COULD “LAW AND EVOLUTION” BE THE NEXT “LAW AND ECONOMICS”?

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Economic analysis has been the lodestone for an enormous portion of legal scholarship for the past thirty years. At many law schools, and certainly at the University of Virginia School of Law, a clear majority of the productive legal scholars adhere, to a greater or lesser extent, to the fundamental tenets of economic theory.

The question I want to raise is whether evolutionary psychology of the sort presented by Professors Wilson and Daly could play the same central role in legal scholarship for the next thirty years that economics has played for the past thirty. And if not in all of legal scholarship, then at least in some large chunk of it, such as the criminal law scholarship that we are concerned with at a conference on family violence.2

Economic analysis has been profoundly influential in legal scholarship for three reasons. First, economics has enormous heuristic power: it has raised interesting legal questions that no one ever asked before. Second, economics has great breadth: it possesses a set of core concepts—such as the “least cost avoider”—that can be productively employed to answer these interesting questions. And finally, economics has impressive depth: it can answer legal questions not just in broad outline, but in the kind of specific detail necessary to guide both legal scholarship (the “positive” aspect of economic analysis) and the law in action (the “normative”

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2 Note, however, that "nepotistic distribution of benefits" has fundamental implications for areas of law such as trusts and estates. "Let the money follow the genes" would seem to be the evolutionary bottom line in the case of intestate succession.
Does evolutionary analysis possess the heuristic power of economics to ask legally interesting questions, and the breadth and depth of the analytic power of economics to answer them precisely? I think it may.

Consider heuristic power—asking interesting questions. Am I the only one to be amazed that no one before Professors Daly and Wilson and their colleagues ever thought to ask whether babies who were killed by their parents were disproportionately killed by their biological parents or by their stepparents? Once the question is uttered, the answer seems obvious—this is invariably the case with path-breaking research. When the data are presented—finding that stepparents in Australia, England, Canada, and the U.S. are over-represented by a factor of one hundred among parental baby killers—they often elicit a “well, duh, of course” response. This is quickly followed by a host of quite plausible although completely ad hoc environmental explanations involving learning and attachment that could account for the findings. The environmental explanations lack parsimony. But perhaps more importantly, the irrefutable fact is that the environmentalists never thought to ask the pivotal question about biological versus stepparents, and the evolutionists like Professors Wilson and Daly did.4

What about the breadth of evolutionary psychology’s explanatory power—can that rival economics? At the grandest level, the evolutionary bromide used to explain gender differences, “cheap sperm, expensive egg” strikes me as right up there with “supply and demand.” Slightly less grandly, at least in the criminal law, “male sexual proprietariness”5 has at least the explanatory

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3 Posner, supra note 1, at 27.
power of "least cost avoider." It makes coherent sense of an enormous amount of fatal and nonfatal criminal behavior, not just in family violence, but in many other areas as well, including stalking and other forms of limiting female autonomy.  

Finally, what about depth? Evolutionary analyses are often disparaged as speculative, as "just so" stories, similar to psychoanalysis in that they are impossible to test in humans with randomized experiments, at least with randomized experiments that have a follow-up period of less than several thousand years. But if that's the case, how do you account for the incredible specificity of modern evolutionary explanations, for the fact that so many of the precise interactions among the nature of family and non-family relationships, the age and gender of the offenders and the victims, the exact degree of relatedness between victims and offenders compared to that between collaborating killers—all of the findings presented by Professors Daly and Wilson7—are exactly what evolutionary theory predicted before the data were collected?  

Take another example. I highly recommend a remarkable law review article by Owen Jones.8 Professor Jones applied evolutionary psychology to the crime of rape, and came up with specific predictions, including these:

1. "The ages of victims of attempted and completed rape will be overwhelmingly concentrated into the part of the female life

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6 See id. at 333, 342.
span that is reproductive.”

(2) “The probability that a female sexual assault victim will be raped penile-vaginally (as opposed to orally, anally, or with digits or objects) will be higher for females within their reproductive years than it is for those outside their reproductive years.”

(3) “The trauma of rape victims in the immediate post-rape period will tend to vary with age, being greatest among females of reproductive age and less, on average, among prepubescent and post-menopausal victims.”

(4) “The trauma of reproductive-aged sexual assault victims in the immediate post-rape period will tend to vary with the type of sexual assault, with vaginal rape being more traumatic, on average, than anal rape, oral rape, or forced cunnilingus—when these are not also accompanied by penile-vaginal rape.”

Amazingly, there are empirical data that bear directly on each of these evolutionary predictions. And, even more amazingly, Professor Jones tells us that each of these hypotheses turns out to be true. “Just so” stories? After the fact explanations? I don’t think so. Not at this incredibly detailed level of specificity.

Grant, _arguendo_, that evolutionary approaches, at least in some areas of law, have the heuristic power, the breadth, and the depth of scope of economic analyses. So what? What would evolutionary psychology have to offer legal scholarship?

Let me give you one example. Consider what evolutionary psychology would have to say about the case of _Michael M. v. Sonoma County Superior Court_.

In _Michael M._, a seventeen-year-old male was charged with violating California’s statutory rape law, which defined unlawful

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9 Jones, Sex, Culture, and the Biology of Rape at 865.
10 Id. at 867.
11 Id. at 868.
12 Id. at 869.
13 Id. at 865-69.
14 See David Buss, The Emergence of Evolutionary Social Psychology, in Evolutionary Social Psychology 388 (Jeffrey Simpson and Douglas Kenrick eds., 1997) (“Evolutionary approaches in the past have been criticized—justly, in my opinion—for having a high ratio of speculation to testable propositions... [T]his criticism is no longer valid.”).
sexual intercourse as “an act of sexual intercourse accomplished [by a male] with a female not the wife of the perpetrator, where the female is under the age of eighteen years.” The defendant claimed that on its face this statute involved unlawful gender discrimination in violation of the equal protection clause of the Fourteenth Amendment.

In his majority opinion upholding the statute, Justice Rehnquist said:

We need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse. Only women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity. The statute at issue here protects women from sexual intercourse at an age when those consequences are particularly severe.

The question thus boils down to whether a State may attack the problem of sexual intercourse and teenage pregnancy directly by prohibiting a male from having sexual intercourse with a minor female. We hold that such a statute is sufficiently related to the State’s objectives to pass constitutional muster.

Because virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct. It is hardly unreasonable for a legislature acting to protect minor females to exclude them from punishment. Moreover, the risk of pregnancy itself constitutes a substantial deterrence to young females. No similar natural sanctions deter males. A criminal sanction imposed solely on males thus serves to roughly “equalize” the deterrents on the sexes.

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16 Id. at 466
17 Id. at 467.
18 Id. at 471-73.
Most of the more than three hundred law review commentators who have discussed \textit{Michael M.} have agreed with Justice Brennan's dissenting view that Justice Rehnquist was "further[ing]... outmoded sexual stereotypes"\textsuperscript{19} in saying that there was a good reason for having different legal standards for the different sexes when it came to statutory rape. Most of the commentators also agreed with another dissenter, Justice Stevens, who wrote: "Surely, if we examine the problem from the point of view of society's interest in preventing the risk-creating conduct from occurring at all, it is irrational to exempt fifty percent of the potential violators."\textsuperscript{20}

\textbf{CONCLUSION}

Legal scholars informed by the works of Professors Wilson and Daly and other evolutionary psychologists would respond very differently than these quoted commentators did. They would have no problem with Justice Rehnquist's notion that the genders had, in the words of David Buss, different "sexual strategies"\textsuperscript{21}—different "by nature," as Justice Rehnquist put it in \textit{Michael M.}\textsuperscript{22}—and that one gender is at vastly higher risk of being sexually victimized than the other. Likewise, an evolutionarily-informed legal scholar could only scratch her head and wonder what Justice Stevens could have been thinking when he said that "fifty percent of the potential violators" in the crime of rape, no less, were female.\textsuperscript{23}

\textsuperscript{19} Id. at 496.
\textsuperscript{20} Id. at 499.
\textsuperscript{22} 450 U.S. at 473.
\textsuperscript{23} See \textbf{Statistical Handbook on Violence in America} 52 (Adam Dobrin et al. eds., 1996) (for no year, and at no age, does the percent of arrestees for rape who are female exceed four-tenths of one percent); see also Martin Lalumiere \& Vernon Quinsey, \textbf{A Darwinian Interpretation of Individual Differences in Male Propensity for Sexual Aggression}, 39 \textbf{Jurimetrics J.} 201-16 (1999) (defining male sexually aggressive behaviors in a Darwinian context and suggested impacts on legal and social policy).