

# LAW'S EVOLVING EMERGENT PHENOMENA: FROM RULES OF SOCIAL INTERCOURSE TO RULE OF LAW SOCIETY

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## INTRODUCTION

Law involves institutions rooted in the history of a society that evolve in relation to surrounding social, psychological, cultural, economic, political, technological, and ecological influences. Law must be understood naturalistically, historically, and holistically. In my usage, naturalism views humans as social animals with natural traits and requirements, historicism presents law as historical manifestations that change over time, and holism sees law within social surroundings. These insights inform my perspective in *A Realistic Theory of Law*.<sup>1</sup> While these propositions might seem obvious, few works in contemporary jurisprudence build around them.<sup>2</sup>

In this essay, I draw on the notion of emergence to further elaborate the implications of naturalism, historicism, and holism for legal theory. Emergent phenomena arise in connection with objects or agents whose interactions produce qualitatively new features not found in its constituent parts.<sup>3</sup> Two senses of emergence are contained in this idea: the emergent phenomenon is greater than the sum of its parts, and its emergence is a historical occurrence. Theories of emergence were originally articulated in a late nineteenth and early twentieth century reaction against scientific

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1. BRIAN Z. TAMANAHA, *A REALISTIC THEORY OF LAW* (2017). This essay further develops ideas presented summarily in the Conclusion.

2. A superb application of historicism and holism is Martin Krygier, *Law as Tradition*, 5 *LAW & PHIL.* 237 (1986).

3. GEOFFREY WEST, *SCALE: THE UNIVERSAL LAWS OF GROWTH, INNOVATION, SUSTAINABILITY, AND THE PACE OF LIFE IN ORGANISMS, CITIES, ECONOMIES, AND COMPANIES* 2 (2017).

reductionism.<sup>4</sup> Originating in biological theories of evolution, emergence was extended to explain a range of phenomena, including the transition in levels from physics, to chemistry, to biology, to the emergence of consciousness from material brains, to the emergence of social structures from the actions of individuals. Emergence is enjoying renewed attention as a component of complexity theory.<sup>5</sup> However, I will use the notion of emergence to illuminate aspects of law without grounding the analysis in complexity theory.<sup>6</sup>

First, I introduce emergence. Then I describe five emergent aspects of law: fundamental rules of social intercourse; legal systems as organized coercion; specialized legal knowledge; a relatively fixed legal fabric; and a rule of law society. The first three emergent phenomena in combination constitute fundamental features of modern legal systems. The two remaining emergent phenomena relate to law in contemporary society. In the course of describing these aspects of law, I address implications for various important issues in legal theory exposed by seeing them as emergent phenomena.

### I. EMERGENT PHENOMENA

The notion of emergence is applied to a host of natural and social phenomena and is taken up in several scientific disciplines. The basic idea is that something novel or additional arises out of the interaction of lower level parts. Commonly offered examples of natural emergence are the combination of hydrogen and oxygen to form water, or sodium and chloride to form salt.<sup>7</sup> Examples of social emergence include social practices, interaction patterns, cultural groups, and knowledge systems.<sup>8</sup> With

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4. See DAVID BLITZ, EMERGENT EVOLUTION: QUALITATIVE NOVELTY AND THE LEVELS OF REALITY (1992). Peter A. Corning, *The Re-Emergence of "Emergence": A Venerable Concept in Search of a Theory*, 7 COMPLEXITY 18 (2002).

5. See generally JOHN H. MILLER & SCOTT E. PAGE, COMPLEX ADAPTIVE SYSTEMS: AN INTRODUCTION TO COMPUTATIONAL MODELS OF SOCIAL LIFE (2007).

6. The application of complexity theory to law raises vexing issues. One hurdle is the difficulty of identifying the measure of fitness and the fitness landscape for law as a complex adaptive system. It is not clear what law is adapting to and how success is to be measured. For a sophisticated effort, see J.B. Ruhl, *The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy*, 49 VAND. L. REV. 1407, 1437 (1996); J.B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State*, 45 DUKE L. J. 849 (1996). Though his account is informative, Ruhl makes questionable assertions about the measure of fitness and he shifts between society as the unit and the legal system as the unit.

7. See Corning, *supra* note 4, at 22, 24.

8. See R. KEITH SAWYER, SOCIAL EMERGENCE: SOCIETIES AS COMPLEX SYSTEMS 210–23 (2005).

emergence, something additional comes into existence—a qualitatively new synergistic effect of the combination of parts and their interactions.<sup>9</sup>

The meaning and characteristics of emergence are disputed. “Despite the recent proliferation of writings on the subject, it is still not clear what the term denotes or, more important, how emergence emerges.”<sup>10</sup> An influential account in the inaugural issue of the journal *Emergence* is provided by Jeffrey Goldstein,<sup>11</sup> who identifies six characteristics. First, emergent phenomena have novel features that are “neither predictable nor deducible from lower or micro-level components.”<sup>12</sup> Second, they “appear as integrated wholes that tend to maintain some sense of identity over time.”<sup>13</sup> Third, “the locus of emergent phenomena occurs at a global or macro level,” so they must be observed at the macro level.<sup>14</sup> Fourth, they “are not pre-given wholes” but rather are dynamic and “arise as a complex system evolves over time.”<sup>15</sup> Fifth, they can be recognized as wholes.<sup>16</sup> Sixth, emergent wholes exert downward causal influences on their constituent parts; causation is therefore bidirectional, with lower levels producing higher, and higher levels shaping interaction at the lower.<sup>17</sup> Emergent wholes, in sum, are coherently integrated through the interaction of their parts, they have certain traits present only at the level of the whole, they have causal consequences, they are resilient, they are dynamic and historical in the sense that they evolve in time, and no central control directs the whole.<sup>18</sup> The emergent legal phenomena I discuss possess these features, though I mention them only when relevant.

Five further clarifications bear on my application of emergence to legal phenomena. First, a plurality of levels and types can exist at which entities and relations cohere as wholes—family, sub-community, occupational group, social practice, etc.—each with its own character.<sup>19</sup> Explanation focuses on the whole and the unique dynamics of each type at each level,

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9. Corning, *supra* note 4, at 22–24.

10. *Id.* at 21.

11. Jeffrey Goldstein, *Emergence as a Construct: History and Issues*, 1 *EMERGENCE* 49 (1999).

12. *Id.* at 50.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* (“[E]mergents are . . . ostensibly recognized.”)

17. *Id.* at 61–62.

18. For a concise summary of these characteristics, see Tom De Wolf & Tom Holvoet, *Emergence Versus Self-Organisation: Different Concepts but Promising When Combined*, in *ENGINEERING SELF-ORGANIZING SYSTEMS* 1, 3–5 (Sven A. Brueckner et al. eds., 2005).

19. Goldstein, *supra* note 11.

though not to the exclusion of the parts.<sup>20</sup> My discussions of fundamental rules of social intercourse, coercive legal systems, specialized legal knowledge, the legal fabric, and the rule of law society involve different levels and types of legal phenomena.

Second, emergent wholes are historical products whose particular courses of development are contingent on initial conditions and continuous interaction with their environment.<sup>21</sup> “Wholes produce unique combined effects, but many of these effects may be codetermined by the context and the interactions between the whole and its environment(s). In fact, many of the ‘properties’ of the whole may arise from such interactions.”<sup>22</sup> Holism has two senses in my usage: attention to the emergent as a whole as well as attention to this whole within its environment. All five emergent legal phenomena are conveyed as wholes thoroughly immersed within and interacting with their surroundings.

Third, emergence is not identical with self-organizing processes, though they share certain characteristics. Developed primarily in physics, computer science, and systems theory, theories of self-organization involve systems that produce autonomously generated, maintained, and changed order without external control and without purposeful creation of the order by agents.<sup>23</sup> Emergent wholes involving human organizations, in contrast, can result from agents purposefully organizing to achieve functions or ends within the environment.<sup>24</sup> Many legal phenomena are the product of purposive actions, though the wholes identified in this essay were not intentionally constructed as such at their inception.

Fourth, emergence theory prompted a dispute over whether evolution can generate qualitative changes. While Charles Darwin argued evolution is continuous and incremental, Alfred Wallace, the co-founder of evolutionary theory, argued qualitative novelties can emerge through evolution.<sup>25</sup> My application of emergence in effect takes both positions. The legal developments conveyed in this essay gradually evolved over eons of human history in various societies. Looking backward with the benefit of hindsight, I frame a series of legal phenomena as emergent wholes to draw out theoretical insights.

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20. *Id.* at 61. For example, the levels of explanation from physics, to chemistry, to biology, to psychology. *See* MILLER & PAGE, *supra* note 5, at 45.

21. Corning, *supra* note 4, at 26.

22. *Id.* at 24.

23. *Id.* at 5–6. *See generally* De Wolf & Holvoet, *supra* note 18. Niklas Luhmann’s autopoiesis is a theory of self-organizing processes applied to law. *See, e.g.*, NIKLAS LUHMANN, SOCIAL SYSTEMS (Joseph Bednarz, Jr. trans., 1996).

24. *See* Corning, *supra* note 4, at 24.

25. BLITZ, *supra* note 4, at 1.

Finally, theorists disagree over whether emergent social phenomena are ontologically real or are merely theoretical constructs.<sup>26</sup> Methodological individualists who discuss emergent social phenomena—including economists and individualist-oriented sociologists<sup>27</sup>—deny that there are irreducible social properties, and insist that all social phenomena can be explained through individuals and their interactions.<sup>28</sup> Sociological holists assert emergent social phenomena exist, which though dependent on individuals and their interactions, have irreducible social properties and causal consequences.<sup>29</sup> I prescind from ontological claims. What matters here is not whether emergent social phenomena (and the “wholes” invoked by holism<sup>30</sup>) actually exist but whether informative generalizations can be generated by seeing them as such. “[E]mergence functions not so much as an explanation but rather as a descriptive term pointing to the patterns, structures, or properties that are exhibited on the macro-level.”<sup>31</sup> Emergence for my purposes is a heuristic device that helps draw out significant aspects of law.

## II. EMERGENT ASPECTS OF LAW

### A. *Fundamental Rules of Social Intercourse*

H.L.A. Hart observed, “there are certain rules of conduct which any social organization must contain if it is to be viable.”<sup>32</sup> These basic rules are tied to human nature and the requirements of life in social groups. We need food, clothing, and shelter, and we reproduce. We are physically vulnerable and roughly equal in our abilities. We are self-interested and also altruistic toward others. There are limited available resources to meet our needs and desires, so we must compete with others. We also cooperate with others to achieve objectives, and we engage in mutually beneficial exchanges. Our

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26. *Id.* at 25. The reality of an emergent phenomenon arguably can be demonstrated through showing its causal effects. Goldstein, *supra* note 11, at 62.

27. Not all economists take this position. Arguing against methodological individualism, economic theorist Kenneth Arrow argued that “every economic model one can think of includes irreducibly social principles and concepts.” Kenneth J. Arrow, *Methodological Individualism and Social Knowledge*, 84 AM. ECON. REV. 1, 2 (1994). He focused on the social pool of technical knowledge, which cannot be reduced to individuals, but also suggests other examples like socially produced tastes, organizations, and social rules and relations more generally. *Id.* at 4–5.

28. SAWYER, *supra* note 8, at 42–44, 73–78, 195–96.

29. *Id.* at 118–24, 210–23.

30. Alexander Rosenberg calls this “methodological” or “instrumental” holism. Alexander Rosenberg, *Philosophy of Social Science* 158 (3d ed. 2008).

31. Goldstein, *supra* note 11, at 58.

32. H.L.A. HART, *THE CONCEPT OF LAW* 188 (1961).

understandings are limited, and we have mixed motives and weak wills. These conditions, Hart asserted, give rise to the legal “protection for persons, property, and promises.”<sup>33</sup> Arising out of natural necessity, he dubbed this the “minimum content of Natural Law.”<sup>34</sup> Natural law theorist John Finnis, grounding his analysis not in human nature but in basic human goods, also identified universally existing legal requirements providing protection of property, protections for life and limb, restrictions on sexual activity, and the call for justice, among others.<sup>35</sup>

Anthropological and psychological research has confirmed the existence of human universals, with a great deal of cultural variation in their expressions.<sup>36</sup> Among a variety of universals (group living, shelter, tools, music, play, aesthetic standards, reciprocal gift giving, cosmology, etc.), those specifically related to law include property rights, prohibitions against murder, redress for violent injuries, marriage, inheritance, sexual restrictions, collectively binding decisions, rights and obligations related to status, and punishments for infractions.<sup>37</sup> A naturalistic, evolutionary basis for a number of these universals is suggested by the fact that other primates (as well as other animals) exhibit enforcement of property rights, a sense of fairness, punishments for breach of reciprocity or cheating, and sexual restrictions by dominant males over mates.<sup>38</sup>

The underlying sources of law-related universals have not been conclusively identified. A leading theory proposes that humans have evolved subject to natural selection to possess moral intuitions—immediate, automatic, and often emotional reactions to situations. These intuitive moral judgments enhance group cohesion and survival; reasoned moral analysis is secondary, mainly used to rationalize the initial intuitive reaction.<sup>39</sup> Jonathan Haidt, a proponent of the moral intuitionist model, asserts that universal moral intuitions are lodged in an ancient affective system within the human brain (experiencing positive and negative reactions like sympathy for suffering and anger at unfairness), which preceded language and the ability to engage in conscious moral reasoning.<sup>40</sup> Evidence showing

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33. *Id.* at 195.

34. *Id.* at 189 (emphasis omitted).

35. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 83 (1980).

36. See DONALD E. BROWN, *HUMAN UNIVERSALS* (1991).

37. *Id.* at 136–40. See also ROBERT M. SAPOLSKY, *BEHAVE: THE BIOLOGY OF HUMANS AT OUR BEST AND WORST* 271–72, 493–95 (Penguin Press 2017); KENT FLANNERY & JOYCE MARCUS, *THE CREATION OF INEQUALITY: HOW OUR PREHISTORIC ANCESTOR SET THE STAGE FOR MONARCHY, SLAVERY, AND EMPIRE* 54–65 (2012); EDWARD O. WILSON, *THE SOCIAL CONQUEST OF EARTH* 192–93 (2012).

38. See MARC D. HAUSER, *MORAL MINDS: HOW NATURE DESIGNED OUR UNIVERSAL SENSE OF RIGHT AND WRONG* 357–418 (2006).

39. Jonathan Haidt, *The New Synthesis in Moral Psychology*, 316 *SCIENCE* 998 (2007).

40. *Id.*

the operation of this instinct include instantaneous moral reactions under experimental conditions (too quick for reasoning), neuroimaging that shows the activation of intuitionist brain regions, and multiple studies finding that toddlers and various species (crows, ravens, dogs, and monkeys) punish perceived injustice.<sup>41</sup>

An ambitious competing theory is that humans possess an innate universal moral faculty analogous to Noam Chomsky's innate language faculty.<sup>42</sup> According to proponent John Mikhail, cognitive systems are structured in ways that generate mental representations and moral reactions to situations involving rules, concepts, and principles.<sup>43</sup> The existence of this moral faculty is evidenced by: studies showing that young children exhibit an "intuitive jurisprudence" when they distinguish intentional from unintentional acts, use proportionality to determine punishment, and make other sorts of legal distinctions; the presence in every language of deontic concepts like "obligatory, permissible, and forbidden;" and universal prohibitions of murder, rape, and other injurious actions, along with concepts of causation and intention.<sup>44</sup>

The moral intuition theory resembles Oliver Wendell Holmes's identification of the origins of law in primitive opinions of "vengeance," "a feeling of blame," "an opinion . . . that a wrong has been done."<sup>45</sup> His account was presaged by Adam Smith's grounding of law in natural reactions to situations of injustice.<sup>46</sup> "Fraud, falsehood, brutality, and violence" excite reactions of "scorn and abhorrence," Smith observed, and murder, theft, and robbery "call loudest for vengeance and punishment."<sup>47</sup> This innate sense of justice is the "main pillar that upholds" society, without which it would "crumble into atoms."<sup>48</sup> "Nature has implanted in the human breast that consciousness of ill desert, those terrors of merited punishment which attend upon its violation, as the great safeguards of the association of

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41. SAPOLSKY, *supra* note 37, at 481–87.

42. For an accessible introduction to Chomsky's theory, see STEVEN PINKER, *THE LANGUAGE INSTINCT: HOW THE MIND CREATES LANGUAGE* (1994).

43. See John Mikhail, *Universal Moral Grammar: Theory, Evidence and the Future*, 11 *TRENDS IN COGNITIVE SCI.* 143 (2007). For a critique of universal moral grammar, see Emmanuel Dupoux & Pierre Jacob, *Universal Moral Grammar: A Critical Appraisal*, 11 *TRENDS IN COGNITIVE SCI.* 373 (2007). The authors do not doubt the biological roots of morality, but rather question whether it is properly understood in terms parallel to Chomsky's linguistic framework.

44. Mikhail, *supra* note 43, at 143 (emphasis omitted).

45. OLIVER WENDELL HOLMES, *THE COMMON LAW* 3 (1881).

46. See Lisa Herzog, *Adam Smith's Account of Justice Between Naturalness and Historicity*, 52 *J. HIST. PHIL.* 703, 705–07 (2014).

47. ADAM SMITH, *THE ESSENTIAL ADAM SMITH* 94, 116 (Robert L. Heilbroner ed., 1986).

48. *Id.* at 97.

mankind, to protect the weak, to curb the violent, and to chastise the guilty.”<sup>49</sup> Recent scientific studies lend support to Smith’s speculations, particularly the finding that when citizens administer punishments to norm violators—“altruistic punishments”—parts of their brains linked to pain, anger, and disgust are activated.<sup>50</sup> Neurobiologist Robert Sapolsky observes that humans manifest brain states that provoke punishment at perceived injustice, which is essential to cooperation and sociality within groups. “The decision to punish, the passionate motivation to do so, is a frothy limbic state.”<sup>51</sup>

Fundamental rules of social intercourse, viewed collectively, are emergent phenomena that evolved at least as far back as early hominid groups and have existed ever since (with variations in content and changes over time). Fueled by natural moral reactions against perceived wrongs, rules protecting property and persons, among other types of rules, emerged to help bond primitive hunter-gatherer groups.<sup>52</sup> Haidt asserts that these fundamental rules “constrain[] individuals and tie[] them to each other to create groups that are *emergent entities* with new properties.”<sup>53</sup> This can be modified to say that both social groups *and* the body of fundamental rules are co-emergent, intertwined phenomena that exist as wholes greater than the sums of their parts, which cannot be reduced without losing the quality of collective cohesiveness.

Two jurisprudential implications follow from presenting Hart’s minimum content of natural law as pivotal to the emergence of primitive groups. The first is about when law came to exist. Scott Shapiro declares: “Those who live in bands . . . don’t have law.”<sup>54</sup> “Indeed,” he asserts, “it is plausible to suppose that law is a comparatively recent invention, postdating the wheel, language, agriculture, art, and religion.”<sup>55</sup> When making these assertions, Shapiro posits that law consists of an organized compulsory planning system that solves complex moral problems.<sup>56</sup> However, if we see law in terms of recognizably familiar legal proscriptions on persons and property, marriage, sexual restrictions, debt obligations, along with other fundamental legal provisions,<sup>57</sup> it follows that law is as old as human society itself. Law and primitive social groups are co-emergent phenomena that

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49. *Id.*

50. See WILSON, *supra* note 37, 250–51.

51. SAPOLSKY, *supra* note 37, at 610.

52. See also Mikhail, *supra* note 43, at 150 (torts, contracts, and criminal law involve “the rules and representations that are implicit in common moral intuitions”).

53. Haidt, *supra* note 39, at 1000 (emphasis added).

54. SCOTT J. SHAPIRO, LEGALITY 35 (2011).

55. *Id.* at 36.

56. *Id.* at 225. For a critique of this position, see TAMANAHA, *supra* note 1, ch. 3–4.

57. I argue on behalf of this approach to identifying law in TAMANAHA, *supra* note 1, at 89–93.

could not exist without one another. Law in its origins was not an “invention” by anyone in the sense of a conscious creation, but rather evolved as an emergent product of collective behavior built on natural reactions to perceived wrongs.

The second jurisprudential implication relates to recent efforts to explain the emergence and characteristics of law through economic reasoning. In “What is Law?,” Gillian Hadfield and Barry Weingast purport to shed “important light on fundamental questions of how, when and why distinctively legal order emerges in human societies.”<sup>58</sup> Their model posits a seller and two buyers of goods who are independent and self-interested, with each buyer indifferent to how the other is treated by the seller.<sup>59</sup> Using this model, Hadfield and Weingast show how actors would purposely create a legal order comprised of “general rules and impersonal abstract reasoning implemented by open, public, and neutral procedures.”<sup>60</sup> Likewise applying an economic model, Daniele Bertolini purports to explain the emergence of spontaneous legal orders that protect property and punish fraud, robbery, theft, and so forth, without a centralized lawmaking authority. Among other assumptions, she posits that “community members have no incentives to cooperate by contributing to the collective action required to enforce efficient standards of behaviour.”<sup>61</sup> In the absence of incentives, “there is a need for an economic explanation of how self-interested individuals surmount the ‘coordination’ and ‘incentive’ problems associated with norm creation and enforcement.”<sup>62</sup> Analysts who begin with economic assumptions, as do Hadfield, Weingast, and Bertolini, must then say why people would engage in punishment of norm violators when the cost to each individual exceeds the expected benefit they receive.<sup>63</sup>

These accounts cannot suffice as actual historical explanations of why legal orders arose in human societies. They fail to recognize social groups are already functioning normative orders supported by moral reactions people naturally experience to harms and unfairness to themselves and others. Eminent biologist Edward O. Wilson remarked, “It turns out that people not only passionately wish to see wrongdoers and layabouts punished; they are also willing to take part in administering justice—even

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58. Gillian K. Hadfield & Barry R. Weingast, *What is Law? A Coordination Model of the Characteristics of Legal Order*, 4 J. LEGAL ANALYSIS 471, 508 (2012); see also Daniele Bertolini, *On the Spontaneous Emergence of Private Law*, 29 CAN. J. L. & JURIS. 5 (2016).

59. Hadfield & Weingast, *supra* note 58, at 477.

60. *Id.* at 474.

61. Bertolini, *supra* note 58, at 7.

62. *Id.* at 19.

63. *Id.* at 21. See Hadfield & Weingast, *supra* note 58, at 505–07.

at a cost to themselves.”<sup>64</sup> As Sapolsky put it, “It makes sense that we’ve evolved such that it is limbic froth that is at the center of punishing, and that a pleasurable dopaminergic surge rewards doing so...That rush of self-righteous pleasure is what drives us to shoulder the costs.”<sup>65</sup> A theory that begins by positing mutually disinterested rationally maximizing individuals detached from a community—a typical starting point for scholars who apply an economic perspective—cannot explain the initial emergence of legal orders in human societies because this model is a complete distortion of social life, not a mere simplifying abstraction. The social group and legal order emerged together in early hominid history through cooperation necessary for collective survival, and individuals have ever since operated within them.<sup>66</sup> A related flaw in economic accounts of the origin of law is the assumption that the explanatory arrow goes from self-interested individuals to the conscious creation of a legal order. The causal arrow instead goes in both directions: the emergent legal order within the social group influences and channels the perceptions and interactions of individuals whose ideas, intuitive responses, and actions give rise to the legal order.

*B. Legal Systems As Organized Coercion Attached to Politics*

H.L.A. Hart described legal systems as “primary rules” of obligation applicable to the social group, combined with “secondary rules” utilized by legal officials to recognize, change, and apply the primary rules.<sup>67</sup> Small social groups like early hunter-gatherers lived adequately under primary rules, he opined. But a bare regime of primary rules is inadequate for larger groups owing to three defects: there is uncertainty about what the rules are, the rules are static and cannot keep up with social change, and the absence of rules for application and punishment renders the system inefficient.<sup>68</sup> The third deficiency is the most urgent, he indicates, for “many societies have remedies for this defect long before the other[s].”<sup>69</sup> The addition of secondary rules remedies these defects: rules of recognition solve uncertainty, rules of change provide mechanisms for altering rules, and rules of adjudication and enforcement make the application of law more efficient. “[A]ll three remedies together are enough to convert the régime of primary rules into what is indisputably a legal system.”<sup>70</sup>

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64. WILSON, *supra* note 37, at 250.

65. SAPOLSKY, *supra* note 37, at 610.

66. On the evolutionary roots of group cooperation, see WILSON, *supra* note 37, at 45–61.

67. HART, *supra* note 32, at 77–96.

68. *Id.* at 89–91.

69. *Id.* at 91.

70. *Id.*

Hart's analysis glosses over *who* made these changes and *why*. He asserts "societies" or "systems" purposefully created secondary rules to improve the functioning of law,<sup>71</sup> saying "[m]ost systems have, after some delay, seen the advantages of further centralization of social pressure [in legal institutions]."<sup>72</sup> Along similar lines, Hadfield and Weingast attribute the emergence of legal systems to "deliberate" efforts to create systems that effectively serve the coordination function of law.<sup>73</sup> Explanations of this sort rely on farsighted actors to intentionally create working systems to serve social purposes.

A darker account of the emergence of legal systems seldom gets serious attention from legal theorists: legal systems initially emerged and served as coercive systems of legal domination attached to ruling polities. This second emergent legal phenomenon encompasses the inception of legal coercion in complex chiefdoms that culminated in early states with established legal systems.<sup>74</sup> Adam Smith explicitly tied the emergence of law to interests of elites.<sup>75</sup>

[W]hen . . . some have great wealth and others nothing, it is necessary that the arm of authority should be continually stretched forth, and permanent laws or regulations made which may ascertain the property of the rich from the inroads of the poor, who would otherwise continually make incroachments upon it, and settle in what the infringement of this property consists and in what cases they will be liable to punishment.<sup>76</sup>

Nineteenth-century jurist Rudolph von Jhering asserted, "Whoever will trace the legal fabric of a people to its ultimate origins will reach innumerable cases where the force of the stronger has laid down the law for the weaker."<sup>77</sup> "Law without force is an empty name, a thing without reality, for it is force, in realizing the norms of law, that makes law what it is and

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71. He refers to historical changes in the law in the course of his explanation. *See id.* at 91 ("The history of law . . . suggest[s] . . . many societies have remedies for this defect"); *id.* at 92 ("as a matter of history this step from the pre-legal to the legal . . .").

72. *Id.* at 95.

73. Hadfield & Weingast, *supra* note 58, at 491, 505.

74. Wilson suggests that the ascent from chiefdoms to states occurred through naturalistic processes propelling expansion and increases in social complexity. WILSON, *supra* note 37, at 98–103.

75. *See* Andrew Skinner, *Adam Smith: Society and Government*, in PERSPECTIVES IN JURISPRUDENCE 195 (Elspeth Attwooll ed., 1977).

76. ADAM SMITH, LECTURES ON JURISPRUDENCE 208 (R. L. Meek et al. eds., 1978) (emphasis added).

77. RUDOLPH VON JHERING, LAW AS A MEANS TO AN END 185 (Isaac Husik trans., Boston Book Co. 1913).

ought to be.”<sup>78</sup> The modern tendency to assume the legitimacy of law derives from consent obscures the possibility that effective force itself confers legitimacy. In earlier periods, Jhering observed, people “did not look upon force with our eyes; they saw nothing improper in such a condition; nought detestable and damnable, but only what was natural and self-evident. Force as such made an impression on them and was the only kind of greatness they could appreciate.”<sup>79</sup>

This alternative theory holds that coercive systems of legal enforcement initially emerged through the actions of a Big Man (from among a ruling oligarchy)<sup>80</sup> and his extended kin group or clan, prepared to exert force in the name of law in return for rents extracted through domination. This theory uses Max Weber’s assertion that law “is externally guaranteed by the probability that physical or psychological coercion will be applied by a *staff* of people in order to bring about compliance or avenge violation.”<sup>81</sup> The warriors aligned with the Big Man constitute the staff applying legal coercion to enforce rules that maintain the authority of the rulers and elite. The Big Man cum paramount chief and his supporters “live on the surplus accumulated by the tribe, employing it to tighten control upon the tribe, to regulate trade, and to wage war with neighbors.”<sup>82</sup> Slowly crystalizing into standing legal institutions, legal systems provided the enforcement muscle that backed ruling polities as they extended their control within society, gradually coming to enforce fundamental rules of social intercourse, resolve disputes, and maintain internal order. After generations (surviving challenges by internal rivals and external threats of conquest), domination by the Big Man and his clan became hereditary rule (via chiefly lineages) supported by property rights and culturally entrenched social ranks (sub-chiefs, priests, warriors, artisans, commoners, serfs, slaves). The paramount chief controls the most fertile land and sources of food, deriving rents and tributes from sub-chiefs and commoners, fighting wars to gain wealth, rewarding warriors with spoils of war, and exchanging gifts with neighboring chiefdoms to obtain luxury items and desirable goods that enhanced their status.<sup>83</sup>

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78. *Id.* at 190.

79. *Id.* at 191.

80. In his study of human universals, Brown found that a de facto oligarchy supporting the ruler is common. BROWN, *supra* note 36, at 138.

81. 1 MAX WEBER, *ECONOMY AND SOCIETY* 34 (Guenther Roth & Claus Wittich eds., 1978).

82. WILSON, *supra* note 37, at 97.

83. *See generally* FLANNERY & MARCUS, *supra* note 37. A summary of developments is provided in Chapter 24. Chapters 5, 10, 16, and 17 provide multiple examples, though much of the book is about the transition in social arrangements from egalitarian societies to hierarchical societies. *See also* Timothy K. Earle, *Chiefdoms in Archaeological and Ethnohistorical Perspective*, 16 ANN. REV. ANTHROPOLOGY 279 (1987).

As populations increased in settled agrarian societies and polities expanded their reach by conquering neighboring territories, bureaucratic states coalesced under rulers and a professional class of administrators.<sup>84</sup> “One of the most dramatic innovations of states is that the central government monopolizes the use of force, dispensing justice according to rules of law.”<sup>85</sup> The state apparatus administered punishment according to established laws and collected taxes to support the bureaucratic state.<sup>86</sup> Rulers, priests, administrators, and judges were drawn from a hereditary aristocracy that controlled landed wealth, using commoners, serfs, and slaves—through debt servitude or capture—to work the land under arrangements enforced by law.<sup>87</sup>

Religious ideologies legitimated early rulers and the legal order, as well as helped secure compliance with law under threat of divine punishment. In early states:

Laws were often claimed to originate with the gods, who transmitted them to humans through the proclamations of rulers. The Aztec term for ‘laws’, *nahuatilli*, meant ‘a set of commands’. Laws were a means by which human society was not only regulated but also aligned with a cosmic order that was profoundly hierarchical. The Babylonian word *mêsaru* and the Egyptian *m3't* referred both to the cosmic order and to legal justice. The Inka state claimed that subjects’ commission of crimes such as murder, witchcraft, theft, and neglect of religious cults threatened the health of the king and considered them sacrilege. Later evidence from China indicates that law (*fa*) was believed to have been created by superhuman beings in accordance with divine models and interests. To promote order on earth, rulers sought to suppress blood feuds and punish murder, treason, theft, incest, and many other forms of misconduct.

Supernatural powers were believed to support the legal process by revealing guilt or innocence through oracles and ordeals and by punishing oath-breakers. The gods punished individuals whose crimes went undetected or unpunished by humans. The Babylonian king Hammurabi claimed to have assembled his law code at the command of the god Utu, or Shamash, who, because as the sun god he saw everything that humans did, was also the patron deity of

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84. WILSON, *supra* note 37, at 97–99.

85. FLANNERY & MARCUS, *supra* note 37, at 476.

86. *Id.*

87. *Id.* at 478–81, 500–02.

justice. Promulgating this law code gave Hammurabi an earthly role analogous to that of Enlil, the chief executive deity of the Sumerian pantheon. The laws proclaimed by the Aztec ruler Mochtezuma I were described as ‘flashes that the great king...[had] sown in his breast, from the divine fire, for the total health of his kingdom.’ This claim referred to the divine powers that were implanted in the Aztec monarch at the time of his enthronement. The early Chinese believed that improper conduct was supernaturally punished.<sup>88</sup>

In many early legal systems, in addition to longstanding customary and religious laws, *law is what the ruler declares*. The Justinian Code makes this explicit: “What has pleased the prince has the force of law;” and “The prince is not bound by the law.”<sup>89</sup>

According to this theory, legal systems initially formed as organized coercion—in religious ideological clothing<sup>90</sup>—attached to the polity that maintained the ruling elite and a hierarchical society, along with laws on property, personal injuries, debt obligations, family unions, sexual restrictions, and sacred matters. Anthropologists, political scientists, and historians who study chiefdoms and early states provide abundant evidence for this account.<sup>91</sup> A leading scholar of state development remarked, “there is always found great inequality in (early) states. Some people, the happy few, are rich and powerful and all others, the great majority, are poor and powerless.”<sup>92</sup> A scholar of early civilizations observed, “The state serves, thus, to maintain the privileged position of a ruling class that is largely based on the exploitation and economic degradation of the masses.”<sup>93</sup> In a work of comparative politics written two millennia ago, Aristotle saw “in some states the entire aim both of the laws and of the constitution is to give men despotic power over their neighbours.”<sup>94</sup> A scholar characterizing the early medieval period noted, “To the German successor-kingdoms of the Western Roman Empire, the monarch was not primarily the head of a territorial State

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88. BRUCE G. TRIGGER, UNDERSTANDING EARLY CIVILIZATIONS: A COMPARATIVE STUDY 221–222 (2003) (alterations in original) (citations omitted).

89. DIG. 1.4.1 (Ulpian, Institutes 1); DIG. 1.3.31 (Ulpian, Lex Julia et Papia 13), (quoted in PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY 59 (1999)).

90. Earle, *supra* note 83, at 298–300.

91. An excellent overview is Robert L. Carneiro, *The Chiefdom: Precursor of the State*, in THE TRANSITION TO STATEHOOD IN THE NEW WORLD 37, 37–75 (1981). See Earle, *supra* note 83, at 290–298; Gil J. Stein, *Heterogeneity, Power, and Political Economy: Some Current Research Issues in the Archaeology of Old World Complex Societies*, 6 J. ARCHAEOLOGICAL RES. 1 (Grant D. Jones & Robert R. Kautz eds., 1998).

92. Henri J. M. Claessen, *Was the State Inevitable?*, 1 SOC. EVOLUTION & HIST. 101, 104 (2002).

93. JOSEPH A. TAINTER, THE COLLAPSE OF COMPLEX SOCIETIES 33 (1988).

94. ARISTOTLE, THE POLITICS 159 (Stephen Everson ed., Cambridge Univ. Press 1988) (350 B.C.E.).

but a personal tribal leader; it might not be too wide of the mark to think of him as a gangster chief, surrounded by his henchmen and living with them off the country they had conquered.”<sup>95</sup> The use of law as a system of coercion over a population was also common to empires and colonization.<sup>96</sup>

The formation of legal systems as organized systems of coercion to maintain polities and social hierarchy has naturalistic roots. Non-human primates engage in power struggles to establish dominance relationships, which determine access to food, preferred resting spots, and mates.<sup>97</sup> Success in these rivalries relates not only to size, strength, and age, but also to the creation of coalitions with allies to fight to overturn an existing order.<sup>98</sup> Chimpanzees hunt in organized packs for live animals and fight for territory with rival groups.<sup>99</sup> Human societies past and present have been characterized by territorial control, dominance relationships, and status hierarchies, from subjugating and extracting wealth from weaker neighboring populations, to aristocratic and caste systems, to male domination over women, to modern forms of inequality enforced by property law. Humans are “just like numerous other social species in terms of having marked status differences among individuals and hierarchies that emerge from those differences,”<sup>100</sup> although humans alone belong to multiple hierarchies attached to different criteria (work, wealth, religion, race or ethnicity, attractiveness, athletic ability, social circles or clubs, etc.).<sup>101</sup> Neurological studies reveal that human brains are highly attuned to the recognition of status differences, and even “bear the imprint of social status.”<sup>102</sup> Uniquely among primates, however, human societies establish dominance hierarchies passed to offspring through lineage based status ranks or accumulated wealth.<sup>103</sup> “When humans invented socioeconomic status,” Sapolsky remarked, “they invented a way to subordinate like nothing that hierarchical primates had ever seen before.”<sup>104</sup>

Natural intuitions have also played a role. In addition to intuitions about harm and fairness mentioned previously, Haidt asserts that evolutionary foundations exist for three further categories of universal moral intuitions:

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95. JOHN MORRALL, *POLITICAL THOUGHT IN MEDIEVAL TIMES* 13 (1980).

96. See TAMANAHA, *supra* note 1, at 100–05.

97. HAUSER, *supra* note 38, at 273, 371.

98. *Id.* at 273–77.

99. See WILSON, *supra* note 37, at 40–41, 46–47, 53–56.

100. See SAPOLSKY, *supra* note 37, at 475, 425–44.

101. *Id.* at 430–31.

102. *Id.* at 476, 430–42.

103. See FLANNERY & MARCUS, *supra* note 35, at 554–55.

104. SAPOLSKY, *supra* note 37, at 673.

“there are also widespread intuitions about ingroup-outgroup dynamics and the importance of loyalty; there are intuitions about authority and the importance of respect and obedience; and there are intuitions about bodily and spiritual purity and the importance of living in a sanctified rather than a carnal way.”<sup>105</sup> All three intuitions support allegiance to divinely appointed ruling authorities and compliance with law backed by organized force. The first binds a populace to their ruler to defend against or to attack neighboring powers;<sup>106</sup> the second renders obedience to the political authority and law morally compelling;<sup>107</sup> and the third relies on religious, aristocratic, and caste ideologies to sanctify the legally enforced hierarchical arrangement.

“Law surely is not the gunman situation writ large, and legal order is surely not to be thus simply identified with compulsion,” Hart insisted.<sup>108</sup> There is truth in this assertion. For millennia, law in many societies has been identified with justice, right, and the common good, charged with protecting the weak and restricting the powerful.<sup>109</sup> Recall that, as mentioned earlier, humans have intuitive reactions against injustice and unfairness, which law reflects and enforces (as informed by religious, cultural, economic, and political ideologies). Humans have mixes of selfish and altruistic traits, with the balance in favor of the latter in ways that are oriented to the good of the group.<sup>110</sup> Wilson explains: “Human beings are prone to be moral—do the right thing, hold back, give aid to others, sometimes even at personal risk—because natural selection has favored those interactions of group members benefitting the group as a whole.”<sup>111</sup> Empathy, cooperation, and the desire to punish wrongdoers all follow.<sup>112</sup> The claim that law represents justice is

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105. Haidt, *supra* note 39, at 1001.

106. Wilson emphasizes that tribalism is a fundamental human trait manifested in wars against neighboring groups for territory and resources. WILSON, *supra* note 37, at 57–76. *See also* SAPOLSKY, *supra* note 37, at 386–424.

107. On the natural roots of obedience to authority figures, see SAPOLSKY, *supra* note 37, at 444–75.

108. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 603 (1958).

109. For the deep historical roots of the identification of law with justice and equity, see Larry May, *Ancient Legal Thought* (2017) (unpublished manuscript) (on file with the author). *See also* TAMANAHA, *supra* note 1, at 39–42.

110. Wilson suggests that the trait of selfishness is selected at the individual reproductive level because selfish individuals do better compared to others in the group, while altruism is selected at level of group competition because groups that show altruism will prevail over groups comprised of selfish people. This is why both traits exist, though the balance favors altruism, primarily toward the group. *See* WILSON, *supra* note 37, at 243. Wilson’s account combines two levels of selection—the individual and the group. Group selection is controversial in evolutionary theory. Sapolsky concludes there is evidence for individual selection, kin selection, and neo-group selection (producing reciprocal altruism essential to cooperation). SAPOLSKY, *supra* note 37, at 332–373.

111. WILSON, *supra* note 37, at 247.

112. *Id.* at 247–52.

a manifestation of these natural human impulses, with important consequences in shaping what is recognized as law and what law is used to do. The identification of law with justice compels officials to explain their actions as consistent with justice and fairness and provides a critical standard the populace can raise against officials. The claim to represent justice thereby points law in the direction of the good.

Yet legal systems look very much like a gunman writ large backing ruling polities and elites when we consider how they formed and have operated in many societies throughout history and today (see North Korea and Syria). Coercive legal systems have commonly served as the enforcer for ruling polities and social-economic hierarchies and to dominate disfavored groups, with the law bolstered by religious, cultural, economic, and political ideologies that legitimated these actions. Again, we can learn from Jhering:

Force produces law immediately out of itself, and as a measure of itself, *law evolving as the politics of force*. It does not therefore abdicate to give the place to law, but whilst retaining its place it adds to itself law as an accessory element belonging to it, and becomes *legal force*.<sup>113</sup>

Coercion is a principal feature of legal systems attached to the polity as emergent phenomena, epitomized in the claim of modern states to possess a monopoly over the application of force. This historical fact exposes the unreality of assertions by leading contemporary legal philosophers that coercive force is not an essential feature of law.<sup>114</sup>

Once coercive legal systems became entrenched within the polity and society, competing social groups and individuals strove to shape law and use it to advance their interests. “All the law in the world has been obtained by strife,” Jhering wrote. “Every principle of law which obtains had first to be wrung by force from those who denied it.”<sup>115</sup> When contesting groups and individuals battle over law, their arguments are often couched in language of justice and the common good, for that is what law purports to represent. But “as in every struggle, the issue is decided not by the weight

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113. JHERING, *supra* note 77, at 187.

114. A powerful recent corrective to the tendency of analytical jurists to separate law from force can be found in FREDERICK SCHAUER, *THE FORCE OF LAW* (2015).

115. RUDOLPH VON JHERING, *THE STRUGGLE FOR LAW 1* (John L. Lalor trans., Callaghan & Co. 2d ed. 1915) (1872).

of reason, but by the relative strength of opposing forces.”<sup>116</sup> Jhering identified these battles as a force propelling the continuous evolution of law.

Notwithstanding the dark overtones of his account, Jhering emphasized that law provides fundamental benefits for society. “Certain legal principles are found among all peoples; murder and robbery are everywhere forbidden; State and property, family and contract are met everywhere. Consequently, in these cases, one may urge, we actually have . . . absolute ‘*legal truths*,’ over which history has no power.”<sup>117</sup> The battles between competing interests benefit society in the long run, he believed, because social views of justice and an ethical sense are reflected in law. Jhering’s insight is that, along with maintaining social order and views of justice and the common good, legal systems *also* reflect and enforce social, economic, and political hierarchies and sources of power. The first two emergent phenomena of law—fundamental legal rules of social intercourse and coercive systems attached to polities—have proven to be enduring components of human societies.

### *C. Legal Specialists and Legal Knowledge*

Rules of recognition, Hart asserted, solve legal uncertainty by clearly identifying primary rules, and judges follow rules of adjudication “to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken.”<sup>118</sup> Hadfield and Weingast conclude that law involves general, stable, predictable, and clear rules, with disputes decided in accordance with law through impersonal and public reasoning.<sup>119</sup> They endorse Hart’s position on secondary rules, affirming that “[t]he capacity to articulate, clarify, and adapt the content of a classification system [for binding rules] is fundamental to a concept of law . . . .”<sup>120</sup> Legal clarity has two distinct audiences in these formulations: the populace and legal officials.<sup>121</sup> Legal clarity for the populace is crucial because it provides individuals with advance knowledge of legal constraints and consequences of their actions. Hart identified general obedience to legal rules by the populace as an essential condition for the existence of a legal

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116. *Id.* at 11.

117. JHERING, *supra* note 77, at 328–29.

118. HART, *supra* note 32, at 94.

119. Hadfield & Weingast, *supra* note 58, at 492–500.

120. *Id.* at 491.

121. These two points are confirmed in Hart’s two necessary conditions for the existence of a legal system: 1) the primary rules of obligation are “generally obeyed” by the populace, and 2) the secondary rules are “generally accepted” by legal officials. HART, *supra* note 32, at 113.

system.<sup>122</sup> As legal philosopher Andrei Marmor declared, law serves the “pivotal function of guiding human conduct.”<sup>123</sup>

The claim by legal theorists that the populace is guided by law is a misleading idealization. “People can only be *guided* by rules or prescriptions if they know about the existence of the rule or prescription.”<sup>124</sup> However, owing to the impact of specialized legal knowledge maintained by legal professionals, magnified by advancing complexity and proliferation of law over time, people do not know about the vast bulk of law. Specialized legal knowledge through which state legal systems operate is the third emergent phenomenon. Together with the two preceding emergent phenomena, they constitute a triumvirate of fundamental features of modern state law.

Throughout its history, the common law has failed to provide clarity to the populace on what the law is. A common law jurist might respond that authoritative precedent identifies law, but that is dubious. Consider this colloquy recorded in the 1345 Year Book on a case in which the judges departed from a previous case:

R. *Thorpe* [counsel] . . . I think you will wish to do what others have done in the same case, or else we do not know what the law is.

HILLARY, J. [judge]. The law is the will of the justices.

STONORE, J. [judge]. No, the law is reason.<sup>125</sup>

As John Dawson explains, at the time “law was an immense body of complex rules carried forward mainly through an oral tradition.”<sup>126</sup> Law was located in writs and specialized pleading forms, as well as in past decisions that judges and pleaders “recollected.”<sup>127</sup> “[P]articular cases could survive as law only as they were absorbed into the common learning of the élite group.”<sup>128</sup>

“Legal historians widely agree that before the eighteenth century there was no firm doctrine of *stare decisis* in English common law.”<sup>129</sup> Precedent could not be treated as binding in England for a very practical reason. Until

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122. *Id.*

123. Andrei Marmor, *The Rule of Law and Its Limits*, 23 *LAW & PHIL.* 1, 5 (2004).

124. *Id.*

125. Reprinted in JOHN P. DAWSON, *THE ORACLES OF THE LAW* 58 (1968) (alteration in original).

126. *Id.* at 59.

127. *Id.*

128. *Id.*

129. Gerald J. Postema, *Philosophy of the Common Law*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 588, 589 (Jules Coleman & Scott Shapiro eds., 2002).

the latter half of the nineteenth century, reports of judicial cases were published by private parties for profit, varying greatly in quality. Certain reports in the eighteenth century “were so manifestly unreliable that judges complained against them bitterly and even forbade lawyers to cite them in court.”<sup>130</sup> Throughout this period, “[t]o laymen the system [of property law] was wholly unintelligible,” legal historian A.W.B. Simpson concluded.<sup>131</sup> The arcane complexity of law also erected a barrier to legislative reform.

To the lawyers, who alone had sufficient grasp of the law to have done something about it, the law of property, and particularly the law of future interests, became a great mystery, an elaborate network of rules so interrelated that any radical legislative interference might destroy the assumed coherence of the whole, and throw men’s security in their property into confusion.<sup>132</sup>

Legal uncertainty was also a problem in the United States through the early twentieth century. A 1904 article in the *Yale Law Journal* lamented:

In this condition of affairs judges indulge in the delusion that they are observing *stare decisis* merely because they cite precedents. The truth is that, much in the same manner that expert witnesses are procurable to give almost any opinions that are desired, judicial precedents may be found for any proposition that a counsel, or a court, wishes established, or to establish.<sup>133</sup>

Elihu Root, in the 1916 Presidential Address to the ABA, similarly noted:

The vast and continually increasing mass of reported decisions which afford authorities on almost every side of almost every question admonish us that by the mere following of precedent we should soon have no system of law at all, but the rule of the Turkish *cadi* who is expected to do in each case what seems to him to be right . . . .<sup>134</sup>

The common law is clearer today thanks to treatises, restatements, and model codes written in the past century—but this renders the law clear to legal specialists, not the populace. Chief Justice Lord Bingham delivered a 1998 speech advocating the enactment of a Criminal Code, quoting a century old statement of a jurist:

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130. DAWSON, *supra* note 125, at 77.

131. A.W.B. SIMPSON, A HISTORY OF THE LAND LAW 233 (2d ed. 1986).

132. *Id.*

133. Wilbur Larremore, *Judicial Legislation in New York*, 14 YALE L.J. 312, 317–18 (1905). Other jurists at the time said the same. See BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE 33–36 (2010).

134. Elihu Root, *Public Service by the Bar*, 39 ANN. REP. A.B.A. 355, 364 (1916).

The criminal law is entirely different. It is incoherent and inconsistent. State almost any general principle and you will find one or more leading cases which contradict it. It is littered with distinctions which have no basis in reason but are mere historical accidents. I am in favour of codification of the criminal law because I see no other way of reducing a chaotic system to order, of eliminating irrational distinctions and of making the law reasonably comprehensible, accessible and certain.<sup>135</sup>

Justice Bingham endorsed this assessment, asserting “the cure now can only be achieved by codification.”<sup>136</sup> “[A]nybody who may want to know the law on a particular subject should be able to turn to a chapter of the Code, and there find the law he is in search of explained in a few intelligible and well-constructed sentences. . . .”<sup>137</sup> England and Wales still do not have a criminal code.

A person in the United States today who wants to discern tort laws applicable to her conduct would have great difficulty discovering it. Never mind that statements of tort law—a mixture of common law doctrines and statutes—are written in legalese that is difficult to fully comprehend without legal training. The threshold hurdle is to find it. A state’s pattern jury instructions provide statements of tort law, though few lay people would know that is where they should look. Nor will the jury instructions be easy to locate. The Missouri Court website unhelpfully announces: “The Court does not prepare or publish a compilation of its Missouri Approved Instructions for civil cases. Nevertheless, such compilations are available from various commercial and other entities.”<sup>138</sup> This is tantamount to telling people to call a lawyer.

My argument is not that law is pervasively unclear and uncertain. Legal specialists have an understanding of most areas of law and know how to figure out what they do not know, although uncertainties and open questions regularly arise. However, for the *populace*, the law is hard to find, hard to understand, and obscure in its operation. Studies have found that lay beliefs about law on important matters, common law as well as statutory, are

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135. Lord Thomas Bingham, Lord Chief Justice of England, Speech at Dinner for Her Majesty’s Judges (July 22, 1998), [https://web.archive.org/web/20070927120512/http://www.judiciary.gov.uk/publications\\_media/speeches/pre\\_2004/mnsion98.htm](https://web.archive.org/web/20070927120512/http://www.judiciary.gov.uk/publications_media/speeches/pre_2004/mnsion98.htm) [<http://perma.cc/8WV7-WKVA>] (quoting Sir John Smith).

136. *Id.*

137. *Id.*

138. *Jury Instructions and Charges*, MO. CTS., <https://www.courts.mo.gov/page.jsp?id=589> [<https://perma.cc/XN57-U7JB>].

incorrect a significant percentage of time across a range of legal subjects.<sup>139</sup> The sheer volume of law in contemporary society insures that people are ignorant of the vast bulk of law. There are over 3,000 federal crimes and another 300,000 federal regulations that carry criminal punishments, along with innumerable state and municipal crimes and regulations.<sup>140</sup> “A citizen who wants to abide by the law has no quick and easy way to find out what the law actually is . . . .”<sup>141</sup>

The only way for most people to determine what the law is on a given topic is to consult a lawyer. But legal theorists should not assume access to lawyers provides legal certainty for the general populace<sup>142</sup> (as distinguished from commercial actors who retain lawyers). A large proportion of Americans with legal problems—including child custody and support, employment, housing, etc.—forgo legal remedies outright or handle them without retaining a lawyer.<sup>143</sup> A recent report issued by the U.K. judiciary found, “The single, most pervasive and intractable weakness of our civil courts is that they simply do not provide reasonable access to justice for any but the most wealthy individuals.”<sup>144</sup> Commercial actors and wealthy individuals use legal specialists extensively to arrange their affairs and assert their legal rights—handsomely compensating lawyers in the process—so for these groups the theoretical assertion that law provides advanced notice is true. But many people dealing with personal matters cannot afford to retain lawyers.

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139. See Arden Rowell, *Legal Rules, Beliefs, and Aspirations* (Oct. 13, 2017) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2903049](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2903049) [<https://perma.cc/SW9E-YNUP>] (survey finding significant percentages of erroneous beliefs about law on ten subjects); Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105 (1997) (showing that workers often harbor erroneous beliefs about legal employment protections); Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447 (1999) (same); John M. Darley et al., *The Ex Ante Function of the Criminal Law*, 35 LAW & SOC'Y REV. 165, 181 (2001) (“[F]or a number of laws, the citizens of states that hold deviant versions of . . . laws are unaware of their content.”).

140. See Stephen L. Carter, *Law Puts Us All in Same Danger as Eric Garner*, BLOOMBERG VIEW (Dec. 4, 2014), <https://www.bloomberg.com/view/articles/2014-12-04/law-puts-us-all-in-same-danger-as-eric-garner>. For these statistics, Carter cites DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008).

141. Carter, *supra* note 140.

142. Legal theorist Andrei Marmor recognizes “most people do not know the vast majority of the laws of their country,” though he quickly dispels this by noting “there are numerous experts who know the details. When the practical need arises, we can rely on others who know better.” Marmor, *supra* note 123, at 16–17.

143. See Gillian K. Hadfield & Jamie Heine, *Life in the Law-Thick World: Legal Resources for Ordinary Americans*, in *BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA* 21 (Samuel Estreicher & Joy Radice eds., 2016); LEGAL SERVS. CORP., *DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* (2009).

144. LORD JUSTICE BRIGGS, *JUDICIARY OF ENG. AND WALES, CIVIL COURTS STRUCTURE REVIEW: INTERIM REPORT* 51 (2015).

Jeremy Bentham and Max Weber paid significant attention to legal specialists and their monopoly over legal knowledge. Bentham castigated the common law for pervasive jargon, technicalities, and fictions that render it obscure to the public.<sup>145</sup> Comprehensible only to members of the legal guild, this enabled lawyers to boost their fees, raise their status, and conceal deficiencies in the law.<sup>146</sup> Cases, statutes and regulations are difficult to comprehend without a baseline of knowledge of legal practices and procedures, concepts, technicalities, methods of interpretation, and modes of analysis maintained by legal specialists. Legal formalism pervades law, the operation of which is not familiar to most people. Legal rules are formal in the sense that they are general proscriptions addressing categories of conduct that specify legal consequences to follow in concrete contexts of application.<sup>147</sup> Formalistic qualities of modern bodies of legal knowledge were enhanced through the efforts of legal specialists toward “increasingly specialized juridical and logical rationality and systematization,” Weber explained, until it finally assumes “an increasingly logical sublimation and deductive rigor and develop[s] an increasingly rational technique in procedure.”<sup>148</sup> The coherence of legal knowledge as a whole generates “inner necessities,” including “increasingly logical interpretation of meaning in relation to the legal norms themselves as well as in relation to legal transactions.”<sup>149</sup>

Legal doctrines and concepts (legal personality, intention, malice, etc.) carry technical meanings across various legal contexts, so efforts at conceptual consistency and systematic arrangement, Jeremy Waldron points out, help jurists manage the implications of this “de facto systematicity.”<sup>150</sup> This is “law’s system,” as Gerald Postema put it, whereby particular legal actions—from a specific contract, to a legislative act or judicial decision, to a will or transfer of property, to a bank loan, etc.—obtain their legal meaning and implications within a taken-for-granted backdrop of legal doctrines and concepts.<sup>151</sup> This juridical backdrop is the

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145. For an illuminating explication of Bentham’s critique of the common law, see GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* 263–301 (1986).

146. See H.L.A. HART, *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 29–30 (1982).

147. For an explanation of the formal quality of law, see Frederick Schauer, *Formalism*, 97 *YALE L.J.* 509 (1988).

148. 2 MAX WEBER, *ECONOMY AND SOCIETY* 882 (Guenther Roth & Claus Wittich eds., 1978).

149. *Id.* at 884.

150. Jeremy Waldron, “*Transcendental Nonsense*” and *System in the Law*, 100 *COLUM. L. REV.* 16, 40 (2000).

151. See Gerald J. Postema, *Law’s System: The Necessity of System in Common Law*, 2014 *N.Z. L. REV.* 69 (2014).

legal tradition, which evolved to acquire its present content and form, including many historical vestiges, through the efforts of generations of jurists modifying law to adjust to external influences while striving to render law systematic.<sup>152</sup> Also propelling the urge to construct legal systematicity is the tendency of theoretically minded jurists to seek analytical clarity, consistency, and order in law. A loop of reciprocal causation exists in which legal concepts and doctrines—continuously added to and modified in connection with surrounding changes and social battles over law—in the aggregate constitute legal knowledge as a whole, which in turn influences the contours of particular constituent legal concepts and doctrines and their development.

Once legal specialists monopolize legal knowledge attached to the operation of the legal system, inputs from the cultural, social, economic, political, and technological environment are absorbed on law's own terms, thereby transformed. Through this process of incorporation, results produced by the legal system may diverge from expectations of lay people. A substantial majority of the population, for example, was opposed to the Supreme Court decision that corporations have constitutionally protected free speech rights that prohibit limits on campaign contributions.<sup>153</sup> “Such disappointments are inevitable indeed,” Weber observed, “where the facts of life are juridically ‘construed’ in order to make them fit the abstract propositions of law and in accordance with the maxim that nothing can exist in the realm of law unless it can be ‘conceived’ by the jurist in conformity with those ‘principles’ which are revealed to him by juristic science.”<sup>154</sup>

Legal specialists are thus oriented in two directions in perpetual tension: keeping law in sync with surrounding social influences and changes, and maintaining the conceptual coherence of law. As Friedrich Savigny first made clear:

A two-fold spirit is indispensable to the jurist; the historical, to seize with readiness the peculiarities of every age and every form of law; and the systematic, to view every notion and every rule in lively connection and co-operation with the whole [legal science], that is, in the only true and natural relation.<sup>155</sup>

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152. See Krygier, *supra* note 2.

153. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010). See Dan Eggen, *Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing*, WASH. POST (Feb. 17, 2010, 4:38 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html> [<https://perma.cc/YML2-SGNG>]; *Washington Post-ABC News Poll*, WASH. POST (Feb. 4–8, 2010) [https://www.washingtonpost.com/wp-srv/politics/polls/postpoll\\_021010.html](https://www.washingtonpost.com/wp-srv/politics/polls/postpoll_021010.html) [<https://perma.cc/9FHN-4RQD>] (question 35, 80 percent oppose ruling).

154. 2 WEBER, *supra* note 81, at 885.

155. FRIEDRICH CHARLES VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE 64–65 (Abraham Hayward trans., London, Littlewood & Co. Old Bailey 1831).

The latter orientation constantly pulls legal specialists towards satisfying the inner necessities of a coherent body of legal knowledge. Savigny warned, however, that if legal science “veers away” too much from concrete social relations, it “can reach a high degree of formal perfection, but it will nonetheless be devoid of any true reality.”<sup>156</sup>

The emergent phenomenon of systematic legal knowledge constructed by legal specialists attached to the legal system constitutes a filter through which surrounding factors are brought into law in reconstructed form. An essential consequence of this whole is that jurists collectively are committed to perpetuate law’s system as a value in itself—dedicated to the proposition that the integrity of law and legal knowledge are goods worth maintaining. Jurists are the group in society most devoted to this proposition, which significantly contributes to the functioning of law.

When this emergent phenomenon arose cannot be precisely identified, and the answer varies depending on the history of particular legal systems. A pivotal factor was the development of institutions for the creation, preservation, and transmission of legal knowledge. In a sweeping historical survey of Western legal thought extending back more than two millennia, Donald Kelley shows that over many centuries “the language of the law has been preserved—through intellectual habits, professional conventions, technical terms, proverbs, maxims, and the like;”<sup>157</sup> at least since the twelfth century, legal professionals have maintained “its structure and texture, including general categories, time-tested assumptions and ‘maxims,’ standards of judgment, and methods of analysis.”<sup>158</sup> Legal specialists have long monopolized legal knowledge attached to coercive legal systems, at least in the West, which likely will continue far into the future. The monopoly of legal knowledge attached to the official legal system is enduring and resilient.

Legal knowledge is complex and inaccessible for reasons entirely apart from law’s technical system. Social, economic, technological, and political life are increasingly complex, and law is correspondingly complex as it struggles to keep up with surrounding technical complexities that legal officials themselves sometimes have difficulty comprehending. A feature of modern society identified by social theorist Anthony Giddens is the “disembedding” or “lifting out” from local social relations of expert bodies

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156. 9 A TREATISE OF LEGAL PHILOSOPHY AND GENERAL JURISPRUDENCE 208 (Enrico Pattaro ed., 2009).

157. DONALD R. KELLEY, THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION xii–xiii (1990).

158. *Id.* at 11.

of knowledge—including law, medicine, engineering, etc.—which pervasively influence the circumstances of our existence, but which lay people lack the capacity to understand.<sup>159</sup> Legal theorists recognize that technology, medicine, engineering, and other specializations are beyond the ken of the public, yet overlook that the same holds for legal knowledge.

Legal rules do not substantially guide and provide notice to the populace, notwithstanding repeated avowals by legal theorists. “It is . . . the essence of *following* a rule that one is aware of the rule one follows.”<sup>160</sup> Yet it is undeniable that most people do not know the overwhelming bulk of law, and even lawyers do not know much law outside their area of expertise. A centuries old common law maxim is “everyone is presumed to know the law.”<sup>161</sup> Jurists have long acknowledged, however, that this proposition “is on its face absurd.”<sup>162</sup> The justification for the maxim was not factual accuracy, but a prudential government policy that purportedly incentivizes people to know the law and holds them responsible regardless.<sup>163</sup> Legal theorists who categorically assert that legal rules guide the populace in effect implicitly adopt as true a maxim that is known to be a convenient fiction. The actual relationship between law and the populace is otherwise, as I describe later.

#### D. *The Relatively Fixed Legal Fabric*

Contemporary society involves countless millions of actors (natural and artificial) engaged in an incalculable number and range of social, economic, and political interactions. Beneath these interactions in advanced capitalist societies lay a relatively fixed legal fabric. Not intentionally created by anyone, this legal fabric is an emergent phenomenon that gradually coalesced in the past two centuries owing mainly to the aggregate impact of five factors.<sup>164</sup>

The first factor is a monumental change in social action involving the proliferation of organizations extensively using law in their affairs that coincided with rapid demographic expansion, industrialization, and

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159. ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* 21–29 (1990).

160. Marmor, *supra* note 123, at 5.

161. Richard E. Kohler, *Ignorance or Mistake of Law as a Defense in Criminal Cases*, 40 DICK. L. REV. 113, 113 (1935).

162. Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75, 91 (1908). See also Livingston Hall & Selig J. Seligman, *Mistake of Law and Mens Rea*, 8 U. CHI. L. REV. 641, 646 (1941) (“It is easy to show that such a presumption is now indefensible as a statement of fact, even though it may have been substantially true in the very early days of the criminal law.”); Ronald A. Cass, *Ignorance of the Law: A Maxim Reexamined*, 17 WM. & MARY L. REV. 671, 691 (1976).

163. Hall & Seligman, *supra* note 162, at 646–52.

164. This account is a revised version of the argument in TAMANAHA, *supra* note 1, at 118–20, 139–42.

urbanization. We live in “a society of organizations,” “the key phenomenon of our time.”<sup>165</sup> “It is the corporate actors, the organizations that draw their power from persons and employ that power to corporate ends, that are the primary actors in the social structure of modern society,” social theorist James Coleman declared.<sup>166</sup> Organizations engage with law in a variety of ways: they are created by and structured through law; they use contracts with employees, customers, suppliers, and sources of financing; they exercise property rights to acquire, preserve, and transfer assets; tort law and criminal law apply to their actions; corporate law and securities laws govern the operation of private corporations; various regulatory regimes apply to their relations with employees, the products or services they sell, etc.; government organizations wield law to achieve their purposes; and much more.

The second factor is that a huge portion of legal arrangements involve fixed-form contracts. Renting an apartment, taking out a mortgage, hooking up gas and electricity, acquiring a credit card, obtaining a loan, opening a bank account, signing with a phone carrier, downloading a computer program, entering an employment relationship, purchasing goods, attending a sporting event or concert—for these and innumerable other daily transactions, while price can be haggled and quality and quantity decided, the legal arrangement is preset. People bind themselves to form contracts filled with detailed legal language specifying terms and conditions, often without thinking twice about it. These contracts usually cannot be individually tailored through negotiation except by wealthy or powerful parties. Form contracts are ubiquitous because they are cheaper and more efficient to use, and their use reflects the superior bargaining powers of private and public organizations over the parties with which they interact.

The third factor is the multitude of instrumental uses of law by government organizations to achieve social purposes. Layers of laws and regulations address a vast range of activities, setting minimum terms and restricting options. Health regulations impose standards for food and drugs; consumer protection regulations impose warranties and protect purchasers from fraud; safety regulations cover the features and operation of trains, planes, buses, automobiles, and so on; safety and sanitation features are required in homes, rental properties, hotels, and restaurants; labor laws set rules for collective bargaining and employment laws apply to work conditions; workman compensation laws cover injuries suffered at work;

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165. Charles Perrow, *A Society of Organizations*, 20 *THEORY & SOC'Y* 725, 725 (1991).

166. JAMES S. COLEMAN, *POWER AND THE STRUCTURE OF SOCIETY* 49 (1973).

licensing requirements apply to countless occupations; medical insurance, life insurance, vehicle insurance, annuities, pensions, banks accounts and loans, etc., have minimum requirements and restrictions; environmental restrictions apply to pesticide use, particulates released from factories, and so on. The list of legally imposed terms and conditions is endless and constantly added to.

The fourth factor is a combination of the effects of law as a body of specialized knowledge and the tendency within law to settle on, copy, and repeat standard words, phrases, and provisions. This involves the formalization of legal terminology in packets of settled legal meaning.<sup>167</sup> Many legal agreements are cut-and-paste products comprised of previously interpreted and utilized words and phrases. Legal actors repeat technical words and phrases because their implications are relatively known and predictable, and imitation is more cost effective and less risky than drafting entirely new provisions. Standard templates are common in legal offices for transactions, complaints, motions, briefs, and other legal documents. Legal standardization builds on and incorporates generally fixed aspects of background legal rules, like established rules of property, contract, and torts, and incorporates terms and requirements of various sorts legally imposed by government.

The fifth factor is the passage of time (historicism) and the interconnectedness of law within society (holism). Long co-evolution within society renders existing legal doctrines into normalized background aspects of social interaction.<sup>168</sup> Routine affairs build on top of and around laws (though social actors may also ignore law or rearrange their actions to circumvent it). Mortgages, for instance, developed over the course of several centuries in English law via the interaction of evolving common law property doctrines with statutes promoting selected economic interests.<sup>169</sup> Mortgages now occupy a pivotal place in real property financing and can be modified in various respects but cannot be abolished without wreaking economic havoc. The same is true of many other longstanding legal arrangements—in principle completely alterable but in practice not. Resistance to change is not just passive inertia. As Jhering remarked, “In the course of time, the interests of thousands of individuals and of whole classes, have become bound up with the existing principles of law in such a manner that these cannot be done away with, without doing the greatest injury to the former.”<sup>170</sup> Parties who benefit from existing arrangements will

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167. See Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 814, 848–850 (1987).

168. *Id.* at 843–848.

169. See SIMPSON, *supra* note 131.

170. JHERING, *supra* note 77, at 10.

fight to defend them. Law and surrounding social and economic relations thereby become mutually anchored and relatively fixed though lengthy coexistence.

The emergent legal fabric for social, economic, and political interaction has two dimensions: omnipresence and fixity. The *omnipresence* of law is largely the product of the first and third factors. The proliferation of organizations extensively using law has brought a mountainous multiplication of law. Uses of law by government organizations to advance myriad projects in the social arena brings an extensive penetration of law into social and economic affairs. Supplementing these two factors, individuals use law in personal matters outside of interaction with organizations—marriage, divorce, property transactions, wills, trusts, and so forth. As the population increases, the absolute quantity of law grows. Multiple factors contribute to the *fixity* of the fabric: the ubiquity of repeated standardized form contracts; government regulations once in place are hard to dislodge; systematic elements of legal knowledge as a whole and the tendency within law to copy and repeat; and the passage of time and interconnectedness of law within society. This fixity is only relatively so because aspects of the legal fabric are constantly changing to reflect new surrounding developments and battles among competing interests to use law for their purposes. These modifying influences enter through political mechanisms (legislative, regulatory, executive orders, municipal orders, etc.), through court decisions altering law, and through the work of jurists adjusting law to meet new circumstances or effectuate legal change. At any given moment, however, the bulk of the fabric remains a stable backdrop for life in advanced capitalist societies. The emergent legal fabric is integral to and interacts continuously with its environment.

Law was not pervasive in society two centuries ago. On the demand side, there were vastly fewer organizations using law, vastly fewer instrumental uses of law by governments, and vastly fewer people. On the supply side, state legal institutions lacked the capabilities necessary to provide large volumes of law with extensive reach. Not until effective bureaucratic legal organizations had developed and multiplied in number—as part of the rise of bureaucratic organizations more generally—could legal mechanisms be utilized so extensively. The legal fabric is not the result of law in isolation, it must be emphasized, but of modern social developments, in particular the rationalization and explosion of organizations as vehicles of coordinated social action.

The relatively fixed legal fabric in advanced capitalist societies is an emergent phenomenon never before present. Taken as a whole, the legal

fabric enables and constrains an unfathomable range and number of interactions in society by supplying an assurance that law stands ready to be called on should something go wrong. Karl Llewellyn captured this in a comment about contracts:

[T]he major importance of legal contract is to provide a frame-work for well-nigh every type of group organization and for well-nigh every type of passing or permanent relations between individuals and groups, up to and including states—a frame-work highly adjustable, a frame-work which almost never accurately indicates real working relations, but which affords a rough indication around which such relations vary, an occasional guide in cases of doubt, and a norm of ultimate appeal when the relations cease in fact to work.<sup>171</sup>

His comment applies beyond contracts to the entire legal-regulatory realm. The assurance provided by the legal fabric holds even when, as often occurs, people have incorrect intuitions about law or they do not in fact resort to law when problems arise. Implicit trust owing to the presence of the legal fabric underwrites life in advanced capitalist societies.

The legal fabric is an emergent infrastructure constructed through legal mechanisms that supports social, economic, and political dynamics in modern societies—a type of social connectivity—much like modern cities rely on physical infrastructures of roads, electricity grids, water lines, mass transit, waste disposal, and so forth.<sup>172</sup> And akin to other forms of social connectivity, the legal fabric is pervasively interconnected with and interdependent on cultural, economic, political, and all other aspects of society.<sup>173</sup>

### *E. A Rule of Law Society*

Theoretical discussions of the rule of law span a range of literatures, from legal theory,<sup>174</sup> to political science,<sup>175</sup> to development theory and practice.<sup>176</sup> At the core of debates over what the rule of law entails is an idea articulated by Friedrich Hayek seven decades ago.

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171. Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 *YALE L.J.* 704, 736–37 (1931).

172. Studies have found that the number of lawyers scales in relation to other social-economic and physical factors. See WEST, *supra* note 3, at 370–78.

173. *Id.* at 412.

174. See BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* (2004).

175. See Gillian K. Hadfield & Barry R. Weingast, *Microfoundations of the Rule of Law*, 17 *ANN. REV. POL. SCI.* 21 (2014).

176. See Mark Brown, “An Unqualified Human Good”? *On Rule of Law, Globalization, and Imperialism*, *LAW & SOC. INQUIRY* (May 19, 2017), <http://onlinelibrary.wiley.com/doi/10.1111/lsi.12302/full> [https://perma.cc/6RJN-DCTP].

Stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.<sup>177</sup>

Following Hayek, Joseph Raz identified the “the basic intuition” underlying the rule of law that “[the law] must be capable of guiding the behaviour of its subjects.”<sup>178</sup> This requires that law be prospective, general, clear, public, and relatively stable. This also requires mechanisms necessary to effectuate legal rules: an independent judiciary, open and fair hearings without bias, review of legislative and administrative officials, and limitations on the discretion of police to insure conformity to law.

Many accounts of the rule of law center on the common theoretical claim that law provides the populace notice of rules governing their conduct. However, if many lay people do not actually know the law because of legal complexity, the proliferation of law, and the obscurity of legal knowledge and practices, as I argued earlier, it is implausible to explain the rule of law in these terms.

The rule of law is not only a topic of interest to theorists. Billions of dollars have been expended in recent decades to develop the rule of law in societies that suffer from its absence, with little evident success.<sup>179</sup> The World Bank's 2017 World Development Report, “Governance and the Law,” reaffirms the signal importance of law to society, while acknowledging that intransigent difficulties stymie efforts to develop the rule of law.<sup>180</sup> The rule of law does not follow from judicial training programs or training police, from writing codes and regulations, from computerizing court systems, from training more lawyers, or any other common development approaches.<sup>181</sup> Nor does the rule of law appear to consist of a necessary set of institutional arrangements. The United States has judicial review though the United Kingdom does not, for example, and the United States has many more lawyers per capita than Japan, while all three are considered rule of law countries. The enigma is how to build the rule of law in a society that lacks it.

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177. F.A. HAYEK, *THE ROAD TO SERFDOM* 75–76 (Routledge Classics 2001) (1944).

178. JOSEPH RAZ, *THE AUTHORITY OF LAW* 214 (2d ed. 2009).

179. See Brown, *supra* note 176, at 2.

180. THE WORLD BANK, *WORLD DEVELOPMENT REPORT 2017: GOVERNANCE AND THE LAW* (2017).

181. See Brian Z. Tamanaha, *The Primacy of Society and the Failures of Law and Development*, 44 *CORNELL INT'L L.J.* 209 (2011).

Put in the simplest terms, the rule of law exists in societies in which the populace and government officials largely act consistent with the law. The rule of law today amounts to a society under law. The rule of law society as an emergent phenomenon is not about the legal system itself, but law and society together. The evolution that led to its emergence transpired over millennia building on the first three emergent phenomena identified earlier and coinciding with the fourth. The very existence of the rule of law helps perpetuate the attitudes and institutions necessary to produce the rule of law. This comprises a loop of reciprocal causation in which individuals and their legally bound interactions produce a society under law, which encourages legally bound behavior of individuals and their interactions, which produces a society under law—with the lower-level actions and higher-level whole forming a mutually perpetuating relationship (though it can break down). With law and society developing in unison over time, this virtuous loop was not consciously created and cannot be intentionally duplicated when the emergent whole does not exist.

A major plank of the rule of law society is in place from the outset. Individuals already generally act consistent with fundamental legal rules of social intercourse, for these rules are *socially* perpetuated through collectively shared actions, moral views, and cultural understandings (though violators and disputes inevitably arise). It does not matter that the details of official law are obscure to most people. If law generally comports in outcome with their moral views and intuitions about law, the populace acts consistent with law, although they are not actually guided by publicly declared law. Most people do not commit murder because they find it repugnant, not because the law punishes it. A general correspondence between intuitions about law held by the populace on fundamental rules of intercourse is what allows legal theorists (Hart, Hayek, Raz, and many others) to repeat that publicly declared law provides notice to the populace, though this is inaccurate. Law is not actually guiding behavior, but instead generally matches behavior.

The hard part of the rule of law lies in two contexts outside the fundamental rules of social intercourse. The first is securing compliance of the populace with government legal dictates (taxes, conscription, safety standards, etc.). In addition to having a shared cultural orientation that people should be law-abiding, this can be obtained by a credible looming threat of coercive legal sanctions (though not in the face of sustained mass resistance). The second is securing adherence to law by government officials in their conduct toward the populace. The apparent dilemma this poses is that it cannot be maintained by force because government officials themselves wield legal coercion. This conundrum is behind Hobbes's

objection that the rule of law is illogical, for “he that is bound to himself only, is not bound.”<sup>182</sup>

A sophisticated account of the development of the rule of law was provided by Douglass North, John Wallis, and Barry Weingast. The crucial first step, according to their account, is that elites find it in their mutual self-interest to subject themselves to an order of impersonally administered legal rules as a means to dampen intra-elite fighting, allowing them to focus on maximizing their economic return. “The ability of elites to organize cooperative behavior under the aegis of the state enhances the elite return from society’s productive resources—land, labor, capital, and organizations.”<sup>183</sup> The authors call this “rule of law for elites.”<sup>184</sup> Elites converted their privileges into rights enforced by legal institutions that guaranteed their ability to engage in open economic and political competition.<sup>185</sup> The rule of law extended to society at large in mid-nineteenth-century Britain and America, they assert, when it became possible for people to freely create and participate in “perpetually lived organizations” for economic purposes (through general incorporation laws) and political purposes (through open public offices and political parties) operating through and governed under impersonal legal rules.<sup>186</sup>

Their illuminating account recognizes the significance of the rise of organizations for the rule of law. But it misses fundamental aspects of law, and of society, which have been essential in the development of the rule of law society. A key factor giving rise to the rule of law was a centuries-old shared cultural view that everyone, including rulers, operated within a pre-existing legal order. In Medieval Europe, rulers were seen as subject to customary law, natural law, and ecclesiastical law, a shared understanding expressed in coronation oaths. “These ceremonies, controlled and performed by the Church hierarchy, incorporated the secular Germanic idea that the king’s chief duty was to be guardian of the community’s law; in all the rituals the king promised to perform this duty faithfully.”<sup>187</sup> Pepin said, “Inasmuch as we shall observe law toward everybody, we wish everybody to observe it toward us;” Charles the Bold swore, “I shall keep the law and justice;” Louis the Stammerer asserted “I shall keep the customs and the

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182. THOMAS HOBBS, *LEVIATHAN* 207 (Michael Oakeshott ed., Simon & Schuster 2008).

183. DOUGLASS C. NORTH ET AL., *VIOLENCE AND SOCIAL ORDERS: A CONCEPTUAL FRAMEWORK FOR INTERPRETING RECORDED HUMAN HISTORY* 20 (2009).

184. *Id.* at 26.

185. *Id.* at 256.

186. *Id.* at 26–27, 148–250, 254–55.

187. John B. Morrall, *Political Thought in Medieval Times* (1980) 24.

laws of the nation.”<sup>188</sup> Louis XIV stated in an ordinance in 1667, “Let it be not said that the sovereign is not subjected to the laws of his State; the contrary proposition is a truth of natural law...; what brings perfect felicity to a kingdom is the fact that the king is obeyed by his subjects and that he himself obeys the law.”<sup>189</sup> The general expectation that rulers are accountable to law like everyone else provided a deeply rooted cultural foundation for the rule of law.

The authors extensively discuss the evolution of property rights as pivotal to elite interests,<sup>190</sup> while depicting this evolution in passive terms—“the land law changed”<sup>191</sup>—with no attention to the impact of legal specialists and systematic legal knowledge. Property rights evolved in response to political and economic demands, to be sure, but excruciatingly slowly and within constraints of established procedures and concepts of the common law tradition maintained by jurists deriving income therefrom.<sup>192</sup> Law existed as a body of specialized knowledge with its own internal imperatives and consequences. Absent widespread belief among legal specialists that law genuinely exists apart from political and economic clashes (never mind regular deviations from this ideal)—without their commitment to maintain law’s system—there would have been no impersonal law to which elites could submit themselves. To function as impersonal law, individuals who staffed legal positions, judges in particular (who were societal elites as well), must have been steeped in and oriented to carrying out the law. Necessary for the rule of law is the presence of an entrenched tradition of specialists monopolizing legal knowledge (the third emergent phenomenon). Their account thus presupposes, without explaining, an essential condition for the emergence of the rule of law.<sup>193</sup>

North, Wallis, and Weingast also miss several social developments significant in the emergence of rule of law societies. They correctly emphasize that the ability to easily create and enter public and private organizations are central to democratic capitalist societies. For the rule of law specifically, however, the more salient point is that public and private organizations use law in nearly all aspects of their existence and interaction, so the profusion of law-using organizations brought a profusion of law

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188. Andre Tunc, “The Royal Will and the Rule of Law,” in ARTHUR E. SUTHERLAND, *GOVERNMENT UNDER LAW* 404 (1956).

189. *Id.* p. 408.

190. North et al., *supra* note 183, at 77–104.

191. *Id.* at 91.

192. For a superb history that shows the interaction between the common law of property and surrounding interests, see SIMPSON, *supra* note 131.

193. Chapter 3 presents a lengthy account of the development of English property law without discussing the legal specialists who produced these changes and carried out the law, a serious omission for an account that purports to explain of the establishment of the rule of law. NORTH ET AL., *supra* note 183, at 77–109.

throughout society. Legal relations thereby thoroughly penetrated economic, political, and cultural arenas, flowing through and beneath all manner of public and private interaction. Everyone came implicitly to rely on the legal order in their myriad interactions with other individuals and organizations, rendering law a normalized background of social interaction (the fourth emergent phenomenon). The ubiquitous permeation of law within society has been a pivotal factor that coincided with and gave rise to the rule of law society.

Another essential social development during the rise of organizations was the enhancement of bureaucratic rationality within organizations, which likewise took place in legal organizations, and the subsequent distribution of legal institutions and legal specialists across social arenas. Well into the nineteenth century, courts, prosecutors, and other government officials derived income from payments by private parties for public services; this practice was gradually abolished, replaced with regular salaries tied to offices.<sup>194</sup> Legal institutions became widely disbursed, spread across law schools rapidly increasing in number (from the final quarter of the nineteenth century), across a multitude of lawmaking, judicial, and prosecutorial offices at various levels and types (municipal, state, federal, agencies, etc.), and across private attorneys working solo, in firms, in government agencies, and as legal advisors within private business corporations. This disbursed proliferation resulted in the absence of central control for legal institutions. The solution to Hobbes' objection—that a sovereign bound to itself is not bound—is that no singular sovereign creates and enforces law. A multitude of diffuse institutionalized locations of law—staffed by legal specialists committed to law—in the aggregate hold government officials accountable to law.

Finally, lengthy co-evolution entrenches the penetration of law throughout society.<sup>195</sup> The interconnectedness of law within society yokes them together from both directions over time. Law interacts with and changes in relation to surrounding cultural, social, economic, political, and technological forces and competing social interests; these surrounding forces and interests build on, react to (avoiding or conforming), and intertwine their activities with law. The longer law and society have evolved together, the more thoroughly imbricated they become, in the aggregate constituting a rule of law society.

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194. See NICHOLAS R. PARILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940* 1 (2013).

195. North, Wallis, and Weingast describe law in evolving terms, without specifically identifying how this matters. NORTH ET AL., *supra* note 183.

Rule of law societies are emergent wholes of relatively recent vintage, by this account, congealing into existence in decades spanning the turn of the twentieth century. Various aspects and manifestations of the rule of law go back millennia, but the existence of a *rule of law society* required social transformations that occurred with the rise of organizations in mass societies. It came about concomitant with the establishment of the fixed legal fabric. Though they emerged together in advanced capitalist societies, a rule of law society is not identical with the legal fabric. A legal fabric can exist alongside an authoritarian ruling polity that does not operate subject to legal constraints.

Societies that lack the rule of law did not undergo the same evolutionary sequence as rule of law societies, needless to say, and each took its own uniquely different path. There are many possible barriers impeding the development of the rule of law, but five quick generalizations can be gleaned from this analysis. First, the fundamental rules of social intercourse in many of these societies are based on traditional customary and religious systems, while significant elements of their state legal systems have been transplanted through colonial imposition or voluntary borrowing. Consequently, a large schism exists in which a significant percentage of the population (in some places up to ninety percent)<sup>196</sup> use a body of fundamental legal rules of social intercourse that diverge from state law. The general correspondence between fundamental rules and state-enforced law that rule of law societies take for granted does not exist. Second, much of the body of legal knowledge has been transplanted from elsewhere, its content built within the society of origin, and, therefore, it did not co-evolve for a lengthy period within the recipient society. Though time has passed since initial transplantation, this has served to entrench the schism and the complex of actions in response to it by settlers and indigenous actors. Third, they lack robust traditions of legal knowledge maintained by legal specialists. Fourth, they lack the ubiquity of bureaucratic organizations extensively using law and pervasive instrumental uses of law by government, so law is not a background aspect of society, and legal institutions and legal specialists are not widely distributed and decentralized. Finally, they lack a longstanding and broadly shared cultural expectation that everyone, rulers included, are bound by and must act consistent with state law (though this orientation often exists toward customary and religious law).

As a result of these five factors, state law is only partially interconnected within society; it lacks deep social roots and supportive cultural attitudes; it

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196. See Leila Chirayath et al., *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems* 3 (World Bank, Paper No. 33655, July 2005).

suffers from a shortage of legal specialists committed to upholding law across a multitude of social, legal, economic, and political settings; and it cannot consistently hold government officials legally accountable. These entrenched aspects are the products of initial conditions and historical developments which resulted in present conditions and path-dependent dynamics that will not be erased. If the rule of law is to develop in these societies, they must evolve entirely novel arrangements built on their unique circumstances.

### CONCLUSION

Let me close with a few words about why legal theorists should give greater attention to naturalism, historicism, and holism. A prominent legal philosopher recently claimed to produce a theory of law true for alien civilizations,<sup>197</sup> while another invoked a society of angels to analyze the features of law,<sup>198</sup> both undeterred by the fact that they know nothing about aliens or angels beyond what is supplied by their imaginations. Economic efforts to explain law typically posit independent, mutually indifferent, self-interested rational actors engaging in transactions, building up law therefrom, never mind that this scenario strips away much of what gives rise to legal orders. The naturalistic discussions in this essay show that, to understand what generates and gives shape to law, one must attend to its roots in natural human traits and life in social groups. What historicism emphasizes is that law has undergone profound changes over time in connection with the evolution of human societies. This runs contrary to claims by prominent contemporary analytical jurists that they have identified necessary features of law for all times and places.<sup>199</sup> Finally, the lesson of holism is that law cannot be reduced to a set of features distinct and apart from surrounding social influences because they course through its every pore and are integral aspects of law. Holism is antithetical to legal philosophers who assert, like Joseph Raz:

Since a legal theory must be true of all legal systems the identifying features by which it characterizes them must of necessity be very general and abstract. It must disregard those functions which some legal systems fulfil in some societies because of the special social,

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197. See SHAPIRO, *supra* note 54, at 406–07 n.16.

198. See Leslie Green, *The Forces of Law: Duty, Coercion, and Power*, 29 *RATIO JURIS* 164, 165 (2016).

199. See, e.g., JOSEPH RAZ, *BETWEEN AUTHORITY AND INTERPRETATION* 91 (2009). For a critique of this position, see TAMANHA, *supra* note 1, at 57.

economic, or cultural conditions of those societies.<sup>200</sup>

Against this position, holism holds that law cannot be abstracted from or understood without attention to surrounding social, economic, cultural, political, technological and ecological conditions. All five of the emergent phenomena addressed in this essay involve changing configurations of law within society from the beginning of human history to the present. Any theory of law not informed by naturalism, historicism, and holism inevitably will be inadequate.

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200. RAZ, *supra* note 178, at 104.