 83 NORTHWESTERN UNIVERSITY LAW REVIEW 140 (1989). But see LUHMANN, LAW AS A SOCIAL SYSTEM, supra at 252 (where the author implicitly underestimates the power of “ideologies” on law). See also id. at 270. See, e.g., Deakin, Evolution for Our Time, supra at 26-29.} By following the suggested normative patterns, and due to the very
nature of the law as a human creation, legal actors in the end are able to shape the law in a certain direction, regardless of any possible predictions made by the legal scholarship.\footnote{See Bruce Ackerman, \textit{Revolution on a Human Scale}, 108 \textit{Yale Law Journal} 2287 (1999)(and his “ten-year test” in order to reclassify what is reconstructed \textit{ex post} “normal evolutionary development” as an actual “juridical revolution”). See also Blankenburg, \textit{The Poverty of Evolutionism}, supra at 278-280 (as to the historical reasons behind the distance of European evolutionary theories from the actual developments in legal practice).}

In other words, being predictivist in the legal world, i.e. the idea of being able to “objectively” determine possible evolutions of the law, can be quite a risky business: Law and its evolution (especially in its decisive moments) takes into serious consideration that which legal actors subjectively consider what the law ought to be from economic, political, or purely systematic criteria. For example, the objective positions of the surrounding environments and of the legal system as to the issue of what “person” means in the Fourteenth Amendment were roughly the same under *Santa Clara v. Southern Pacific Railroad* as they were no more than thirteen years prior under the *Slaughterhouse Cases*, where (though with a tight 5-4 majority) the equal protection clause was limited not only to physical persons but, among them, mostly only to recently freed slaves.

(1949)(Douglas dissenting). *But see*, e.g., *Horwitz, The Transformation of American Law 1870-1960*, *supra* at 69-70 (as to the continuity of the *Santa Clara* decision in itself, and instead the revolutionary character of its judicial and doctrinal interpretation in the following decades); or Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 University of Chicago Law Review 1463 (1987)(as to the non-revolutionary role played by the Supreme Court in its 1886 decision).


With both decisions, one can observe how the surrounding environment presented the same features of large corporations pressuring justices and law-makers generally in order to be safeguarded from state interference. Looking at the legal system, one could also notice how the situation was more or less the same in both cases, the Fourteenth Amendment was already in force from 1868 and neither the Supreme Court nor the legislatures had marked any clear shift in interpretation of this Constitutional amendment in the short period between 1873 and 1886. Nevertheless, the majority of justices sitting in the Supreme Court in 1866 subjectively considered that the same text (“person” under the Equal Protection Clause) meant a substantially different thing (having legal personality) from that stated previously in 1873 in the *Slaughterhouse Cases* (being a US citizen). Consequently, their normative accounts as to American constitutional law (it ought to protect all persons, both physical and legal) were not only unpredictable at the time of *Santa Clara*, i.e. not anticipated considering the previous

(1883)(describing the Supreme Court’s history in analyzing the fundamental nature of a corporation, beginning with *Trustees of Dartmouth College v. Woodward* (1819), in which the Court held a corporation to be simply an artificial legal product, consequently then outside the sphere of protection guaranteed by the Fourteenth Amendment).

118 A central role in this legal revolution has been argued to have been played by a very unpredictable and subjective factor, i.e. the influenced exercised upon the justices by a lawyer (not even involved in the case). Roscoe Conkling advocated in front of the same Supreme Court the “personality” of corporations in a similar case discussed the year before Santa Clara, namely *County of San Mateo v. Southern Pacific Railroad Co.*, 116 U.S. 138 (1885). In order to reinforce his argument, Conkling heavily used his position as a member of the Congressional Reconstruction Committee that in 1882 drafted the Fourteenth Amendment. See Howard Jay Graham, *The “Conspiracy Theory” of the Fourteenth Amendment*, 47 YALE LAW JOURNAL 371-378 (1938); and CHARLES FAIRMAN, *RECONSTRUCTION AND REUNION* 1864-88. PART TWO 725-728 (New York: Macmillan, 1987). As to a similar subjective influence by Justice Joseph Bradley (and his ideas as to what a corporation is) on the same legal issue and in the same period, see LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 343-344 (2nd ed., New York: Simon and Schuster, 1985).
decisions and the surrounding environment, the justices’ normative statements also became legal reality (constitutional law actually protects corporations against state and federal actions). This set the agenda for predictions as to future corporate law-making and, in particular, as to the constitutional status of the legal entity known as “corporation.”

As pointed out by Alan C. Hutchinson, “law will always be a relatively open ended and stylized form of politics in which ‘anything might go’.” For this reason, and almost paradoxically, the evolutionary theory, in order to become as predictivist as possible, i.e. to foresee which directions the law will take, should itself explicitly provide legal actors with

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119 See Richard L. Aynes, Unintended Consequences of the Fourteenth Amendment and What They Tell us About its Interpretation, 39 Akron Law Review 307-308 (2006). But see Mark, The Personification of the Business Corporation in American Law, supra at 1457 (pointing out how “[i]n the 1880s it appeared that the time was ripe for a new approach to the corporation,” though in comparison to the legal and social climate around Dartmouth decision in 1819). As stressed, for instance, by Suzanne B. Goldberg in her evolutionary investigation of the judicial law-making in civil rights issues, the courts tends to obscure the normative fundamental reasons of their ground-breaking decisions with descriptive prepositions claiming “continuity.” See Goldberg, Constitutional Tipping Points: Civil Rights, Social Change, and Fact-based Adjudication, 106 Columbia Law Review 1958-1961 (2006). But see Deakin, Evolution for Our Time, supra at 14 (“The widespread and unavoidable practice of providing after-the-event rationalizations to doctrinal innovations often obscures the historical process by which they were formed”).

120 See, e.g., Bellotti v. Baird, 443 U.S. 622 (1979)(where corporations have also been granted freedom of speech). See also Carl J. Mayer, Personalizing the Impersonal: Corporations and the Bill of Rights, 41 Hastings Law Journal 580 (1990)(according to whom the decision in Santa Clara “paved the way for companies to receive the benefits of Lochner era substantive due process and the Court’s invalidation of state economic regulation prior to the New Deal”)[italics in the text]; and Horwitz, The Transformation of American Law 1870-1960, supra at 70-107 (according to whom the Santa Clara decision had the effect of setting the stage for the imposition upon corporate law of the corporate personality theory, an imposition which was actually reached only by the subsequent jurisprudence up to 1910).

121 Hutchinson, Work-in-progress, supra at 265.
some normative criteria, i.e. to offer directions as to that the law ought to take. This actually is one of the major goals of every legal theory and, in the end, the measurement of its success or failure as such: the capacity to provide law-makers (when facing new realities) and law-appliers (when facing “hard cases”) not only with a better picture of the present, but also with criteria or general analytical tools to somehow face and change the future.122

As seen at the beginning of this Part, each theory claiming to be legal not only aims at explaining the legal phenomenon, but also seeks to help legal actors work “better” by offering some evaluative cornerstones (criterion α) according to which lawyers, law-makers and judges can consider solution y as “legal” and solution z as “non-legal.” The incorporation of a normative component then is a necessary step in order to transform the evolutionary approach to the law into a more popular legal theory, i.e. a theory that is immediately recognizable and used by legal actors as appropriate in their daily work.123 This integration means that

122 See Anthony D’Amato, Jurisprudence: A Descriptive and Normative Analysis of Law 50-51 (1984); and MacCormick, Rhetoric and the Rule of Law, supra at 14-15. “Theories are nets cast to catch what we call ‘the world’; to rationalize, explain and to master it.” Karl Popper, The Logic of Scientific Discovery 59 (1961). See also Hutchinson and Archer, Of Bulldogs and Soapy Sams, supra at 50. Cf. Richard Dawkins, The Blind Watchmaker 5 (New York: W.W. Norton & Co., 1987)(“Natural selection, the blind, unconscious, automatic process which Darwin discovered, and which we now know is the explanation for the existence and apparently purposeful form of all life, has no purpose in mind. It has no mind and no mind’s eye. It does not plan for the future. It has no vision, no foresight, no sight at all. If it can be said to play the role of watchmaker in nature, it is the blind watchmaker”). But see Julie Dickson, Evaluation and Legal Theory 17 (Oxford: Hart Publishing, 2001)(as to limited criteria in order to evaluate the success of a legal theory, namely its capacity to be correct and to explain the nature of law).

123 See David S. Law, Positive Political Theory and the Law. Introduction: Positive Political Theory and The Law, 15 Journal of Contemporary Legal Issues 2 (2006)(“[w]hatever its explanatory or predictive power, no theory of lawmaking is likely to command the full attention of legal scholars unless it pays generous regard to
evolutionary scholars must explicitly offer legal actors the evaluative cornerstone to be chosen as an axiomatic term in the normative reasoning; a legal evolutionary theory needs to explicitly state whether and why the criterion $\alpha$ separating law from non-law, for instance, is the one of “justice,” “economic efficiency,” or “formal consistency within the legal system.” Evolutionary scholars have two possible paths to take in order to do this: either they remain single (i.e. by developing their own normative side) or they marry a well-established legal theory, from which they can take something (i.e. the normative part) and to which they can bring a dowry (i.e. a well established descriptive part, in particular in terms of the explanatory part of the processes of law-making).

4. POSSIBLE BRIDES –“CREATIONIST” VS. “DARWINIST” LEGAL THEORIES

Several considerations seem to somehow discourage evolutionary scholars to remain single, that is to go down the aisle of developing their own normative component alone, and then add it to the already existing descriptive part. Generally speaking, as pointed out by a former evolutionary scholar:

“Legal scholarship should not be so timid as to depend on others for its theoretical models. We might take our inspiration where we find it, but we should build our theories

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124 See, e.g., Steven Walt, Hart and the Claims of Analytic Jurisprudence,” 15 LAW AND PHILOSOPHY 388 (1996), according to whom “[a] complete theory of law presumably would include at least the following components: (1) a theory of legal validity; (2) criteria for the identity of legal norms; (3) a descriptive and normative theory of legislative and judicial reasoning; (4) a theory of institutional legitimacy; (5) a semantics of legal language; and (6) a theory of compliance” [italics added]. See also Hutchinson and Archer, Of Bulldogs and Soapy Sams, supra at 42 and 55. Compare Elliott, The Evolutionary Tradition in Jurisprudence, supra at 93 (limiting the role of the evolutionary approach to law to a pure descriptive role of “creat[ing] a context, a distinctive kind of conversational setting, within which [the normative] dialogue about law may occur”).
within our own discipline, constrained only by the data that defines it and the criteria of quality appropriate to it.\textsuperscript{125}

The evolutionary theory should therefore avoid seeking to develop its own normative apparatus in order to become a theoretical approach useful and used by legal actors, as in the end, it will tend to mirror the normative elements developed within the field of knowledge that have inspired the evolutionary approach to law (\textit{e.g.} sociology or biology).\textsuperscript{126} Instead,


\textsuperscript{126} \textit{See, e.g.}, Douglas A. Terry, \textit{Don’t Forget About Reciprocal Altruism: Critical Review of the Evolutionary Jurisprudence Movement}, 34 \textbf{Connecticut Law Review} 50-508 (2002), where the author suggests the use by the evolutionary approach of the normative components (\textit{e.g.} a theory of justice) present in sociobiology. \textit{See also} the critiques in Duncan Kennedy, \textit{Cost-Reduction Theory as Legitimation}, 90 \textbf{Yale Law Journal} 1278-1281 (1281); Hutchinson and Archer, \textit{Of Bulldogs and Soapy Sams, supra} at 47; and Jeffrey J. Rachlinski, \textit{Is Evolutionary Analysis of Law Science or Storytelling?}, 41 \textbf{Jurimetrics} 368-369 (2001). \textit{But see} Hutchinson and Archer, \textit{Of Bulldogs and Soapy Sams, supra} at 54 (as to the impossibility of having a normative component without ending up being “creationist).
evolutionary scholars should attempt to find, within the legal world, the normative components that once added to the already present descriptive part, could smooth the acceptance by the inhabitants of the legal world, such as judges or lawyers.\textsuperscript{127}

In particular, there are two main reasons for opting to marry a normative component constructed by a more established legal theory: one of an economic nature, the other of a theoretical character. As to the economic reason, one must keep in mind that the theoretical thinking as to the law and its making has taken place for more than 2400 years (at least in Western legal systems).\textsuperscript{128} Due to this chronological length, which has resulted in a vast amount of potential explanations and normative messages, it is conceivable that there is a legal theory “out there” that has gained a certain degree of legitimacy among legal actors and which, at the same time, has come forward with normative messages compatible, or at least very similar, to those normative results an evolutionary scholar would have come forward with on his or her own. In short, legal theories with normative components have been on the

\textsuperscript{127} See Holmes, Law in Science and Science in Law, supra at 447. See, e.g., Leiter and Weisberg, Why Evolutionary Biology is (so Far) Irrelevant to Law, supra at 48; or Owen D. Jones, Law and Evolutionary Biology: Obstacles and Opportunities, 10 JOURNAL OF CONTEMPORARY HEALTH LAW AND POLICY 265 (1994). See also Jack M. Balkin and Sanford Levinson, Law and the Humanities: An Uneasy Relationship, 18 YALE JOURNAL OF LAW AND THE HUMANITIES 173 (2006)(“Law seems endlessly to poach upon other disciplines and absorb many of their insights while still remaining law. Conversely, many disciplines have tried to invade and colonize law over the years, yet the legal academy still continues to produce legal scholarship that asks recognizably traditional sorts of legal questions”).


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market for a much longer period so perhaps, it can be practical to (try to) use their well-oiled system of distribution of normative messages among legal actors.129

Shifting attention to the theoretical reason favoring a borrowing of the normative component from a well-established legal theory, this is based on the consideration that evolutionary theory is not a “complete” theory of law, not even in a descriptive sense.130 If one accepts the Hartian definition of legal theory as presented above (clarification of a legal system from an internal perspective), evolutionary theory does not fit into this as it describes the elements and mechanisms of change and stability in the legal system from an external perspective, either of a sociological nature (as in the European version) or of a more natural sciences origin (as for the American counterpart).131 As consequence, the evolutionary approach lacks several of the descriptive components necessary from an internal perspective

129 See Ugo Mattei, Efficiency in Legal Transplants: An Essay in Comparative Law and Economics, 14 INTERNATIONAL REVIEW OF LAW AND ECONOMICS 8-9 (1994)(as to the necessity, in a post-nation state world, to also shift the major paradigm governing the “market of legal ideas,” i.e. from a protectionist and parochial policy to an attitude more open to “shopping around”).

130 See JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM 1-2 (2nd ed., Oxford: Clarendon Press, 1980)(as to the issues a legal theory needs to tackle in order to be “complete”: existence of the law, identity of the law, structure of the law, and content of the law). It should be, however, stressed that for some hard-liner legal positivists, the legal positivism itself is not “a whole theory of law’s nature” either, being merely “a thesis about legal validity.” Gardner, Legal Positivism, supra at 210. See also id. at 224.

131 See Robert Wai, The Interlegality of Transnational Private Law, 71 LAW AND CONTEMPORARY PROBLEMS 112 (2008)(pointing out the missing internal perspective in the European version of evolutionary theory); and Terry, Don’t Forget About Reciprocal Altruism, supra at 502 (underlining the lack of the internal perspective in the American version of evolutionary theory). See also Hart, Postscript, supra at 255-257. But see Richard A. Posner, The Decline of Law as an Autonomous Discipline: 1962-1987, 100 HARVARD LAW REVIEW 779 (1987), (according to whom legal theory is “the study of law... ‘from the outside,’ using the methods of scientific and humanistic inquiry to enlarge our knowledge of the legal system”).
for legal actors and which, at the same time, are an essential underpinning for having normative messages directed to these very actors creating the law.¹³² One classical example of an element present in all contemporary reflections about the law from an internal perspective and which, at the same time, is conditio sine qua for their normative component, is the discussion as to the nature of law, i.e. a theory on the fundamental elements characterizing the binding character of the law as different from other normative systems.¹³³

A descriptive theory of the nature of law is an essential background for having a normative component because, by characterizing what makes the law different from other normative systems, it becomes possible to offer to legal actors indications as to what “ought

¹³² See, e.g., Robert S. Summers, On Identifying and Reconstructing a General Legal Theory, in R. S. SUMMERS, ESSAYS IN LEGAL THEORY 62 (Dordrecht: Kluwer Academic Publishers, 2000)(where the author counts, among the constitutive fields of a general theory of law, investigations on adjudication and legislation, the nature of law, theory of law-making, the separation of law and morals, legal methods, and criteria in order to identify valid law).

to be done” by law in order to unravel conflicts not resolvable (or not wishing to be resolved) by non-legal standards.\footnote{See Hart, Postscript, supra at 240; Finnis, Natural Law and Natural Rights, supra at 276; Felix Cohen, The Ethical Basis of Legal Criticism, 41 Yale Law Journal 204 (1931); and Jules L. Coleman, Beyond the Separability Thesis: Moral Semantics and the Methodology of Jurisprudence, 27 Oxford Journal of Legal Studies 607-608 (2007). But see, e.g., Hans A. Linde, Judges, Critics, and the Realist Tradition, 82 Yale Law Journal 252 (1972)(as to the unnecessary connection, inside the legal realism, between the description of what the law is, i.e. what the judges do, and what the law ought to be, i.e. what the judges should do); Kenneth Einar Himma, Substance and Method in Conceptual Jurisprudence and Legal Theory, 88 Virginia Law Review 1219-1221 (2002)(as to the intrinsic value of a pure theoretical description of the nature of law); or John Finnis, On the Incoherence of Legal Positivism, 75 Notre Dame Law Review 1604 (2000)(“general descriptions of law will be fruitful only if their basic conceptual structure is… derived from the understanding of good reasons”). It should be pointed out, however, that, in its turn, a descriptive theory as to the nature of law, just like for every theory, requires a normative choice as to the perspective from which to describe what law is and what law is not, i.e. a choice made upon or presupposing certain value considerations. See, e.g., Finnis, Natural Law and Natural Rights, supra at 172; Nicola Lacey, A Life of H.L.A. Hart: The Nightmare and the Noble Dream 198 (Oxford: Oxford University Press, 2004); Neil D. MacCormick, Institutional Normative Order: A Conception of Law, 82 Cornell Law Review 1068 (1997); and Ronald Dworkin, Justice in Robes 32-34 (Cambridge, Mass.: Harvard University Press, 2006). But see Marmor, Legal Positivism, supra at 699 (defining as “too trivial” this meaning of “normative” in the sense of choosing the perspective from which to describe).}

For instance, in a hard case where there is a conflict between the principles of legal certainty and justice, a legal scholar can indicate to the judge what he or she “ought to decide” only by having a general theory on what is part of the law (and therefore to be upheld) and what is not.\footnote{See, e.g., Ronald Dworkin, Taking Rights Seriously ch. 2-3 (Cambridge, Mass.: Harvard University Press, 1978), where the author points out the rightness of the decision taken by the court in Riggs v. Palmer, an evaluation which requires the previous endorsement of Dworkin’s description of what the nature of law is (i.e. a system of binding norms traceable not only in rules, but also in principles); Catharine A. MacKinnon, Graduation Address: Yale Law School, June 1989, 2 Yale Journal of Law and Feminism 299-300 (1990)(as}
possible to see how the latter does not provide a theory as to the nature of law (at least not explicitly) since it falls outside its purview. As seen above, the origins of the evolutionary approach to law lay outside the legal discourse and therefore, evolutionary scholars are “by birth” not as involved in the philosophical discussions on topics such as “what is the law.” In Merton’s terminology, one can say that the evolutionary theory of law aims at tackling issues concerning the mechanisms of law-making from a middle-range theoretical standing, i.e. by leaving at the periphery (or better, in the background) of their focus more general questions as to the nature or ontology of the law.136

Since it is necessary for the evolutionary theory to have a normative part to offer legal actors, and since it is not advisable (for the two main reasons just mentioned) to start constructing from scratch a specific evolutionary normative component, the remaining available option is to take advantage of the long tradition inside legal theory of discussing which criteria legal actors ought to use (or not) in order to establish what is and what is not to the description of the nature of law as gender biased) and Catharine A. MacKinnon, Pornography as Defamation and Discrimination, 71 BOSTON UNIVERSITY LAW REVIEW 804-806 (1991)(as to some normative proposals to change the male dominated perception of law); or MACCORMICK, LEGAL REASONING AND LEGAL THEORY, supra at xiv-xv, 54, 61-62 [2nd ed.](for a definition as to the nature of law) and at ch. 5 (as to its normative implications).

136 See Clark, The Interdisciplinary Study of Legal Evolution, supra at 1265; and Merton, The Role-Set: Problems in Sociological Theory, supra at 108-110 (as to the definition of middle-range theory as a theory mostly directed at the explanation and analysis of only segments of a phenomenon, e.g. only the creation and evolution of legal concepts instead of the nature of law in general). See also COLEMAN, THE PRACTICE OF PRINCIPLE, supra at 5-6; Roger Cotterrell, Sociological Interpretations of Legal Development, 2 EUROPEAN JOURNAL OF LAW AND ECONOMICS 352 (1995); and Mathias M. Siems, Legal Originality, 28 OXFORD JOURNAL OF LEGAL STUDIES 152-153 (2008)(as to the possible space of a “meso-legal analysis” between micro- and macro legal investigations).
law.\textsuperscript{137} It can be particularly helpful evaluating whether it is generally possible to bring into play as the normative component for the evolutionary approach the one already developed by some of the well-established contemporary legal theories.

It is true, as stated by J. B. Ruhl, that:

“Whether law evolves through some definable internal process or merely changes in response to events around it depends on our understanding of the why, how, and to where of the changes that take place. Much of legal theory has been devoted to the ambitious undertaking of answering those questions.”\textsuperscript{138}

However, not all legal theories can be seen as “suitable” brides for the evolutionary approach. In other words, the first step is to see whether a normative component as developed by

\textsuperscript{137} See, e.g., the classical Hart vs. Fuller debate as in Hart, \textit{Positivism and the Separation of Law and Morals}, \textit{supra} at 618-619, 627-629 and Lon L. Fuller, \textit{Positivism and Fidelity to Law —A Reply to Professor Hart}, 71 \textit{HARVARD LAW REVIEW} 648-657 (1958)(as to the criteria to be used in order to establish whether the statutory provisions enacted during the Third Reich were binding law or not). See also Posner, \textit{The Problems of Jurisprudence}, \textit{supra} at 10-23, very briefly sketching a history of Western legal theory based on the different normative components (or “political theories”, as Posner defines them) offered by some major legal thinkers.

different schools of contemporary legal thinking can contain normative proposals compatible with the basic research program and methodologies endorsed by the evolutionary approach.139

In order to evaluate the compatibility between evolutionary theory and legal theory, one possible criterion consists of loosely applying Hutchinson’s analytical distinction of contemporary legal theoretical movements between “Creationists” and “Darwinians,” according to their fundamental ideas as to the driving forces behind legal evolution.140 For the movements belonging to the “Creationist” legal theory, it is generally possible to identify

139 See, e.g., Adrian Vermeule, Connecting Positive and Normative Legal Theory, 10 UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW 394-395 (2008) (as to the “constraining” power exercised by descriptive legal theory upon choosing compatible normative messages). As to similar enterprises of inserting normative components originated in other legal movements in a descriptive legal theory, see, e.g., TUORI, CRITICAL LEGAL POSITIVISM, supra at 1-17 (combining of the descriptive part of legal positivism with the normative part of Critical Legal Studies); or Paul B. Cliteur, Spontaneous Order, Natural Law, and Legal Positivism in the Work of F. A. Hayek, in B. BOUCKAERT AND A. GODART-VAN DER KROON (EDS.), SPONTANEOUS ORDER, NATURAL LAW, AND LEGAL POSITIVISM IN THE WORK OF F. A. HAYEK 14-32 (Northhampton: Edward Elgar, 2000) (as to a possible combination of Hayek’s descriptive evolutionary economic theory with normative components borrowed from natural law).

140 See Hutchinson and Archer, Of Bulldogs and Soapy Sams, supra at 31. See also, as a possible alternative categorization, the distinction between “Lamarckian” and “Darwinist” theories of legal evolution as hinted by Hovenkamp, Evolutionary Models in Jurisprudence, supra at 648-649, and George L. Priest, The New Scientism in Legal Scholarship: A Comment on Clark and Posner, 90 YALE LAW JOURNAL 1288 (1981); or the division, based on Robert M. Cover work, among “jusgenetic” (a sort of European version of evolutionary legal model), “creationist,” “applicationist,” and “illusionist” theories of (judicial) legal evolution as described by in Franklin G. Snyder, Nomos, Narrative, and Adjudication: Toward a Jurisgenetic Theory of Law, 40 WILLIAM AND MARY LAW REVIEW 1644-1654, 1714-1716 (1999). Cf. HAYEK, LAW, LEGISLATION, AND LIBERTY, supra at 8-9 (pointing out “constructivism” and “evolutionism” as the two ideal-typical ways of thinking about the regulation of human activities in general).
certain unique and “hidden designer behind law’s development and direction.” Leaving Hutchinson’s grouping, it is possible to place among the creationist legal theories, Marxist legal theory, classic natural law (John Finnis), Dworkin, Law and economics, Critical Legal Studies, and their spin-off schools (e.g. feminist jurisprudence and Critical Race Theory). All these very different legal theories can be described as creationist in relation to the evolution of the law, as they all adopt a linear model of law-making: to a larger or narrower extent, they all presuppose some unique force behind the evolution of the law, a sort of Intelligent Designer, operating from the origins of the law until the end of time and pushing

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142 See, e.g., Hutchinson and Archer, Of Bulldogs and Soapy Sams, supra at 39 (where the authors consider Dworkin and Posner as being both “creationist”). See also HUTCHINSON, EVOLUTION AND COMMON LAW, supra at 70-76. But see, e.g., Varmeule, The Invisible Hand in Legal Theory (October 6, 2009), supra at 3 (where Holmes is counted among the “creationists”); or Hutchinson and Archer, Of Bulldogs and Soapy Sams, supra at 36 (where the authors instead consider an evolutionary approach as typical of most “critical” legal movements). It should be, however, stressed that Hutchinson and Archer seem to group the various legal schools in relation to the evolutionary approach in terms of their value-messages the law should implement (e.g. “which value will in the end prevail?”) rather than, as done here, in terms of the processes superseding the legal change (e.g. “how will in the end the value x prevail?”). See, e.g., Hutchinson and Archer, Of Bulldogs and Soapy Sams, supra at 29; and HUTCHINSON, EVOLUTION AND COMMON LAW, supra at 99 (where feminist jurisprudence and respectively Law and economics are defined as “social Darwinist”).

All these legal theoretical movements differ greatly when it comes to the identification of what this “creationist” force is, and in which direction this force pushes the legal system.\footnote{See, e.g., \textit{Varmeule, The Invisible Hand in Legal Theory, supra} at 6-11 (where the author speaks of a high degree of heterogeneity as to both the value messages and the mechanisms of various legal theory embracing the idea of an invisible-hand leading the legal change).} The Intelligent Designer can be the evil God of patriarchy pushing the law towards gender discrimination (as for feminist jurisprudence); or class stratification determining the content of the legal superstructure (as for Marxists); or, finally, the dominating political ideologies deciding where the law ought to head (as for Critical Legal Studies).\footnote{See, e.g., \textit{Catherine McKinnon, Toward a Feminist Theory of the State} 114 (Cambridge, Mass.: Harvard University Press, 1989); \textit{Karl Marx, Communist Manifesto} 23-27 (Chicago: Henry Regnery Company, 1950 [1848]); or Duncan Kennedy, \textit{Form and Substance in Private Law Adjudication}, 89 \textit{Harvard Law Review} 1685 (1976).} However, it can also be the good God of reasonability aiming at the common good for the community (as for Finnis) or the good God of economy carrying the legal system towards the land of efficiency (as for Law and economics).\footnote{See, e.g., \textit{Finnis, Natural Law and Natural Rights, supra} at 100-126, 276-282; Robert P. George, \textit{Human Flourishing as a Criterion of Morality: a Critique of Perry’s Naturalism}, 16 \textit{Tulane Law Review} 1462} Nevertheless, all these theories have a basic idea in common
that sets them on a plane incompatible with the basic assumptions of the evolutionary approach: there is always an underlying and unique force (patriarchy, class interests, common good, economic efficiency) which, regardless of the environmental changes and independent of the development of the internal structure of the legal system, molds the evolution of the law.\footnote{See Varmeule, The Invisible Hand in Legal Theory, supra at 4; and Scott Dodson, A Darwinist View of the Living Constitution, 61 VANDERBILT LAW REVIEW 1335-1336 (2008)(as a concrete creationist approach to the theory of constitutional law). Moreover, as for instance pointed out by Lewis A. Kornhauser as to Law and economics, according to the creationist legal theories the forces operating on the law tend to have almost exclusively an endogenous nature in relation to the legal system. See Kornhauser, A World Apart? An Essay on The Autonomy Of The Law, 78 BOSTON UNIVERSITY LAW REVIEW 768 (1998). See, e.g., Horowitz, The Qur’an and the Common Law, supra at 248; or Jody S. Kraus, Legal Design and the Evolution of Commercial Norms, 26 JOURNAL OF LEGAL STUDIES 382 (1997)(“All of the traditional legal-evolutionary theories have difficulty demonstrating the existence, much less dynamics, of an evolutionary force. In contrast, there is an obvious candidate for the evolutionary force acting on the development of commercial practices: the competitive market.”). But see Kornhauser, A World Apart?, supra at 764-766, where the author considers the presence within the Law and economics movement of a “purist” fraction (for which “the law has no normative force,” 765) and a more “mixed” segment (for which “agents are constrained by some institutional rules,” 765-766). It should finally be added that, during the late 19\textsuperscript{th} and early 20\textsuperscript{th} century of Western legal theory, it is possible to trace some legal movements (e.g. the American legal formalism by Christopher Columbus Langdell or the German school of Begriffsfurisprudenz) which, though embracing a creationist mode of law-making, placed the Intelligent Designer within the very legal system and its history. See, e.g., Joseph H. Beale, Jr., The Development of Jurisprudence During the Past Century, 18 HARVARD LAW REVIEW 282-283 (1905); or, more recently,}
The normative component for this group of legal theories focuses not so much on modifying the mechanisms of evolution, but rather on modifying the *deus ex machina* (and consequently, the final results of the legal evolution). Their normative component can be roughly summarized as based on the leading cornerstone that legal actors ought to operate in all possible ways, as long as in the end, they are able, for example, to introduce a gender perspective in the law and, in this way, shift a patriarchal legal system into a truly “gender neutral” law; or as long as in the end, judges and law-makers succeed in having a *homo œconomicus* view of legal matters and, in this way, move from an “economic inefficient” law into an “economic efficient” one.\(^\text{149}\)

These legal theories can then hardly be invoked for the normative component lacking in the evolutionary approach to the law. The evolutionary theory’s methodology is based instead on searching for constant elements in the mechanisms of changes in the law, where in particular the interaction between changing internal structures of the legal system (*e.g.* as to the production of new legal categories) and the changing surrounding environmental

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conditions (e.g. as to the selection phase) play a decisive role. For this reason, and also in order to avoid falling into the “evolutionist” trap, any normative proposals coming from a possible legal evolutionary theory necessarily need to consist of “ought-to-be” messages centered around the idea of improving such processes of creation, selection, and retention. This theoretical objective should outweigh offering criteria according to which one can evaluate the “inner goodness” of their final results. For example, a normative component of a legal evolutionary theory should be in the direction of offering to legal actors the procedural criterion according to which a legal category can be defined as “better fitting” into a certain environment, regardless of whether this environment (and consequently the fitting category) is patriarchal or economically efficient.

150 See, e.g., Smits, Applied Evolutionary Theory, supra at 481; Elliott, Ackerman, and Millian, Toward a Theory of Statutory Evolution, supra at 315; or Holmes, Law in Science and Science in Law, supra at 448-450. But see the cutting critique by Lawrence M. Friedman, On Legal Development, 24 Rutgers Law Review 22 (1970) (“Evasion of the problem of cause and effect is a general, nagging problem in all the evolutionary theories. They do not shed any light on how legal change and social change fit together. They describe some sort of relationship over time, but they do not show whether law or society moves first or whether a particular sort of interaction exists”).

151 See, e.g., Smits, The Harmonisation of Private Law in Europe, supra at 99; Skeel, An Evolutionary Theory of Corporate Law and Corporate Bankruptcy, supra at 1394-1397; or Justice Holmes’ dissenting opinion in Abrams v. United States, 250 U.S. 630 (1919) (as to the procedural criterion of legally guaranteeing the existence of a “marketplace of ideas,” regardless of which idea then comes out as victorious). See also Luhmann, Law as a Social System, supra at 271. As to some other possible evolutionary procedural criteria for statutory and judicial law-making, see, e.g., Whitt, Adaptive Policymaking, supra at 567-589; Michael B. W. Sinclair, 46 Drake Law Review 376-379 (1997); and Bruce Ackerman, We the People. Volume II: Transformations 409 (Cambridge, Mass: Harvard University Press, 2000). Needless to say, this distinction between “procedural” normative criteria (as required by the evolutionary approach) and “substantive” (or goal-oriented) normative criteria (as offered by the creationist legal theories) is of an ideal-typical and relative nature. As stressed by many legal scholars, every procedural normative criterion presupposes somehow certain “hidden”
Shifting now to the other group of potential contributors to the normative component of the evolutionary theory, Lon L. Fuller’s procedural natural law and modern legal positivism can be counted as “Darwinist” in respect of the issue of legal changes.\(^{152}\) For these legal theoretical streams, the law tends to evolve according to non-linear-models, where a “hidden” creator or agenda is absent. As for Darwin’s theory of natural selection, Fuller and modern legal positivists produce an “explanation of evolution [which does] not require the active substantive criterion according to which a certain procedure is considered better than another. See, e.g., Fried, The Evolution of Legal Concepts, supra at 314 (as to the hidden substantive criteria in the apparently procedural Holmes’ normative proposal of maintaining a “free market of ideas”); or Michel Rosenfeld, Can Rights, Democracy, and Justice Be Reconciled Through Discourse Theory? Reflections on Habermas’ Proceduralist Paradigm of Law, 17 CARDOZO LAW REVIEW 793 (1996) But see, e.g., LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 7-8 (New York: Basic Books, 1999)(as to the possibility of separating procedural and substantive normative proposals).

\(^{152}\) Another possible Darwinist legal theory is the Legal Process movement, due in particular to their attention both to the modalities of legal evolution and the central role played in the law-making by the complex interactions of the legal world with the surrounding environment. See, e.g., WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 141-142 (Cambridge, Mass: Harvard University Press, 1994); and William N. Eskridge and Philip P. Frickey, The Making of the Legal Process, 107 HARVARD LAW REVIEW 2034-2035 (1994). However, as pointed out by several authors, the Legal Process embraces many of Fuller’s positions and therefore, due to space constraints, Legal Process will not be considered further in this work. See for example DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE, supra at 251-262; BIX, JURISPRUDENCE, supra at 84-85; and James Boyle, Legal Realism and the Social Contract: Fuller’s Public Jurisprudence of Form, Private Jurisprudence of Substance, 78 CORNELL LAW REVIEW 377 (1993). But see Eskridge and Frickey, The Making of the Legal Process, supra at 2045 (defining the Legal Process as a “procedure-based positivism”). Cf. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE, supra at 129-179 (offering an illuminating picture to the complexity of the relations between the Legal Process school, legal positivism, and Fuller’s natural law theory).
participation of God or the Zeitgeist or Natural Law.” Instead, determinative for the functioning of the evolution are the interactions between the environment in which the evolution is taking place, and the internal development of the legal world.

It is true that for procedural natural law and modern legal positivism, there are certain constant processes of change or evolution of the law on which these scholars focus their attention. However, these recurring evolutions of the law are neither in the hands of a unique creating force (such as the Marxist economic ruling class) nor do they tend to follow a determinative path.

153 Hovenkamp, Evolutionary Models in Jurisprudence, supra at 647. See also Hutchinson, Evolution and The Common Law, supra at 42-44; and Duncan Kennedy, The Disenchantment of Logically Formal Legal Rationality: Or, Max Weber’s Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought, 55 Hastings Law Journal 1059 (2004)(where, according to the author, the procedural natural law and modern legal positivism are endorsing the same secular idea as to the law-making due to the two major paradigms dominating the modern idea of what the law ought to be, i.e. “desacralization and elimination of transcendence”). Compare with Justice Holmes’ dissenting opinion in Southern Pacific Co. v. Jensen, 244 U.S. 222 (1917)(“The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified”). See also Richard Dawkins, Climbing Mount Improbable 4-5 (New York: W.W. Norton & Co., 1996)(where the author defines evolution as the “blind watchmaker” in order to stress the lack of a unique mastermind behind a planned creation of new species). Compare Teubner, Law as an Autopoietic System, supra at 47-63 (and the description of his theory as the one of blind evolution).

deterministic cause-effect relations (such as the feministic legal idea of laws drafting by men and the resulting discrimination of women). For all Darwinist legal theories, the evolution of the law is a very complex phenomenon that does not abide by a single formula (e.g. change of the power structure equals change in law). Instead, legal changes are based on broader interactions of different formulas (e.g. doctrinal evolution of a certain legal category and, at the same time, changing of the surrounding environment), in which moreover the power relations can change over time and place.\footnote{See, e.g., Kelsen, \textit{General Theory of Law and State}, \textit{supra} at 120, in particular in relation to \textit{id.}, 135 and to Kelsen, \textit{The Pure Theory of Law}, \textit{supra} at 238-240, 242-245; Raz, \textit{Hart on Moral Rights and Legal Duties}, \textit{4 Oxford Journal of Legal Studies} 131 (1984); Hart, \textit{The Concept of Law}, \textit{supra} at 103; Hart, \textit{Analytical Jurisprudence in Mid-Twentieth Century}, \textit{supra} at 76; Hart, \textit{Postscript}, \textit{supra} at 256-257; MacCormick, \textit{Legal Reasoning and Legal Theory}, \textit{supra} at 139-140 [2nd ed.]; Lon L. Fuller, \textit{An Afterword: Science and the Judicial Process}, \textit{79 Harvard Law Review} 1626-1627 (1966); Fuller, \textit{The Morality of Law}, \textit{supra} at 91, 145-151; or Lyons, \textit{Ethics and the Rule of Law}, \textit{supra} at 75-78. \textit{Compare}, e.g., to Teubner, \textit{Autopoiesis in Law and Society}, \textit{supra} at 292-293 (as to the complexity tackled by his concept of self-referentiality of the law). \textit{See also} Habermas, \textit{Between Facts and Norms}, \textit{supra} at 152; and Cotterrell, \textit{Law’s Community}, \textit{supra} at 277-278, 319.}

Though being extremely different theoretical approaches, both procedural natural law and modern legal positivism tend to assume a more Darwinistic approach to the normative component of legal evolution. The normative proposals of both theoretical movements do not focus on directly offering normative substantive models (i.e. which kind of behaviors the law ought to promote or forbid) for either the legal arena or its surrounding environments. Leaving aside the desirable ultimate goals of a legal system, procedural natural law and modern legal positivism aim instead at indicating the “desirable ultimate procedures” of the law-making, i.e. ways to improve the functioning of the processes of interactions between internal mechanisms of the legal world and the environmental constrictions as to what can
(and cannot) become law. Based on the procedural focus in their descriptive parts, e.g. stressing the existence of a “reciprocity of expectations between lawgiver and subject” (Fuller) or a concrete obedience by the addressees “as a whole” (Hart) in order to speak of a valid legal system, both procedural natural law and legal positivism tend to offer normative messages that are of procedural nature.

156 See Fuller, The Morality of Law, supra at 97 (“[W]e are concerned, not with the substantive aims of legal rules, but with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be”); and H. L. A. Hart, The Morality of Law. By Lon L. Fuller (Book Review), 78 Harvard Law Review 1285-1286 (1961). See, e.g., Fuller, The Morality of Law, supra at 165-166 (as to the normative message of structuring the law so that it keeps the channels of communications among the various components of the society open); or Hart, The Concept of Law, supra at 156-157 (where Hart disconnects the ideal of justice, which a legal system ought to pursue, from any substantive goal and, instead invokes a procedural requirement for the legal system to treat similar cases in a similar way). See also Tom Campbell, Prescriptive Legal Positivism: Law, Rights and Democracy 31 (London: Routledge-Cavendish, 2004); MacCormick, Legal Reasoning and Legal Theory, supra at 62 [2nd ed.]; Deryck Beyleveld and Roger Brownsword, Law as a Moral Judgement 100 n. 43 (London: Sweet & Maxwell, 1986); and Barry Macleod-Cullinane, Lon L. Fuller and the Enterprise of Law, 22 Legal Notes 3, available at www.libertarian.co.uk/lapubs/legan/legan022.pdf (last accessed: June 30, 2010)(according to whom one of the “major feature[s] of the Inner Morality of Law is that, apart from the pursuit of such legal excellence, it is not concerned with any substantive ends” [italics in the text]). But see Brian H. Bix, Natural Law: The Modern Tradition, in Coleman and Shapiro (eds.), The Oxford Handbook of Jurisprudence and Philosophy of Law, supra at 77-78 (Oxford: Oxford University Press, 2002)(according to whom only Fuller has a procedural descriptive idea of law, i.e. law more as process than as object).

157 Fuller, The Morality of Law, supra at 209; and Hart, The Concept of Law, supra at 55. It should be stressed that though the normative components of procedural natural law theory and legal positivism are of procedural nature, this does not mean that these procedural suggestions are not based upon considerations instead of a substantive nature. At the end of the day, both Hart and Fuller decide to “go procedural” because they think the procedural way is the best way to construct a “good” legal system. For instance, Hart’s procedural turn towards normative messages directed in improving the overall obedience of the addressees is ultimately
In order to facilitate the interactions of the legal world with the surrounding environment, both legal movements repeatedly stress, for instance, the fact that each legal system ought to adopt a “thin” (or procedural version of the) rule of law.\textsuperscript{158} Though for different reasons, the rule of law is “thin” because it is intended by both procedural natural law theoreticians and legal positivists as a way of structuring the relations between the internal functioning of the legal system (\textit{e.g.} a new statute) and the limits imposed by the social and political environments (\textit{e.g.} as to the question of legitimacy of the new statute), regardless of the substantive consequences (\textit{e.g.} as whether the new statute actually promotes a morally good or bad behavior).\textsuperscript{159}


\textsuperscript{159} See, \textit{e.g.}, RAZ, \textit{THE AUTHORITY OF LAW}, \textit{supra} at 211-219; and Joseph Raz, \textit{The Rule of Law and its Virtue}, 93 \textit{LAW QUARTERLY REVIEW} 195-196 (1997)(though speaking of “formal” instead of “thin” rule of law). \textit{Compare} to the function played by Fuller’s principles in \textit{THE MORALITY OF LAW}, \textit{supra} at 39. \textit{See also} KRAMER, \textit{IN DEFENSE OF LEGAL POSITIVISM}, \textit{supra} at 67; Kenneth Einar Himma, \textit{Natural Law, in THE INTERNET ENCYCLOPEDIA OF PHILOSOPHY}, available at www.iep.utm.edu/natlaw/#H4 (last accessed: June 30, 2010)(“Insofar as [Fuller’s] principles are built into the existence conditions for law, it is because they operate as efficacy conditions and not because they function as moral ideals”); and Brian Z. Tamanaha, \textit{The Tension Between Legal Instrumentalism And The Rule Of Law}, 33 \textit{SYRACUSE JOURNAL OF INTERNATIONAL LAW AND...
The foundational ideas of procedural natural law and modern legal positivism as to where to address the normative proposals concerning legal evolution then seem compatible with the basic assumptions of an evolutionary approach to the law. For the latter, as seen above in Part Two (What is An Evolutionary Theory of Law-making?), the primary target of investigation (and therefore of possible normative propositions) is also the legal evolution intended as the interconnection and mutual influences between internal developments of the legal system and *stimuli* coming from the surrounding political, economic, and social environments. Based on this non-contradictory relation between each respective theory’s fundamental ideas, it then is possible to limit the range of legal theoretical movements in which a normative theory suitable to integrate the evolutionary approach to the law can be found to procedural natural law and modern legal positivism.\(^{160}\)

\(^{160}\) Beside the question of compatibility, it is worth pointing out that procedural natural law and legal positivism can better integrate the evolutionary approach also because, as seen above, the latter lacks a normative message “usable” by legal actors. On the other hand, these two legal movements have been characterized more than the others for their being the very perspective of legal actors on the law. See, e.g., Denis J. Galligan, *Law in Modern Society* 125-127 (Oxford: Oxford University Press, 2007); Frederick Schauer, *Fuller’s Internal Point of View*, 13 Law and Philosophy 304-305 (1994); and Tim Kaye, *Natural Law Theory and Legal Positivism: Two Sides of the Same Practical Coin?*, 14 Journal of Law and Society 312-314 (1987)(critically tracing this common position back to a shared “legalistic” perspective as to the law).
5. THE WEDDING –LEGAL POSITIVISM AND THE EVOLUTIONARY THEORY OF LAW-MAKING

Part Four (“Creationist” vs. “Darwinist” Legal Theory) has demonstrated that the field of possible brides offering a normative component compatible to the evolutionary approach, i.e. a component providing legal actors with some guiding criteria to be used in the creation of new laws, can be reduced to procedural natural law and modern positivisms. The second step then is to choose, as between these two legal theoretical movements, the one whose fundamental methodology and results, in particular in the normative component, can better be incorporated into the research program of evolutionary theory. In particular, the evolutionary theory from a legal theoretical perspective focuses, as seen above in Part Three (The Missing Part in The Evolutionary Theory of Law-making), its attention on two components of the life of the law: the factors triggering a certain change in the law (i.e. the why of the evolution of law) and the processes through which the law changes (i.e. the how of the evolution of law). It then is reasonable to expect that normative proposals coming from procedural natural law theory and legal positivism will also have as their targets both the activating forces and the avenues through which law changes.

Starting with procedural natural law theory, this movement is considered as part of natural law theory since it is rooted in the idea of an existing natural law according to whose criteria the “wannabe-legal” categories are measured and defined as law or not. Similarly as for Fuller’s legal theory, the essential points in order to understand and evaluate a certain legal system and its changes are the “ideal” (procedural) models to which each legal system, in order to be considered as such, should strive.\(^{161}\) Despite being known for being a

\(^{161}\) See Fuller, The Morality of Law, supra at 186, 96-97 (“Do the principles expounded in my second chapter represent some variety of natural law? The answer is an emphatic, though qualified, yes,” at 96). See also Bix, Jurisprudence, supra at 74; Robert C. L. Moffat, Lon Fuller: Natural Lawyer After all!, 26 American Journal of Jurisprudence 190-201 (1981); Anthony J. Lisska, Aquinas’s Theory of Natural
“procedural” natural law, when it comes to the investigation of the evolution of the law, Fuller’s natural law theory somehow pays the price for his idea of law as a “purposive enterprise.” Procedural natural law tends to focus its investigative attention and its normative proposals only on one of the components of the life of the law, also of interest to the evolutionary approach: the why (or purposes) of the legal evolution.162

Procedural natural law scholars primarily focus on identifying the triggering factor that “ought to be” behind legal change, namely the construction of an ideal legal procedure according to eight fundamental rules.163 The normative indication of the paths legal actors ought to follow in order to implement such procedural desiderata, i.e. the message on how law ought to evolve, is left at the edges of Fuller’s normative component. For example, one of

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162 See Fuller, The Morality of Law, supra at 30, 145-146; Lon L. Fuller, Problems of Jurisprudence 711 (temporary edition, Brooklyn: The Foundation Press, 1949); and Lon L. Fuller, The Law in Quest of Itself 3 (Union, NJ: The Lawbook Exchange, 1999 [1940])(as to the goal of natural law lawyers of “reducing the relations of men to a reasoned harmony”). See also Robert S. Summers, Lon L. Fuller 37 (Stanford: Stanford University Press, 1984), where the author stresses how, in Fuller’s vision, the fulfillment of the procedural requirements is necessary as in this way, it is possible to offer citizens a “fair opportunity to obey the law” [italics in the text]; and Robert P. George, Natural Law and Positive Law, in George (Ed.), The Autonomy of Law, supra at 321 (stating that the most fundamental principles of a natural law approach in general “refer to ends or purposes which provide non-instrumental reasons for acting”).

163 See, e.g., Fuller, The Morality of Law, supra at 186 (where the author traces his connection to the substantive natural law back to the idea that the use of his eight procedural criteria should produce legal systems which “[o]pen up, maintain, and preserve the integrity of the channels of communication by which men convey to one another what they perceive, feel and desire”).
the eight procedural requirements states that legal actors ought to strive for changing a legal system in such a way that, in the end, there is congruence between what the law says and its application. However, Fuller gives no normative indication of how to reach such congruence: whether legal reforms should operate in the direction of making the law more open to its application by being, for instance, simply a loose legal framework for the discretion of administrative agencies; or whether the latter should be placed under tighter control of legality by administrative judicial bodies.

The basic idea of the normative component of procedural natural law theory is the desire to see a certain “ideal model” of the legal system fulfilled, in particular in its procedural aspects. The possible patterns to be chosen by legal actors in order to reach such a model, though sometimes sketchy, are not an essential component of the normative solutions offered


165 See, e.g., Edward L. Rubin, Law and Legislation in the Administrative State, 89 Columbia Law Review 398-403 (1989)(pointing out possible problems in applying Fuller’s eight criteria to administrative law-making); or Jaye Ellis and Alison FitzGerald, The Precautionary Principle in International Law: Lessons from Fuller’s Internal Morality, 49 McGill Law Journal 793 (2004)(as to the problems raised by the congruence criterion when applied, without indication of its implementation’s modalities, to the precautionary principle of international law). Cf. Duncan Kennedy, From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s “Consideration and Form,” 100 Columbia Law Review 170 (2000)(where the author criticizes in general Fuller’s theory of contract and its prominence of the autonomy of the parties because it lacks normative indications on “how the legal system should respond when heteronomy is established”). One should note that this lack of clear indications by Fuller as to the paths to be taken in order to implement the normative (procedural) purposes is even more peculiar considering that, according to his theory, the eight procedural desiderata aim not only at the traditional actors superseding the law-making, but to a broader audience (e.g. administrative personnel or private citizens). See Summers, Lon L. Fuller, supra at 28-29. But see, e.g., Gerald J. Postema, Implicit Law, 13 Law and Philosophy 386 (1994)(as to an indication by Fuller that, in his ideal legal system, a central role ought to be played by third-party decision-makers).
to legal actors by natural law theory.\textsuperscript{166} For example, Fuller carefully indicates some ideal requirements aiming at the “optimum realization of the notion of duty” to obey the law, \textit{e.g.} reversibility in roles between rulers and ruled (”the same duty you owe me today, I may owe you tomorrow”).\textsuperscript{167} However, he does not explicitly indicate the “best” way to achieve (or guarantee) such role reversibility. For instance, what are the legal mechanisms that are to guarantee more strongly role reversibility between judges and the population at large (and therefore, better promote the duty to obey the law)? Operating on the constitutional field and increasing the control of political power in the selection procedures of the judicial body? Or instead by broadening the legal concept of “misconduct” for which the judges are considered liable? In other words, while indicating that a legal system must adopt “equal-value-of-contributions” procedures favoring a good interplay between the ruled and authority, Fuller does not seem to point out the modalities on how to structure such procedures.\textsuperscript{168} In short, procedural natural law offers legal actors the reasons why a change in the law triggered in the direction of a “good” procedural system ought to be taken, but not how this change ought to take place.\textsuperscript{169}

\textsuperscript{166} \textit{See}, \textit{e.g.}, Lon L. Fuller, \textit{The Forms and Limits of Adjudication}, 92 \textit{Harvard Law Review} 388-391 (1978)(asserting generally a more passive role for judges by basing their decisions “wholly on the proofs and argument actually presented to him by the parties,” at 388).

\textsuperscript{167} \textit{Fuller, The Morality of Law, supra} at 23-24.

\textsuperscript{168} \textit{See also} Rubin, \textit{Law and Legislation in the Administrative State, supra} at 387 (pointing out in Fuller’s theory “an underlying attitude of distrust about the modern legislative process”); and Benjamin C. Zipursky, \textit{Practical Positivism Versus Practical Perfectionism: The Hart-Fuller Debate at Fifty}, 83 \textit{New York University Law Review} 1210 (2008), where the author, though positively oriented to Fuller, reduces the latter’s normative proposals (on how to change the actual legal system to one procedurally better) to vague indications such as “creativity in interpreting the law and finding new legal arguments.”

\textsuperscript{169} \textit{See}, \textit{e.g.}, Matthew Kramer, \textit{Scrupulousness without Scruples: a Critique of Lon Fuller and his Defenders}, 18 \textit{Oxford Journal Legal Studies} 241 (1998)(“[E]ven when a reduction of uncertainty involves an assurance
In contrast with procedural natural law theory, it is possible in modern legal positivism to trace law-making normative proposals that are well-matched to the research program of the evolutionary approach, as they focus their attention on both the factors that ought to trigger legal change (why) and the mechanisms through which the law ought to evolve (how). From the perspective of the evolutionary approach, legal positivism then becomes a very helpful tool in order to provide the absent normative component and, through it, directly penetrate and influence legal thinking.\footnote{See Stephen M. Feldman, \textit{From Premodern to Modern American Jurisprudence: The Onset of Positivism}, 50 \textit{Vanderbilt Law Review} 1416, 1420 (1997) and Keith Culver, \textit{Leaving the Hart-Dworkin Debate}, 51 \textit{University of Toronto Law Journal} 372 (2001)(as to the historical and programmatic commonalities between the evolutionary theory in natural sciences and legal positivism). \textit{Compare} Bruce L. Benson, \textit{Enforcement of Private Property Rights in Primitive Societies: Law Without Government}, 9 \textit{Journal of Libertarian Studies} 5, 12 (1989)(according to whom the true evolutionary approach is Fuller’s, while legal positivists such as Hart maintain an idea of legal evolution as a “product of deliberate design,” at 12). For the sake of clarity, it should be pointed out that, as stressed by Coleman and Leiter, legal positivists consider their normative proposals as an immediate way for legal actors to know how they “ought to act” in order for their actions to be considered law or legal, regardless whether such legal actions are directly for a good cause or not. \textit{See} Jules L. Coleman and Brian Leiter, \textit{Determinacy, Objectivity, and Authority}, 142 \textit{University of Pennsylvania Law Review} 557 (1993). Though not elaborated further in this work, the reason for the presence of a strong normative program in modern legal positivists, i.e. a series of “suggestions” to legal actors on which path to take, most likely is connected to their attention to the legal actors’ perspective, but at the same time, lacking a predictivist perspective, i.e. a lack of indication to legal actors of future path of legal development. \textit{See} Herbert J. Hovenkamp, \textit{Positivism in Law & Economics}, 78 \textit{California Law Review} 819 (1990).}
belongs to legal reasoning and, related thereto, the emphasis given to the discussion on the sources of law. Starting with legal reasoning, this is a form of practical reasoning and entails arguing for or against certain directions to be given to a decision (in the law-applying moment) or to a new legal category (at least in the judicial law-making) with the fundamental help of legally relevant material, i.e. material somehow traceable in the sources of the law.

This idea of legal reasoning as mainly grounded on legal material not only is a fundamental component in the concept of law (and its creation) as depicted by legal positivism, but also is

171 See Jules L. Coleman, Rules and Social Facts, 14 HARVARD JOURNAL OF LAW AND PUBLIC POLICY 716-717 (1991); RAZ, THE AUTHORITY OF LAW, supra at 37-52; Wilfred J. Waluchow, The Many Faces of Legal Positivism, 48 UNIVERSITY OF TORONTO LAW JOURNAL 387 (1998); Neil D. MacCormick, The Concept of Law and ‘The Concept of Law’, 14 OXFORD JOURNAL OF LEGAL STUDIES 6-7 (1994); Fernando Atria, Legal Reasoning and Legal Theory Revisited, 18 LAW AND PHILOSOPHY 549-576 (1999); and DWORKIN, TAKING RIGHTS SERIOUSLY, supra at 17 and 41. See also Gardner, Legal Positivism, supra at 206, where the basic idea of legal positivism (i.e. the fact that validity is given to the law by its source and not by its merits) “is not a proposition specifically about laws. It is a proposition about what makes norms valid as legal norms, and hence as part of the law;” and Kornhauser, A World Apart?, supra at 758-759 (as to the centrality of the nature of legal reasoning for the legal positivism).

the essence of the normative proposals produced by modern legal positivist scholars, in particular those belonging to what Jeremy Waldron has defined as “normative legal positivism.” This group of legal positivists is sometimes defined as “normative” because they maintain that the separation in general of law from other types of reasoning is a value legal actors ought to pursue per se. In other words, this version of legal positivism is “normative” in that it promotes a normative approach about legal positivism, in the sense that it promotes as “intrinsically good” the idea of a legal positivistic (normative) program of dividing law from other types of reasoning.

In this work, however, normative legal positivism is not only considered as a normative approach on how law ought to be studied; as suggested by Waldron, normative legal positivism is also a normative approach about law in itself, i.e. a legal scholarship aiming at offering legal actors the best normative proposals in order to maintain the specific character of

173 See Jeremy Waldron, Law and Disagreement 166-168 (Oxford: Oxford University Press, 1999); and Jeremy Waldron, Normative (or Ethical) Positivism, in Coleman (ed.), Hart’s Postscript, supra at 411-412 (as to Postema, Campbell, MacCormick and, to some extent, Raz as the main representatives of this school, for which the legal positivism is mainly a theory on how legal actors should act rather than on how they act). See, e.g., Neil D. MacCormick, A Moralistic Case for A-Moralistic Law, 20 Valparaiso University Law Review 30 (1985). But see Jules L. Coleman, Negative and Positive Positivism, 11 Journal of Legal Studies 147 (1982); and Marmor, Legal Positivism, supra at 684-685. As to a possible historical precedent of such branch of legal positivism, see Postema, Bentham and the Common Law Tradition, supra at 328-336. See also Cotterrell, The Politics of Jurisprudence, supra at 6-7 (including also Kelsen and Hart among those offering a normative version of legal positivism).

The ultimate goal of this group of legal positivists is then to offer to legal actors normative criteria ensuring the maintenance of the specific nature of the legal reasoning, as different from other types of reasoning, e.g. morals, politics, or economics.\footnote{See Waldron, \textit{Normative (or Ethical) Positivism}, supra at 419-422.} In this enlarged sense, normative legal positivism aims at offering normative criteria as to “what law ought to be, not with respect to its content but with respect to its form.”\footnote{See Waldron, \textit{Normative (or Ethical) Positivism}, supra at 430. See, e.g., Neil D. MacCormick, \textit{The Ethics of Legalism}, 2 \textit{Ratio Juris} 184-193 (1989); Campbell, \textit{Prescriptive Legal Positivism}, supra at 55, 303; Frederick Schauer, \textit{Rules and the Rule of Law}, 14 \textit{Harvard Journal of Law and Public Policy} 679-680 (1991); or, though in a more hidden form, Hart, \textit{Positivism and the Separation of Law and Morals}, supra at 620. \textit{See also} Raz, \textit{The Authority of Law}, supra at 45 (as to the centrality for legal positivism of separating legal reasoning from other types of reasoning); and Fredrik Schauer, \textit{Positivism as Pariah, in} George (ed.), \textit{The Autonomy of Law}, supra at 38-41. As recently recognized by a scholar, “a principal rationale for practical positivism—for separating what the law is from what the interpreter thinks it ought to be—was the passion for reform of law; the sense that a blurring of the distinction between what law is and what law ought to be tends to undercut the possibility of legal change by inviting people to become complacent and to assume that what is the law must be good.” Zipursky, \textit{Practical Positivism Versus Practical Perfectionism}, supra at 1209. \textit{See also} Kent Greenawalt, \textit{How Persuasive Is Natural Law Theory?}, 75 \textit{Notre Dame Law Review} 1651-1652 (2000)(“Legal positivism, by itself, is a theory about what makes a human law a law; that legal theory can be joined with a wide range of theories about moral truth, about how judges should interpret, and about a citizen’s obligation to obey the law”); and Liam Murphy, \textit{The Concept of Law}, 36 \textit{Australian Journal of Legal Philosophy} 10 (2005). \textit{But see, e.g.}, Robin West, \textit{Narrative, Authority, and Law (Law, Meaning, and Violence)} 3-4 (Ann Arbor: University of Michigan Press. 1993)(as to the short-sighted and tepid normative proposals offered by legal positivists in general); or Brian H. Bix, \textit{Legal Positivism, in} M. P. Golding and W. A. Edmundson (eds.), \textit{The Blackwell Guide to the Philosophy of Law and Legal Theory} 31 (Oxford: Blackwell, 2005)(as to a lack of “reformist” thinking within legal positivism in general).}

For example, the normative criterion of making laws or deciding cases can be in such a way that the consistency within the legal system is retained, regardless of whether new
statutory laws or judicial decisions fulfill the requirements posed by the moral reasoning (e.g. in terms of substantive justice). Or, in case of conflicting interpretations of a certain rule, it can be the normative criterion that forces legal actors to apply the interpretative norms applicable to the rule in question at the time when the rule was created, regardless of whether these norms of interpretation can be considered as leading the issue at stake to an “unjust” or “inefficient” outcome.

These normative proposals as to how to use legal reasoning as a sort of codifying mechanism for entering into the legal world of non-legal instances are central not only for modern legal positivism. The legal reasoning-based normative criteria of modern legal positivism are central not only for modern legal positivism.

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180 See, e.g., HART, THE CONCEPT OF LAW, supra at 90-92; or Raz, The Problem about the Nature of Law, supra at 208. See also José Juan Moreso and Pablo E. Navarro, The Reception of Norms, and Open Legal Systems, in S. L. PAULSON AND B. LITSCHIEWSKI PAULSON (EDS.), NORMATIVITY AND NORMS: CRITICAL PERSPECTIVES ON
positivism can also be useful once integrated, for instance, into Luhmann and Teubner’s evolutionary findings of legal systems as evolving by using the selecting criteria of a binary code, in essence “legal/illegal.” If one accepts as correct the description offered by Luhmann and Teubner of an evolution of the law based on operative closure, and the consequential coding of inputs coming from outside the legal system, the need to have an explicit normative component following these findings becomes urgent, at least if one wants to see evolutionary theory also used inside the legal world. Legal actors still need normative criteria for their work, i.e. for their future decisions and law-making, helping them both to position the code legal/illegal and shift it each time in order to be adapted to the changing social conditions.

KELSENIAN THEMES 273-275 (Oxford: Clarendon Press, 1998); Coleman, Beyond the Separability Thesis, supra at 597; Marmor, Exclusive Legal Positivism, supra at 104 (as to the theorizing on law-making as the unifying point of interest for all the various streams of modern legal positivism); HABERMAS, BETWEEN FACTS AND NORMS, supra at 201-202; and FULLER, THE MORALITY OF LAW, supra at 192-193 (according to whom it is often the very normative proposals about the law-making processes that characterize legal positivists).

181 See LUHMANN, LAW AS A SOCIAL SYSTEM, supra at 233-234; NIKLAS LUHMANN, ESSAYS ON SELF-REFERENCE 229-232 (New York: Columbia University Press, 1990); Teubner, And God Laughed, supra at 27; and Teubner, Substantive and Reflexive Elements in Modern Law, supra at 249 (as to how “external changes… are selectively filtered into legal structures and adapted in accordance with a logic of normative development”). See also Teubner, Nobles, and Schiff, The Autonomy of Law, supra at 900; Teubner, And God Laughed, supra at 24 (indicating Hart as one of the legal theoreticians who focuses on “self-referential norm structures”); Adrian L. James, An Open or Shut Case? Law as an Autopoietic System, 19 JOURNAL OF LAW AND SOCIETY 282 (1992); and Drucilla Cornell, Time, Deconstruction, and the Challenge of Legal Positivism: The Call for Judicial Responsibility, in J. D. LEONARD (ED.), LEGAL STUDIES AS CULTURAL STUDIES: A READER IN (POST) MODERN CRITICAL THEORY 234 (New York: SUNY Press, 1995)(where Luhmann’s evolutionary processes are considered as an expression of “the newest brand of legal positivism”).

182 See HABERMAS, BETWEEN FACTS AND NORMS, supra at 56; and Michael B. W. Sinclair, Statutory Reasoning, 46 DRAKE LAW REVIEW 315 (1997). See also Duffy, Inventing Invention, supra at 6 (stressing the same
For example, law-making actors need normative criteria in order to decide as to one fundamental legal question of corporate governance: ought corporate law focus around the wealth of shareholders or ought stakeholders and their interests also be taken into consideration?\textsuperscript{183} Moreover, it is necessary to have some normative guidelines in order to answer the question brought up in particular by the business ethics community as to stakeholder identity: ought stakeholders, from a legal perspective, be defined in a narrow sense (\textit{e.g.} only the professional figures attached to the corporate activities) or in a broader meaning (\textit{e.g.} including also the communities at large where the corporate activities take place)?\textsuperscript{184}


Legal positivism then can directly offer a contribution in one of the major areas of the research program described above of the evolutionary approach to the law: the modalities (the how) through which the legal system changes. By incorporating the criteria modern legal positivism prescribes legal actors to observe when applying, but also when producing, new law (e.g. “like cases should be treated alike” or “a judge cannot create a new norm entirely on non-legal grounds”), the evolutionary theory can offer legal actors not only a description of how a certain legal reality has come to existence.\(^{185}\) It can also prescribe to legal actors how a change in the law ought to take place and, in this way, help legal actors choose the “legally right” answer (at least from an evolutionary perspective) in future hard cases.

The evolutionary theory would not then simply describe, for instance, how the legal concept of corporation has developed around the goal of pursuing primarily the interests of shareholders, e.g. by organizing the way control rights are allocated between the minority and

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\(^{185}\) See, e.g., Hart, *Positivism and the Separation of Law and Morals*, supra at 623-624 (as to the normative criterion of “like cases should be treated alike”); Andrei Marmor, *Should Like Cases Be Treated Alike?*, in A. MARMOR, LAW IN THE AGE OF PLURALISM 183-184 (Oxford: Oxford University Press, 2007)(as to the normative principle of “treating like cases alike” as more than a simple analogical methodology); Gardner, *Legal Positivism*, supra at 215-218 (as to the normative proposal that the judge ought not to create a new legal norm based exclusively on non-legal sources). As to other possible normative messages sent out by legal positivists, one should count in the preference for an open-ended law-making’s style or the idea that, in case of gaps in the legal system, the judge “ought” to take a law-making role also (though not exclusively) by making reference to extra-legal sources. See, e.g., Hart, *The Concept of Law*, supra at 127; John Gardner, *Concerning Permissive Sources and Gaps*, 8 OXFORD JOURNAL OF LEGAL STUDIES 457-458 (1988); Raz, *On the Autonomy of Legal Reasoning*, supra at 316-317. *But see*, e.g., Hans Kelsen, *Introduction to the Problems of Legal Theory* 85 (2\(^{nd}\) ed., Oxford: Clarendon Press, 1992 [1934]). *See also* Dyzenhaus, *The Genealogy of Legal Positivism*, *supra* at 60-61; and both Finnis, *Natural Law and Natural Rights*, *supra* at 12 and Perry, *Hart’s Methodological Positivism*, in Coleman, *Hart’s Postscript*, *supra* at 342-346 as to modern legal positivism’s normative foundations.
the majority. Once married with legal positivism and its normative components, among which the “general duty of obeying the positively enacted law” should be counted, the evolutionary scholar can also advise legal actors that, unless a fundamental shift of a paradigm has taken place in the sources of law (e.g. with new general and extensive legislation or a watershed decision by the highest court), the center stage of corporate legal regulation has to be considered as “per default” occupied by shareholders and their rights.

By absorbing legal positivism’s normative components, evolutionary theory can then become a theory of law-making directly influencing the positioning of the code legal/illegal in corporate law and, indirectly, determining how corporate law evolves (e.g. in the direction of being shareholder-centered).


188 As to other possible examples of the impact of the normative components of a legal theory on law-making, see, e.g., Stefan Vogenuer, An Empire of Light? II: Learning and Lawmaking in Germany Today, 26 OXFORD JOURNAL OF LEGAL STUDIES 630-637 (2006)(as to the different types of influence exercised by German scholarship on German law-making); George P. Fletcher, Two Modes of Legal Thought, 90 YALE LAW JOURNAL 990 (1981)(as to the historical example of the Swiss code); or David B. Wilkins, Legal Realism for Lawyers, 104 HARVARD LAW REVIEW 474-478, 505-523 (1990)(as to the possible impact of both descriptive and normative components of the legal realist theory in the law-making concerning advocacy). But see STANLEY FISH, DOING
Moreover, far from being of a conservative nature, the evolutionary theory, once integrated with legal positivist normative components, can promote legal reforms. One should keep in mind that as a matter of fact, the legal positivist normative criteria are relative by nature. This relativity of the normative criteria means that, according to normative legal positivists (as for most legal positivists), while following the criteria of consistency or of “treating like cases alike” when shaping a new statute or a new law-making judicial decision, law-makers must always also take into fundamental consideration the social, political, and historical context in which such legal tools and their outputs are going to operate.\footnote{\textit{See} \textsc{Hart, The Concept of Law}, supra at 68-69; and \textsc{Neil D. MacCormick, Natural Law and the Separation of Law and Morals}, in \textsc{R. P. George (Ed.), Natural Law Theory: Contemporary Essays} 110-113 (Oxford: Clarendon Press, 1992). \textit{See}, e.g., \textsc{Jeremy Waldron, Indigeneity? First Peoples and Last Occupancy}, 1 \textsc{New Zealand Journal of Public and International Law} 56 (2003). \textit{See also} \textsc{Edward H. Levi, An Introduction to Legal Reasoning}, 15 \textsc{University of Chicago Law Review} 501-504, 507-519, 573 (1948). As to the source of this relativist attitude by legal positivists towards what the law ought to be, \textit{see} \textsc{Herbert L. A. Hart, Social Solidarity}, in \textsc{Hart, Essays in Jurisprudence and Philosophy, supra} at 248; and \textsc{Kelsen, General Theory of Law and State, supra} at 5-8. \textit{See also} \textsc{Robin West, Three Positivisms}, 78 \textsc{Boston University Law Review} 792-794 (1998). Though it is not possible here to develop the highly complex question of the relations of legal positivism to morals in law (or, in other words, to what ought to be done in law), it should be stressed that the acceptance by legal positivists of the relative nature of normative proposals does not make them immediately moral relativists. \textit{See} \textsc{Frederick Schauer, Deferring (book review)}, 103 \textsc{Michigan Law Review} 1576-1577 (2005). \textit{See}, e.g., \textsc{Jeremy Waldron, One Law for All: The Logic of Cultural Accommodation}, 59 \textsc{Washington and Lee Law Review} 29-30 (2002).}

Therefore, in contrast with the absolute criteria offered by the Creationist legal theories, such as the “abolition of gender discriminatory procedures” or “structuring of an economic efficient legal system” (whose validity is somehow beyond time and space), the normative
proposals offered by modern legal positivism are modifiable according to the descriptive findings reached by the evolutionary approach as to the social, political, and historical context ("external environment") in which the evolution of a certain legal concept has taken place. \(^{190}\)

For instance, as strikingly pointed out by Joseph Raz, “there is no closed list of duties which correspond to the right... *A change of circumstances may lead to the creation of new duties based on the old right.*" \(^{191}\)

Using the previous hypothetical example, the evolutionary scholar can come forward in finding that the legal category of corporation has evolved considerably in the last century in order to adjust to (or survive in) mutated social, economic, and political environments. A corporation is generally perceived today as something more than an economic organization with the goal of maximizing the interests of the shareholders, *e.g.* as an economic organization operating in respect of figures other than the shareholders while still directly affected by their activities. In this way, law-making actors ought to consider, at least as a possibility, the fact that the mismanagement of a corporation can give rise to liability for violations of interests of a local community directly affected by the corporate activities. For instance, the mismanagement of a corporation can lead to the dismissal of a number of


\(^{191}\) RAZ, *THE MORALITY OF FREEDOM*, *supra* at 171 [italics added]. *See also* Joseph Raz, *The Problem of Authority: Revisiting the Service Conception*, 90 MINNESOTA LAW REVIEW 1010-1011 (2006)(as to the necessity of historical contextualization in order to grasp the concept of authority from a legal perspective).
employees representing the majority of the labor force and economic back-bone of a local community.\textsuperscript{192}

Shifting attention now to the other focal point of the evolutionary research program (the why of legal changes), evolutionary scholars can also here find in legal positivism some helpful contributions for becoming a theory of law-making useful to legal actors. In particular, the evolutionary approach can use some of the normative components as developed by the modern legal positivism’s discussion on the sources of law and the reasons why a certain legal system (or parts thereof) ought to evolve.

One of the major focuses of modern legal positivism, or obsession of legal positivism as some would certainly say, are the sources of law.\textsuperscript{193} As seen above, legal reasoning for this legal theoretical movement is a central codifying mechanism determining what is acceptable

\textsuperscript{192} As to an actual example of a similar evolutionary process (though within criminal law), see the evolution in English law of the definition of “rape” as described by Richard H. S. Tur, *Time and Law*, 22 OXFORD JOURNAL OF LEGAL STUDIES 465 (2002).

\textsuperscript{193} See, e.g., RAZ, THE AUTHORITY OF LAW, supra at 38; WALUCHOW, INCLUSIVE LEGAL POSITIVISM, supra at 81; Raz, Authority, Law, and Morality, supra at 231; Frederick Schauer and Virginia J. Wise, Legal Positivism as Legal Information, 82 CORNELL LAW REVIEW 1093 (1997)(“It is the central and persistent claim of legal positivism that the criteria for the existence of law -collectively, the rule of recognition- are source-based”); Gardner, Legal Positivism, supra at 201; and ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 7 (2nd ed., Oxford: Hart Publishing, 2005). See also Gerald J. Postema, Law’s Autonomy and Public Practical Reason, in GEORGE (ED.), THE AUTONOMY OF LAW, supra at 82; and Leslie Green, General Jurisprudence: A 25th Anniversary Essay, 25 OXFORD JOURNAL OF LEGAL STUDIES 570 (2005). Similarly, for evolutionary theory the very element characterizing the legal system is its autonomy in the modalities of its organization. As pointed out strikingly by Teubner, autonomy of the legal system means in the end that “decision refers to rules and rules to decisions,” i.e. an autonomy of the legal discourse which is based on the “legitimized” sources of law (judicial decisions, statutory acts, and legal scholarship). Teubner, Autopoiesis in Law and Society, supra at 295. See also Elliott, The Evolutionary Tradition in Jurisprudence, supra at 39 (pointing out that the focus of evolutionary theory is on the nature and the sources of law).
as law and how law evolves, in particular by justifying the exclusion of non-legally relevant statements and principles. Therefore, modern legal positivism has paid quite a bit of attention to indicating the fundamental (and often ultimate) normative criterion according to which legal actors should be able to separate statements that ought to be part of legal reasoning and statements that ought to be part of other types of reasoning: the possibility (or not) of tracing back the statements to “conventionally identified” (usually by the majority of legal actors) sources of law.

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194 See Brian Leiter, Why Legal Positivism?, UNIVERSITY OF CHICAGO, PUBLIC LAW WORKING 4, available at http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1521761_code119223.pdf?abstractid=1521761&mirid=1 (last accessed: June 30, 2010)(“If one surveys… the now vast empirical literature on adjudication, which aims to explore the relative contributions of legal versus non-legal norms to decision-making by courts, that literature always demarcates the distinction in positivist terms”)[footnotes omitted, italics in the text]. See, e.g., MacCormick, Rhetoric and the Rule of Law, supra at 121-142. See also Coleman, The Practice of Principle, supra at 152-153 and Spaak, Legal Positivism and the Objectivity of Law, supra at 258 (where both authors stress how the legal positivist discussion on the sources of law is functional to the establishment of the very existence of the law and not to its content). But see Lyons, Moral Aspects of Legal Theory, supra at 77 (“the existence and content of law is determined by some range of facts about human beings in a social setting”) [italics added].

195 See, e.g., MacCormick, H. L. A. Hart, supra at 110; Raz, Hart on Moral Rights and Legal Duties, 4 OXFORD JOURNAL OF LEGAL STUDIES 129-131 (1984); and Marmor, Exclusive Legal Positivism, supra at 105 (“legal validity is exhausted by reference to the conventionally identified sources of law”). See also James Allan, Internal and Engaged or External and Detached?, 12 CANADIAN JOURNAL OF LAW AND JURISPRUDENCE 15 (1999)(as to the possibility of this “minimal normative element” within a descriptive theory of law as legal positivism); Hart, Postscript, supra at 269; Alfred W. B. Simpson, The Common Law and Legal Theory, in A. W. B. Simpson, (ed.), OXFORD ESSAYS IN JURISPRUDENCE. 2nd SERIES 81 (Oxford: Clarendon Press, 1973); Raz, The Authority of Law, supra at 47-48; and Scott J. Shapiro, On Hart’s Way Out, in Coleman (ed.), Hart’s Postscript, supra 175-177 (where legal positivist are characterized, among the other things, also for their idea
This being the ultimate criterion for determining what the law is, it is possible to see how according to modern legal positivists all changes that ought to take place in a legal system should start with changes in (or at least should be “legalized” by) the conventionally identified sources of law.\textsuperscript{196} If the behavior-imposing or competence-assigning category \( y \) is now to be considered a “legal” category, this mutation necessarily has to do with the fact that the conventionally identified sources of law, while before refusing the legal nature of such a construction, have now changed their position, either through a legislative process (\textit{e.g.} statutory reform), or judicial law-making (\textit{e.g.} a new interpretation of an old statutory provision by a highest court).\textsuperscript{197}

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that legal norms are “content-independent” reasons for action, i.e. reasons based not on the message they carry but instead on the legal shape given to the norm by its being produced by certain sources).
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\textsuperscript{197} See, \textit{e.g.}, HART, \textit{THE CONCEPT OF LAW}, \textit{supra} at 92; Marmor, \textit{Exclusive Legal Positivism}, \textit{supra} at 106-108; Kelsen, \textit{THE PURE THEORY OF LAW}, \textit{supra} at 2-4. \textit{See also} Raz, \textit{Kelsen’s Theory of the Basic Norm}, in S. L. Paulson and B. Litschewski Paulson (EDS.), \textit{NORMATIVITY AND NORMS. CRITICAL PERSPECTIVES ON KELSENIAN THEMES} 50 (Oxford: Clarendon Press, 1998); and WALDRON, \textit{LAW AND DISAGREEMENT}, \textit{supra} at 35-36 (stressing the centrality in modern legal positivism’s program of the nexus between legal change and sources of law). It is worth to noting that for Teubner’s idea of autopoiesis, the very reference to the sources of law is also the decisive element allowing the legal system to open itself to new normative \textit{stimula} coming from surrounding environments. \textit{See} Teubner, \textit{Autopoiesis in Law and Society}, \textit{supra} at 296. \textit{See also} TEUBNER, \textit{LAW AS AN AUTOPOIETIC SYSTEM}, \textit{supra} at 59; and LUHMANN, \textit{LAW AS A SOCIAL SYSTEM}, \textit{supra} at 242-243.
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For example, the evolutionary scholar can explain how the responsibility for preserving the equilibrium in the natural environment has gone from being only a morally or economically relevant category, to being legally applicable to the operations of multinational corporations. This shift has been the consequence of a recent series of soft-law (decisions by various private actors such as arbitration tribunals or professional associations) or hard-law provisions (by public actors such as the United Nations, for example). Pressured by NGOs and world public opinion, these sources of transnational law have now delineate one of the basic principles of corporate law as considering as guiding normative criterion for all economic enterprises the prevalence of social responsibility on economic considerations.

While the traditional evolutionary approach would stop here, i.e. to the mere description of what has happened (a change within the sources of law), once married to the legal positivism and its normative criterion, the evolutionary scholar can go a step further, a step decisive in being accepted as an authentic theoretical tool usable by legal actors. He or she can suggest that legal actors operating in the transnational context, due to a change in the conventionally identified sources of transnational law (arbitration tribunals), ought now to consider that the category \( y \) (corporate social responsibility) has moved from the group of “not-relevant-for-legal-reasoning” statements to the group of “relevant-for-legal-reasoning” statements.198

This particular focus on the sources of law in order to explain legal changes is extremely helpful in signaling a common pattern, or at least compatibility, between the evolutionary approach to the law and modern legal positivism. In both cases, the basic idea as seen in the previous Part Four ("Creationist" vs. "Darwinist" Legal Theory) is that the triggering of a legal change (i.e. the why of the evolution of the law) is neither a quality that is (as for evolutionary theory) nor ought to be (as for legal positivism) built into the very nature of the law, as it is for instance, for Critical Legal Studies, natural law theories, or Law and economics. For both evolutionary scholars and legal positivists, legal change is the effect of a complex relation between pressures coming from the surrounding environments, features of the legal system, and, last but not least, legal withinputs produced by the very legal actors.199

The complexity of the relations among such different (and often unstable) sources renders, on one side, both the legal positivist and the evolutionary theory’s law-makings different from that of Creationist legal scholarship. This is due to the fact that law-making according to legal positivists and evolutionary scholars are relatively open-ended as to where to go: legal actors have at their disposal different venues in which to channel the creation of new laws. On the other side, the evolutionary and positivistic law-makings are only relatively open-ended since, either by referring to the sources of law (as for legal positivism) or by pointing out the history of a certain legal category (as for evolutionary theory), both

199 See, e.g., WALUCHOW, INCLUSIVE LEGAL POSITIVISM, supra at 33-46; and JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM 188-189 (2nd ed., Oxford: Clarendon Press, 1980). Compare to TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM, supra at 58; and LUHMANN, LAW AS A SOCIAL SYSTEM, supra at 265 (pointing out “autopoiesis and structural coupling as a precondition for evolution”). See also Clark, The Interdisciplinary Study of Legal Evolution, supra at 1241-1242; and Simon Deakin, Evolution for Our Time, supra at 2.
theoretical approaches somehow “restrict” the possible patterns which law-making actors can take.\footnote{See, e.g., HART, THE CONCEPT OF LAW, supra at 64-76 (as to the institutional constraints of law-makers); Neil D. MacCormick, Coherence in Justification, in H. SCHELSKY, W. KRAWIETZ, G. WINKLER, AND A. SCHRAMM (EDS.), THEORIE DER NORMEN: FESTGABE FUR OTA WEINBERGER ZUM 65. GEBURTSTAG 37 (Berlin: Duncker & Humblot, 1984); Joseph Raz, Intention in Interpretation, in GEORGE (ED.), THE AUTONOMY OF LAW, supra at 267-268 (encouraging legal actors “to understand the legislation as meaning what the legislator said. What the legislator said is what his words mean, given the circumstances of the promulgation of the legislation, and the conventions of interpretation prevailing at the time,” at 271); LUHMANN, LAW AS A SOCIAL SYSTEM, supra at 257-258; and id. 235-236 (as to the importance of writing judicial decisions and law-making in general in order to ensure consistency to the legal system); and TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM, supra at 56 (pointing out the primary necessity, when faced with environmental changes, of maintaining the legal system’s way of working unchanged in order to keep the main feature of a legal system, i.e. its differentiation from other sub-systems): But see Hovenkamp, Evolutionary Models in Jurisprudence, supra at 649 n. 19, where the author points out that the only normative messages coming from an evolutionary approach are those traceable in the Law and economics’ scholarship. However, as seen in Part Four (“Creationist” vs. “Darwinist” Legal Theory), Law and economics is in general a legal theoretical movement which is fundamentally incompatible with an evolutionary approach (at least in its proper meaning). See, e.g., Lewis Kornhauser, L’Analyse Economique du Droit [Economic Analysis of Law], 16 MATERIALI PER UNA STORIA DELLA CULTURA GIURIDICA 244-245 (1986).}

For example, by making reference to a necessary connection in the sources of law between someone’s rights and somebody else’s duties, legal positivism can point out the necessity of imposing certain legal duties upon a corporation whose activities have violated the individual rights of others than those of the shareholders.\footnote{See, e.g., Steven R. Ratner, Corporations and Human Rights: A Theory of Legal Responsibility, 111 YALE LAW JOURNAL 468 (2001).} Reaching the same result, evolutionary theory can show legal actors that the liability of a corporation towards a local community is not a concept foreign to corporate law, but the historical product of a certain
evolution of the law into the direction of attributing more “social responsibility” also to economic actors.\textsuperscript{202}

Taking this direction a step further than evolutionary scholars, modern legal positivism not only describes where the legal change is aiming to, but also why it ought to take this direction: legal positivists also point out some normative criteria suggesting the reasons why legal actors ought to choose one direction over another. As to the previous example, modern legal positivism explicitly indicates that, if the law in the Constitution guarantees certain basic rights to individuals (\textit{e.g.} living in a clean environment), legal actors (both in judicial and legislative forms) ought always to find the corresponding duty-holder, either among public agencies or private actors (\textit{e.g.} in terms of corporate social responsibility).\textsuperscript{203}

The “hard” or “exclusivist” version of modern legal positivism (as represented by Raz) is the version of legal positivism more suitable according to Waldron to be (or become) normative in its mission, and therefore, more helpful to integrate into the evolutionary approach.\textsuperscript{204} In particular, the exclusivist legal positivists have pointed out one fundamental normative criterion legal actors ought to follow in determining which source of law is to be taken into consideration: the “Social Fact Thesis” or, synonymously, the “Sources Thesis.”\textsuperscript{205}


\textsuperscript{204} See Waldron, \textit{Normative (or Ethical) Positivism}, \textit{supra} at 412-414.

\textsuperscript{205} See Raz, \textit{Authority, Law, and Morality}, \textit{supra} at 195 (“[L]aw is source based if its existence and content can be identified by reference to social facts alone, without resort to any evaluative argument”). As to a definition of what it means to be an “exclusivist” legal positivist, in particular in the approach to the sources of law, see, \textit{e.g.}, \textit{Raz, The Authority of Law}, \textit{supra} at 38, 47; Scott J. Shapiro, \textit{The Difference That Rules Make}, in \textit{B. Bix (ed.), Analyzing Law: New Essays in Legal Theory} 56-62 (Oxford: Clarendon Press, 1998); Scott J.
According to this thesis, law acquires, as for all legal positivists, its legal nature for being source-based and not, for instance, for having a specific content.\(^{206}\) However, and here comes the original contribution of exclusivist legal positivism, the law is a social phenomenon and the fundamental sources of law for each legal system are social facts or social conventions, \(i.e.\) “conventionally established social practices” directed at determining which political, moral, or economic values have legal status and which not.\(^{207}\) In other words, the normative proposal offered by exclusivist legal positivists is that, in case of doubt as to which


road to take during the (either legislative or judicial) law-making, legal actors should not rely on a-social or a-historical criteria, such as the abstract idea of “morals” or “good faith.” As the law is a social fact originating in and aiming at authoritatively changing social reality, legal actors ought always to choose the legal solution considered more in line with the patterns of expectations and understanding latent either among the addressees in the society (as for Gerald Postema) or more specifically among legal actors (as for Hart and for most exclusivist legal positivists).

It is, however, not only the evolutionary approach that can benefit from a possible marriage with legal positivism. Paradoxically enough, considering their attack of the “abstractness” of natural law theories, legal positivists are often themselves characterized for their a-historical and a-contextual approach to changes in law. Movements like Critical Legal Studies or Law and economics have at times attacked legal positivist works for their lack of investigation on how in historical and social contexts, certain normative propositions have acquired legal status while others have remained, for instance, merely moral or religious.


209 See Gerald Postema, Coordination and Convention at the Foundations of Law, 11 JOURNAL OF LEGAL STUDIES 189 (1982); Scott J. Shapiro, Law, Plans, and Practical Reason, 8 LEGAL THEORY 418, 426 (2002); Andrei Marmor, Legal Conventionalism, 4 LEGAL THEORY 524-525 (1998); and HART, THE CONCEPT OF LAW, supra at 111. But see DWORKIN, LAW’S EMPIRE, supra at 136-139 (where the author stresses the unnecessary connection between social conventions and legal obligations) and the response by KRAMER, IN DEFENSE OF LEGAL POSITIVISM, supra at 146-151. Compare Smits, The Harmonisation of Private Law in Europe, supra at 80 (where according to the author evolutionary scholarship starts from the hypothesis that the uniformity in law cannot be reached simply by the “imposition of rules in a centralist way”).
norms. In particular, due to their focus on positive law and its legitimacy, one of the major criticisms advanced against modern legal positivism is their lack of attention to the processes through which positive law has become such. The focus of legal positivism being on the *lex positiva*, i.e. on the already established law, a certain disregard of the historical and social processes somehow prior to the transformation is almost natural, for instance, of moral norms into positive law.

However, as stated by Holmes, “if we want to know why a rule of law has taken its particular shape, and more or less if we want to know why it exists at all, we go to tradition.” In this respect, a legal evolutionary theory can provide such genealogical

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213 Holmes, *The Path of the Law*, supra at 469.
investigations.214 These investigations explain the present by looking into its history and
defining in a clearer way the “conventionally established social practices” behind the
regulation of certain legal issues, the social practices legal actors ought always to consider
during law-making, regardless whether the latter are aimed at maintaining the status quo of
the legal regulation or changing it.215

For example, a legal evolutionary analysis can build a more stable ground for the
normative proposal that the legal organization known as a corporation “ought” to be held
liable for damages to stakeholders in a broad meaning. This securing in the legal discourse of
the idea of corporate social responsibility can be done by showing in the welfare state, a
pattern of reinforcing, by the use of law, a general social convention guaranteeing citizens
against the risks of modern economy. This even if it means diminishing the possibility of the
very citizens to make larger profits (e.g. by not putting their interests as shareholders in the
first row when discussing strategies for corporate activities).

214 See Paul A. David, Why are institutions the ‘carriers of history’?: Path dependence and the evolution of
conventions, organizations and institutions, 5 STRUCTURAL CHANGE AND ECONOMIC DYNAMICS 206 (1994). See
also DEAKIN AND WILKINSON, THE LAW OF THE LABOUR MARKET, supra at 33 (in particular as to the
genealogical orientation of the evolutionary approach).

215 See DEAKIN AND WILKINSON, THE LAW OF THE LABOUR MARKET, supra at 35. See, e.g., Owen D. Jones,
Evolutionary Analysis in Law: An Introduction and Application to Child Abuse, 75 NORTH CAROLINA LAW
REVIEW 1157-1158 (1997)(as to the four stages at which, according to Jones, an evolutionary theory can be a
useful tool for the law-makers). See also LUHMANN, LAW AS A SOCIAL SYSTEM, supra at 261 (“The consequence
of this evolution for the legal system is that there is only positive law”); and TEUBNER, LAW AS AN AUTOPOIETIC
SYSTEM, supra at 49 (where the author however limits the possible contribution of an evolutionary approach to
legal theory to a rather obscure idea of “discouraging” the faith in possible “legal progress”). But see the
critiques in HUTCHINSON, EVOLUTION AND THE COMMON LAW, supra at 8-9. More in general, as pointed out by
Kornhauser, “[s]trategies for legal change clearly depend in one’s understanding of the evolutionary pressures in
the legal system.” Kornhauser, A World Apart?, supra at 747.
As another example, an evolutionary approach can show how corporations have been created as a legal product in order to answer to both a certain environmental demand (e.g. to encourage financial investment) and, at the same time, a certain logical requirement coming from the legal system itself (e.g. around the definition of “legal person”). As a result, the evolutionary investigation can provide legal positivist analysis with a clearer picture of what the legal concept of corporation contained, whether the idea of corporate social responsibility is included, and, if not, whether its insertion (due to a mutated social environment) is allowed by the fundamental elements characterizing a corporation as a distinct legal personality.

To sum up, a marriage between the evolutionary approach and legal positivism seems to provide for benefits to both parties. On one side, the evolutionary approach to the law requires a normative component in order to become a theory of law-making whose findings not only are better understood but also directly of use by legal actors. It then seems quite natural to search for these normative proposals in modern legal positivism, this school more than others having focused its descriptive and normative enterprises on the modalities and reasons behind legal changes, i.e. two aspects also central for the evolutionary approach to the law. On the other side, legal positivism can greatly benefit from the evolutionary approach and its historical and social explanation as to why and how the “law is what it is” and on which to build an analytical investigation of what the binding law nowadays ought to be.²¹⁶ In this way, the evolutionary approach can provide legal positivist scholars with an element lacking to a large degree in contemporary legal theory, as also as pointed out by Alfred W. B. Simpson: a historical and socially contextualized study of the birth and development of legal concepts.²¹⁷

²¹⁷ See ALFRED B. W. SIMPSON, LEGAL THEORY AND LEGAL HISTORY: ESSAYS IN THE COMMON LAW IX (London: The Hambledon Press, 1987); and Harold J. Berman, The Origins of Historical Jurisprudence: Coke, Selden, Hale, 103 YALE LAW JOURNAL 1654 and 1655 n. 8 (1994)(according to whom this lack of historical
6. LIFE AFTER MARRIAGE –SOME POSSIBLE CONTRIBUTIONS TO TRANSNATIONAL CORPORATE LAW-MAKING BY THE “REFORMED” EVOLUTIONARY THEORY

As for most newlyweds, the life of evolutionary theory, once married to legal positivism, will be difficult to predict in reality. However, even if the path ahead is unknown, and for that reason, uncertain, the insertion into the world of legal thinking of the evolutionary approach once married to the normative components offered by the legal positivism, is still very much desirable, in particular from the perspective of using it as a theory of law-making.218

Since the major focus of the evolutionary approach is on the changes in the law, its contributions (at least initially) should be directed towards the construction of a theory of law-making of positive law.219 For example, a possible starting point for the “reformed” perspective is a feature of the entirety of contemporary legal thinking, including Critical Legal Studies, Law and economics, and feminist legal theories. See also HOLMES, THE COMMON LAW 1 (New York: Dover Publications, 1991)(“The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics”).

218 See, e.g., DEAKIN AND WILKINSON, THE LAW OF THE LABOUR MARKET, supra at 26 (as to the rationalization of labor law-making as a necessary cause and effect of industrialization). In particular, evolutionary theory can be helpful in contributing to a phronetic theory of law-making, i.e. a theory aiming “to uncover the forgotten history carried in legal concepts… [and to] inquir[e] on the conditions under which tacit understandings embedded in legal rules are challenged and altered.” KATERINA SIDERI, LAW’S PRACTICAL WISDOM: THE THEORY AND PRACTICE OF LAW MAKING IN THE NEW GOVERNANCE STRUCTURES IN THE EUROPEAN UNION 4 (Aldershot: Ashgate, 2007).

219 Though not investigated here, evolutionary theory can also contribute indirectly to the law-applying moment of the legal positivist investigations. For instance, the explanation of how and why a certain legal category has become dominate in a certain area of the law, can help the judiciary interpreting the law in “hard cases,” assistance that mainly consists of the discovery of the logic and values underlying a certain authoritative regulation. See, e.g., Holmes, The Path of the Law, supra at 465. See also JOHN BELL, POLICY ARGUMENTS IN JUDICIAL DECISIONS 270 (Oxford: Clarendon Press, 1983); and RAZ, THE AUTHORITY OF LAW, supra at 105-111 (as to the essential role in legal positivism played by the analysis of the law-applying moment).
evolutionary theory of law-making is the emphasis many evolutionary scholars have placed on showing how the “evolution of the law” does not necessarily mean the “progress” or “development” of the law. Particularly in recent decades, a large part of the evolutionary theory approach has pointed out how the use of this methodology does not necessarily imply an idea of always having a legal system that “tries to adjust to increasing complexity” (as originally stated by Luhmann).\(^\text{220}\)

In this sense, a married evolutionary theory can still emphasize this anti-evolutionist attitude without dismissing its new normative component. In particular, it can do this by employing one of the most successful normative assumptions of the legal positivistic theory of law-making: the explanation of the law-making, \(i.e.\) how the changes in a legal system ought not presuppose or sponsor (at least in the descriptive phase) the existence of an “inner

\(^{220}\) LUHMANN, LAW AS A SOCIAL SYSTEM, supra at 267 (while, however, rebutting the idea of progress). See also, Elliott, The Evolutionary Tradition in Jurisprudence, supra at 41; and, reaching more or less the same conclusion as Luhmann, the father of modern legal positivism, \(i.e.\) HART, THE CONCEPT OF LAW, supra at 116. Compare Deakin, Evolution for our Time, supra at 25 as to disconnecting the neutral idea of evolution of the law (in the sense of legal change according to certain patterns) from the positive idea of a progress of the law (in the sense of “improving” certain qualities of legal regulations). Cf. Roe, Chaos and Evolution in Law and Economics, supra at 663-664; Smits, Applied Evolutionary Theory, supra at 487; and, more in general against the idea of evolution towards complexity, STEPHEN JAY GOULD, FULL HOUSE: THE SPREAD OF EXCELLENCE FROM PLATO TO DARWIN 135-230 (New York: Three Rivers Press 1996) As to the historical roots of this moving away from the progress of ideas when speaking about the evolution of the law, see ALBERT KOCOUREK AND JOHN HENRY WIGMORE, EVOLUTION OF LAW: SELECT READINGS ON THE ORIGIN AND DEVELOPMENT OF LEGAL INSTITUTIONS. VOL. III: FORMATIVE INFLUENCES OF LEGAL DEVELOPMENT 533 (Boston: Little, Brown, and Co., 1918); and, more in general, Jim Chen, Diversity in a Different Dimension: Evolutionary Theory And Affirmative Action’s Destiny, 59 OHIO STATE LAW JOURNAL 833 (1988) (“Diversity, not progress in the sense of an inexorable march toward increasing complexity, is the true hallmark of evolution”). For a similar detachment of evolution from the idea of progress within the economic debate, see, \(e.g.\), RICHARD S. NELSON AND SIDNEY G. WINTER, AN EVOLUTIONARY THEORY OF ECONOMIC CHANGE 142 (Cambridge: Belknap Press, 1982).
value” or “final goal” to which the law-making ought to aim. This initial absence of inner goals in the descriptive component of a reformed evolutionary theory of law-making absolutely does not mean a rebuttal of a normative component. As for most modern legal positivists, it simply means that the sponsoring of certain models of “good” law, belong more to a second, separate but still necessary phase of the evolutionary investigations, namely the normative one. For instance, it is possible to descriptively trace, as done by Luhmann, a tendency of legal systems to match the increasing complexity of the surrounding social environment. Nevertheless, a theory of law-making using an evolutionary approach still needs to offer legal actors a value-based answer to the following question: Ought judges

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221 See, e.g., HART, THE CONCEPT OF LAW, supra at 17, 54, and in particular, 206. This programmatic statement of a temporary division between analysis of “ought” and “is”, typical of legal positivists, is the consequence of the endorsement of another basic assumption (the so-called “Separation Thesis”): the idea that “determining what the law is does not necessarily, or conceptually, depend on moral or other evaluative considerations about what the law ought to be in the relevant circumstances.” Marmor, Legal Positivism, supra at 686 [italics in the text].

222 See HART, THE CONCEPT OF LAW, supra at 205-206 and Hart, Positivism and the Separation of Law and Morals, supra at 594-599 (as to the functional character of the descriptive phase in order to have a better normative phase). As to the only momentary separation in the study of the law, of a normative and a descriptive phase, see also Karl N. Llewellyn, Some Realism about Realism, 44 HARVARD LAW REVIEW 1235 (1931). As to a similar tendency already hidden within the current evolutionary approach, see, e.g., Elliot, The Evolutionary Tradition in Jurisprudence, supra at 94; Hovenkamp, Evolutionary Models in Jurisprudence, supra at 671; and TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM, supra at 54 (refusing the “modified” version of evolutionary theory suggested by Habermas as it implies “an inherent developmental logic… [while] the question of which mechanisms… remains unanswered”). See also LUHMANN, LAW AS A SOCIAL SYSTEM, supra at 231; and Hutchinson and Archer, Of Bulldogs and Soapy Sams, supra at 35.

223 See, e.g., LUHMANN, A SOCIOLOGICAL THEORY OF LAW, supra at 106-107; and LUHMANN, LAW AS A SOCIAL SYSTEM, supra at 266. See also Clark, The Morphogenesis of Subchapter C, supra at 92 (though expressly limited only to the US corporate taxation law).
always aim to contributing to a “higher” complexity of the legal system? Or ought judges instead opt for a more “de-regularized” or less complex legal system? Moreover, regardless of the answer given to this dilemma, which are the evaluative criteria making one solution better than the other?224

A reformulated evolutionary theory, i.e. a descriptive evolutionary approach with a normative (legal positivist) component, can be extremely valuable in the legal discussion, and this can be particularly detected by looking at one emerging field for legal scholarship: transnational corporate law. Transnational corporate law is the regulation of both corporate governance (the rules governing the exercise of power within the corporation) and corporate finance (the rules concerning the use of the capital in a corporation) with respect to multinational enterprises and their cross-bordering structures (e.g. the relations between parent companies and subsidiaries around the globe).225 However, in contrast to the international or domestic legal regulations of similar corporate matters, the transnational regulation of corporations is characterized for being a hybrid of regulations promulgated by private actors and states.226 Transnational corporate law is then the legal regime applicable to

224 See, e.g., Wolfgang Kerber, Institutional Change in Globalization: Transnational Commercial Law from an Evolutionary Economics Perspective, 9 German Law Journal 422 (2008)(in particular under point 1); or Skeel, An Evolutionary Theory of Corporate Law and Corporate Bankruptcy, supra at 1390-1392 (as to possible private ordering of some areas of the corporate governance traditionally regulated by US law).


226 As to the definition of transnational law, see, e.g., Graft-Peter Calliess, Reflexive Transnational Law The Privatisation of Civil Law and the Civilisation of Private Law, 23 Zeitschrift für Rechtssoziology 188
cross-border structures and activities of multinational corporations. It can then be considered as the best field to put to the test a marriage between legal positivism and evolutionary theory. This is the case for two main reasons, one concerning the transnational feature of this legal field, the other due to its targeting corporate activities.

Starting with the transnational aspect of corporate law, the potential importance of an evolutionary theory of law-making has particularly increased as legal positivism in recent decades has started to face the problems that the rise and spread of the transnationalization of the law has posed to its basic assumptions.227 The transnationalization of the law is characterized by the absence of a “normative agency,” i.e. a single central authority typical of the nation state (or a state-based international organization), producing or somehow legitimizing those legal concepts that should or should not be considered valid. At the transnational level, for example, there usually is no unique assembly manifesting within a

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(2002); and Harold Hongju Koh, Why Transnational Law Matters, 24 PENN STATE INTERNATIONAL LAW REVIEW 745-746 (2006). See also Peer Zumbansen, The Parallel Worlds of Corporate Governance and Labor Law, 13 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 261 (2006)(where transnational corporate law is defined as the body of regulations that “captures the specific regulatory mix of formal, hard, public regulation, on the one hand, and of informal, soft, private regulation, on the other, that characterizes the contemporary evolution of corporate governance norms”).

statute legal concepts as “invented” by a law professor, judge, or law firm. As a consequence, legal positivism has found itself in the difficult position of investigating the transnationalization of the law, i.e. a phenomenon that appears to be legal in all its aspects, except for one fundamental aspect (at least for the legal positivists): the sources of law. It becomes difficult in transnational law for legal positivist scholars to trace back the origins of the law to clearly legitimized sources of law. Centralized legitimizing agencies, such as national assemblies or supreme courts, actually have a quite weak position within the transnational community, the law-making instead being scattered among a broad and blurring spectrum of actors, both quantitatively (e.g. several judicial and third-party bodies in competition with each other and without an over-arching supreme court) and qualitatively (e.g. law-making actors of public, private, and mixed natures).


Shifting attention to the second reason encouraging the choice of transnational corporate law as a test-field, there are two major motives indicating how corporate law is the field where an application of an evolutionary theory supplemented with certain parts of legal positivism can offer rather interesting results. First, corporate law, and in particular the legal concept of a corporation, traditionally is an area that has attracted the attention of several as well as the most prominent legal thinkers. Answering the question of “what is a corporation”, and how the legal concept of corporation has come into existence, is a task that has attracted the attention of many legal scholars, from Weber to Holmes, from American legal realists to representatives of Critical Legal Studies, from Hans Kelsen to Hart or Richard Posner, all of whom have applied (or built upon) their theories of law to this very field of legal regulation.230


230 See, e.g., WEBER, ECONOMY AND SOCIETY, supra at 720-725; Wesley Newcomb Hohfeld, Nature Of Stockholders’ Individual Liability For Corporation Debts, 4 COLUMBIA LAW REVIEW 291 (1909); Hart, Definition and Theory in Jurisprudence, supra at 3-7; Holmes’ definition in the Supreme Court’s decision Klein v. Board of Tax Supervisors, 282 U.S. 24 (1930); POSNER, ECONOMIC ANALYSIS OF LAW, supra at 419-420 [4th ed.]; Max Radin, The Endless Problem of Corporate Personality, 32 COLUMBIA LAW REVIEW 643 (1932); Richard L. Abel, Judges Write the Darndest Things: Judicial Mystification of Limitations on Tort Liability, 80 TEXAS LAW REVIEW 1554-1564, 1572 (2002); and KELSEN, GENERAL THEORY OF LAW AND STATE, supra at 96-97. As to the reason for legal theory’s enduring and deep interests generally in corporate law, and the notion of a corporation, one can agree with the fact that “fundamental to our legal system[s] is the distinction between ‘persons’ and ‘property’… [and t]he large, modern corporation does not fit neatly into this conceptual scheme.” Jeffrey Nesteruk, Conceptions of the Corporation and the Prospects of Sustainable Peace, 35 VANDERBILT
Second, it is possible to see how the legal regulation of multinational corporations is not only a passive recipient but also one of the main active sources for the globalization of law, i.e. for the spread around the globe of legal models. In contrast to other globalizing and globalized transnational legal fields (e.g. lex mercatoria, lex maritima, lex sportiva, or lex informatica), the globalization of corporate law, as pointed out by Larry Catá Backer, is


however characterized by having a transnational aspiration while still starting from a structural state-based status quo, i.e. from state-based legal constructions and paradigms.\(^{232}\) On one side, it then appears that this phenomenon of the transnationalization of corporate law perfectly suits an analytical goal of the evolutionary approach to the law: the explanation of which evolution a legal paradigm (such as the legal definition of a corporation) goes through while moving from one environment (Westphalian or state-based) to another (post-Westphalian or non-state based), while still keeping its fundamental legal shape and nature, i.e. its being perceived as binding by the vast majority of its addressees.\(^{233}\)


On the other side, when facing the transnationalization of corporate law, evolutionary approach scholars need more than ever the normative sticks offered by a legal positivistic analysis. Namely, due to the structural deficiency of a central normativizing agency, transnational corporate law is characterized by “blurred borders” to a higher degree than the corporate regulations valid in a national or nation-based legal system. By this expression is meant that the lack of a legislative agency or a court legitimized clearly as the “highest and ultimate” law-maker, leaves more space in the transnational regulation of corporations to the penumbral areas around the meaning of the legal concepts. This feature of the legal discourse taking place at the transnational level then allows a broader room for maneuverability for legal thinking, e.g. for the evolutionary theory, in order to affect its

(Cambridge: Cambridge University Press, 2009); and HART, THE CONCEPT OF LAW, supra at 55-60 (as to “continuity” as one of the features characterizing the law and its “ought” nature, even in revolutionary passages from one legal system to another). To this one should also add that, as stressed by Benson, one of the features of transnational law (in particular for the business areas) is complementary to one of the paradigms of the evolutionary approach (as presented above): legal evolution takes place through a constant interaction between changes in the surrounding environments (e.g. in form of different customs) and changes in the law (e.g. in form of different norms). See BRUCE L. BENSON, THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE 21 (San Francisco: Pacific Research Institute, 1990).

development, or, in other words, to determine how and in which direction to direct the spotlights highlighting the penumbral areas of legal concepts.235

Due to this specific blurred nature of transnational legal concepts, the evolutionary approach is particularly needed in a transnational legal discourse. However, it necessarily has to be capable of offering to legal actors operating in such a discourse, e.g. arbitrators or in-house attorneys, not only the history and actual content of a certain legal concept, but also some clear normative guidelines or firms sticks in the magma of transnational law. For example, the evolutionary theory can affect the development of transnational corporate law if, and only if, it is able to offer not only a description of what a corporation is from a transnational legal perspective, but also some answers as to the fundamental question as to what a corporation ought to do (and why, from a legal reasoning perspective) when facing the issue of corporate social responsibility: ought the latter to be considered by CEOs and boards of directors as simply “morally” or “marketing” binding, or as an integral part of the legal genome of a multinational corporation?236

235 See Harry W. Arthurs, Where Have You Gone, John R. Commons, Now That We Need You So?, 21 COMPARATIVE LABOR LAW AND POLICY JOURNAL 389 (2000)(where the author points out how the new possibilities for traditional legal thinking paradoxically stem from the very problems that the transnationalization of law created, i.e. the lack of a central law-making and law-applying authority). See also Michael Abramowicz, Speeding Up the Crawl to the Top, 20 YALE JOURNAL ON REGULATION 183-204 (2003)(as to the necessity among legal scholars of inventing new legal principles in order to accelerate the adaptation of corporate law to modern society); and Roberta Romano, After The Revolution in Corporate Law, 55 JOURNAL OF LEGAL EDUCATION 348-351 (2005)(showing how the legal corporate scholarship, in particular in its financial and law and economics investigations, has always lived in a “symbiotic relationship” (349) both with the corporate practice, the judicial power, and the legislatures).

236 See, e.g., Reuven Avi-Yonah, The Cyclical Transformations of the Corporate Form: An Historical Perspective on Corporate Social Responsibility, 30 DELAWARE JOURNAL OF CORPORATE LAW 813-818
In other words, an evolutionary theory of law-making, if integrated with the necessary normative components, can explain not only how certain legal concepts are created and become dominate in the transnational legal context, despite lacking support or a formal sanctioning of a unique legally legitimizing agency.\textsuperscript{237} As pointed out by Teubner, transnational law is actually “one of the rare cases in which practical legal decision-making becomes directly dependent on legal theory.”\textsuperscript{238} Therefore, the evolutionary theory can offer a decisive contribution to law-makers and decision-makers lacking centralized authoritative signals of direction (e.g. legislative preparatory works by the national assembly or fundamental documents such as a Bill of Rights or classical judicial decisions in the legal history of a country), when taking the “right” decisions or the “right” legal measures in hard cases according to whatever criteria the evolutionary theoreticians decide to provide.\textsuperscript{239}


\textsuperscript{238} Teubner, ‘Global Bukowina’, supra at 9.

To these aspects, one should also add that the application of the evolutionary theory to transnational (corporate) law could somehow have a positive backlash-effect on the very structure of the evolutionary approach itself. In particular, it is most likely that some basic points of differentiation between American evolutionary theory, in which legislating actors play a relevant (though often negative) role, and the European evolutionary theory, more focused on the evolution made by private actors and courts as opposed to legislative codification, will tend to dissolve in an evolutionary theory of transnational law-making.\footnote{See, e.g., Skeel, *An Evolutionary Theory of Corporate Law and Corporate Bankruptcy*, supra at 1329-1330, in comparison to Amstutz, Abegg, and Karavas, *Civil Society Constitutionalism*, supra at 245-249.}

The transnational production of legal regulations is characterized by the very law-making roles played, on a peer-to-peer basis, not only by public actors such as legislative assemblies (both at national, supranational and international levels) but also by private actors such as practitioners, arbitration tribunals, and think-tanks.\footnote{See Anne-Marie Slaughter, *Breaking Out: The Proliferation of Actors in the International System*, in Y. DEZALAY AND B. G. GARTH (EDS.), *GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY* 16-17 (Ann Arbor, MI: University of Michigan Press, 2002). See, e.g., MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW*, supra at 82-85; or Peer Zumbansen, *The Privatization of Corporate Law? Corporate Governance Codes and Commercial Self-Regulation*, JURIDIKUM 32-37 (2002).}

An evolutionary theory can offer a major contribution in building a middle range theory of law-making, above all in the area of transnational corporate law, mainly due to the coexistence of two conditions specific for this legal field. First, on a more practical level, the evolutionary approach has already devoted specific attention to the analysis of the evolution of transnational law in general (and its economic branches specifically). In recent decades, many works have applied evolutionary theoretical analytical tools specifically in order to explain the birth and diffusion of new legal commercial categories at a new level, \textit{i.e.} the
transnational level, and how these changes affect both the national and international legal systems. Therefore, particularly at this level of the law, it is possible to utilize the fundamental contributions evolutionary studies offer, reaching a better understanding of how and why certain legal categories have come to be dominating in the cross-bordering commercial legal world.

Second, evolutionary theory can play a decisive role in building a theory for transnational corporate law-making because of the specific structural features of the latter. The legal regulation of transnational activities and structures of multinational corporations is characterized for being an area, more than others, where the old paradigms typical for state based law-making (both national and international) appear to be under heavy scrutiny. As a

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243 See Danielsen, How Corporations Govern, supra at 413-416; and Delissa A. Ridgway and Mariya A. Talib, Globalization and Development—Free Trade, Foreign Aid, Investment and the Rule of Law, 33 California Western International Law Journal 328-331 (2003), where the authors emphasize that “[t]he waning power of the sovereign nation/state—and its replacement by a multiplicity of structures and institutions that share in political, economic and legal authority—heralds a new era. Familiar concepts of municipal and international law are yielding to an emerging international legal pluralism. In more and more instances, no one entity has the sort of legal authority that has traditionally been the hallmark of sovereign states. It is, indeed, a brave new world of global governance, with a whole new cast of players” (at 329) [footnotes omitted]. See also De Sousa
consequence, corporate law-making at the transnational level tends to challenge some of the assumptions traditionally embraced without so much questioning by contemporary legal theory.244

In particular, certain practitioners and areas of legal positivism, having roots in the ideology of the nation state and separation of powers, still retain in both their descriptive and normative components the idea that the law-making phase and the dispute-resolving phase are usually separate (which, mostly but not exclusively in the civil law systems, also implies clearly differentiated actors empowered to supersede such phases).245 This looking back to the


past, i.e. to the golden age of the nation state, is strengthened by the fact that lawyers (and also among them, legal theoreticians), when faced with the actual complexity of law-making in a globalized world, find illusory comfort by directing “themselves to a hierarchical solution to the problem, which, whilst not least wholly reproducing the ideal of legal hierarchies of the nation-state, at least comes somewhere close to it.”

However, if a legal positivistic theory is

MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23 (Princeton, NJ: Princeton University Press, 1997); or Neil D. MacCormick, Why Cases have Rationes and What These Are, in L. GOLDSTEIN (ED.), PRECEDENT IN LAW 167-169 (Oxford: Clarendon Press, 1987). As to the legal positivists (and the legal scholarship at large) operating in countries of common law, it should however be stressed that, due to their legal culture, the separation of the two phases does not mean that judicial bodies cannot participate to both the law-making and the dispute-resolving. See, e.g., Timothy Endicott, Adjudication and the Law, 27 OXFORD JOURNAL OF LEGAL STUDIES 315-320 (2007); or Frank I. Michelman, Thirteen Easy Pieces, 93 MICHIGAN LAW REVIEW 1298 (1995)(where the author, in recognizing the law-making function played by the judges, admits that in this respect “we are all to some degree positivists now”). See also David R. Cleveland, Overturning the Last Stone: The Final Step in Returning Precedential Status to All Opinions, 10 JOURNAL OF APPELLATE PRACTICE AND PROCESS 110-112 (2009)(more from a practitioner’s point of view). For legal positivists coming from a common law tradition, judges are fully entitled to play a law-making role, though they ought not become judicial legislators. See, e.g., Gardner, Legal Positivism, supra at 213-215. With this distinction, positivist legal scholars simply aim to point out that judges should always be aware of the different features characterizing a judicial law-making, more bound to existing legal grounds, and a legislative law-making, where one “can make a new legal norm on entirely nonlegal grounds.” Gardner, Legal Positivism, supra at 217. See also RAZ, THE AUTHORITY OF LAW, supra at 200 (pointing out the constrained nature of judicial law-making); Peter Cane, Taking Disagreement Seriously: Courts, Legislatures and the Reform of Tort Law, 25 OXFORD JOURNAL OF LEGAL STUDIES 403 (2005); and Kornhauser, A World Apart?, supra at 770 (where the author stresses the prevalence of systemic, or “internal” forces upon external forces in adjudication and the reverse in legislation).

to investigate the reality of transnational corporate law-making, then it needs at least to question paradigms such as the one of an existing hierarchical structure of legal rules and regimes where some actors usually have the monopoly of creating the law, while others tend only to apply it.\textsuperscript{247}

Cross-border corporate structuring and activities are characterized by the lack of an established monopoly governing their legal regulation. At the same time, there is an urgent need for certain normative standards according to which to resolve legal conflicts and (even more importantly) to program economic cross-border transactions.\textsuperscript{248} Not having at their

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\textsuperscript{247} See Jean-Philippe Robé, \textit{Multinational Enterprises: The Constitution of a Pluralistic Legal Order}, in \textit{Teubner, Global Law Without a State}, supra at 49-56; Roger Cotterrell, \textit{Transnational Communities and the Concept of Law}, 21 \textit{Ratio Juris} 15 (2008); and Michaels and Jansen, \textit{Private Law Beyond the State?}, supra at 879. See also Linarelli, \textit{Analytical Jurisprudence and the Concept of Commercial Law}, supra at 197-198 (where the author’s “cosmopolitan” interpretation of legal positivism allows a non-hierarchical idea of legal norms within the transnational context); and Martti Koskenniemi, \textit{The Fate of Public International Law: Between Technique and Politics}, 70 \textit{Modern Law Review} 4 (2007)(where the author points out a process of “reverse established legal hierarchies” also within the traditionally state-based public international law).

disposal clear and fixed rules produced by well-established law-making agencies, the actors operating at the transnational level have turned their attention to the actors of the law-apply ing moment for authoritative indications:

“Transnational law predominantly emerges in the very peculiar setting of international arbitration and is shaped by the international arbitrators’ specific perspectives and methods of decision-making.”

In other words, in the transnational context it is often the very application of what is “thought to be law” that “creates” the law. Following this general path, it is possible to see how, despite that legislated by the scarce few designated law-making actors (e.g. international law)

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organizations regulating international commerce), in many parts of transnational corporate law the work of judicial bodies or arbitrators can also shift certain rules from the status of mere recommendations, *i.e.* almost not existing for the legal order, to those “felt as binding” and therefore existing for the legal system.²⁵¹

A possible contribution here can come from evolutionary studies which, in particular in recent decades and based on their findings as to transnational law in general, have broadened the very idea of the law-making moment in the life of a legal system and question the need, in order to have a better understanding of the functioning of a legal system, of a clear separation between the law-making and the dispute-resolution phases.²⁵² For instance, the evolutionary studies conducted both by European and American scholars have shown the importance of


²⁵² See, e.g., Robert D. Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 INTERNATIONAL REVIEW OF LAW AND ECONOMICS 226-227 (1994); or Amstutz, *Global (Non-)Law*, supra at 471. As to a similar need in modern legal positivism of somehow dissolving the borders between clearly defined law-making and dispute-resolution phases, see, e.g., Gardner, *Legal Positivism*, supra at 217, where the author stresses the fact that “the separation of powers is not separation of law-making powers from law-applying powers, but rather the separation of *legislative* powers of law-making (i.e. powers to make legally unprecedented laws) from *judicial* powers of law-making (i.e. powers to develop the law gradually using existing legal resources)” [italics in the text]. See also RAZ, *THE AUTHORITY OF LAW*, supra at 90 (where the author underlines how modern legal positivism aims more, as among the others, at clarifying the borders between (judicial) law-making and (judicial) law applying).
considering the creation of legal categories as a process where the different phases are based upon what the actors do (e.g. create, select, and retain) rather than upon the institutional role assigned *a priori* to them (e.g. statutory law-makers vs. judicial dispute-solvers).  

Another example of a possible innovative input an evolutionary approach can offer to a theory of transnational corporate law-making has to do with the very way the law-making process takes place at the transnational level. Most contemporary legal theories (with few exceptions, such as certain feminist legal studies and legal sociologists), when speaking of law-making at the transnational level, tend to have a “linear” conception of it. Legal theory tends to see one actor (either international, transnational, national or local) as starting the process while the others, working successively, operate on the legal category the original actor has produced, influencing each other but only in terms of results, and not in the very process leading to such results. For instance, John Braithwaite and Peter Drahos, on one

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253 See, e.g., Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 Harvard Law Review 644-646 (1996); Skeel, *An Evolutionary Theory of Corporate Law and Corporate Bankruptcy*, supra at 1355-1357; Amstutz, *Global (Non-)Law*, supra at 472-473; Smits, *The Harmonisation of Private Law in Europe*, supra at 83-88. On this path, see also Clark, *The Interdisciplinary Study of Legal Evolution*, supra at 1241; and Teubner, ‘*Global Bukowina*’, supra at 20-21. In particular, Teubner points out that in transnational law, it is possible to observe how the law produced by international tribunals tends to be considered as “higher” or “lower” based on the tribunals’ reputation (i.e. on what they have done) rather than, as for national courts, being based on the location of the decision-making bodies in an (hypothetical transnational) organizational hierarchy.

side, point out the preeminence of the business world as a primary law-making agency for transnational law; on the other side, they perceive the relations between the state-based law and the privately made law in terms of phases where “state regulation follows industry self-regulatory practice more than the reverse.”

The origins of this idea of a “linear” law-making in the globalization of legal categories can be traced back to the older vision of law-making, typical in Western national democracies, where the highest legitimizied agency (mostly national assemblies) produce law which then is “tested” and eventually “refined” by other legitimizied agencies (e.g. supreme courts or local assemblies) in successive stages (e.g. control of constitutionality, referendum or practices). This linear perception is also reinforced by a more general idea of the international system labeled as the “Westphalian system,” where the monopolizing legal actors are the sovereign territorial national states and the only possible legal relations are either as among states (international law) or within states (domestic laws).

GLOBALISATION AND LEGAL THEORY, supra at 85-86. Among the feminist and critical race feminist legal studies not endorsing a linear vision of law-making, see, e.g., Penelope Andrews, Globalization, Human Rights and Critical Race Feminism: Voices from the Margins, 3 JOURNAL OF GENDER, RACE, AND JUSTICE 395-399 (2000).

Braithwaite and Drahos, Global Business Regulation, supra at 481.


Many legal scholars (at least within legal theory) seem to have paid less attention to the fact that the globalization of the law, and especially transnational corporate law, is a “new” phenomenon not only because it gives new content to the law. It also changes the way the very law is created, by questioning both the linear nature of law-making and its monopoly by state or state-based actors:

“Globalization affects law in two ways. Not only does it undermine the control-potential of national policy and therefore the chances of legal regulation, it also deconstructs the dominant law-making processes.”258

The lack of attention by modern legal thinking to these novelties then further stresses the need to integrate, at least inside legal theoretical scholarship, the results and methodologies of the evolutionary theory as a fundamental underpinning upon which to build a systematic and specialized investigation of law-making in transnational corporate law. As a matter of fact, the evolutionary approach is certainly suitable to face such new forms of legal regulations because it has adopted, at least when dealing with law-making in transnational law, both a non-state based approach (in this way dismissing the supremacy of the Westphalian model) and a non-linear model.

As to the first, in particular the European version of evolutionary theory tends to dismiss the traditional state-based perspective as to the law-making. The evolutionary approach promotes a move in the very way the legal discourse needs to perceive the structure of transnational law-making: from a pyramidal idea of the law-making (at the top with state and state-based law-makers) to a more network based relations, where the various private and public law-making agencies operate on the same level of legitimacy and authority.259

As to the second novelty introduced by the globalization in the transnational corporate law, this is particularly tackled by the American version of the evolutionary approach: a non-linear model can be useful for updating the theory of law-making to the new complex reality of the globalized world, a reality where transnational law is created through “a fluid, constantly changing set of interactions in a complex struggle between a large number of groups and institutions.”260 The non-linear modality of law-making as proposed by the


260 CHARLES J. G. SAMPFORD, THE DISORDER OF LAW: A CRITIQUE OF LEGAL THEORY 203 (Oxford: Basil Blackwell, 1989). See also Donald T. Hornstein, Complexity Theory, Adaptation, and Administrative Law, 54 Duke Law Journal 928-934 (2005)(“complex adaptive systems [such as the law] reflect the more unpredictable properties of nonlinearity,” at 931). See, e.g., Ruhl, Complexity Theory as a Paradigm for the Dynamical Law-and-Society System, supra at 862-875; Ruhl, The Fitness of Law, supra at 1437-1467 (where the author uses complexity theory in order to render the evolutionary approach to law more in line with the legal reality and its non-linear nature); Thomas Earl Geu, Chaos, Complexity, and Coevolution: The Web of Law, Management Theory, and Law Related Services at the Millennium, 65 TENNESSEE LAW REVIEW 190-216 (1998); Smits, The Harmonisation of Private Law in Europe, supra at 87; or Amstutz, Abegg, and Karavas, Civil Society Constitutionalism, supra at 250-251. As to the definition of non-linearity used in this work, see RALPH D. STACEY, COMPLEXITY AND CREATIVITY IN ORGANIZATIONS 288 (San Francisco, CA: Berrett-Koehler Publishers,
evolutionary theory is especially traceable in the idea of “contingency” as an important factor triggering evolution in one direction instead of another.\textsuperscript{261}

From a legal theoretical perspective, the concept of contingency can be defined as that analytical approach taking into consideration that the effect of one factor $[X]$ on another $[Y]$ can depend upon some third variable $[z]$ which, despite the influence on the two, tends to somehow be positioned outside the environment under investigation.\textsuperscript{262} In an evolutionary

\textsuperscript{261} As recently pointed out by an evolutionary scholar, “[n]ot surprisingly, systems characterized by multiple interconnected components, nonlinearity and emergence tend to be full of surprises.” Deborah S. Tussey, *Music at the Edge of Chaos: A Complex Systems Perspective on File Sharing*, 37 LOYOLA UNIVERSITY CHICAGO LAW JOURNAL 158 (2005). See, e.g., Fried, *The Evolution of Legal Concepts*, supra at 315-316; or Eckardt, *Explaining Legal Change from an Evolutionary Economics Perspective*, supra at 454. See also STEPHEN JAY GOULD, WONDERFUL LIFE: THE BURGESS SHALE AND THE NATURE OF HISTORY 288 (New York: W. W. Norton & Company, 1990)(“The modern order is largely a product of contingency”). But see Gordon, *Critical Legal Histories*, supra at 81-87; and Sinclair, *Statutory Reasoning*, supra at 370-372 (as to the critical point being the definition of what is meant with “legal change”). It then is not the case that the concept of contingency also plays an important role in the debate taking place in the legal investigations closest to the evolutionary approach to law, i.e. legal history and legal positivism. See, e.g., Jeremy Waldron, *Lucky in Your Judge*, 9 THEORETICAL INQUIRIES IN LAW 193 (2008)(“Legal positivism reminds us that all law is a matter of contingency”); or Elizabeth Mensch, *The History of Mainstream Legal Thought*, in KAIRYS (ED.), THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE, supra at 23 [3rd ed.](“The most corrosive message of legal history is the message of contingency”).

\textsuperscript{262} This definition of “contingency” as to the legal discourse is derived (though slightly modified) from the original definition in organizational studies as, for instance, in LEX DONALDSON, THE CONTINGENCY THEORY OF ORGANIZATIONS 5 (London: Sage Publications Ltd., 2001). See also Waldron, *Lucky in Your Judge*, supra at 193-194 (as to a similar idea of contingency within legal theory, and more specifically, within legal positivism, which “reminds us that all law is a matter of contingency,” at 193). As to the modalities through which contingencies can affect the creation of new normative models in general, see, e.g., THOMAS S. KUHN, THE
theory of law-making, the idea of contingency means that the reciprocal relations between the environment and legal systems can be affected by a “third player”, z, usually of an ideological nature (e.g. a political party or a legal scholarship), who tends to operate relatively independent (or “arbitrarily”) in relation to both the environment X and the legal system Y.263

For example, the formation and diffusion of a legal construction of corporate governance where stakeholders are less protected, cannot be explained by looking exclusively to the interrelations between a legal system (X) and the existing economic and financial environment (Y). In some cases, as stressed by Mark J. Roe, in order to explain the evolution of a certain legal category of corporation as excluding stakeholders, it is also necessary to make reference to the “model of the perfect citizen” that the party in power has as its basic ideal (z).264

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263 As to this use of the term “contingency” within the evolutionary scholarship, see, e.g., Richard H. McAdams, Cultural Contingency and Economic Function: Bridge-Building from the Law & Economics Side, 38 LAW AND SOCIETY REVIEW 222-225 (2004); LUHMANN, LAW AS A SOCIAL SYSTEM, supra at 145; or Hutchinson and Archer, Of Bulldogs and Soapy Sams, supra at 47-48 (speaking of “human elements”). See also DEAKIN AND WILKINSON, THE LAW OF THE LABOUR MARKET, supra at 29.

264 See Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert W. Vishny, Law and Finance, 106 JOURNAL OF POLITICAL ECONOMY 1145-1151 (1998), in combination with Mark J. Roe, Political Preconditions to Separating Ownership from Corporate Control, 53 STANFORD LAW REVIEW 561-566 (2000), as to the importance of both the legal and economic systems (different financial systems and the dichotomy civil law vs. common law) and the political contingency (social democracy vs. liberal democracy) in order to explain the development in Western legal systems of different legal patterns of corporate governance. See also Skeel, An Evolutionary Theory of Corporate Law and Corporate Bankruptcy, supra at 1346-1347; and Henry N. Butler, The Smith v. Van Gorkom Symposium: Jurisdictional Competition, and the Role of Random Mutations in the
As can be easily understood, this very evolutionary concept of contingency can help legal theory in sketching a framework of transnational corporate law-making closer to reality. Transnational corporate law-making, due in particular to the lack of centralized law-making actors with a monopolizing legitimacy and jurisdiction as to the creation of new corporate legal rules, tends to be more sensitive to “arbitrary” factors, e.g. a change of leadership in the Popular Republic of China (z). These factors can affect the interplay between the transnational corporate legal community (X) and the surrounding international economic environment where the multinational corporations operates (Y).265

To conclude, certain areas of the law have gone through a process of accelerating transnationalization in the last decades. Corporate law needs to be counted among them. This process has implied such a radical level of changes in the traditional idea of law-making, with the loss of monopoly by the state and the restructuring according to non-linear modalities, that traditional legal theory seems to have some difficulties in fully grasping how transnational law is created. It perhaps is time to explore a possible way out of these difficulties by introducing a new approach to transnational law-making, i.e. an evolutionary approach integrated with normative components offered by legal positivism. On one side, the

265 See, e.g., MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW, supra at 196-201 (as to the legal effects at the transnational level of the progressive liberalization taking place in China since 1979 as to foreign investments). As to another concrete example of a similar transnational law-making process (in the field of human rights) where the contingent “arbitrary” factor plays a relevant role, see Roger P. Alford, The Nobel Effect: Nobel Peace Prize Laureates as International Norm Entrepreneurs, 49 VIRGINIA JOURNAL OF INTERNATIONAL LAW 62-65 (2008). In his work, Alford in particular uses an evolutionary approach in order to stress the importance of arbitrary factors such as Nobel Peace Prize Laureates. These individuals operate as international “norm entrepreneurs” and play a fundamental role in the selection phase of the evolution of international norms by promoting certain legal categories instead of others.
evolutionary perspective creates, with its three explanatory phases, some order in describing that which appears to be a chaotic process where private and public actors participate in creating transnational corporate law. On the other side, being equipped with the normative messages produced by legal positivists, the evolutionary approach and its descriptions as to how and why a certain legal category is what it is, can also become useful for transnational legal actors. At the end of the day, while the evolutionary approach is most likely not the best theory of law in general, if there ever would be one, one should to start to consider whether, once married to legal positivism and its normative component, it may nevertheless become the best theory explaining and clarifying transnational law-making.

7. THE END – CONCLUSION

The evolutionary theory of law-making has been recast here in order to render it more useful for the players actually creating the law, i.e. legal actors. This re-modeling has been done by combining the evolutionary approach with legal positivism, the theory par excellence for legal actors. After having presented in Parts One and Two both some clarification as to the terminology used in this work and as to what an evolutionary theory of law-making is, Part Three pointed out how this approach has encountered some difficulties in being accepted among legal actors. In particular, one of the main reasons that have contributed to such “reluctance” is the theory’s lack of an explicit normative side, where lawyers, law-makers and judges can retrieve “ought” criteria to be used for deciding in which directions future law-making should proceed.

Parts Four and Five proposed the integration of the normative component of already well-established legal theories into the evolutionary approach. After having categorized the latter in two larger groups, namely “Creationist” and “Darwinians,” only those belonging to the second group (procedural natural law theory and modern legal positivism) have been shown to present messages compatible with the basic ideas of the evolutionary research
program. Moreover, among the “Darwinist” legal theories, the normative message of modern legal positivism, because of its focus on both legal reasoning and sources of law, is probably the most appropriate to be integrated into the evolutionary approach. Finally, Part Six has pointed out the possible contribution a legal evolutionary theory can offer to the construction of a theory of transnational corporate law-making, e.g. with its idea of contingency or its non-linear model.

To conclude, it should once again be highlighted that the adjustment described in this work does not aim at changing the very nature of the evolutionary approach, i.e. in making evolutionary theory something else. Since law is a human product, and human beings do not always act in predictable ways, the goal is simply to render the evolutionary theory a theory of law-making more appealing to legal actors. In this way, this approach can be used to understand not only the actual legal reality but also its potential developments by channeling them into patterns that are more predictable. Though, as with life, marriage is far from being a necessary step in order to take care of children, from a pragmatic perspective, by marrying a wealthy and well-established theory like legal positivism, evolutionary theory certainly increases its capacity to influence the inhabitants of the legal world and, through it, to take better care of raising a newborn such as transnational corporate law.