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## **ANOTHER QUEST FOR THE HOLY GRAIL OF LAW: *IUS GENERIS* – LAW AS A COUNTERMOVEMENT TO HUMAN COGNITION**

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### ABSTRACT

*In hopes of providing some possible further insight into the nature of law in all contexts, this Article contributes another layer to the discussion respecting an evolutionary ontology of law. It advances a preliminary sketch of the possible genesis of norms as a countermovement to human cognition, with law, as a type of norms thereby integrally interwoven into humanity itself. With this understanding of its origins, law, whether considered from the positive law, natural law or systems theory perspective, may be understood more clearly and its applications perhaps anticipated. This Article analyzes whether this proposed countermovement theory might provide common threads between it and existing epistemologies. Implicit is that legal and non-legal norms are interrelated in humanity. This interrelationship will affect any attempt to transport law from one society to another and may explain the lack of success in transporting law as was attempted by the law and development movement. Anticipating this interrelationship might then result in better implementation of the rule of law worldwide.*

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## INTRODUCTION

Two things are commonly accepted about humankind: we are biologically derived from an ancient extinct relative, with our closest relatives today being chimpanzees; and, in our humanity, we are qualitatively and quantitatively different from all other animals. Part of this difference is law, which, as we understand it, does not exist for any other animal. This Article, which is directed towards an ontology of law, is inspired on the one hand by our biological evolution and on the other hand, by that uniqueness which constitutes us, *homo sapiens*, as an animal different from all others. While law is at the center of all human societies intersecting all its actors' transactions at all levels, an understanding of law's ontology seems as elusive as Sir Galahad's quest for the Holy Grail: seemingly possible, never found, but nevertheless worth the effort of the search.

In his 1988 Tanner Lecture, *Law and Morality*, Jürgen Habermas noted that "law as such precedes the rise of the state and of political power in the strict sense, whereas politically sanctioned law and legally organized political power arise simultaneously,"<sup>1</sup> thereby implicating the origins of mankind with the origins of law and legal reality which John Griffiths described as:

an unsystematic collage of inconsistent and overlapping parts, lending itself to no easy legal interpretation, morally and aesthetically offensive to the eye of the liberal idealist, and almost incomprehensible in its complexity to the would-be empirical student.<sup>2</sup>

Any discussion of the legal reality so aptly described by Griffiths must, however, reduce it to a representation. But this process is filled with difficulties since reality cannot be reduced to a representation without simplifying and omitting various parts,<sup>3</sup> destroying the reality that the representation seeks in its model or description. This destruction results

1. Jürgen Habermas, *Law and Morality*, in 8 THE TANNER LECTURES ON HUMAN VALUES 217, 263 (Oct. 1-2, 1986) (Sterling McMurrin ed., 1988).

2. John Griffiths, *What is Legal Pluralism?*, 24 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 4 (1986).

3. Boaventura de Sousa Santos, *Law: A Map of Misreading - Toward a Postmodern Conception of Law*, 14 J. L. & SOC'Y 279, 284 (1987). This appears to be a more general difficulty with representations, which must also afflict the representation of law as created by this Article, so similarly in a study of art history, which must remain "in close contact with the study of man," ERNST H. GOMBRICH, *ART AND ILLUSION: A STUDY IN THE PSYCHOLOGY OF PICTORIAL REPRESENTATION*, *Preface to the Second Edition*, ix and xi (1977): "no artist can copy what he sees."

from at least three difficulties. First, and most generally, a model cannot make a complete model of itself.<sup>4</sup>

A second difficulty is one also faced by others also who seek to create a representation of the reality around them:<sup>5</sup> in reality, the more closely we examine an object, the more detail we see. In any representation or description, the representation or description does not change as we try to examine it more closely. We need a different representation or description at each scale.<sup>6</sup>

A third difficulty results from the fact that our thought processes appear to be linear whereas reality is embedded and, therefore, reflexively implicated in its environment. Nothing can happen within the legal reality without some effect elsewhere in society, and everything that happens elsewhere affects legal reality. In any written representation, we are limited to a linear description forced on us by both our thought processes and our language.<sup>7</sup> Therefore, our linear language, whether oral or written, cannot fully describe reality.<sup>8</sup> We are able to describe only one characteristic at a time.

After this Introduction, Part I is a review of three major models of law, each of which provide an epistemology of law: positive law, natural law, and Luhmann's system theory. This Article focuses on these three models and provides an ontology that adduces elements from all three. In this Article, I suggest that law is an evolutionary countermovement initiated by human cognition. As such a countermovement, law would be reflexively implicated into humanity itself. Since a variation of an evolutionary ontology of law will be outlined, Part II consists of an overview of evolution and postulates the possibilities of countermovements. I progress from discussing organisms, where evolutionary principles would seem to govern

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4. ARTHUR KOESTLER, *THE ACT OF CREATION* 633 (Dell Publishing Inc. 1975). But does it matter? At times the seemingly irreconcilable make no difference. It is accepted that it makes no difference mathematically whether we postulate that two parallel lines meet at infinity, or whether we say that they do not meet at infinity. But, of course, in anything we do, we are bounded by the finite, and not by the infinite. This, however, does seem to raise the issue whether or not it matters that we accept his statement, which reflects the accepted philosophical view.

5. GOMBRICH, *supra* note 3, at 182; de Sousa Santos, *supra* note 3, at 284.

6. de Sousa Santos, *supra* note 3, at 284.

7. STEVEN PINKER, *THE LANGUAGE INSTINCT: THE NEW SCIENCE OF LANGUAGE AND MIND* (The Folio Society 2008) (1994) suggests we have our own mental language within us which describes for us concepts for which we use verbal language to communicate to others, and we cannot say two words simultaneously and still communicate; at the same time, GOMBRICH, *supra* note 3, describes the impossibility of concurrently "seeing" two separate images in the same visual representation, which is the factor used in creating some artistic illusions, and would seem to indicate, if we have a mental language, that we cannot have two separate thoughts simultaneously.

8. PINKER, *supra* note 7.

all life, to animals, when these principles seem to relate to “higher” life forms, and finally to humankind. Part III provides a possible genesis of primal norms, distinct from instinct, and the possible involvement of human cognition in this process. Part IV considers primal social, religious, and cultural norms while Part V postulates a tentative ontology for legal norms deriving from them. Part VI tentatively compares this countermovement model with the other major models of law described in Part I, and Part VII briefly explores its potential practical application to the law and development movement.

A complete canvas of the thoughts in this Article, fully integrated into the present theories of law, including the transition from that which I describe as the legal or proto-legal to what I describe as law, would be a *magnum opus* that is beyond the scope of a preliminary sketch such as this. Consequently, this Article is mingled with significant trepidation. As with any rough sketch, there is no doubt that it will be found wanting. But as with any preliminary artistic sketch, in its overlapping and tentative strokes, and somewhat apparent digressions, at times in the footnotes, hopefully the outline of another picture of law’s ontology in both a Darwinian evolutionary experience and our human uniqueness is sketched. This inquiry, however, delves into human behavior at the earliest stages of human development for which we have only scarce evidence, limiting the validity of any conclusions that may be drawn.

While intertwining law into humanity itself, this Article does not, except in a peripheral manner, deal with the possible origins of the characteristics that differentiate us, *homo sapiens*, from other animals—human cognition—nor does it deal with the interrelationship of law, politics, and the State. Similarly, since this Article deals with the ontology of the legal reality, and not of its differentiation or the subsequent development of law’s institutions, a consideration of the work of Ronald Coase,<sup>9</sup> and Oliver Williamson,<sup>10</sup> respecting the formation of firms, as well as the path dependency of Douglass North<sup>11</sup> are beyond its scope.

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9. R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937).

10. Oliver E. Williamson, *The Modern Corporation: Origins, Evolution, Attribute*, 19 *J. ECON. LITERATURE* 1537 (1981).

11. DOUGLASS NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* (Cambridge University Press 1990).

## I. MODELS OF LAW

A. *Positive Law*

Today's most common epistemology of law is the positive law model.<sup>12</sup> In it, law is founded in the free will and reason of man. Abetted by Thomas Hobbes' concept of the common man as *tabula rasa*,<sup>13</sup> law, seen as the product of relativism, is more highly developed by institutionalists and the historical model of law. Under this rubric of positive law, two distinct approaches have an ontological aspect: a) the social contract concept espoused by Hobbes and John Locke – a concept founded in the free will of personal sovereignty and moral autonomy; and b) institutionalism, also encompassing the societal developmentalists, which rejected the social contract model.

Hobbes and Locke postulated that people, in a free will process, constructed a social contract to create the state, thereby bringing themselves out of the state of nature.<sup>14</sup> This social contract created positive law as well as the state. For institutionalists, both law and the economy were evolutionary developments which maintained the free will so dear to Hobbes and Locke.<sup>15</sup> For both this free will is a sociological fact; nevertheless, Sir Frederick Pollock referred to them as the “Darwinians before Darwin.”<sup>16</sup>

The societal developmentalists posit a similar evolutionary epistemology but advance institutional evolution as well.<sup>17</sup> Among them are Chief Justice Sir Matthew Hale and John R. Commons. Hale observed that law “accommodates to the Conditions, Exigencies and Conveniences of the people.”<sup>18</sup> Similarly, Commons saw law as born “when functionaries of the state find a going concern ‘already in a trembling existence and then proceed ‘artificially’ to guide the individuals concerned and give it a safer

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12. It is as times also described as “legal positivism,” which Suri Ratnapala has described as “the most influential school of thought in jurisprudence.” SURI RATNAPALA, *JURISPRUDENCE* 21 (2009).

13. THOMAS HOBBS, *LEVIATHAN: OR, THE MATTER, FORME, AND POWER OF A COMMONWEALTH ECCLESIASTICAL AND CIVIL* 263 (Michael Oakeshott ed., Collier Books 1962) (1651).

14. *Id.*; see generally JOHN LOCKE, *SECOND TREATISE ON GOVERNMENT* (1689).

15. Cf. GEOFFREY M. HODGSON, *ECONOMICS AND EVOLUTION - BRINGING LIFE BACK INTO ECONOMICS* 235-36 (1996).

16. Cf. KOESTLER, *supra* note 4, at n.131 (respecting pre-Darwinian evolutionary thought). See also HODGSON, *supra* note 15, at 159; Suri Ratnapala, *Eighteenth-Century Evolutionary Thought and its Relevance in the Age of Legislation*, 12 CONST. POL. ECON 51 (2001).

17. RATNAPALA, *JURISPRUDENCE*, *supra* note 12, at 281.

18. Ratnapala, *Eighteenth-Century Evolutionary Thought*, *supra* note 16, at 55.

existence.”<sup>19</sup> These views seem similar because both require some antecedent societal formation and thereby fail to provide an ontology of law.

After Hobbes and Locke, Adam Smith was the most prominent institutionalist legal philosopher to reject the notion of a social contract. He considered law as arising from the effect of competing individual passions—which appear to be instincts by another name. This competition led us “to form to ourselves certain general rules concerning what is fit and proper either to be done or to be avoided.”<sup>20</sup> In this regard, Smith propounded the views of his friend David Hume,<sup>21</sup> who himself had followed Bernard Mandeville.<sup>22</sup> More than once, Hume states that in thought and reason animals are no different than human beings.<sup>23</sup> Smith never denies this and continues Hume’s nomenclatures.<sup>24</sup> Carl Menger<sup>25</sup> and Friedrich Hayek<sup>26</sup> followed the same path. Robert Axelrod continued with

19. *Id.* at 64.

20. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 153 (1756), <http://www.marxists.org/reference/archive/smith-adam/index.htm> [https://perma.cc/26S8-CP28] [hereinafter *MORAL SENTIMENTS*]; Ratnapala, *Eighteenth-Century Evolutionary Thought*, *supra* note 16, at 58.

21. DAVID HUME, *A TREATISE OF HUMAN NATURE: BEING AN ATTEMPT TO INTRODUCE THE EXPERIMENTAL METHOD OF REASONING INTO MORAL SUBJECTS* (Penguin Books 1985); Ratnapala, *Eighteenth-Century Evolutionary Thought*, *supra* note 16, at 57. Hume’s view that “social institutions originated in convention not design or agreement,” would seem to place law as an instinct. Nothing in Hume’s discussion of desire, aversion, hope and fear, the starting points for his analysis, indicates a need for rational thought or free will but rather seems to rely on the reflexive nature of evolutionary development. As Ratnapala points out, Hume wrote, “Tho’ the rules of justice be *artificial*, they are not *arbitrary*. Nor is the expression improper to call the *Law of Nature*; if by natural we understand what is common to any species, or even if we confine it to mean what is inseparable from the species.” *Id.* at 57 (citing DAVID HUME, *ENQUIRIES CONCERNING HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS* (Clarendon Press 3d ed. 1975)). “The rules of justice arise out of a sense of mutual need. This shared sense does not result from verbal exchanges but through the coincidence of behavior.” *Id.* But, very fairly, Hume seems to muddy the water when he compares the situation to “two men, who pull the oars of a boat, [who] do it by an agreement or convention, tho’ they have never given promises to each other,” which seems to imply more than coincidences of behavior.

22. Ratnapala, *Eighteenth-Century Evolutionary Thought*, *supra* note 16, at 55-56. Mandeville who sees culture as the product of “every individual . . . acting in his or her self interest” and the process by which law attains its complexity to “the mechanical process of weaving stockings,” which seems quite different from free will.

23. HUME, *supra* note 21, at 226 *et seq.*

24. SMITH, *MORAL SENTIMENTS*, *supra* note 20; ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 61 (The Folio Society 2008) (1776).

25. Carl Menger’s view, placing law as one of the strongest ties by which the population of a territory becomes a nation and achieves state organization, appears to take us towards Carl Schmitt’s view of the state, and even in its simplest is beyond the scope of this Article.

26. HODGSON, *supra* note 15, at 152. But as he points out, Hayek distinctly diminished Darwin’s view of evolution. *Cf.* Ratnapala, *Eighteenth-Century Evolutionary Thought*, *supra* note 16, at 61. Ratnapala points out: “Hayek distinguished spontaneous order (*cosmoi*) from made order or organizations (*taxies*). Spontaneous order was found in complex systems in which constituent members have freedom of action but are coordinated in their interactions by the observance of general rules.” *Id.* This must raise the questions: 1) If there are pre-existing general rules, are these not found in mankind’s

the concept of free will but uses game theory for simulations and calculations with the economic concept of the “prisoner’s dilemma”<sup>27</sup> to focus on norm creation through a consideration of individual behavior. Richard Alexander has stated that game theory is the “epitome of a rational choice theory of behavior.”<sup>28</sup>

Lastly, the German “historical” model espoused by Friedrich Carl von Savigny, who saw law as deriving from the *Volkgeist*,<sup>29</sup> finds close parallels in Charles Taylor’s social imaginary in which people “imagine their social existence, how they fit together with others, how things go on between them and their fellows, the expectations which are normally met, and the deeper normative notions and images which underlie these expectations.”<sup>30</sup> This historical model, which contrary to its appellation considers customary, unwritten law, is, or is similar to, the *agraphoi nomoi* referred to by Niklas Luhmann.<sup>31</sup> Eminent legal scholars such as Hermann Kantorowicz and now Jürgen Habermas have continued to apply von Savigny’s thoughts in their analyses.<sup>32</sup>

instincts, rather than our free will? 2) What are those general rules, and if there are pre-existing “general rules” does that not imply that there cannot be a complete freedom of action, but only a limited freedom, and is that truly freedom of action? Does this not become equivalent to Kelsen’s *Grundnorm*? Hans Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 HARV. L. REV. 44 (1941-1942); HANS KELSEN, PURE THEORY OF LAW, (2d ed., Max Knight trans.) 8 and §34 (1967). This only raises the more difficult question of where this *Grundnorm* truly originates? A “complex system” would seem applicable as well to Hale, Commons, and von Savigny, as to the individualistic reactions to which Smith, etc. pin norms.

27. See, e.g., ROBERT AXELROD, THE EVOLUTION OF COOPERATION, (1984); Robert Axelrod, *An Evolutionary Approach to Norms*, 80 AM. POL. SCI. REV. 1095 (1986), <http://www.jstor.org/stable/1960858> [<https://perma.cc/C62A-HG4H>]. Game theory being the study of mathematical models of strategic interaction among rational decision makers and the “Prisoner’s Dilemma” a conceptual example used to show why two competing rational individuals might not cooperate even if it might be in their joint best interests to do so.

28. Richard D. Alexander, *Biology and Law*, 7 ETHOLOGY & SOCIOBIOLOGY 167, 171 (1986); cf. HODGSON, *supra* note 15, at 223. “The second extreme position, traditionally associated with the Austrian School and with those under their influence, is that human action is based exclusively on decision and choice which are themselves wholly uncaused.” *Id.*

29. Ratnapala, *Eighteenth-Century Evolutionary Thought*, *supra* note 16, at 60. I would also suggest that there is a subtle but profound distinction between Savigny’s *Volkgeist* (which I would translate as ‘the consciousness inherent in a people’) and a “*Volksgesit*” (which is perhaps more properly translated as ‘the common consciousness of a people’).

30. CHARLES TAYLOR, A SECULAR AGE 71 (2007).

31. NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM 239 (Klaus Ziegert trans., Fatima Kastner *et al.* eds., 2004).

32. Brian Z. Tamanaha, *What Legal Philosophers Can Learn From Non-Philosophers About the Concept of Law*, draft of the presentation, *What Legal Philosophers Can Learn From Sociological Concepts of Law*, to the Legal Philosophy Between State and Transnationalism Seminar Series of the Jack and Mae Nathanson Centre on Transnational Human Rights, Crime and Security, at Osgoode Hall Law School (Apr. 3, 2009).

### B. The Weberian Problematic

For positive law scholars, two effects destroyed the foundations upon which the previously widely accepted natural law model had been based. The first effect was from the relativism observed by Max Weber's sociological approach to law and religion, which seemed to confirm both Hobbes' observation that "good, evil, and contemptible, are ever used with relation to the person that used them: there being nothing simply and absolutely so"<sup>33</sup> and John Stuart Mill's observation that "[n]o two ages, and scarcely any two countries, have decided [the rules of conduct which are imposed by law and opinion] alike."<sup>34</sup> The second effect was Friedrich Nietzsche's observation that "God is dead,"<sup>35</sup> which may be regarded as referencing a God who created a rational world. The deviations in laws between societies that social scientists such as Leopold Pospisil and Bronislaw Malinowski observed seemed to confirm the positive law model.<sup>36</sup> If we could no longer look to God or other reasons for a rational design of the universe, and thus the social universe, then it must be that we created the social universe and we could use law, as suggested by the instrumental school, for social engineering to benefit society.<sup>37</sup> The realists among positive law thinkers, therefore, looked outside law for what was needed to determine how law should be directed.

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33. HOBBS, *supra* note 13, at 48, 119. Hobbes, nevertheless, waffles between natural law and relativism. Despite writing that: "good, evil, and contemptible, are ever used with relation to the person that useth them: there being nothing simply and absolutely so," *id.* at 48; "good and evil, are names that signify our appetites, and aversions; which in different tempers, customs, and doctrines of men, are different," *id.* at 123; "the law of nature, and the civil law, contain each other, and are of equal extent," *id.* at 199; "therefore a fundamental law is that, by which subjects are bound to uphold whatsoever power is given to the sovereign, ... without which the commonwealth cannot stand," *id.* at 214; and "law is made by sovereign power, and all that is done by such power, is warranted," *id.* at 270; he comments that the sovereign is still subject to the laws of God, or natural law: "it is true that sovereigns are all subject to the laws of nature; because such laws be divine, and cannot by any man or commonwealth be abrogated," *id.* at 240, even though he strives to equate natural laws to "qualities that dispose men to peace and obedience." *Id.* at 200. Subject to that equivocation, it is the sovereign who has complete control over the subjects, and is able to create laws and punish acts contrary to its wishes. For Hobbes law requires the force of the sovereign to punish infractions, and the state (since the leviathan gives us our "place and defence") is the leviathan: the sovereign who has sovereign power, which may control us.

34. JOHN STUART MILL, *ON LIBERTY* 9 (The Folio Society 2008).

35. FRIEDRICH NIETZSCHE, *DIE FRÖHLICHE WISSENSCHAFT* Book 3, §108 (1882).

36. Cf. Sally Falk Moore, *Law and Social Change: The Semi-autonomous Field as an Appropriate Subject of Study*, 7 *LAW & SOC'Y REV.* 719 (1973); Sally Engle Merry, *Legal Pluralism*, 22 *LAW & SOC'Y REV.* 869 (1988).

37. Moore, *supra* note 36.

All of them, however, left unattended what has since been described as the “Weberian Problematic.”<sup>38</sup> Since there is no universal or true morality and we are each born a blank slate on which anything could be written, each society can create its own morality for its members, presenting the possibility of the “tyranny of the majority”<sup>39</sup> in which *might makes right*. Legal philosophers have resolved the Problematic in different ways. Hans Kelsen, similar to Hobbes,<sup>40</sup> looked for a *Grundnorm* on which a society could found its laws to avoid the tyranny,<sup>41</sup> whereas Carl Schmitt accepted the tyranny and glorified the power that it gave to the state.<sup>42</sup> The last of the great positive law thinkers, H.L.A. Hart avoids the Weberian Problematic by describing a soft positivism, which considers the compatibility of a rule to moral values as a criterion for the rule’s legal validity.<sup>43</sup> The Problematic also caused concern among the legal realists such as Oliver Holmes and Roscoe Pound who came to the conclusion that law was more, or must be more, than what society could or would create.<sup>44</sup>

### C. Natural Law

Tracing its sources to the Greek philosophers, the natural law model is much older than positive law.<sup>45</sup> Law derived either a) from God, or b) from the Aristotelian ideal originating in man’s nature as a rational and social being, and divided into natural and conventional justice.<sup>46</sup> Because it was universally applicable, or at least universally applicable among civilized people, natural law never suffered from the Weberian Problematic. The Aristotelian thought that “nature” implied a rational design carried over into the concept of natural justice, resulting in a rational design for natural justice as an abstract ideal law that cannot be fully described.<sup>47</sup>

The Latin terms for natural law, *lex naturae* or *ius naturale*, came to signify this ideal, based on the ideal of human nature, which the Roman *ius*

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38. David Dyzenhaus, *Herman Heller and the Legitimacy of Legality*, 16.40 OXFORD J. LEGAL STUD. 641, 642 (1996).

39. MILL, *supra* note 34, at 8.

40. HOBBS, *supra* note 13, at 224. He styles this as a “fundamental law.” *Id.*

41. KELSEN, *supra* note 26.

42. Carl Schmitt, *Ethic of State and Pluralistic State*, in *THE CHALLENGE OF CARL SCHMITT* 195 (Chantal Mouffe ed., 1999).

43. H.L.A. Hart, *THE CONCEPT OF LAW* 250 (1994).

44. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897); Roscoe Pound, *The New Feudal System*, 35 COM. L. J. 397 (1930).

45. RATNAPALA, *JURISPRUDENCE*, *supra* note 12, at 119 *et seq.*

46. Fredrick Pollock, *The History of the Law of Nature: A Preliminary Study*, 1 COLUM. L. REV. 11-12 (1901).

47. de Sousa Santos, *supra* note 3. He thereby describes this as “Homeric” law. *Id.*

*gentium* (the universal law of mankind actually found in practice) could only approximate but never attain.<sup>48</sup> In one way or another the term natural law has persisted since the late Roman Empire although its definition has not been constant. The early Christian Fathers saw the proponents of natural law as so persuasive that to maintain the supremacy of the law of God they identified the law of God with this law of nature.<sup>49</sup> But identifying this law of nature as part of the divine law created by God, with which it could not be in conflict, caused it to become closely associated with the power of the Catholic Church.<sup>50</sup>

Subject to John Finnis' restatement of classical natural law,<sup>51</sup> the law of nature had, until its phoenix-like rise from its ashes in the recent "law and biology" movement, been consumed in the fires of the reformation, the Catholic Church's consequent loss of authority, and the concomitant ascendancy of relativism and positive law. The only remaining echoes of natural law remained in the "natural justice" of quasi-judicial acts, the concept of the reasonable man in English common law,<sup>52</sup> *lex mercatoria*, and in the law of nations.<sup>53</sup>

Despite being a form of natural law, the interdisciplinary law and biology movement is in its infancy. Its research is centered at both the Gruter Institute for Law and Behavioral Research and at the Society for Evolutionary Analysis in Law (S.E.A.L.) at Vanderbilt University.<sup>54</sup> As Morris Hoffman, a research fellow at the Gruter Institute, states, by concentrating on "what an evolutionary perspective might say about human nature and the foundations of law," the law and biology movement is the "biology of law."<sup>55</sup>

Focusing on our genetic structure and particularly the evolved structure of the brain,<sup>56</sup> proponents of the movement develop law as created from the cooperation and altruism that is apparent not only among human beings, but also other animals. With the intuitive (which may be equivalent to "instinctive") attempt to prevent free-riding among members of a collective,

48. Pollock, *supra* note 46, at 14.

49. *Id.* at 17 (Aristotle, Cicero, and Justinian).

50. *Id.* at 20.

51. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (2d ed. 2011).

52. Fredrick Pollock, *The History of the Law of Nature: A Preliminary Study, Second Article*, 2 COLUM. L. REV. 131 (1902).

53. *Id.*; Manley O. Hudson, *The Prospect for International Law in the Twentieth Century*, 10 CORNELL L.Q. 419 (1924-1925).

54. RATNAPALA, *JURISPRUDENCE*, *supra* note 12, at 267.

55. Morris B. Hoffman, *Law and Biology*, 8 J. OF PHIL., SCI. & L. 1 (2008), <http://www6.miami.edu/ethics/jpsl/archives/all/LawandBiology.html>.

56. *Id.* at 8-9.

comes an urge to punish potential free-riders, and thus an intuitive ability to assess the blameworthiness of their conduct.<sup>57</sup> As Hoffman points out, “[i]t seems all of us, at least those of us who are not sociopaths, have no trouble at all making very fine distinctions between the just deserts of different crimes, and exhibit widespread agreement about those distinctions.”<sup>58</sup> Proponents of the law and biology movement see free will and responsibility, both of which are deeply important within law to impose punishment, as “mechanisms” to conserve the effectiveness of the human brain:

Blessed with incredible computing power and the ability to imagine that the future may depend on our present actions, human brains would lose much of their effectiveness if they didn’t also come equipped with the belief, illusion or not, that they are free to make decisions and that those decisions will matter. That is, a conscious ancestor, blessed and cursed with the feeling of free will, was much more likely to survive than one without these traits.<sup>59</sup>

By this Hoffman, at the least, seems to put the originating key to free will into our imagination.

Based at S.E.A.L., Paul Robinson, Robert Kurzban and Owen Jones, argue that because of the requirement for cooperation, which can evolve through overlapping processes,<sup>60</sup> “people have a specific ability to acquire intuitions of justice” in the same way that they can learn languages.<sup>61</sup> For Robinson, Kurzban, and Jones, this forms a basis for why humans have self-sustaining intuitions that people who have harmed or cheated them should be punished,<sup>62</sup> as well as why we concern ourselves if someone else is wronged and this act is not punished.<sup>63</sup> Robinson, Kurzban, and Jones see the same characteristics in animals,<sup>64</sup> and cite compelling reasons for viewing this as stemming from the structure of the brain.<sup>65</sup>

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57. *Id.* at 7.

58. *Id.* at 8. But primates will ostracize others in their collective if their conduct is inappropriate, *cf.* Morris B. Hoffman & Timothy H. Goldsmith, *The Biological Roots of Punishment*, 1 OHIO ST. J. CRIM. L. 627, 634-35 (2003-2004), which would seem to involve the same process. While it adequately describes a basis for prohibitive law, it seems to maintain a difficulty of describing enabling laws.

59. Hoffman, *supra* note 55, at 11 (emphasis added).

60. Paul H. Robinson, *et al.*, *The Origins of Shared Intuitions of Justice*, 60 VAND. L. REV. 1633, 1647 (2007).

61. *Id.* at 1642.

62. *Id.* at 1652.

63. *Id.* at 1649 (again seeming to describe prohibitive, but not enabling, law).

64. Robinson, *et al.*, *supra* note 60, at 1654.

65. *Id.* at 1659 *et seq.*

#### D. Social System

Today's western European trend, led by such notable philosophers as Luhmann, Foucault, and Habermas, is to see law as a social system replacing the individual with communicative processes.<sup>66</sup> This trend provides a deep understanding of law as it is today in "advanced" legal societies based in the western European tradition, but does not, except peripherally, consider the ontology of law.<sup>67</sup> This system theory seems neither to ask nor to answer the question of why only some norms are laws and within the system.<sup>68</sup> As a constructivist elucidation, it sees law as an abstract autopoietic system whose existence does not depend on human awareness but instead constructs its own social reality, even though law cannot be matched to any other social reality "out there."<sup>69</sup> As independent of and separate from human awareness, the system theory model of the law is similar to the "ideal" law in the natural law model.

The purpose of an autopoietic constructivist view of law is to avoid the problems of circuitry and infinite regression which would otherwise result.<sup>70</sup> Other than Luhmann's observation that laws are expectations worth protecting, the legal social system, bounded by a legal/illegal binary,<sup>71</sup> begs the question why some norms are legal norms finding their place within the system. Notwithstanding this autopoietic constructionist view with humans being the only animal to have law raises the issue whether law, nevertheless, must be intertwined in the human condition, linked to the essence of

66. Gunther Teubner, *How the Law Thinks: Toward a Constructivist Epistemology of Law*, 23.5 L. & SOC'Y REV. 727, 729-32 (1989). If the boundaries of a system are drawn too narrowly, it seems a fictitious system may be created, which nevertheless is imagined to be real. Cf. Jozica Kenz-Riedl, Matjaz Mulej, & Robert G. Dyck, *Corporate Social Responsibility from the Viewpoint of Systems Thinking*, 35 KYBERNETES 441, 443 (2006). Because of the structural coupling between law and politics, the question remains whether it is law alone, or law and politics, which form the true system.

67. LUHMANN, *supra* note 31, at Ch. 6.

68. While Luhmann indicates: "We understand norms as the form of a general stabilizing function, which derives its specific legal quality only from being differentiated as and in the legal system .... [but] this can be achieved only by a selection of those expectations that are worth protecting." He does not further indicate why these norms are differentiated or worth protecting, thereby bringing them into the legal. *Id.* at 151-52.

69. *Id.* at 730.

70. See generally *id.*

71. And it also raises the interesting point, not addressed by Luhmann, that any process which defines a boundary or dichotomy would in fact create a tri-valent outcome: the inside, the outside and the boundary itself (which is neither in nor out and thus one cannot from the characteristics of that which is in or out, deduce its characteristics), and what may exist at the boundary of legal/illegal; that place which exists, where, as M. de Lamartine poetically puts it in *Le Temple*, "... l'ombre et le jour se disputent la terre." The true paradox of law then is that it is both inside and outside of itself. If law is that which is legal, it can only be understood by excluding the illegal from it, yet to determine what law is the conversation must be in the legal/illegal dialectic.

humanity,<sup>72</sup> from which human awareness or cognition cannot be completely taken out.

### *E. The Perpetual Legal Dilemma*

In all three models of law, another dilemma rears its ugly head. From Plato and Aristotle, to Hobbes and Locke, and to Kelsen, Schmitt, Luhmann and Teubner, writers have grappled with the dilemma of a *constituting* and *constituted* law.<sup>73</sup> Kelsen described the constituting law as the *Grundnorm*. This *Grundnorm* is the foundational basis permitting all other (constituted) laws to be effective. Giorgio Agamben describes this in terms of the inclusiveness and exclusiveness which law creates by defining itself as a mechanism to maintain the stability of conduct within society.<sup>74</sup> Ultimately, however, law can only be a mechanism to *maintain* stability if stability exists. But the stability which law maintains (which Agamben describes as the power outside the law) raises the dilemma of why those forces which created this stability need law to maintain it?

Natural law theorists resolved the dilemma by placing law's originating stability in God and our nature; positivists resolved it in our free will to associate. As a social system it is resolved by seeing law as autopoietic and its own constituting power: it is because it is; but law's existence begs the question why law created itself in this manner. I will suggest that seeing law as a countermovement to human cognition may assist in an explanation for this dilemma. Since one avenue of such a countermovement may be evolution, a brief overview of evolutionary processes is appropriate.

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72. As Giorgio Agamben points out, from the Greeks, that to men Zeus gave the *nomos* that men have *Dikē*, of which perhaps the more important part is not that men have *Dikē*, but that we can appreciate this *nomos*, which must seem to imply recognizing both the distinction between the Self and the other (not with the other being the continuum of the environment but a like individual, with both that Self and other interacting with the continuum of the environment. GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* §1 *The Paradox of Sovereignty*, (Daniel Heller-Roazen trans., 1998) [hereinafter *HOMO SACER*].

73. *Id.* at §3.

74. *Id.*

## II. OVERVIEW OF EVOLUTION

Darwinian evolutionary processes have been used to explain the beauty of the reality of our biological world and social behavior.<sup>75</sup> Therefore it should not be surprising if these evolutionary principles could assist in explaining a marvel such as legal reality, including its complexity, the collage of apparently inconsistent yet interrelated and overlapping parts, the dispersion of the authority by which rules are made,<sup>76</sup> and the simultaneous dispersion of indigenous and official orderings.<sup>77</sup> Through its myriad of independent recursive processes evolutionary change provides benefits;<sup>78</sup> benefits which seem impervious to the scale at which they are examined, despite the apparently disparate results at those scales,<sup>79</sup> but that nonetheless increase the ability to adapt to the environment and to succeed in the constant struggle for survival.<sup>80</sup>

In his seminal book *On The Origin of Species*,<sup>81</sup> Charles Darwin outlined the basic tenets of his explanation for evolution from this struggle for survival.<sup>82</sup> For him the ability to propagate is exponential, but the potential growth of the organism's food supply is linear, which implies that an organism will prosper if it has some advantage to survive *vis-à-vis* its competitors. This outcome is known as survival of the fittest.<sup>83</sup> Darwin saw organisms' steady gradual change and improvement in the ability to survive

75. EDWARD O. WILSON, *SOCIOBIOLOGY: THE NEW SYNTHESIS* (1975); RICHARD DAWKINS, *THE SELFISH GENE* (1976); W. D. HAMILTON, *NARROW ROADS OF GENE LAND: THE COLLECTED PAPERS OF W. D. HAMILTON* (1996).

76. PHILIP C. JESSUP, *TRANSNATIONAL LAW* 8 (1956).

77. Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1, 17 (1981).

78. Cf. BRUNO LATOUR, *WE HAVE NEVER BEEN MODERN* 4 (Catherine Porter trans., Harvard Univ. Press 1993) (1991). Latour does not reutilize terms invented by the social sciences because of the "rhetoric, textual strategies, writing, staging [and] semiotics" associated with words to describe concepts invented by the social sciences, deciding, rather, to use "the word 'collective' to describe the associations of humans and nonhumans." *Id.* at 4-5. For the same reason I intend on using the word 'society' in situations in which the societal divide is intended, and otherwise use the word 'collective.'

79. de Sousa Santos, *supra* note 3.

80. Griffiths, *supra* note 2, at 3; Robert Axelrod & William D. Hamilton, *The Evolution of Cooperation*, 211 SCIENCE, New Series, 1390 (1981).

81. CHARLES DARWIN, *ON THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION OR THE PRESERVATION OF FAVOURED RACES IN THE STRUGGLE FOR LIFE* (The Folio Society 2006).

82. But as Koestler points out, on July 1, 1848, Charles Darwin and Alfred Russell Wallace presented a joint memoir to the Linnean Society entitled '*On the Tendency of Species to form Varieties; and on the Perpetuation of Varieties and Species by Natural Means of Selection.*' and both had read and been influenced by Malthus' '*An Essay on the Principle of Population.*' independently coming to the same conclusions. KOESTLER, *supra* note 4, at 140, 142 (the difference between the two seeming to be that Darwin published *ON THE ORIGIN OF SPECIES* first).

83. DARWIN, *supra* note 81, at 48; Axelrod & Hamilton, *supra* note 80, at 1390.

in accordance with the maxim *natura non facit saltum*<sup>84</sup> predicated on the constant competition of one organism against another for the food supply. Such competition for success is, however, dependent upon the specific environment in which an organism finds itself. The same type of organism would, in different places, find itself in different environments. Different environments affect the organism's food supply and the other conditions against which it must struggle. This directs different evolutions in different places for the same initial organism.

While he may have been wrong on the details and one might quibble whether these almost infinitesimal changes occurred,<sup>85</sup> or more discrete mutations resulting from imperfect replication of the DNA in organisms from generation to generation as noted by Erwin Schrödinger and others,<sup>86</sup> the result is the same: the mutations cannot be drastic but must build on a large number of smaller mutations, which cumulatively result in a change. Survival of the fittest implies that if a change or mutation is detrimental, the progeny of that organism will have less chance to succeed and will almost certainly die out. The existing organism, however, would have another opportunity to change differently and improve its chances of success. Through these changes, the organism becomes more successful in its environment. Because neither the physical environment nor the progeny of an organism are static, there will be continuous change from one generation to the next, and one change will eventually be beneficial. Beneficial changes will accumulate, causing the resulting progeny to eventually appear separate from its ancestor and from other progeny of its ancestor located in different environments where random mutations would cause other characteristics to be beneficial. In neither situation would an organism double back on itself and re-create an organism identical to one that had existed previously.

However, a third possibility for an evolutionary system also presents itself. Oona Hathaway refers to it as “sequencing path dependence,” which finds its origins in game theory rather than the biological environment,<sup>87</sup> making it perhaps more applicable to a cognitive system. Game theory is the study of mathematical models of strategic interaction and logical

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84. Literally, nature does not make leaps.

85. Which Oona Hathaway also describes as “increasing returns path dependence,” one of the three types of path dependence she described, this one based on economic literature. Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 101 (2000-2001).

86. ERWIN SCHRÖDINGER, *WHAT IS LIFE?* (The Folio Society 2000); WILSON, *supra* note 75; DAWKINS, *supra* note 75; HAMILTON, *supra* note 75; and which appears as the “evolutionary path dependence” envisaged by Hathaway, *supra* note 85.

87. Hathaway, *supra* note 85, at 121-22.

decision making developed extensively in the 1950s. Because the foundation of sequencing path dependence is not biological, it would seem possible that it might double back on itself and re-create a situation identical to one that existed previously. Yet Victor Hugo, who was not just a great novelist but a profound philosopher as well, suggests that “[i]deas can’t flow backward any more than rivers can.”<sup>88</sup>

#### *A. Closed Natural System*

Since organisms do not live forever, they must reproduce for its species to survive. Except for the most elementary types of organisms, they do so by combining and replicating the DNA from two separate organisms of the same species. If the ability to combine DNA – imperfect though the replication may be because of random mutations – deteriorates, organisms will increasingly diverge, eventually losing the ability to combine and arguably becoming separate species.<sup>89</sup> Whether this inability to combine DNA is a result of changes in the reproductive organs as envisioned by Darwin or changes in the DNA matters little: the end result is the same.

By joining in reproduction, the genetic information of one organism is transmitted to another generation, making the species to which the organism belongs (within which it can combine and thus propagate) an operationally closed system. As such a closed system, it can influence and be influenced by its environment, including by other organisms around it, but it cannot benefit from the information coded in (the DNA of) another species. Because of the myriad of factors that will have influenced the development of a species, the separation of species in the natural biosphere is thought to be irreversible. This, however, may not apply in sequencing path dependence which is not biologically based but derived from the conceptual processes of game theory. Even if Hugo is correct that ideas cannot flow backwards, this would not necessarily imply that in this system, unlike the biological system, the ideas from different systems cannot combine. Indeed, Arthur Koestler's “bisociation” may be such an example.<sup>90</sup> He coins the term “bisociation” to distinguish between thinking on a single “plane” and the creative act which always operates on more than one plane or frame of

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88. VICTOR HUGO, *LES MISÉRABLES* 822 (Julie Rose trans., Modern Library 2008).

89. Kevin de Queiroz, *Ernst Mayr and the Modern Concept Of Species*, PROC. NAT’L ACAD. SCI. USA (May 2005), [www.pnas.org/cgi/doi/10.1073/pnas.0502030102](http://www.pnas.org/cgi/doi/10.1073/pnas.0502030102) [<https://perma.cc/5YCK-G2Z8>].

90. KOESTLER, *supra* note 4, at 656-67.

reference,<sup>91</sup> which would seem to imply that concepts from more than one system might combine.

### *B. Change and Countermovement*

As Luhmann points out, evolution requires three effects: variation, selection, and stabilization.<sup>92</sup> Variation occurs continually whether due to non-perfect replication in reproduction or due to effects of the environment, which also may be transmitted during reproduction.<sup>93</sup> Selection weeds out variants that are detrimental.<sup>94</sup> Neutral changes (*e.g.* consider attached and free earlobes among people) continue and cause non-homogeneity.<sup>95</sup> When a variation is beneficial, it will allow progeny to out-compete others,<sup>96</sup> and will stabilize as a new standard.<sup>97</sup> But this may have unexpected effects.<sup>98</sup>

While noting that unexpected changes may result when an organism changes in one feature, Darwin does not explain this phenomenon.<sup>99</sup> It may, however, be suggested that this result is to some extent predictable under Luhmann's explanation. After each sequence of change, Luhmann says there is a period of stabilization. A sequence of change implies a period of instability during the time of selection. Stability is balance; instability is imbalance. If the change is detrimental, the purported change will likely vanish during the instability; if it is beneficial, the change might require a counterweight to regain balance: a *yin* and *yang*. It seems possible that such a counterweight, stabilizing the effects of a change, is what Darwin noted generally, and what Hugo seemed to describe for religious notions as:

In the nineteenth century, religious notions are in turmoil. We are: unlearning certain things and that is all to the good, as long as in unlearning this, you learn that. No vacuum in the human heart. Certain things are being torn down, and so they should be, but only on condition that all the demolition be followed by reconstruction.<sup>100</sup>

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91. *Id.* at 35-36.

92. LUHMANN, *supra* note 31, at 232.

93. *See, e.g.*, Walfred Tang, *et al.*, *A unique gene regulatory network resets the human germline epigenome for development*, CELL (June 4, 2015).

94. DARWIN, *supra* note 81, at 161, 364, 373.

95. *Id.* at 318-19.

96. *Id.* at 48.

97. LUHMANN, *supra* note 31, at 232.

98. DARWIN, *supra* note 81, at 66, 375.

99. *Id.* at 114, 375.

100. HUGO, *supra* note 88, at 421.

But evolutionary changes being small would result in equally small counterweights or countermovements, each a *yin* for a *yang*. The changes and countermovements would not usually be sequential (unless the stress of the change is not sufficient to tear the cohesion of the species apart, but only create a strain within it, giving time for a number of changes which then result in a countermovement) but reflexive and would, for all intents and purposes, appear simultaneously.

Changes and countermovements may be observed in, and perhaps explain, complex situations other than the physical characteristics of species. Because language is a highly developed instinct,<sup>101</sup> it might be appropriate to examine it for a possible countermovement. Language may be seen as a biological adaptation for communicating information; an adaptation whose greatness we can scarcely comprehend permitting the communication of an infinite array of unique and novel information.<sup>102</sup> To accomplish this communication, language uses a discrete combinatorial system, which implies a) its vastness; and b) a code needed to manipulate this discrete combinatorial system. Without this code, the combinatorial system would become too vast to handle the infinite array of unique and novel information and any potential benefit would be lost. As such the code, which manipulates the system, must develop reflexively, and might be seen a countermovement to the development of the discrete combinatorial system.

I suggest it is also such a countermovement that Karl Polanyi observed and described as a double movement.<sup>103</sup> In this regard, I read Polanyi's double movement differently than many others. I see it as a reflexive societal reaction to the original action rather than a conscious free will decision to mediate the results of the action.<sup>104</sup> Such a countermovement might also have been described by Sally Falk Moore.<sup>105</sup> Her description of the end result of the legislation creating a system of "ten-house cells" throughout Tanzania is, just as for Polanyi, the creation of a re-stabilization of a system which change had destabilized.

Indeed, the countermovement may be more ubiquitous than we might at first perceive and may be described differently in the dialectics of

101. See PINKER, *supra* note 7, for this description of language.

102. *Id.*

103. See generally, KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* (Beacon Press 2d ed. 2001).

104. Cf. Dragana Bodružić, *Privatizing Development: Corporate Social Responsibility in the Developing World* (May 8, 2012) (unpublished presentation, University of Toronto) (on file with the Canadian Political Science Association).

105. Moore, *supra* note 36.

different disciplines. In *Sinning Saints and Sainly Sinners*,<sup>106</sup> Sonya Sachdeva and her collaborators conducted three experiments to test their hypothesis that moral and immoral behavior can result from an internal balancing of moral self-worth and the cost inherent in altruistic behavior. Moral cleansing is seen by Sachdeva and her collaborators as actions engaged in by actors to regain some self-worth that was lost through acting immorally, whereas they see moral licensing as refraining from good behavior when people perceive the actors have an accrued surplus of self-worth. Both are seen as acting convergently. When moral self-worth is threatened, moral cleansing restores the moral self-concept, but when moral self-worth is too high, moral licensing allows a relaxation of moral behavior. Thereby, both return the actor to a more comfortable level of self-worth.<sup>107</sup> To compensate for their departures from a normal state of being, actors behaved either more or less morally, due respectively to moral cleansing or moral licensing, suggesting that people aspire to maintain a comfortable moral self-image. The authors view this result as another step toward thinking of moral behavior as embedded within a larger system that contains competing forces.<sup>108</sup> These competing forces might also be described as a *yin* and *yang*, a movement and countermovement regaining the stability of the moral system of the actor on a moment-to-moment basis.

### III. GENESIS OF NORMS

#### *A. Instinct and Cooperation*

The tendency to see evolution as responsible for typically human characteristics has expanded to include characteristics such as the development of language,<sup>109</sup> religion,<sup>110</sup> music,<sup>111</sup> and the intuition to seek

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106. Sonya Sachdeva, *et al.*, *Sinning Saints and Sainly Sinners: The Paradox of Moral Self-regulation*, 20 *ASS'N PSYCHOLOGICAL SCI.* 523 (2009).

107. *Id.* at 526.

108. *Id.* at 528.

109. PINKER, *supra* note 7, at 4, 7; Geoffrey F. Miller, *Sexual selection*, in *ENCYCLOPEDIA OF SOCIAL PSYCHOLOGY* (R. Baumeister & K. Vohs eds., 2007).

110. JUSTIN L. BARRETT, *WHY WOULD ANYONE BELIEVE IN GOD?* (2004).

111. PHILLIP BALL, *THE MUSIC INSTINCT: HOW MUSIC WORKS AND WHY WE CAN'T DO WITHOUT IT* (2012). But as *The Economist* points out, if it were implicated in the process of sexual selection it could be expected that it would be more evident in one sex than the other, which it is not. *The Science of Music: Sounds Wonderful*, *ECONOMIST* (Feb. 3, 2010), <https://www.economist.com/books-and-arts/2010/02/04/sounds-wonderful> [<https://perma.cc/3MSL-NUF5>]. Yet that need not mean that the ability to make music might not serve as a salutary trait. If music, for example caused a greater proclivity for sexual intercourse between two people, that should appear as a benefit which would improve the chances of survival of those who had that trait, since the greater

justice.<sup>112</sup> Each is an instinct: “a complex, specialized skill which develops spontaneously, without conscious effort or formal instruction, ... develop[ing] without awareness of its underlying logic, [and which] is qualitatively the same in every individual.”<sup>113</sup> Darwin included instincts as evolutionary processes.<sup>114</sup> All these developments are predicated upon the tenet that a species will develop upon a path that will benefit it in its struggle for survival and, as such, may be traced to non-humans.

Subject to minor non-homogeneity, which causes no stress to the survival of a species, instincts stabilize conduct because they will be the same for the species, causing the same response to a given type of stimulus by all members of the species. With a uniform response to a similar stimulus, an organism in a species survives not only by trial and error: past successful conduct by its ancestors is carried forward and saves energy, since energy which would otherwise be expended through trial and error can then be used for other conduct.

With equivalent responses to the same type of stimulus mutual symbiosis, which might be referred to as coordinated action, between members of separate species using one another for their mutual benefit may develop. In such action, each species is its own system; there is a structural coupling of one system with another but no sharing of information between them. Such coordinated action would seem to be a most elementary form of cooperation and is not of the same scale as cooperative action.<sup>115</sup> True cooperation permits additional benefits, namely greater success,<sup>116</sup> whether for animals in hunting, or in war, which was a fairly recent and apparently human invention.<sup>117</sup> Cooperation, however, requires sharing of information, which can only occur *intra* species (*i.e. intra* system and which results in

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amount of intercourse, the greater the likelihood of offspring. In a species with a free-will, if the indication by HUGO, *supra* note 88, at 188, is correct, and free will seldom shows itself, one could postulate that there would be a decreased likelihood of intercourse than for a species governed by instinct, since a) the individuals would generally engage in intercourse when their emotions/instincts determine that course of conduct, and b) the free-will should, at times, override the emotions for intercourse. For their free-will to initiate intercourse, it would need to be present in both parties at the same time. If then, music was to increase the proclivity for intercourse, the ability for music could be seen as another countermovement to that free-will, and thus embedded in humanity.

112. Robinson, *et al*, *supra* note 60, at 1640, 1642, 1644.

113. PINKER, *supra* note 7, at 4.

114. DARWIN, *supra* note 81, at 364.

115. Axelrod & Hamilton, *supra* note 80, at 1391.

116. *Id.*

117. John Horgan, *Margaret Mead's war theory kicks butt of neo-Darwinian and Malthusian models*, SCIENTIFIC AMERICAN (November 8, 2010), <https://blogs.scientificamerican.com/cross-check/margaret-meads-war-theory-kicks-butt-of-neo-darwinian-and-malthusian-models/> [<https://perma.cc/8EY2-Q64F>]; cf. Margaret Mead, *Warfare is Only an Invention – Not a Biological Necessity*, THE DOLPHIN READER 415 (1990).

greater interaction between members within a species). When transmitted from generation to generation, coordinated action and cooperation become an instinct.<sup>118</sup> Instinct, therefore, seems to be at the foundation of how animals will interact and allows collective behavior. Thus, cooperative behavior allows the development of collectives because each member has “learned” its place and fits into the collective, exhibiting reactions which benefit the collective, in what might be termed a “proto-society.”

Instinctive behavior, however, does not mean that any one member of the collective can distinguish itself or any other member of the collective as an entity. Such behavior may merely be a response to complex external stimuli. With instinct, a member of a collective may, however, recognize itself and its environment, which may include other members of the collective. Even then, a member may or may not recognize another member as distinct or separate from the environment.

### *B. Human Cognition*

Animals react to their environments which contain a multitude of stimuli, including other animals of the same or different species. The issue is determining whether these reactions, no matter how complex, are the result of instinct, a complex intuitive reaction to the stimuli of the environment,<sup>119</sup> or are the result of something more. Hugo alludes to this conceptual struggle when he describes Inspector Javert’s animal instinct as:

pure and intact like all instincts, that creates antipathies and affinities, that fatally divides one personality from another, that does not hesitate, that is never in doubt, is never silenced and never flags, clear in its obscurity, infallible, imperious, resistant to all the counsels of intelligence and all the solvents of reason and that, whatever their fates may be, secretly alerts the dog-man to the presence of the cat-man, and the fox-man to the presence of the lion-man.<sup>120</sup>

Nevertheless, we generally regard human beings as distinct and qualitatively different from other animals. This difference could be described as the essence of humanity, human awareness, human consciousness, or human cognition. While a full description of human

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118. Cf. Theodore P. Seto, *Originalism vs. Precedent: An Evolutionary Perspective*, 38 LOY. L.A. L. REV. 2001, 2008 (2005), <https://digitalcommons.lmu.edu/llr/vol138/iss5/4/> [https://perma.cc/ZE4S-XHWD].

119. PINKER, *supra* note 7, at 4.

120. HUGO, *supra* note 88, at 142.

cognition is beyond the consideration of this Article, I suggest there are possible distinctions between instincts and human cognition.

For the ancient Greek, the concept of *logos*, which the philosopher Giorgio Agamben describes as the ability to make an argument was the essence that separates human beings from other animals.<sup>121</sup> Similarly, John Stuart Mill saw the essence of humanity in the ability to make decisions.<sup>122</sup> I suggest that what underlies both concepts is an actor's capacity to recognize distinctions. Persuading someone with an argument implies a distinction between the actor making the argument and the other whom the actor wishes to persuade. Making decisions requires a distinction between choices to which the assumptive purpose of individual power is directed. Thus what both the Greeks and Mill saw as the essence of humanity is dependent on the same distinctions to which Ranulph Glanville referred between the "[S]elf" and the "[O]ther" (using his nomenclature).<sup>123</sup> Perhaps this may be what Victor Hugo intended by the statement "Humanity is identity."<sup>124</sup> If all the choices appeared the same, there would be no decision to be made; and if the Other were not on the same plane as the Self, but distinct from the Self while still allowing communication, persuasion would not be possible.

While human cognition could be understood as recognition of the Self and the Other, it must go further than a closed cybernetic loop, which is created when the other reacts to a stimulus from the Self and the Self can recognize this reaction and respond to it. Such a loop might occur when the Other is the whole continuum of the environment around the Self, with no distinction in that environment. It might seem that for human consciousness, a Self would not need to be aware of anything besides an Other (individual). However, we live in an environment, so it would seem that human cognition must require two Others: the environment itself and an Other that is similarly distinct from this environment as the Self. Only then could the Self's other and the Other's other recognize a distinction between the Other

121. AGAMBEN, *HOMO SACER*, *supra* note 72.

122. MILL, *supra* note 34, at 61; Isaiah Berlin, *John Stuart Mill and the Ends of Life*, Robert Waley Cohen Memorial Lecture to the Council of Christians and Jews, London (December, 1959), in *LIBERTY* (Henry Hardy ed., Oxford University Press 2002); reprinted in *ON LIBERTY & CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* (Folio Society 2008) xiii.

123. Ranulph Glanville, *The Self and the Other: The Purpose of Distinction*, in *CYBERNETICS & SYSTEMS '90*, the Proceedings of the Tenth European Meeting on Cybernetics and Systems Research (Robert Trappi ed., World Scientific 1990).

124. HUGO, *supra* note 88, at 595.

(and others) and the environment, creating a foundation for human cognition.<sup>125</sup>

Whether human beings are the only species with this ability cannot be proven without a language common to another species to convey the necessarily complex information needed to communicate such thoughts. This ability does, however, seem to exist only in human beings, and as such may be an aspect of our humanity.<sup>126</sup> In this human cognition, other human beings do not blend into the continuum of the environment. It is not that an observer sees a distinction, but that each person in the system sees the difference between the Self and an Other who is also a person. Without this cognition, it could be argued that all human action would be an instinctive reaction to changes to the continuum of the environment.<sup>127</sup> Even though some conduct may be different towards different Others, if those Others cannot be recognized as distinct Others but only part of the continuum of the environment, any reaction to them, or interaction with them, would seem to remain an instinctive response to the continuum of the environment into which all Others (who are not seen separately) blend.

One could consider the matter in the following manner. If we consider the Self to be blue (that is sees itself as blue) which recognizes its environment (its Other) as red, then the whole Other that the Self sees is red. Much could be comprehended in such an environment and a cybernetic loop is easily established. In that loop, the Self may see that it affects changes in its environment. The Self can see those changes and react to them, causing further changes in its environment. This environment could go from the lightest to the most intense red, but everything remains red. The environment may be exceedingly complex, with the most complex reactions and interactions between the various facets of the environment and the Self, but the environment remains red. What a shock it would be for the Self if, at one point, it recognized something other than itself as *blue*: something completely different from the previously entirely red environment.

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125. Which can only be if the distinction which both the Self and the other see is the same. But this would seem to imply that solipsism is a paradox. We must recognize the other to have human cognition (consciousness) but that consciousness nevertheless exists, or can only be proven to exist, for the Self.

126. Cf. Glanville, *supra* note 123.

127. Cf. Atahualpa Fernandez, *Law and Evolution: Human Nature and the Adaptive Function of Normative Behavior*, EXPRESSO PREPRINT SERIES 19 (2005), published in Spanish, *Revista Critica de Ciencias Sociales y Juridicas*, UCM-Universidad Complutense de Madrid, n. 11-2005/1, Enero-Junio 2005, ISSN 1578-6730 at 3. Which is what I suggest Fernandez intimates when he states, for example, that “Wolves and lions, for example, solve these problems [that our secular existence might have presented and the mutual relationship of social life] with very skillful strategies, such as grouping, without any type of norm or grammatical language.”

Nevertheless, just as Darwin was not concerned with how life appeared but with its progression and continuation,<sup>128</sup> this preliminary sketch is not primarily concerned with how human cognition, the spark of humanity “that infinity that each man carries within him,”<sup>129</sup> appeared. Cognition could come into being in at least two ways: by divine intervention (an outside force) or as an evolutionary change. If seen as stemming from divine intervention, cognition leaves little room for further analysis,<sup>130</sup> other than asking why God would add such a quality to his creation. Seen as an evolutionary change, one is entitled to ask what benefit this change provides. In either event, human cognition might cause a countermovement.

Human cognition, as here envisioned, was a discrete quantum change from what was before it. While it may be impossible to devise an experiment to test the benefit that such cognition might render, Darwinian evolution indicates a benefit. If one member of the collective comes to the realization that each of the members of the collective is distinct from the environment and from each other, a profound change takes place. Everyone around is no longer part of the continuum of the environment. Outside observers may not see a distinction, but each one in the system would “see” the distinction between one’s Self and another. Without this human cognition different actions towards different others must remain instinctive responses to the continuum of the environment into which all such others blend.

What sparked this cognition is nevertheless interesting since it could be a source of our social nature that extends beyond the genetic bond and merits more thought than can be given in this Article. Seeing oneself on the same plane as someone else may cause that perennial question that has plagued the parents of every three-year-old child: “Why?” The realization that the Self is distinct from other similar members similarly presents the disconcerting questions (not dissimilar to *logos*) alluded to above: why do I do as all the others in my collective do, and why should I not do something different? Without these questions there is no true recognition of any

128. DARWIN, *supra* note 81, at 165.

129. HUGO, *supra* note 88, at 184.

130. Just as Darwin found the explanations of the genesis of species implied in VESTIGES OF CREATION unsatisfactory because it left much “untouched and unexplained,” DARWIN, *supra* note 81, at xxix; *cf.* his comments respecting naturalists:

It is easy to hide our ignorance under such expressions as the ‘plan of creation’, ‘unity of design’, etc, and to think we give an explanation when we only restate a fact. . . . Nevertheless, they do not pretend that they can define, or even conjecture, which are the created forms of life, and which are those produced by secondary laws. They admit variation as a *vera causa* in one case, and arbitrarily reject it in another, without assigning any distinction in the two cases.

*Id.* at 382.

difference (*i.e.* between the Self and the Other).<sup>131</sup> These questions also lead to Judith Butler's concept of "freedom," or the ability to act,<sup>132</sup> in the sense of a decision or assumption of a purpose independent of a reaction to the environment.<sup>133</sup> Such a development would be a tremendous change from the past, a great "disturbance in the force" which would destroy the stability that instinct had previously provided to the species. Such change would create an instability, necessitating a countermovement.

Thus, it may be more accurate to consider human cognition, and thereby humanity, as an overlay on the animal instincts from which we evolved, sublating those instincts, but through which those underlying instincts may at times protrude. Therefore, human cognition is not an overlay obscuring that infinity described by Koestler as being within us,<sup>134</sup> but rather covering Hugo's terrifying blankness that is barely conscious, where the fiend dimly takes shape and every man is for himself, "brutally voracious, not in the manner of a tyrant, but in the manner of the tiger."<sup>135</sup> In this description, Hugo again alludes to the distinction between what a person's "brain wants and what his life puts into action;"<sup>136</sup> a conflict which made Monsieur Madeleine's brain "so troubled that he could not latch on to any idea clearly ... [and] created an indescribable commotion inside him that no one ever experiences more than two or three times in a lifetime."<sup>137</sup> Such commotion would seem to imply instability.

### C. Instability

Instinct implies that as a reaction to a specific stimulus, members of a species or collective follow their ingrained pattern of behavior. Human cognition as described above would detrimentally break this stability. Asking the question *why not do something different from other members of the collective?* invites the danger of disintegration: each member going a separate way and thereby losing the benefits of collective cooperative action.

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131. Still using Glanville's nomenclature; since without this question there is no difference between what we do today and what was prompted by instinct.

132. CHAD LAVIN, *THE POLITICS OF RESPONSIBILITY* 40 (2008).

133. *Id.* at 45 (in this I see power as being the reaction to the structure of the environment).

134. KOESTLER, *supra* note 4, at Ch. 7.

135. HUGO, *supra* note 88, at 594 (alluding to Agamben's quote from Hesiod's *Work and Days*, *infra* note 190, that Persus "forget violence").

136. HUGO, *supra* note 88, at 184.

137. *Id.* at 186-88.

For human beings, disintegration would herald a time of instability where individuals are no longer governed by instinct but not yet ruled by law. When human beings are not governed by instinct – and are therefore something more than animals – the death of one human being brought about by another becomes more than just a change in the killer’s environment. Instead, as a result of human cognition, the killer may know that they are killing an Other, but since there is no law, there could be no guilt or sacrifice.<sup>138</sup> In this condition, the individual might be considered as being in the state of Giorgio Agamben’s *homo sacer*, *wulfesheid*, or bare life,<sup>139</sup> since without law, there is no guilt: “*Guilt refers not to transgression, that is, to determination of the licit and the illicit, but to the pure force of law, to the law’s simple reference to something.*”<sup>140</sup> Because evolutionary change is essentially reflexive, this instability need not have existed for any length of time,<sup>141</sup> but nevertheless it is enlightening to contemplate, just as Hobbes contemplated the state “as a principle internal to the State revealed in the moment in which the State is considered ‘as if it were dissolved.’”<sup>142</sup>

#### IV. NORMS

##### A. Countermovement to Cognition

With human cognition destroying the stability of instincts suggests that for a collective to regain its prior stability it needs a *yin* for the *yang*. This re-stabilization seems accomplished by norms. In particular, an ultimate norm that everyone should continue to act as they have in the past may be considered a countermovement to human cognition, maintaining cooperation with all its benefits for the collective. To the extent that human cognition is co-extensive with humanity, and thus with society, the countermovement of norms would be equivalent. Even if human cognition did not impair the ability of instincts to stabilize conduct, norms would add another layer of stability. As Atahualpa Fernandez notes, if law originates as a response to something,

*this something must have been an adaptive challenge that perhaps only human beings may have had to face: a challenge that was born*

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138. AGAMBEN, HOMO SACER, *supra* note 72, at § 6. Indeed, a “sacrifice” would imply either a religious or legal undertone, both of which would imply norms of one manner or another, but which could be considered as then not yet having come into being.

139. *Id.*

140. *Id.* at 22 (alteration in original).

141. Using Hobbes’ comment in DE CIVE.

142. *Id.* at 27.

from the human need to understand and valorize the behavior of other human beings, to respond to it, to predict and manipulate it and, from this, to establish and regulate the most complex relations of group life (emphasis added).<sup>143</sup>

Such a development, however, raises the issue of why a species, which has evolved to engage in cooperative behavior, would develop a characteristic with the potentially devastating consequence of destroying the advantages of cooperation. Individual originality might be the benefit that solves the paradox.<sup>144</sup> Originality is non-evolutionary inspiration, innovation, and progress that comes from the individual, not the collective.<sup>145</sup> As Hoffman points out, human cognition (free will, or for him, the imagination to see events in the future as predicated on our present actions) may have served an evolutionary purpose: to conserve brain power for purposes other than trivial decisions.<sup>146</sup> Despite more deviation in conduct, an individual need not expend time and energy toward the trivial, but rather use their energy towards what would derive greater benefit. Because members are not all expected to act identically, allowing for individual independence could be a source of original inspiration and innovation, therefore driving non-evolutionary progress within the collective. Certainly, Ayn Rand and Arthur Koestler would see the source of original innovation in the individual.<sup>147</sup> Brought about by the originality of the individual, this innovation of originality may have been more valuable to the collective than the communal stability of the iron grip of instinct. With the countermovement of norms, and in particular the ultimate norm, any such risk of disintegration of the collective becomes averted.

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143. Fernandez, *supra* note 127.

144. Cf. KOESTLER, *supra* note 4 (in which he argues for the genius of human (non-evolutionary) innovation as springing from an unknown source within us (which would seem to put it on the same plane as human cognition is put in this Article and perhaps that which HUGO, *supra* note 88, at 184, describes as the infinity within us), which Koestler seeks to find a way to promote).

145. MILL, *supra* note 34; AYN RAND, *THE FOUNTAINHEAD* (1943); cf. HOBBS, *supra* note 13, at 254, 262.

146. Hoffman, *supra* note 55.

147. RAND, *supra* note 145; KOESTLER, *supra* note 4. But at the same time this immediately implicates the political, Schmitt, *Ethic of State*, *supra* note 42, at 195, which is beyond the scope of this Article.

*B. Primal Norms*

Norms are “ought” statements.<sup>148</sup> Norms imply that one “ought” to conduct oneself in a certain manner and seem to imply that the members of the collective recognize a distinction between themselves. By fulfilling a norm, I do something because I “ought” to do it: it is expected of me by the collective, *i.e.* by others in the collective. As Luhmann suggests, such an expectation implicitly restricts freedom of conduct.<sup>149</sup> While instinct and norms both restrict freedom of behavior, norms differ from instinct because norms suggest that one “ought” to do something, whereas instincts are intuitive reactions to the environment. Norms tolerate aberrant behavior.<sup>150</sup> In their manner of implying that certain conduct “ought” to transpire, norms create an expectation that the normative expectation of the norm will govern despite aberrant behavior.<sup>151</sup> When norms, which provide stability, are transmitted from one generation to the next, the collective is benefitted by both individuality with its non-evolutionary innovation as well as the stability brought by norms.<sup>152</sup> If they are bindingly transmitted and communicated by inheritance, *i.e.* ingrained into the DNA of the members, then norms would not be different than instincts. However, if inheritance or DNA does not communicate norms from generation to generation, they arguably are transmitted and communicated by language.<sup>153</sup>

Language is able to transmit novel information. The easier language is transmitted, the easier it would be to transmit the abstract ideas of norms and attain greater stability for the intra-collective behavior. While language is not dependent on human cognition, nor human cognition on language,<sup>154</sup> language is beneficial, if not ideal, for transmitting norms. Therefore, language is also beneficial to collective behavior and helps mediate the instability caused by human cognition, *i.e.* the knowledge of the Self and the Other.

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148. KELSEN, *supra* note 26; *cf.* LUHMANN, *supra* note 31, at 71, referring to a certain form of factual expectation which must be observable either psychologically or as the intended and understandable meaning of communication.

149. *Id.* at 146.

150. *Id.* at 150.

151. *Id.* at 171-72.

152. LUHMANN, *supra* note 31, at 145.

153. And it would seem that this is the reason that in the social system model of law, it is communication that is paramount. “Societies ... can only communicate orally ...” *Id.* at 138. *Cf.* Seto, *supra* note 118, at 11 (“Because genetic change is not a prerequisite for changes in and transmission of learned behaviors, learned behaviors can evolve orders of magnitude nor quickly than instinctive behaviors.”).

154. PINKER, *supra* note 7.

As stated, it may be argued that the benefits provided by the admittedly weak strength of norms exceed the benefits of the extreme strength of instincts since norms would allow for non-evolutionary innovation. For the sake of classification, these norms may be grouped into four broad categories: social, religious or moral, cultural, and legal.<sup>155</sup> As indicated below I suggest social, religious, and cultural norms are more primal than legal norms. It thus would seem worthwhile to first reflect, albeit summarily, on these more primal norms.

### *C. Social Norms*

Whether considering humankind as having evolved along the same pattern as other primates or simply considering that children would not survive at birth without care from at least one parent, there is familial social interaction that is of benefit to a collective. This interaction is also seen in primates and other animals and, thus, seems to go back furthest in time. If the great apes and other primates are not “human,” this social interaction predates human cognition and humanity. Nevertheless, it need not have been founded on norms. In the situation, for example, in which one animal challenges the primary, alpha, animal within a collective, instinct may explain the challenger “seeing” itself as leader in place of the existing alpha. Such a contest simply may be a reaction to create the greatest possibility of success by arranging to produce the most and best progeny for the collective based on a multitude of factors that the challenger perceives in its environment. The challenger might “see” itself as distinct from its environment, but this does not imply that the challenger recognizes the alpha as an Other, nor that the alpha can recognize the challenger as an Other. Unless something similar to human cognition could be shown for primates, what seems like social norms in their collectives (since they all appear to “know” their place within the collective and how to react, whether consciously or not, within it) may be construed as instinct rather than as the result of any free will.

Similarly, all cooperative collective action – whether for defense, hunting, gathering, or scouting – may in their origins be seen as being instincts that would apply in a family, group, clan, or tribe. Nevertheless, with the advent of human cognition and its destabilizing effect, the existing social conduct of such small groups would seem ideal to be the first to change to a normative basis allowing continued cohesion of the group.

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155. KELSEN, *supra* note 26.

#### D. Religious Norms

Anthropologists have suggested that religiosity is an evolutionary trait for humans.<sup>156</sup> Religion may be seen as the attempt to understand and bring order to the universe around us from the invisible,<sup>157</sup> whereas science may be seen as the attempt to create this understanding and order from the observations of the universe itself. When the question “*Why do I do this?*”<sup>158</sup> is answered “[*b*]ecause I ought to.” This answer presents the question, “[*w*]hy ‘ought’ I do this?” The answer that religion provides, which avoids circularity and infinite regression, seems to be “[*b*]ecause I am required to do so by God.” Looking broadly, religion thus seems similar to the social system except that the Other with whom the interaction occurs is a deity rather than a person.

It may be moot whether religious norms predate, developed contemporaneously with, or postdate social norms. Nevertheless, religion and religious norms are of ancient existence.<sup>159</sup> But since social norms are dependent on an awareness of the Self and the Other in the closest of kin relationships, it could be argued that religious norms likely came into being after social norms. The Judeo-Christian tradition similarly seems to identify social norms as predating religious norms. Cain was aware he did wrong and was punished when he killed his brother Abel,<sup>160</sup> but the Bible only later states that “then began men to call upon the name of the Lord.”<sup>161</sup> While this appears to reference religion rather than religious norms, religious norms are logically dependent on religion and, thus, cannot predate it. By providing stability, as all norms do, religious norms allow religion to continue.

If religiosity has an evolutionary benefit, its norms, which provide stability, would be beneficial as well. However, these norms would change

156. BARRETT, *supra* note 110.

157. Which the Apostle Paul acknowledged for Christianity when he stated that “[n]ow faith is the substance of things hoped for, the evidence of things not seen.” *Hebrews* 11:1 (King James); *cf.* Galileo Galilei, *DIALOGUE CONCERNING THE TWO CHIEF WORLD SYSTEMS: PTOLEMAIC AND COPERNICAN*, (Stillman Drake trans., The Folio Society 2013).

158. Which as I suggest is a requirement for human cognition. Potentiality, in its pure form, would not seem sufficient since if it were never exercised, it could not truly be called as a potential. To suggest that someone is an architect even if he does not build overlooks the fact that unless he has built something in the first place, and demonstrated that ability, one could not call him an architect. If the question were never asked, conduct must be seen as no different from instinct, which also does not allow questioning of why the conduct exists.

159. ROBERT GRAVES, *THE GREEK MYTHS* (The Folio Society 1996).

160. *Genesis* 4:12-13 (King James), which may imply that religious norms were synonymous with social norms.

161. *Genesis* 4:26 (King James).

only slowly in accordance with Darwin's observation: *natura non facit saltum*. This remains true with the course of events today: although laws in western countries have tracked societal norms and changed dramatically regarding abortion, the religious norms respecting abortion have not been able to change as quickly, or perhaps at all.

### E. Cultural Norms

Cultural norms are different from both social and religious norms. When we speak of cultural norms, it appears that we are considering the distinctions between different collectives. Similar to a distinction between individuals, such distinctions divide two collectives and define cultural norms. Part of these distinctions are the social and religious norms that evolved differently in different collectives, suggesting that cultural norms arose later than the other two primal norms.

Mark Granovetter pointed out that we trust closely related individuals.<sup>162</sup> Within the family, we trust individuals to act altruistically.<sup>163</sup> The more removed the individuals, the less altruism will mediate any desire for one's self-benefit. This accords with the tenets of social psychology,<sup>164</sup> and it would be beneficial to be able to identify members as from a more distant collective since they would be less trustworthy. Both Hamilton's Rule, which explains when relatedness will favor altruism through natural selection,<sup>165</sup> and the recent psychological studies by Margaret Foddy and her collaborators,<sup>166</sup> seem to confirm this. Cultural norms define the community of the collective, and thereby become the first of these primal norms to operate by exclusion.<sup>167</sup> In this way they are similar to legal norms.<sup>168</sup>

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162. Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91.3 AM. J. SOCIOLOGY 481 (1985); Mark Granovetter, *The Impact of Social Structure on Economic Outcomes*, 19.1 J. ECON. PERSPECTIVES 33 (2005).

163. Granovetter, *Embeddedness*, *supra* note 162, at 490 ("In the family, there is no Prisoner's Dilemma because each is confident that the others can be counted on.").

164. Granovetter, *Social Structures*, *supra* note 162, at 34.

165. HAMILTON, *supra* note 75; Robert Axelrod, *et al.*, *Altruism via Kin-selection Strategies that Rely on Arbitrary Tags with which they Co-evolve*, 58.8 EVOLUTION 1833 (2004).

166. Margaret Foddy *et al.*, *Group-Based Trust in Strangers: The Role of Stereotypes and Expectations*, 20.4 PSYCHOLOGICAL SCIENCE 419 (2009).

167. Cf. Meeka Walsh, *Stutter: The Body and the Institution*, 113 BORDER CROSSINGS 12 (2010).

168. AGAMBEN, HOMO SACER, *supra* note 72 (leading one to wonder whether they are a necessary precursor to law).

### *F. A Variety of Norms*

It would be difficult to imagine that a collective would have only one norm. With the recognition that there is more than one norm, there must be a distinction between them that makes a difference. Such a distinction would imply that some of its norms are more important than others and some are more closely aligned to each other. This process would seem to provide a benefit for the collective that attained it since if all norms, including cultural norms which act by exclusion, were equally important they would quickly banish and exclude all the members and the collective with its benefits of cooperative social action would be lost.

In some respects, the determination of which norms are more important to a collective may seem fluid and random.<sup>169</sup> Nevertheless, a starting point is that we all bleed and need food and water for survival. In colder climates, human beings need clothing and shelter, etc.<sup>170</sup> Aside from this, however, what a collective might consider important results from a coincidence of other factors: factors which might even just temporarily increase the importance of some norms over others, but which would limit the choices which the collective could thereafter make. These factors might combine in the most unexpected ways,<sup>171</sup> and because not all possible future events can be foreseen, sub-pareto-optimal results might obtain.<sup>172</sup>

169. Which would be why social scientists such as Pospisil and Malinowski saw such a divergence in the social orderings which maintained tribal collectives outside western Europe.

170. Which also is the starting point for structuralists such as the eminent French anthropologist Claude Lévi-Strauss, and a part of “life,” one of Finnis’ seven basic values which represent “human flourishing.” FINNIS, *supra* note 51, at 92.

171. Consider the alleged ancient Inuit norm that the old, rather than be a drain on the society, would go out on an ice flow and die, conserving energy that, in the hostile environment in which they lived, they could scarcely afford to squander.

172. The result is different that the solution to the mathematical problem of constructing the most cost effective (from a construction point of view) railway line to connect a number of stations is simply to select the most cost efficient segment each time and to keep repeating the process until the line is finished, which is a problem similar to but not identical with the situation of evolution in which there is not a finite number of options which can all be assessed at the same time. Cf. Paul Mahoney & Chris Sanchirico, *Competing Norms and Social Evolution: Is the Fittest Norm Efficient?*, L. & ECON., Working Paper No. 00-15, Univ. of VA, School of Law (2001), [http://papers.ssrn.com/papers.taf?abstract\\_id=229694](http://papers.ssrn.com/papers.taf?abstract_id=229694) [<https://perma.cc/VZC3-U6SY>].

## V. DEVELOPMENT OF LEGAL NORMS

*A. Proto-legal Norms*

As Luhmann intimates when he states that laws consist of important norms,<sup>173</sup> some norms are more important to a collective than others, but this can be only if there is some indication that they are more important. If all norms were always adhered to, they, firstly, would seem identical to instincts. Secondly, nothing could demonstrate that a particular norm was more important than another, nor would there seem to be any need to do so. Such a mechanism is only required when a norm is breached: when a norm is breached there must be societal decisions about whether the breach is important and what consequences should follow.

Nevertheless, even in the “decision” of which norms are important, there is an element of mediation and accommodation of the various views and opinions of the members of a collective. Just as Hobbes acknowledges the difference between private worship and public worship<sup>174</sup> as the former being merely an eccentricity, the breaching of a non-important norm is an eccentricity. If an important norm is breached, a public intra-collective demonstration of some manner is needed to demonstrate its importance: otherwise, the members of the collective would never know its importance. Other less significant norms need not have the same demonstration of importance.

Such a public demonstration of importance would seem to require some social method of determination or adjudication to establish it. Therein, we may see the beginnings of law. However, it may be more appropriate to call these norms “proto-legal.” Indeed, legal norms, paving the way for and making possible “the emergence of a political rule in which political power and compulsory law mutually constitute[] one another,”<sup>175</sup> are generally described today as needing additional traits. Nothing in this process dictates which social, religious, or cultural norms become important. Thereby, these proto-legal norms easily lead to the “unsystematic collage of inconsistent and overlapping parts” noted by Griffiths.

Nor has anything in this sketch required these proto-legal norms to be enforced by sanctions. Indeed, if we view the law as a variety of the legal

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173. LUHMANN, *supra* note 31, at 152 (which I suggest is the same as referring to those “expectations that are worth protecting,” but because of the nature of his inquiry, he does not deal with the originating character of this importance).

174. HOBBS, *supra* note 13, at 282, 401.

175. Habermas, *supra* note 1, at 264.

norm, when Gunther Teubner and others find that a law need not have a legal sanction,<sup>176</sup> this proposed model would agree. By viewing law in terms of justice proponents of the law and biology movement contradict this, characterizing punishment, and by extension legal sanction, as an originating foundation of law. Nevertheless, attaching a formal sanction to a norm would certainly reinforce the facticity of its importance. But a norm could be seen as important without accompaniment by sanction: only an adjudicatory process is needed to show its importance. The breach of the proto-legal norm could be enforced in various ways besides formal sanctions, e.g. societal opinion, displeasure, and social stigma or shaming.<sup>177</sup> A formal sanction could add further weight to this adjudicatory decision, increasing its relative importance in any hierarchy of norms, but may otherwise be superfluous.

### B. Legal Norms

As part of a countermovement, these proto-legal norms would only change slowly, governed by the same principle as evolution: *natura non facit saltum*. The proto-legal norms might be described as the Greek *agraphoi nomoi* (unwritten law). When a society can alter its *agraphoi nomoi* expeditiously, these norms could be classed as legal norms or law. This process places the legal, like all norms, in the midst of society and treats them as co-extensive with society, which is the aggregation of the norms of that collective.<sup>178</sup> From today's vantage point, these important norms might seem to be chosen haphazardly, allowing for lacunae between the legal norms. For this reason, I disagree with Agamben: the *agraphoi nomoi* and the *diritto* (which could be seen as founded on the *agraphoi nomoi*) as well the *legge*, may contain lacunae.<sup>179</sup>

The further development of these proto-legal norms would also require benefits to be provided to the collective. It is suggested that it would be beneficial for a collective if its proto-legal norms could be changed expeditiously if necessary.<sup>180</sup> A collective that could do so would have a

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176. See generally *id.* at 217; Eugen Ehrlich, Chap. XXI, *The Methods of the Sociology of Law*, in *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 486 (Walter L. Moll trans., 1962); Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society*, in *GLOBAL LAW WITHOUT A STATE* 3 (1997).

177. Habermas, *supra* note 1, at 217; MILL, *supra* note 34. Consider the effect of online shaming on social websites, which at times is more devastating than any legal sanction. All of these in and of themselves are sanctions, but not legal sanctions.

178. Cf. Griffiths, *supra* note 2, at 3.

179. Cf. GIORGIO AGAMBEN, *STATE OF EXCEPTION* (Kevin Attell trans., 2005).

180. Cf. Seto, *supra* note 118, at 11.

distinct advantage over other collectives.<sup>181</sup> Other collectives, whose important norms are less malleable, could suffer when changing circumstances make their old norms disadvantageous.

It may be worthwhile to again briefly consider religious norms as an example of norms which do not change quickly. Religious norms appear to have great affinity to legal norms since they, like legal norms, deal with the abstract and important religious norms include a punishment component (in the past in the corporeal, and today mostly in ostracization). As indicated, religious norms regarding abortion have remained very stable and appear out of sync from western society, whereas the legal norms relating to abortion appear to reflect current western societal views. These current societal views permit a wide variety of diverse individuals to be included in western societies, increasing the pool of people from which western societies may attain success.

### C. *Ius Generis*

The Greeks considered the *agraphoi nomoi*, being derived from the natural evolution of norms before any changes that were legislatively introduced, as more normative than written legislative law.<sup>182</sup> Legislatively malleable norms might be subverted for the good of a part rather than be used for the good of an entire collective. While it might seem appropriate to describe the remnants of the original legal norms as *ius non dispositivum* or *ius cogens*, both terms seem so implicated into international law,<sup>183</sup> that it may be more appropriate to term them, with apologies to Seneca, as *ius generis*: basic unique primal legal norms.

As countermovements, the *ius generis* of two societies could be radically different, causing a clash between those societies. When social scientists such as Pospisil and Malinowski examined the social ordering of non-western European tribes and villages,<sup>184</sup> all law appeared as positive law, with clashes of cultures originating from the circumstances in which

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181. Cf. Seto, *supra* note 118, at 10-11 (“The faster a population can adapt, the more likely it is to survive and flourish. Because genetic change is not a prerequisite for changes in and transmission of learned behaviors, learned behavior can evolve orders of magnitude more quickly than instinctive behaviors.”).

182. LUHMANN, *supra* note 31.

183. Cf. Andreas Fischer-Lescano & Gunther Teubner, *Diversity or Cacophony?: New Sources of Norms in International Law*, 25 MICH. J. INT’L L. 999, 1034 (2004). Thereby I contrast *ius non dispositivum* (law which is not consented to) with *ius dispositivum* (law applicable to a nation because it has consented to it); *ius cogens*, literally being a compelling law, which is a fundamental principle of international law.

184. Moore, *supra* note 36; Merry, *supra* note 36.

different societies founded themselves.<sup>185</sup> This same possibility of clashes is also anticipated in the social system model.<sup>186</sup>

#### *D. An Inter-relationship of Norms*

All classifications of norms are, of course, in some sense arbitrary selections made solely for the purpose of enabling us to examine them, and their interactions, in greater detail. They are subsets of social norms that blend together without any distinct boundaries. We place the boundaries for our convenience and analytical purposes using, as Luhmann does to examine law as a social system, Occam's razor to create and simplify the selection of the norms in each subset. As Latour suggested in *We Have Never Been Modern*, if we did not "purify" the set that we are examining, the combined hybrid would appear not to change. In other words, if we did not examine the various norms independent of each other, we would not see any change, or in any case not the changes that occur among them.

Having derived from other norms, the *ius generis* would have an affinity to them. If one would try to create a visual representation of these and other norms, one would likely need to map them as volumes, perhaps with amoeba-like wandering boundaries, filling the space of society which is where Eugen Ehrlich, Hermann Kantorowicz, and Jürgen Habermas site law's center of gravity.<sup>187</sup> Intriguingly, by referring to the "center of gravity," they provide a way of simplifying our approach to norms. The term center of gravity derives from a mathematical concept in engineering and physics.<sup>188</sup> It is a simplification for dealing with complex objects, which replaces the object with a point. The center of gravity of an object is a function of the characteristics of its material properties, shape, and mass. While law is not shackled with the physical dimensions of width, length and height, it has dimensions just as all debates and dialogues<sup>189</sup> which then ground law's center of gravity within society.

Since laws are legal norms, the centers of gravities of norms also could be sited in dimensions within society. Norms have characteristics or

185. While the proponents of the natural law model had no proper explanation for the variations in law that they found.

186. LUHMANN, *supra* note 31, at 150.

187. Tamanaha, *supra* note 32; Teubner, *Global Bukowina*, *supra* note 176; *cf.* Ehrlich, *supra* note 176. But putting only the center of gravity within society leaves open the possibility that a portion of the dimensions of law fall outside of society.

188. I am not the first to draw analogies between law and the physical world. *Cf.* Walter Wheeler Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 YALE L. J. 333 (1932-1933).

189. *Cf.* Peer Zumbansen, *Spaces and Places: A Systems Theory Approach to Regulatory Competition in European Company Law*, 12 EUROPEAN L. J. 534 (2006).

properties. Their areas of influence may be analogous to shape, and their importance is analogous to weight. In these characteristics, norms would have centers of gravity within the space of society, with its multifaceted dimensions. However, as soon as there are more than three points in a two-dimensional space or more than four points in a three-dimensional space, some of the points must be closer to each other than others. Regardless of the number of dimensions to consider for society into which to place the centers of gravity for norms, there will quickly be the situation where some norms are more closely adjoined to other norms, which may or may not be proto-legal or legal norms.

It should, however, also be possible to examine norms by dividing them into two sets: one of “legal” norms and one including those norms do not fit in this set. Since one of the requirements of legal norms is that they are malleable through legislative change, those which only for that reasons are not considered law would be the less malleable, whether social, religious, and cultural norms. For the legal norms to appear distinct, their center of gravity must be separate and distinct from the center of gravity of these other “non-legal” norms.

Nevertheless, this does not indicate the degree of separation of legal norms from other norms. Legal norms might be closely adjoined to other norms or greatly separated from them. If the center of gravity of the legal norms were close to the centers of gravity of the other norms, this would mean that law would be very similar to other norms in society. Their proximity might suggest legal norms would be greatly influenced by these others. The more legal norms are separated from other norms, the less they should be influenced by them and the more distinct law should appear, as is when comparing western European legal systems with those of other societies.

#### VI. COMPARING THIS COUNTERMOVEMENT THEORY TO OTHER MODELS OF LAW

I suggest that this countermovement model of law provides another way to bridge the conflict between natural law and positive law, provides an ontology distinct from institutionalism and the historical model as well as to the law and biology movement, and yet maintains a systems perspective towards law. This countermovement model combines facets from natural and positive law to provide a fuller description than one accomplished by examining natural and positive law separately.

### A. Natural Law

This countermovement model of law is empirically similar to the natural law model. In the natural law model, law is seen as continually in development and continually progressing toward an ideal that is universally applicable, but always unattainable. In my model, law has similar underpinnings throughout a society because many of the factors prevalent at its origination would have been similar everywhere. It has continually developed and progressed, not towards an ideal, but always recreating itself with new pragmatic benefits for society.

In his discussion of the foundations of sovereignty, Agamben quotes from Hesiod's *Works and Days*:<sup>190</sup>

O Persus, keep these things in mind and  
forget violence [*Biaia*] when you attend to justice [*Dikē*].  
To men, Zeus gave this *nomos*:  
What is proper to the fish, the wild beasts, and the winged birds  
is to devour each other, since there is no *Dikē* between them.  
But to men Zeus gave *Dikē*, which is much better.

He thereby equates *Dikē* with both justice and law. While Hesiod places the *nomos* as a gift from Zeus, with the exhortation to forget violence it uncannily reflects an evolutionary epistemology.

Recall that instincts are innate, inherent, and inconspicuous. Because norms have now taken their place, one would expect norms to appear similarly. We simply “know” within ourselves what the *agraphoi nomoi* is, even though we struggle to describe it due to its embeddedness. Thus, in terms of this Article, the natural law insight that law is derived from man's nature applies, but not in the sense described by natural law scholars. It is here seen as the countermovement to human cognition, which is inherent in humankind itself.

### B. Positive Law

All the positive law models, including institutionalism, are predicated on the free will and reason of mankind. But if we are biologically derived from other animals in whom social aspects may be discerned, then this seems more questionable than ever. Consider Jean-Jacques Rousseau's view that women lacked the ability to reason and were therefore inferior to

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190. AGAMBEN, HOMO SACER, *supra* note 72, at 24-25.

men. Mary Wollstonecraft decimates much of Rousseau's concept of women<sup>191</sup> and concludes that men and women are, in essence, no different and any perceived differences between them is due to the disparate educations they receive. Nevertheless, despite the subsequent implementation of many of the changes in education which Wollstonecraft advocated to eliminate this disparity being over the years implemented, some of the differences which Rousseau observed remain today, including a penchant towards the romantic (consider the Harlequin romantic novels which are very popular) and a fondness for dress and ornamentation (consider the many women's fashion magazines). This raises the question of whether both are correct. Rousseau and other scholars placed men on a pedestal, unable to accept that their own ability to reason and make free will decisions is as limited as they believed it to be for women: that is, both sexes are equal in their abilities to reason and equally governed by instinct rather than free will and reason.

Because law, in terms of this Article, derives from norms present throughout society, the *ius generis* may be viewed as comparable to the social contract of Locke,<sup>192</sup> Rousseau,<sup>193</sup> and de Soto:<sup>194</sup> tantamount to an innate "understanding" deriving from the important norms throughout society which exist without further conscious justification. Social scientists and the positive law scholars, when looking from the outside at law, saw such deviations in law that it looked as if it could only be explained by relativism. Every society could create its own structure of good and bad, right and wrong, and just and unjust. They therefore saw law as malleable to our ideas and social engineering agendas. In an evolutionary model, ultimately, nothing is bad or good. In the course of time we evolved so that we consider some things bad and some good, because the good provided us a benefit. By forming the *ius generis*, evolutionary processes created that which we now rationally see as good (based on our past evolutionary pattern) and strive for. Thereby, the terms justice and injustice are just as relative as the terms good and bad.<sup>195</sup> Justice in legal terms being the corollary to good and injustice the corollary to bad, reinforces the ideas of positive law scholars.

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191. MARY WOLLSTONECRAFT, A VINDICATION OF THE RIGHTS OF WOMAN WITH STRICTURES ON POLITICAL AND MORAL SUBJECTS (Folio Society 2008) (1972).

192. LOCKE, *supra* note 14.

193. JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (G.D.H. Cole trans., 1762).

194. Hernando de Soto, *The Mystery of Legal Failure*, in THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 153-205 (2000).

195. HOBBS, *supra* note 13, at 38, 119.

This proposed model is no different from positive law except that it is the countermovement and its evolution which created law. In accordance with this model, the deviations in the laws among societies may be attributed to the different influences and pressures exerted on societies in different places. Even if norms began the same everywhere, not all events are the same throughout the globe at the same time. Because each change is dependent on the change before it, an initial change to an almost imperceptible difference *could* amplify into significant differences. Similarly, the “unsystematic collage of inconsistent and overlapping parts” of law which Griffiths’ noted,<sup>196</sup> finds a satisfactory explanation.

### *C. Institutionalism*

While the societal developmentalists do not address the ontology of law, the positive law models emanating from the economic thought of Adam Smith leads us to Hayek and today's institutionalism that is founded in free will. The subtle distinctions between the views of the institutionalists are beyond the scope of this Article,<sup>197</sup> but note that by concentrating on our passions and instincts, institutionalism’s epistemology gives law little explanation that would center it in a humanity qualitatively distinct from any animal that preceded us. If it is passions (instinct) that cause mankind to ‘form to ourselves’ general rules, I suggest this forming process maintains the effect of those passions (instinct) rather than of free will. Nevertheless, the institutionalist view that “form[ing general rules] to ourselves” is done of our free will seemingly leads to social contract theory which they did not accept. These scholars considered law from the economist’s viewpoint. But economics itself (although not its study) seems to predate humanity,<sup>198</sup> this too seems to leave human beings in the realm of instinct, despite institutionalism’s attempt to ground itself in free will.

Game theory is also based on free will and has been conjoined with institutionalism. Richard Alexander states that game theory, which is the foundation of the prisoner’s dilemma, is the “epitome of a rational choice theory of behavior” and a basis for norms.<sup>199</sup> Game theory goes beyond what

196. Griffiths, *supra* note 2.

197. See generally HODGSON, *supra* note 15 (focusing in particular Chapter 3 for an insightful taxonomy of economic evolutionary thought).

198. See, e.g., Laurie R. Santos & M. Keith Chen, *The Evolution of Rational and Irrational Economic Behavior: Evidence and Insight from a Non-human Primate Species*, in *NEUROECONOMICS: DECISION MAKING AND THE BRAIN* (Paul Glimcher, et al. eds., 2009).

199. Alexander, *supra* note 28, at 171; cf. HODGSON, *supra* note 15, at 223 (“The second extreme position, traditionally associated with the Austrian School and with those under their influence,

Adam Smith contemplated in *THE THEORY OF MORAL SENTIMENTS* when he indicated that “[a]s we have no immediate experience of what other men feel, we can form no idea of the manner in which they are affected, but by conceiving what we ourselves should feel in the like situation.”<sup>200</sup> Hume is correct when he states that one cannot resolve philosophical matters by considering how we ourselves would act; nevertheless, game theory seems to do exactly this.

One difficulty in trying to reconcile Axelrod’s ideas with those of the institutionalists is that if we shape our environment completely, as institutionalists propose, then we are shaped by those who shaped our environment before us. Being shaped by others is the antithesis of free will. Indeed, Paul Mahoney and Chris Sanchirico point out that efficient norms can be quite fragile to random shocks. They suggest that law may provide one means for “mid-course corrections when the [normative] system slips off the equilibrium path.”<sup>201</sup> Unfortunately, they do not explain what definition of law they use. Their definition is important, since Jose Galan and Luis Izquierdo have shown that by slightly modifying some of the parameters or changing some of the arbitrary assumptions of the “prisoner’s dilemma,” Axelrod’s simulation results are not as reliable as might be desired. When considered over longer periods than Axelrod considered, the changes in parameters or arbitrary assumptions caused the system to collapse rather than perpetuate itself.<sup>202</sup>

Also important is the extent to which our free will, founded in human cognition, shows itself: do we continually make free will decisions or do we as Hugo intimates, only seldom, two or three times in a lifetime, rise out of the realm of instinct? Learning may not be sufficient to remove us from this realm of instinct. Brian Ferguson’s concept that human learning is radically different from the learning of animals may be doubtful.<sup>203</sup> If the supposed free will decisions encapsulated in the prisoner’s dilemma is the basis for norms and if there is no radical distinction between how humans and animals learn, then instinct may be at the foundation of norms. In terms of this Article, however, this underrates the reflexive nature of the competition

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is that human action is based exclusively on decision and choice which are themselves wholly uncaused.”).

200. SMITH, *MORAL SENTIMENTS*, *supra* note 20.

201. Mahoney & Sanchirico, *supra* note 172, at 2062.

202. Jose Manuel Galan & Luis R. Izquierdo, *Appearances Can Be Deceiving: Lessons Learned Re-Implementing Axelrod’s ‘Evolutionary Approach to Norms’*, 8 *J. ARTIFICIAL SOCIETIES & SOCIAL SIMULATION* 3 (2005), <http://jasss.soc.surrey.ac.uk/8/3/2.html> [<https://perma.cc/R65Z-A8PF>].

203. Ratnapala, *Eighteenth-Century Evolutionary Thought*, *supra* note 16; *cf.* KOESTLER, *supra* note 4 (respecting the evidence that all animals, including humans, learn in very much the same manner).

for survival in which our greatest competitors are other human beings. By viewing law as a countermovement to human cognition, the evolutionary ontology put forward in this Article in its most tentative stages would have the potential to take us beyond a competition for survival and beyond the *homo sacer*.

#### *D. Law and Biology*

The debate between institutionalism and the law and biology movement, which sees justice as created in our biology, is aptly described similarly to the dichotomy between natural and positive law, namely that

[c]enturies of debate on the origins of law (and ethics) can be reduced to either the ethical and juridical precepts, such as Justice and human rights, that appeared thanks to human nature (and there is an innate rule on the behaviors and universal morals determined by our nature), or that they are socially constructed human inventions (in the sense that nothing exists without human agreement or disagreement).<sup>204</sup>

As Fernandez notes, law, on the one hand, is in “ethical and juridical precepts.”<sup>205</sup> Nevertheless, as Luhmann and every litigator and judge will acknowledge, law is at best an approximation of justice, and, at times, parties to a legal dispute question whether even an approximation of justice is achieved.

With its concentration on the innate intuition for justice, and thus on deterrence through punishment, the law and biology movement places enforcement at the originating point of law. While deterrence may be an originating point of justice, it is arguable whether deterrence is at the origin of law. Proponents of the law and biology movement see the cost of punishment, not only for the individual but also for the collective, as foundational for both the characteristic to punish only serious violations and for the call to be “sensitive to the circumstances in which everyone might be better off if some wrongs...went unpunished”<sup>206</sup> as characteristics which are intrinsically bound into our genetics as instinct and thereby always come to the foreground. As such, the law and biology movement seems capable of providing an ontology for prohibitive laws, whether civil or criminal. However, enabling laws such as those related to contract, association, and

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204. Fernandez, *supra* note 127, at 1.

205. *Id.* at 1. As he states in the quote, the debate has been that these precepts appeared either from human nature or were socially constructed. *Id.*

206. Hoffman, *supra* note 55, at 12.

inheritance would seem not to be dictated by any concept of right or wrong, and it would be difficult for proponents of the movement to find their origin. Nor does anything in the movement explain the state of exception witnessed in the last century.<sup>207</sup>

I argue that law and biology explanations do not center law in that qualitatively distinct humanity that distinguishes us from other animals. If we do not view law in terms of this distinct humanity, however, there should be no reason why we do not find law in other animals: but we have not. In the ontology that I sketch in this Article, the origin of law is considered as independent from the ontology of justice. Whether justice and morality may appropriate law for their purposes or whether law imposes itself on a human intuition, justice, and morality, are considerations beyond the scope of this esquisse.

#### *E. Social System*

Niklas Luhmann used system theory for his observations of law, primarily considering western European legal systems. For him, law is a system entirely separated from other systems in society, rather than a system that may not yet be completely separated. As such, the system theory model of law is as idealized as is the natural law model.

In some respects law follows other rules of systems, but it is not subject to *all* the rules and forces of a biological system.<sup>208</sup> One such rule of a biological system is that a species, as it succeeds, will tend to expand its territory. Similarly, operationally closed and fragmented systems have expansionist tendencies,<sup>209</sup> which may be witnessed in the expansive tendencies of the western European legal systems examined by Luhmann.

While both the social system and Darwinian evolutionary theory are systems, they are also different. If we accept Darwinian evolution (in whatever modern form), humankind descended from animals which did not have law, into humankind with law. Law must have had an origin. More importantly, Luhmann saw law as autopoietic, continuing its development in an evolutionary manner.<sup>210</sup> He dealt with a closed system rather than the incomplete system that law must have been in its originating moments. As suggested by this Article, legal norms need to separate from other norms

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207. AGAMBEN, STATE OF EXCEPTION, *supra* note 179; AGAMBEN, HOMO SACER, *supra* note 72.

208. See generally LUHMANN, *supra* note 31, at Ch. 6.

209. See Fischer-Lescano, *et al.*, *supra* note 183, at 1034; Jessup, *supra* note 76; Peer Zumbansen, *Transnational Law*, in *ENCYCLOPEDIA OF COMPARATIVE LAW* 738 (Jan Smits ed., 2006).

210. LUHMANN, *supra* note 31, at Ch. 6.

and become a system. As such, at some point it could not have been the closed system examined by Luhmann.

In the non-western European context, some see law as a semi-autonomous social field,<sup>211</sup> rather than an operationally closed system. Such a social field, or something similar, would be predicted by the ontology of the countermovement. A detailed examination of the differences between the social system and the social field is not possible within the scope of this preliminary sketch. A further point, however, deserves note since, as Agamben points out when referencing Carl Schmitt, it is the exception which “is more interesting than the regular case. The latter proves nothing; the exception proves everything”<sup>212</sup> and “creates and guarantees the rule.”<sup>213</sup> If the rule does not exclude the exception, we should examine the rule in closer detail.

As demonstrated by juries, even western style legal systems may not be completely closed. Various countries, especially those whose laws and legal systems are based in the common law tradition, use juries in criminal matters. Juries are also used in Islamic law and the civil law countries of continental Europe.<sup>214</sup> While Russia and Britain have restricted, or are seeking to restrict, jury trials, China, South Korea, and Japan are introducing or extending them.<sup>215</sup> As aptly demonstrated by the events in the Canadian prosecutions against Dr. Henry Morgentaler for improperly performing abortions, the criminal law jury systems of common law countries have long accepted the concept of jury nullification.<sup>216</sup> A properly instructed jury is at liberty to bring back a not guilty verdict notwithstanding the overwhelming proof of the criminal offense presented by the prosecution, and such a verdict is not open to question within the legal system. This concept is of such long tradition in English common law that Thomas Hobbes already commented on it.<sup>217</sup>

While certainly open to the point that jury nullification is dependent on law to permit its result, law appears to do nothing from a systems theory perspective to mediate the result (as it does with civil jury trials). Jury nullification from a systems theory perspective appears as more of an intrusion or invasion by society into law than as anything else. In some

211. Moore, *supra* note 36.

212. CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 19-22 (George Schwab trans., 1985).

213. AGAMBEN, *HOMO SACER*, *supra* note 72, at 18-19.

214. *The jury is out*, *ECONOMIST* 71 (Feb. 14, 2009).

215. *Id.*

216. HOBBS, *supra* note 13, at 219.

217. *Id.*

Canadian provinces its lawyers (and at one time in some provinces their spouses as well) are excluded from serving on a jury,<sup>218</sup> which may be a societal decision that the law should not in any way influence this societal invasion into law. The effect of juries on the social system of law certainly merits further consideration. Whether law is a closed system, or a semi-autonomous field, and whether law can be directly affected by society without any structural coupling necessary to communicate the information of events in society into its own system, may therefore still remain an important consideration, but does not suggest that societal sub-systems can infiltrate law without such a process. Society, however, is more than the agglomeration of all its subsystems, and law may still be seen as a semi-autonomous social field rather than as an autonomous operatively closed system.

#### *F. The Weberian Problematic*

I already presented some of the connections between this ontological countermovement model and other models of law. Despite the insights possibly gained through this model, if it is correct, law would still be a relativistic creation, and the Weberian Problematic<sup>219</sup> again leads to the proposition that might makes right. Without more, this model does not resolve the Problematic.

Nevertheless, the model may also provide another glimpse into a possible solution to the Problematic. This model suggests an ultimate stabilizing norm that each one ought to continue to act as in the past,<sup>220</sup> thereby continuing the benefits of cooperation which the collective had attained through the evolution of instincts. It also provides a simplified version of that which Ranulph Glanville proposes in *Sed Quis Custodient Ipsos Custodes*,<sup>221</sup> and which Teubner also suggests in *Global Bukowina*.<sup>222</sup> The general answer to the question “why ought one abide by the legal norm,” would appear circular. Society may be seen to have simplified this circularity to the smallest form which would not appear to be reciprocal. Simultaneously, a countermovement may be seen as having reflexively

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218. See, e.g., in Manitoba, *The Jury Act*, CCSM, c.J30, s. 3(i) and in Alberta, the *Jury Act*, RSA 2000 c. J3, s.4(e).

219. Since there is no universal or true morality any society can create its own morality resulting in a tyranny of the majority.

220. This may be the *Grundnorm*. Cf. Kelsen, *supra* note 26, at 8, §34.

221. Ranulph Glanville, *Sed Quis Custodient Ipsos Custodes?*, in *SELF-STEERING AND COGNITION IN COMPLEX SYSTEMS* 107 (F. Heylighen, et al. eds., 1990).

222. Teubner, *Global Bukowina*, *supra* note 176.

created firstly a societal normative order. Because all norms cannot be of the same importance, society created a method of adjudication to demonstrate which norms are more important. Lastly, to be able to respond to circumstances expeditiously and to accommodate factions within society so those factions do not tear the society apart, society in this model created a method for altering these norms.<sup>223</sup> Thereby three distinct elements each referencing only one of the other two become created.<sup>224</sup> Each element appears to look back at only one, and not both, of the other elements creating the appearance that might does not make right, but ultimately brings us back to Oliver Holmes and Roscoe Pound.<sup>225</sup>

## VII. APPLICATION AND CONCLUSION

The implications of considering law as a countermovement may not only be useful in considering the various models of law but also may be useful for examining transnational and external projections of legal orders. These external projections of legal orders have occurred not only through various attempted extra-territorial effects of national laws but also through their export, as was attempted by what is commonly referred to as the law and development movement, for which a quick oversight is provided using this countermovement model.

### *A. Law and Development*

The original purpose of the law and development movement was to benefit “less advanced” societies by importing into them “advanced” laws,<sup>226</sup> thereby creating general social benefits for the importing society. In its original phase, this attempt to import advanced laws into other societies failed and today has been replaced by an attempt to introduce what is generally referred to as the rule of law into those societies with laws seen as backwards.<sup>227</sup> But again, there have been problems in implementation.<sup>228</sup>

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223. It is in these factions and alterations of norms which we have the political and politics.

224. Glanville, *Sed Quis*, *supra* note 221.

225. Holmes, *supra* note 44; Pound, *supra* note 44.

226. David M. Trubek, *The “Rule of Law” in Development Assistance: Past, Present, and Future*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 74, 76 (David M. Trubek & Alvaro Santos eds., 2006).

227. *Id.* The rule of law being generally meant to be the principal that all members of a society are considered equally subject to legal codes and processes, thereby establishing them as a *Rechtsstaat*, namely a constitutional state in which the exercise of governmental authority is constrained by law. Dyzenhaus, *supra* note 38.

228. *Order in the jungle - Economics and the rule of law*, *ECONOMIST* 83 (Mar. 15, 2008), <https://www.economist.com/briefing/2008/03/13/order-in-the-jungle> [<https://perma.cc/MHM3-NDY4>].

In the original phase in the 1960s, the movement failed because existing institutions mediated the newly created laws and institutions.<sup>229</sup> From the point of view of this preliminary sketch, it could be argued that one reason for this failure was that the legal norms of the importing society were not significantly separated from its other norms. Precisely because of this lack of separation, the original authors of the movement should have been aware that the changes they introduced would result in an instability that would cause a countermovement in which other closely related norms mediated the laws they introduced.

The same might be said of the attempts to introduce the rule of law. The rule of law would suggest a significant separation of legal norms from other societal norms which otherwise would allow some in society including the government greater influence on and benefit from the outcome of legal processes. The more legal and non-legal norms are adjoined the more the one will influence the other. If legal and non-legal norms are closely adjoined, without other antecedent or concurrent action to change these other norms, non-legal norms will again mediate the effects of any attempt for their greater separation.

This does not leave us without hope for changing the legal systems of various nations. What seems necessary, however, is that we must change other norms before or as we seek to change legal norms. Indeed, Davis and Trebilcock are cautiously optimistic about what the law and development movement may accomplish.<sup>230</sup> One reason for their optimism may be that as we have become a more global community, worldwide social norms have grown closer (and thereby grown more distinct from legal norms, as is the case in western societies). Changes to legal norms should then not cause the same instability as before, but this remains to be seen.

### *B. Conclusion*

Humans are distinctly different from other animals because of human cognition. We do not truly know and may never fully understand this distinction: the “unknown [which] persists that affects men and only them.”<sup>231</sup> It is human cognition, humanity, to which this Article attaches norms as a countermovement, norms which differentiated and developed

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229. David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 4 WIS. L. REV. 1062 (1974).

230. Kevin E. Davis & Michael J. Trebilcock, *The Relationship between Law and Development: Optimists versus Skeptics*, 56 AM. J. COMPARATIVE LAW 895 (2008), <http://ssrn.com/abstract=1124045> [<https://perma.cc/G5GV-M43N>].

231. Fernandez, *supra* note 127, at 4.

into legal norms. By pinning law as a countermovement to human cognition, it may be possible to put law's ontology one layer closer to its source in human cognition, as the Greeks did by placing it within the humanity given by the gods. Thereby this ontology reflects Friedrich von Savigny's insight,<sup>232</sup> which Agamben translates as: "Law has no existence for itself; rather its existence lies, from a certain perspective, in the very life of men."<sup>233</sup>

Among the great traditions of law are positive law, including institutionalism, and natural law including the recent law and biology movement. The search for an alternate ontology should not detract from the insights of these models. The intention in this Article was to seek another ontology perhaps leading to common thoughts among the characteristics of law that the disparate models examined illuminate.

If we follow positive law thinking to institutionalism and instrumentalism, from Hume and Smith to Hayek and beyond, we may never leave a world of instinct, which, paradoxically, is where structuralism also seems to locate itself. Hayek seems to leave us in the law of the jungle, which we see in the "dog eat dog" world of the economic capitalism of today. In every iteration of this model, law must be less than society, having been created by it.

Natural law theory traces law to the inherent nature of man which, unless of divine origin, seems to leave us with our originating animal instincts. The law and biology movement also leaves us in instinct, but with ameliorated effects. The link between this ontology and the law and biology movement is the question whether law requires a power of enforcement on which it depends. Yet, in every natural law concept law is greater than society itself.

This countermovement ontology arrives at a model of law co-extensive with society, with similar conclusions as Luhmannian systems theory because evolution is a system that creates sub-systems. Darwin's evolution was based on the biological evolution of life rather than knowledge. As Luhmann states, not all biological evolutionary concepts are applicable to the legal system in which knowledge, rather than life, evolves. Primary among the biological concepts is that a system must be operationally closed. In this preliminary sketch the system does not necessarily appear closed, but

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232. "Das Recht nämlich hat kein Dasein für sich, sein Wesen vielmehr ist das Leben der Menschen selbst, von einer besondern Seite angesehen." FRIEDRICH CARL VON SAVIGNY, VON BERUF UNSRER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT 30 (1814), <https://digi.ub.uni-heidelberg.de/diglit/savigny1814/0038> [<https://perma.cc/XB3V-LE5M>].

233. AGAMBEN, HOMO SACER, *supra* note 72, at *Introduction*.

rather seems more akin to the semi-autonomous field described by Sally Moore.

Further examination of the model I present in this Article is clearly warranted, raising more questions than answers, questions requiring more time than can be given in a preliminary outline. So the quest continues, and the holy grail of an ontological model to describe law remains out of our grasp.