LAW AS REFERENT

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> Do you think that regimes somehow come into being "from oak or stone"? Isn't it rather from the characters of people in the city…?
> Socrates
> Plato, *Republic*, 544D[1]

1.

A. Introduction

The question, 'what is law?,' has intrigued scholars of both jurisprudence and philosophy for centuries, and, most recently, it has caused a few theorists to throw up their proverbial hands in despair and suggest that "law" is merely a subjective concept.[2] In this paper I will challenge this idea and I will also argue that "law" has an objective dimension to it. In making these assertions I will draw from sources ancient and new so as to try and convince the reader that we can know what "law" implies at its core.

My argument will be best understood by those who strive to achieve a degree of Lockean *tubula rasa*, which assists one in wiping their pre-programmed characterizations of law off the proverbial slate of their mind. To the degree that this is possible, I propose the following portrayal of law will be both borne out by the evidence, and functionally useful in the critical analysis of laws.

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[1] Benjamin Jowett translates this section: Do you know, I said, that governments vary as the dispositions of men vary, and that there must be as many of the one as there are of the other? For we cannot suppose that States are made of 'oak and rock,' and not out of the human natures which are in them, and which in a figure turn the scale and draw other things after them? Plato, *The Republic by Plato*, trans. Benjamin Jowett (New York: P. F. Collier & Son, The Colonial Press, 1901).

[2] Vide infra.

I also ask the reader to bear in mind the fact that the definition of the word "law" in modern Western society has largely been taken over by the sciences, and to a lesser degree, religion. The laws of thermodynamics and of gravity are just two examples of what science has insisted we accept as persistently true states of affairs. No reasonable person could argue against such a claim; but what about constitutional law, statute law, and common law? Is there any way, in light of history, that we could claim for these laws the same status as the aforementioned? Alternatively, and admittedly to a lesser degree, do religious people such as Jews and Christians regard the ten commandments and the golden rule as laws which are constantly in a state of flux? The answer to these two questions would usually be an emphatic "no." While science and religion, historically often set at odds against each other, have certain "laws" which are not subject to debate in regards to their general veracity, the very nature of something like common law is change and growth, and both constitutional and statute laws are constantly being updated, revised, and struck down. This means that it would be foolhardy to insist that, for instance, constitutional laws regarding free speech and privacy are just as fixed as the laws of thermodynamics. It is because of this and the very real possibility of semantic tangles surrounding the word "law" that I invite the reader to think of law in two distinctly separate ways.

In this article, I suggest that "the Law," (hereinafter the LAW) can be most functionally understood as a conglomeration of referent ideals which emanate from the minds of law creators, and are the source of what we regularly understand as laws. I separate from the concept of the LAW the usual suspects of constitutions, codes, acts, and charters, etc. I separate these from their inceptional ideals and suggest we ascribe a label to these familiar kinds of categories such as "lower order laws," being careful to confine our discussions of them with the exclusive use of a small "l" (law), whenever grammatically possible. To make this separation clearer, I have chosen to use the word "referent" to represent the higher order LAW which the lower order laws all refer to in one way or another. By naming ideals "referents" there is a constant reminder to the reader that laws are ontologically inseparable from the ideals to which they refer. The laws, then, are referrers of a sort. In other words, they refer to something, and that something is the referent ideals which first existed in the minds of those responsible for the creation of laws. These referents, the LAW, also have an ongoing existence by the very fact of the various laws' continued use. The fact that law creators may be long dead or have changed their views does not change the fact that those initial referents still exist as the bases for any particular law in question.

To summarize, the LAW, a number of referent ideals, turns out to be the basis for our lower order laws that we experience in every day life: all the way from the parking ticket to the judgments of the Supreme Court. The LAW, the referents, though, is not something we "experience" as a rule: in one sense they are hidden from view, hardly cognizable to even—and perhaps especially—those who run afoul of the sometimes bludgeoning tendencies of the laws of a modern state. So, because we experience the multitude of written laws in our activities within society generally, many have been wont to wrap the whole lot of them up in one package and call these the law. This research, however, rejects this oversimplification in order to be as clear as possible about what laws are, and how they speak to what the LAW really is. One of the reasons I have chosen to split the idea of law in this way is because while laws are consistently in a state of flux – they are being altered via common law growth; they are being struck down; they are being subjected to legislative revision – the referent ideals are *stable* so long as the referrer laws exist in some form or another. The reason the instability of the laws does not affect the stability of referents, in most cases, is that for every referent ideal, say "the inviolableness of human life," there are a vast number of laws which draw from that one ideal. In order for the referent to lose stability, whole bodies of law would need to be struck down in order to escape the obvious connections they have to the ideal.

Characterizing the LAW as referent, then, does primarily two things: first, the word "referent" reminds us that laws are not independent entities which can vouchsafe their own validity or efficacy; rather, they are merely dependent variables which are in a dependent relationship with a higher order referent or ideal. Second, by separating the LAW from laws we are attributing the phrase "the LAW" only to those referent/ideals that are relatively stable and identifiable over very long periods of time. At the same time, we are still able to talk about this or that *law* without entirely losing the age old nomenclature of Western legal cultures that gives us the word "law" itself. In a connected, third way, this theory proposes a reasonable way to be able to talk about the LAW, without getting lost in the morass of those many societal variables which lay claim to owning a stake in the term. All ostensible stakeholders realize that over-inclusiveness is unsatisfactory because too much of society would then be placed under law's purview. At the same time, narrowing the idea too much, which would leave various stakeholders in the dark, is thought to be disingenuous because there are many societal entities which are legitimately either law-like or law-related. LAW as referent, as a theory, allows all relevant stakeholders to employ the concepts of "a law" or "laws" to describe their phenomena, but it separates "the LAW" to mean only those referent ideals which first arise in the human mind and then serve as the basis for laws.

Before beginning the main discussion, it is important that the reader understand a fundamental assumption that runs through this theory. Put simply, it is a hard fact that societies are older than the legal provisions which grow up in them.[3] If there was a societal order previous to the establishment of laws, courts, and states, this order must have been based on something. I agree with sociologist Eugen Ehrlich and anthropologist Bronislaw Malinowski that such order emerged from the self-regulation of the society itself. Societies did, and continue to, appeal to the efficacy of written legal provisions, but in historical perspective, we find this appeal only as an afterthought:[4] Hence, written laws always follow the norms which precede them.[5] Can you think of one instance where the written law preceded its practice's normative use? If you cannot, then you already assent to a fundamental axiom of my thesis: that what I suggest is the LAW had, and continues to have, an existence apart from written laws. My argument for the theory of LAW as referent puts the emphasis on a particular source which gives rise to societal norms and, eventually, laws. Ontologically, this source is best and most simply understood as the referent ideals arising in the minds of those who create laws. When people create laws, they are drawing on referential ideals.

B. The Project of Defining Law

Brian Tamanaha has noted that the question, 'what is law' has been answered with reference to three general categories: law as order, state based law, and law as justice.[6] My definition of LAW as referent will draw on 'law as order' insofar as such order means the implicit creation of laws based on referent ideals in the human mind. Tamanaha asserts that instead of trying to give a definition of law, one should rather try to identify and assess the characteristics of phenomena which are thought of as law.[7] He sees two benefits to this approach, one being that we can jettison the search for a definition because in his estimation one does not exist;[8] and second, that this new orientation will mean better congruence between theory and contemporary legal forms.[9] This approach,

3 Eugen Ehrlich, "The Sociology of Law," *Harvard Law Review* 36.2 (1922): 132. "…is a legal system imaginable which consists of nothing other than the Social Order? This question must be answered in the affirmative if only for the reason that society is older than Legal Provisions and must have had some kind of ordering before Legal Provisions came into existence." See also page 139, "The state is older than state law."

4 Ibid., 139. I borrow this idea of afterthought from Ehrlich. *videre infra.*

5 Ibid., 133.

6 Tamanaha, Brian Z., Law. ; St. John's Legal Studies Research Paper No. 08-0095. Available at SSRN: http://ssrn.com/abstract=1082436, 6-11.

7 Tamanaha, *Law*, 14.

8 Ibid.

9 Ibid., 15.

however, is not new. Richard Wollheim wrote a piece on the nature of law in 1954 in which he postulated that we should study three possible lines of inquiry on this subject: (1) seeking a definition of law, (2) asking, 'what is the criterion of validity of law?', and (3) asking, 'what is the criterion of validity of any system of law?', he thought the third question was the most in need of some form of answer and should fall under the rubric of General Jurisprudence.[10] Tamanaha seems to be recommending a similar design when he writes: "[a] concept that examines, and abstracts from, contemporary state legal forms, should devise a set of characteristics that matches the reality."[11] Tamanaha's overall thesis is both particular and prescriptive, and he advises us to shift the focus away from the traditional models of the definition of law per se, and instead attempt only to define the particular and general phenomena understood as law.[12]

Unlike Tamanaha's prescription, my theory portrays a broad view of the law, and my suggestions are not confined to particular legal systems. The trajectory of LAW as referent is more akin to what jurisprudence scholar M.D.A. Freeman has written on this question.

> …we may concede that we can only adequately understand our concepts [law] by seeing how they function in a particular linguistic or logical framework, but this does not necessarily condemn general definitions as worthless, for though in complex matters they cannot afford complete explanations in themselves, they may help, in the light of the functional exposition, to provide an overall picture and to emphasize certain key criteria.[13]

In explicating a theory of LAW as referent, I will be providing a type of overall picture which emphasizes what I see as a key criterion, the referent ideals, and thus I hope to make clearer the phenomenological and ontological underpinnings of laws in general. In addition to Malinowski and Ehrlich, I will also be offering support for my theory using Peter L. Berger and Thomas Luckmann's idea of a socially constructed reality.[14] In sum, I will demonstrate how LAW as referent is a theory supported by sociological and anthropological

[10] Wollheim, Richard, "The Nature of Law," *Political Studies* 2.2 (1954): 128-141.
[11] Tamanaha, Law, 15.
[12] Ibid., 14.
[13] M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence*, Seventh Edition (London: Sweet & Maxwell, 2001), 42-43.
[14] Peter L. Berger and Thomas Luckmann, The Social Construction of Reality: A Treatise in the Sociology of Knowledge (Garden City, N.Y. : Doubleday, 1966); Peter L. Berger, The Sacred Canopy: Elements of a Sociological Theory of Religion (Garden City, New York: Doubleday, 1967).

theories on law, and I will also show how this research is distinct from other related characterizations of law posited by Robert Cover, Ronald Dworkin, and Lon L. Fuller.

C. Basic Outline for LAW as Referent

In reference to laws made by humans for humans, the LAW is a set of referent ideals that exist in the mind of the human lawmaker. The LAW *is* the referent, and laws are the referrers to that or those ideals. In an Edenic world, a perfect world, ideals would be our only experience, because everything would be perfect, but as it is, laws are employed in an effort to bridge the gulf between the problems created by imperfect human interaction, and the ideals which, although seemingly unattainable, continue to remain as the basis for those laws. Written laws, in one sense, then, are an obvious indication of what we are not experiencing but still aim at; in the reflection of these laws is found the essence of an ideal that is not the case. These ideals, regardless of their moral content, are "the LAW." But how can we get from the laws to the ideals; to the LAW behind the laws? I suggest such an inferential process is rather straight forward, while perhaps, like anything else, not a process offering infallibility.

Par exemple, a law against speeding is a direct result of what is not the case in our experiences, the ideal that "all drivers will obey the posted limits," or perhaps, put simpler, "obedient drivers." These idyllic drivers do not conform to human experience, but they are the referent ideal and as such are part of the LAW which gives rise to traffic laws. What we experience—a plurality of speeds driven by imperfect drivers—is the key variable found in the causal nexus between the ideal and the necessary law. Of course, there are other referents/ideals attached to such traffic laws, but it is primarily important at this point to understand the *dependent* relationship between the referent-ideal and the referrer-law. Ontologically, then, the LAW is necessarily indicative of an ideal that is not the case in our daily experiences. While laws appear to be concerned with what *is*, a speeding driver, they are actually a consequence of the LAW's essence, what *is not*, an obedient driver.[15]

As alluded to above, it is also clear that other referents exist here, at the very least that of the "sanctity of human life" or the "inviolableness of human life." The LAW, the referent, as I characterize it withal, is not limited to a one for one relationship with a given law, it may also be the ideal associated with the

[15] The "obedient driver" is defined in the context in which the lawmaker lives and breathes, a world already subject to some kind of ordering, it could not happen any other way, for obvious reasons. I suggest readers keep in mind that an ideal need not be fancifully abstract, they always arise in the human mind in a context with at least two or more people, hence a society.

creation of many laws. The key to understanding LAW as referent is to appreciate the dependent relationship between laws and those referent ideals they are referring to.

D. The Is/Ought Distinction and LAW as Referent

Positivist legal theorists such as John Austin,[16] Oliver Wendell Holmes,[17] and H.L.A. Hart[18] have put the definition about law primarily in terms of what *is*, whether it be a decree, a judgment, a piece of legislation, or a legal system itself. Natural law theorists such as Augustine and Aquinas,[19] and more recently, Lon L. Fuller[20] and John Finnis,[21] define the law in terms of what *ought* to be, and their perspectives can be associated with Augustine's maxim "an unjust law is not a law."[22] But here, at these crossroads of these two perspectives, many aspects of law are conflated or overlooked in the assimilative and interpretive process. The bottom line for both ends of the theoretical spectrum is that there is neither a stable meaning for "what is" nor for "what ought to be." Take first the claim that law is what *is* as opposed to what it *ought* to be. What this meant for the earlier positivists such as Austin and Holmes is that laws, plural, are the

[16] John Austin, *The Province of Jurisprudence Determined* (London: John Murray, Albemarle Street, 1832).

[17] O.W. Holmes, "The Path of the Law," *Collected Legal Papers* ed. Harold J. Laski (New York: Harcourt, Brace, and Howe, 1920).

[18] H.L.A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71.4 (1958): 593-629; H.L.A. Hart *The Concept of Law* (Oxford: Clarendon Press, 1961; 1994); H.L.A. Hart, "The Morality of Law," Book Review, *Harvard Law Review* 78 (1964-1965): 1281-1296.

[19] St. Thomas Aquinas. *Summa Theologica*, 5 vols., trans. Fathers of the English Dominican Province (Westminster, Maryland: Christian Classics, 1911; 1920; 1948; 1981).

[20] Lon L Fuller, *The Law in Quest of Itself* (Chicago: The Foundation Press, 1940); Lon L Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart," *Harvard Law Review* 71.4 (1958): 630-672; Lon L Fuller, *The Morality of Law* (New Haven and London: Yale University Press, 1964); Lon L Fuller, *The Principles of Social Order*, ed. Kenneth I. Winston (Durham, N.C.: Duke University Press, 1981).

[21] John Finnis, ed., *Natural Law* (New York, NY : New York University Press, 1991).

[22] Augustine, St. *The Free Choice of the Will (De libero arbitrio)*, trans. Robert P. Russell, *The Fathers of the Church: A New Translation*, vol. 59, eds. Roy Joseph Deferrari et al. (Washington: The Catholic University of America Press, 1968), 1.5.11, 81. In context the quote is spoken by Augustine to his interlocutor Evodius, and reads: "Then the law is not just which gives a traveler the right to kill a robber to avoid being killed himself, or the right to any man or woman to destroy, if they can, an assailant about to attack with violence before the injury is inflicted. Soldiers, too, are commanded by law to kill the enemy, and if a soldier refrains from doing this, he is punished by the commander. Can we be rash enough to assert that these laws are unjust, or rather that they are no laws at all? For an unjust law, it seems to me, is no law." ; Aquinas, St. Thomas, *Summa Theologica*, vol. 2 of 5, trans. Fathers of the English Dominican Province (Westminster, Maryland: Christian Classics, 1911; 1920; 1948; 1981), Qu. xcv, Art. 2. "I answer that, As Augustine says (De Lib. Arb. i.5), that which is not just seems to be no law at all: wherefore the force of a law depends on the extent of its justice."

law because they are promulgated by the sovereign/state/courts and cognizable in human experience. Furthermore, their strictures also have to have force attached to their regulated employment. Here they are putting the cart before the horse. Laws and their purposes do not come into existence spontaneously, nor do they exist independently. The LAW, however, as I have described it, exists independently of those laws in a loosely analogous way to a horse existing independently of its cart. The horse-cart would have no meaning without the horse, as the laws would mean nothing without the LAW or the referents giving meaning to the lower order laws. As mentioned above, This analogy highlights the dependent relationship between laws and their referent ideals.

Hart, in the twentieth century, claimed that coercive power was not the necessary condition, but instead those fundamental accepted rules delineating the lawmaking procedures.[23] Whatever the weaknesses of early positivist accounts, Hart still claimed that the utilitarian distinction between existing law and any possible merits had survived.[24] Hart also explicitly admitted that the conventional morality of particular groups have profoundly influenced the creation and content of their law.[25] His caution is that this truth can sometimes be confused with another proposition which he saw as unhelpful; namely, that a legal system always conforms to morality, or that there is a moral obligation to obey it. Therefore, the criteria for legal validity are not necessarily or intrinsically related to morality or justice.[26] Here I agree with Hart, but his key points were first, and initially, that law and morality are best kept separate; and second, he aimed at a grand theory of law which spelled out the criteria for a legal system. LAW as referent, on the other hand, posits that law and morality are fundamentally connected because of the law creation process involving referents. Further, LAW as referent is not concerned with a legal system's *criteria*; rather, it is pointedly a descriptive theory of law, not a prescriptive one. Whether a legal system met Hart's criteria leaves alone the examination of laws and their referent ideals. Lon L. Fuller, Hart's theoretical disputant and natural law opponent, differed from Hart in that he saw the socio-historical setting and conventional morality which gave rise to laws as deeply connected to a law's meaning and/or a legal system's validity. I will contrast Fuller's ideas with my own more thoroughly below.

Now, a brief consideration of law as it *ought* to be. This somewhat nebulous claim has been the favorite apophthegm of natural law theorists. On its surface, one might suppose that, at least grammatically, something that ought to be is in

[23] Hart, Separation of Law and Morals, 603. Fuller, Positivism and Fidelity to Law, 639.
[24] Hart, Separation of Law and Morals, 606.
[25] Hart, *Concept of Law*, 185.
[26] Ibid.

fact not yet in existence: as in, "there ought to be a law dealing with the adaptation of horse-carts to mules because the shafts and traces keep breaking." Here it sounds as if there is no law when there should be one. Although if I showed you a horse-cart with a four-year-old American Quarter Horse whose breast collar harness was secured properly, I could also say that this is the way a harness *ought* to be fitted properly. In this second sense, can laws actually be what they *ought* to be, as those such as Augustine, Aquinas, and the rest of the natural law theorists have claimed?

Are the laws against speeding drafted in the way they ought to be? In one sense they are because the sufficient conditions for their employment—speeding drivers—is borne out daily in the era of the automobile.[27] While sufficient, are these conditions necessary or intrinsic to the human condition such that we can claim with confidence that they ought, unquestionably, to exist? Of course, we can think of a time past when these conditions did not exist, and we can think of a time in future when travel might take on a different form, and so it is clear that while laws against speeding are what ought to be given certain conditions, they are not what they ought to be if conditions change. Further, if these laws are as they ought to be, in reference to what criteria must they "ought" to be? My answer to this is that, beyond their criteria, laws are indubitably connected to their referents, to their ideals, to the LAW behind the laws. Yet these referents can be morally positive or negative, helpful or hurtful: there is no reason to think that lawmakers will never draw on morally reprehensible ideals. The history of Western civilization, alone, is rife with evidence bearing out this contention.

To summarize briefly concerning positivism and natural law, the strict positivists cannot attest that law is merely command and concomitant enforcement; the law is not merely what *is*, in *simpliciter*. The law is an amalgam of variables, which, as Hart showed, often includes conventional morality at the time of inception. But as Hart warned, to think that because of this that laws from the same source as, say, the Reichstag meeting in the Kroll Opera House in 1939 are therefore always to be accorded moral approval is a fallacious assumption. In a more demanding way, LAW as referent insists that laws are

[27] It has been pointed out to me that most people might look at this question in terms of whether the laws against speeding accomplish what they set out to do. If they do, perhaps they are as they ought to be and no revision is necessary, but of course that assertion is context dependent and does not face the problem head on about the counterfactual status of "oughts" that were clearly egregiously damaging laws and ought never to have been in any context. Some would raise the alarm of anachronism, but as I have noted before in another place, there is a point at which anachronism dies on the heels of common sense and actions move in to a moral space where they are either right or wrong, regardless of culture or context. (C.G. Bateman, *Church History Seminar*, Final Exam Paper, Professor John B. Toews: Regent College, 2007)

not merely how they appear on the books or even in practice, they are intrinsically dependent on the ideals which gave rise to them in the first place, and these ideals are not always aimed at a common "good". Unlike Hart, LAW as referent assumes that the law and morality can never be separated, because laws, good or bad, are always connected to underlying ideals at their inception.

The natural law theorist's contention that law is somehow what it ought to be is also problematic, because it is always context dependent. In one century it *ought* to be the case that certain people are burned alive at the stake; in another century it *ought* to be that people are free from such a horrid injustice. A law that ought to be, strictly speaking on natural law terms, *is*, but as demonstrated, it is not actually what ought to be in all cases. To escape this dilemma by appealing to relativism – maintaining that we just change the "oughts" whenever we are sufficiently ashamed for having been wrong for the last however many decades or centuries – is intellectually unsatisfying and does not face the "ought" problem head on. LAW as referent, on the other hand, says somewhat the opposite, namely, that the LAW, which is the referent, is not a purpose which ought to be, but an ideal which compels its subject laws into existence through the instrumentality of the mind of a human lawmaker. Whether it "ought to be" is not an intrinsically stable proposition. Laws emerging in the mind of a human during the Bronze Age may reflect ideals that were, ultimately, no longer acceptable during the age of the Industrial Revolution, or they may have been, and so on. The point is that the ideals, the LAW, are dynamic phenomena and thus, in most cases, too unstable to attribute the terminal appellation of "ought".

E. Supranational Continuity in "LAW" as against Hart and Fuller's Evil Regime Problem

If we take the basic premise I have suggested about "the LAW," we can see that many of the world's nations have structured their laws in a strikingly similar way. Prohibitions against theft, fraud, violent crimes, and other behaviors of a negative moral import are virtually characteristic of most legal systems, and this similarity moves beyond the coincidental and into what most would agree is a preponderance of agreement pursuant to what behaviors are and are not acceptable in modern society. Of course, not all nations treat impugned activities in the same fashion, and some take radical departures from the rest in terms of both the number of offenses and the severity of the punishments attached to the former. Yet, based on LAW as referent, one might suggest that the identicalness in nature of some generally recognized laws amongst divergent nations indicates a conglomeration of supranational "LAW" – not supranational laws, but "supranational" and "the LAW" –, in other

words, a grouping of ideals which can be correctly referred to as "the LAW", in so far as they relate to the wide agreement on a limited number of matters. The eminent sociologist Eugene Ehrlich wrote:

> Those who proclaim a multiplicity of Laws understand by "Law" nothing other than Legal Provisions, and these are, at least today, different in every state. On the other hand, those who emphasize the common element in the midst of this variety are centering their attention not on Legal Provisions but on the Social Order, and this is among civilized states and peoples similar in its main outlines. In fact many of its features they possess in common even with the uncivilized and the half civilized.[28]

I do not want to suggest that because of this continuity that "the LAW" in this case is a body of eternal and unchanging law existing outside of reality, similar to Plato's highest reality of the forms.[29] Yet along with Ehrlich, I see these fundamental institutions of society, the LAW, as perceptible to the minds of similarly situated lawmakers, but not any kind of tangible object or thing.[30] The LAW, as I have defined it, finds substantive existence only in the minds of those functioning under its elemental forces. I would further suggest that if we can assume the Law is neither Platonically static nor entirely ontologically temporal, then at this level of human idealism we may better be able to explain the problem of immoral or evil laws.

On this point, what of tyrannies and evil empires, what of Hart and Fuller's Nazi regime, how can we explain the "laws" of these political arrangements? I suggest we explain them by using the same theoretical model. The immoral laws and customs of regimes like the Nazis, the corrupt Catholic Church of the Middle Ages, or the Roman Empire, or the Visigoths, and as far back as one chooses to go in the annals of history, were, each of them, enforcing horrific laws which reflected what "the LAW" was for each of them. What this LAW was in each case can be determined by an examination of their laws to see the reflections of their ideals. While these particular ideals were immoral, they nonetheless served as the source, "the LAW", on which the written and customary laws were based. LAW as referent assumes that ideals will be found to be either morally sound or bankrupt, and this suggests it might be used as a theoretical framework on which to base a critical analysis of any system or sub-grouping of laws.

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[28] Eugen Ehrlich, "The Sociology of Law," *Harvard Law Review* 36.2 (1922): 131.

[29] See discussion below on the ideas of Socrates and Plato.

[30] Ibid.

F. From the laws to the LAW and Back Again

As alluded to, the real benefit from examining laws using this theory of "LAW as referent" may be that it forces us to see, in the reflections of the laws, just what ideals and historically situated variables were responsible for laws. This kind of reasoning bypasses the need for the universal and immutable laws so common to a purely natural law perspective because, as alluded to above, the epicenter of the laws, the LAW, is actually human in nature. It exists within the minds of those responsible for the laws' inception, and it is also strongly connected to those in society who merely accept the laws *ex post facto*[31] - although, in my estimation, to a lesser extent because the genesis for the laws, quite literally, lay elsewhere. Yet this theory is also imbued with natural law-like relationships, such as the proposed ontological relationship between the laws and the LAW. While there may be a relationship of cause between some heretofore unknown, immutable, and eternal principles and the LAW as I have characterized it, for present purposes it is a superfluous and unnecessary consideration precisely because one cannot say with any kind of certainty exactly what those principles are or how they might be verified to any reasonable degree. On the other hand, I think the LAW as referent is a more accessible way to get at the heart of what is really being defended pursuant to a given law or set of laws.

I propose that what could make this theory of law useful for the critical analysis of laws is that by sketching out what the referents must be for a given set of laws, researchers could more easily see anomalies and contradictions, and thereby more acutely understand what degree of equity or appropriateness[32] exists based on the referents: based on the LAW behind the laws. Yet this kind of critical analysis would only be relevant for a government aimed at achieving the common "good", and not likely an immoral regime, although it would not be out of the realm of possibility since appropriateness has been gauged in very different ways throughout history. Another way LAW as referent assists the assessment of a body of laws is that the referents often cover a number of different laws under one rubric. For example, all traffic laws, like the earlier example of laws against speeding, might have only a few referents, such as "obedient/considerate drivers", "human life is sacred and inviolable", etc.[33]

[31] See, for instance, the opinion of Savigny, below.

[32] Sir Paul Vinogradoff, "Legal Standards and Ideals," *Michigan Law Review* 23.1 (1924), in *Landmarks of Law: Highlights of Legal Opinion*, ed. Ray D. Henson (Boston: Beacon Press, 1960), 19. Vinogradoff here discusses the awkwardly rigid nature of law against the actual needs of people caught within its purview, and has a short discussion on equity, a way of correcting law, to this end.

[33] Just because an ideal such as "human life is sacred and inviolable" is used in the construction of traffic laws does not mean there will be no injuries on the road, or that the lawmakers did

Using this example, two things would become clear on an analysis of this sort. The first assessment would revolve around the question of, perhaps, how appropriate the referents were on their own merits, given the present needs of a society that is hopefully represented by its concomitant lawmaking body.[34] The second would concern the question of which laws or rules of court are being employed which are yet unconnected to the referents that a state approves of. Questions such as these lead to a better understanding of whether legal systems and their concomitant intra-legal sub-systems are significantly attached to the referents in a way that reflects current societal goals.

2.

A. Ontological Foundations of LAW as Referent

> About that question of the final good the philosophers have kept a wonderful coil amongst themselves, seeking in every cranny and cavern thereof for the true beatitude; for that is the final good, which is desired only for itself, all other goods having in their attainments a reference unto that alone.
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> Augustine, *The City of God*, XIX.I[35]

A brief overview of the thought of some key historical contributors in the search for the definition of "law" helps illustrate on what theoretical foundations my own theory rests.

I have no doubt that the most perspicacious and enduring of all the theorists of law and order in the history of Western society is Socrates; and, of course, for all intents and purposes he is inseparable from his illustrious student, Plato.[36] Here at the beginning, and in the midst of Greek city-state unrest and

not suspect this, in the same way that laws against assault and battery, being partly based on the same referent as they are, would mean lawmakers did not realize there would be assaults and batteries. If this ideal was not part of traffic laws, one could imagine a very odd set of road rules which would result in reckless driving causing even more injuries and unnecessary deaths.

[34] Legal analyses of this stripe are, by definition, on laws that are already in force and thus the degree of antiquity would be variable across the board.

[35] Augustine, *The City of God* (De Civitate Dei), 2 vols., trans. John Healy, ed. R.V.G. Tasker, vol. 2 (London: J.M. Dent & Sons Ltd., 1945; 1957), 19.1, 231.

[36] This author is well aware of the prevailing view that Socrates can be confined to the earlier of Plato's dialogues, most pointedly due to the exemplary work of scholars like Gregory Vlastos, *Socrates: Ironist and Moral Philosopher* (Cambridge: Cambridge University Press, 1991). While I have been convinced by Vlastos in general, it is by no means a shut case on the question of just how far the thinking of Socrates penetrates into Plato's writing, and I choose to be non-specific about the true etymological foundations of Plato's writings and take rank with him when he says that Socrates was the wisest and most just man of the time.

internecine conflict,[37] Socrates understandably viewed law as a form of societal engineering/control[38] that brought a city-state into order/harmony for the benefit of all, or for the common good. In the *Republic*, Plato takes a very dim view of laws, assigning them a categorical second place to the rule of the true statesman or philosopher king.[39] Barker poignantly notes:

> [In contrast to modern theories from the likes of Hobbes and Locke] …Plato would sweep away the apparatus of the law, courts and pleaders and pleas, just as he would sweep away the surgery and its drugs. The one is the sign of disease of the soul, as the other is a sign of disease of the body; and his State cannot and will not have its members diseased.[40]
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> Law is a spirit: the lawgiver is not the legislator, but the educator who gives the spirit. And when once that spirit is there, it will solve all things, and bring all things to remembrance. Once more we come upon Plato's aversion to written law: once more we come upon the fundamental lesson which he has to teach, that the State is mind, and its institutions ideas.[41]

More specifically, the state *and* the law are products of the mind.[42] For Plato, laws made via objective intelligence are the product of a mind familiar with the forms, and, as such, a mind full of referents. Without going in to details on the

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[37] George Klosko, *The Development of Plato's Political Theory*, 2nd ed. (New York: Oxford, 2006), 1-2, 5-11; E. Barker, *The Political Thought of Plato and Aristotle* (New York: Dover, 1959), 12-13, 61.

[38] Plato, *The Republic*, trans. Tom Griffith, ed. G.R.F. Ferrari, in *Cambridge Texts in the History of Political Thought*, eds. Raymong Geuss and Quentin Skinner (Cambridge: Cambridge University Press, 2000), 7.519e-520a, 226: "The law does not exist for the exclusive benefit of one class in the city. Its aim is to engineer the benefit of the city as a whole, using persuasion and compulsion to bring the citizens into harmony, and making each class share with the other classes the contribution it is able to bring to the community. The law is what puts people like this in the city, and it does so not with the intention of allowing each of them to go his own way, but so that it can make use of them for its own purposes, to bind the city together."

[39] Klosko, *Plato's Political Theory*, "Given the importance of education, Plato places little store in laws. If education is conducted poorly, the resulting social spirit will be poor, and the state as a whole in virtually hopeless shape. Legislation will be able to do little under such conditions." 138-139; Even though Plato eschews laws as against the rule of the true statesman, they are a second option which Plato seems to give cautious approbation to, yet with stringent conditions attached to their employment, such as no violations and no altering of the laws. 210-215.

[40] Barker, Plato and Aristotle, 132.

[41] Ibid., 133.

[42] Barker, *Plato and Aristotle*, 207. Plato, *Laws*, *The Collected Dialogues of Plato: Including the Letters*, trans. A.E. Taylor, eds. Edith Hamilton and Huntington Cairns, Bollingen Series LXXI (Princeton: Princeton University Press, 1961; 1963; 1971), 10.890, 1446. "[Clinias:] …he [the legislator] should defend the claim of law itself and of art to be natural, or no less real than nature, seeing that they are products of mind by a sound argument which I take you to be now propounding and in which I concur."

Platonic theory of forms,[43] it is enough to note that Plato's forms are similar to my characterization of LAW as referent in two ways. First, the Forms are the necessary condition for the existence of the lower order realities such as laws for the purpose of practical justice. Second, Platonic Forms are only perceivable by the mind,[44] in the same way referents are. Yet these Platonic forms are unlike LAW as referent because they are eternal and unchanging[45] and, in Plato's mystically charged mind,[46] exemplified what was more "really" real[47] than the laws, for instance, themselves.

We can see this tendency of Plato to locate ultimate ideals in a person's mind when we consider his overall emphasis that while laws may be a second best option for a community, the ultimate order always remains, through the *Republic*, the *Statesman*, and even the *Laws*, as the emanation of decrees coming from the mind of one who is truly equipped in their understanding to handle the task. For instance, in the *Statesman*, he writes: "In one sense it is evident that the art of kingship does include the art of lawmaking. But the political ideal is not full authority for laws but rather full authority for a man who understands the art of kingship and has kingly ability."[48] Plato goes on to contrast an even higher ideal by insisting: "But when constitutions are lawful and ordered, democracy is the least desirable, and monarchy, the first of the six,[49] is by far the best to live under – unless of course the seventh is possible, for that must always be exalted, like a god among mortals, above all other constitutions."[50]

What Plato is referring to here is the ideal statesperson, a single human who is gifted in the art of "concern for" people.[51] Plato and Socrates are both

[43] For a concise discussion of the forms, see: Klosko, *The Development of Plato's Political Theory*, 87-92.

[44] Ibid., "At heart, the theory of Forms concerns absolute, timeless, immutable essences, completely removed from the sensible world. Because they can be perceived only by the mind, Plato locates them in the 'intelligible realm." 88.

[45] Ibid.

[46] Gregory Vlastos, *A Metaphysical Paradox*, *Plato's Republic: Critical Essays*, ed. Richard Kraut (Lanham, Maryland: Rowman & Littelfield, 1997), 191-192.

[47] Vlastos, A Metaphysical Paradox, 182-186.

[48] Plato, *Statesman*, trans. J.B. Skemp, *The Collected Dialogues of Plato: Including the Letters*, eds. Edith Hamilton and Huntington Cairns, Bollingen Series 71 (Princeton: Princeton University Press, 1961; 1971), 294.a, 1063.

[49] Plato's six constitutions are derived from three basic forms, "the rule of one, the rule of the few, and the rule of the many," (Ibid., 302.c, 1073): these three are then separately divided in two, producing, respectively, kingly rule and tyranny, aristocracy and oligarchy, unprincipled democracy and principled democracy (Ibid., 302.c-303.b, 1073-1074).

[50] Ibid., 303.b, 1074.

[51] Ibid. "Surely 'concern' is available as such a class name; it implies no specific limitation to bodily nurture or to any other specific activity." 275.e, 1041; "…the class name has to be modified from 'nurture' to 'concern.' 276.e, 1042; Tendence of human herds by violent control

emphatic that a truly skilled ruler will, through their understanding and their mind, – be aware that Plato's *Republic* is just as much about justly ordering ones mind and life as it is a state[52] – be able to guide the citizens to as much happiness as a human community will allow.[53] The fact that so much emphasis

is the tyrant's art: tendence freely accepted by herds of free bipeds we call statesmanship." 276.e, 1042; In this general section of Statesman, Plato has the Stranger, his protagonist, in an effort to try and convince his interlocutors of what a true statesman should be like, use the analogy of a shepherd who cares for his or her herd. His emphasis is that people possessed of the "scientific understanding of the art of government" (293.c, 1062) are the only ones fit to serve. It matters not whether the rule be one of laws or one without them, whether there are willing subjects or not, and a person skilled in this art could be rich or poor, it should not matter a whit. These special people could do anything – including putting some citizens to death or banishment – as long as "they work on a reasoned scientific principle following essential justice and art to improve the life of the state so far as may be, [these] we must call them real statesmen according to our standards of judgment." 293.c-293.e, 1062-1063. Plato seems to be quite serious about the powers he is willing to grant this true statesman, in the identical way Socrates granted it to his philosopher kings in *Republic*. To him this scientific rule is the only real constitution, someone skilled in the art of statesmanship. As to what that art entails, the Stranger takes a long time getting to his point, but ultimately he insists that the statesman must act as a weaver in his concern for the citizens and, without doubt, paternalistic intervention for the running of the state. Using this other analogy of a weaver who weaves garments and fabrics, the Stranger says: "Now we have reached the appointed end of the weaving of the web of state. It is fashioned by the statesman's weaving; the strands run true, and these strands [citizens] are the gentle and the brave. Here these strands are woven together into a unified character. For this unity is won where the kingly art draws the life of both types into a true fellowship by mutual concord and by ties of friendship. It is the finest and best of all fabrics. It infolds all who dwell in the city, bond or free, in its firm contexture. Its kingly weaver maintains his control and oversight over it, and it lacks nothing that makes for happiness so far as happiness is obtainable in a human community." 311.b-311.c, 1084-1085.

[52] Plato, *Republic*, trans. Paul Shorey, *The Collected Dialogues of Plato: Including the Letters*, eds. Edith Hamilton and Huntington Cairns, Bollingen Series 71 (Princeton: Princeton University Press, 1961; 1971): Socrates begins in the Republic in a conversation about what it is to be a just man, in essence trying to tease out what justice simpliciter would look like in a person. His interlocutors are not satisfied, primarily Glaucon, and this latter insists that Socrates show what justice does to its possessor. Socrates is challenged by the words, "…you, Socrates, …how strange it is that of all you self-styled advocates of justice, from the heroes of old whose discourses survive to the men of the present day, not one has ever censure injustice or commended justice otherwise than in respect of the repute, the honors, and the gifts that accrue from each. But what each one of them is in itself, by its own inherent force, when it is within the soul of the possessor and escapes the eyes of both gods and men, no one has ever adequately set forth…." 366.d-3666.e, 613. This is the question *Republic* is trying to answer, and because it was such a difficult question, it was suggested to Socrates that an analogy of something simpler would be easier for them to understand. Socrates suggests, "There is justice of one man, we say, and, I suppose, also of an entire city? …Then, perhaps, there would be more justice in the larger object, and more easy to apprehend. If it please you, then, let us first look for its quality in states, and then only examine it also in the individual looking for the likeness of the greater in the form of the less." 368.c-369.ca, 615.

[53] Ibid.

is put on a person who has the understanding in their mind, the ability to think correctly and by so doing directly apply rule over a city or state, demonstrates that Socrates and Plato, as perhaps the earliest theorists on justice and law, had noted this "mind" aspect of social order, which I now suggest is compositionally fundamental to LAW as referent. In Plato's last work touching on these themes, the *Laws*, his protagonist, the Athenian, repeats these sentiments once more. Plato has him say: "When supreme power is combined in one person with wisdom and temperance, then, and on no other conditions conceivable, nature gives birth to the best of constitutions with the best of laws."[54] The Athenian also speaks about what this law is, saying:

> We should do our utmost – this is the moral – to reproduce the life of the age of Cronus,[55] and therefore should order our private households and public societies alike in obedience to the immortal element within us, *giving the name of law to the appointment of understanding*.[56]

While Plato did move the Socratic ideal of those lone rulers of "understanding" in his *Republic* ever so slightly in the direction of written laws to account for the reality of the human condition, one can see chronologically from *Republic*, to the *Statesman*, and finally in the *Laws*, how he still clings to the idea that, as Barker noted, "the State is mind,"[57] and as Plato himself says through the Athenian, the name of law belongs to the appointment of understanding.

The company of thinkers who took up Plato's themes and whose ideas offer some support to LAW as referent are too numerous for a complete analysis here, but it will be of some assistance to briefly note some of the influential thinkers who placed importance on some of the key aspects of LAW as referent. Aristotle acknowledged what positivists like Hart later re-emphasized, that bad law is still law,[58] and LAW as referent assumes this has been the case

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[54] Plato, *Laws*, trans. A.E. Taylor, *The Collected Dialogues of Plato: Including the Letters*, eds. Edith Hamilton and Huntington Cairns, Bollingen Series 71 (Princeton: Princeton University Press, 1961; 1971), 712.a, 1303.

[55] Cronus was the God of Greek legend, who created people from the dust of the earth, who ordered the universe as supreme governor and had lower order servants who shepherded over all provinces of life in the world. There were no constitutions under Cronus and no begetting of children, all food came from the fruit of the tree, etc., and all this strikingly in keeping with the Genesis creation account. Plato, *Statesman*, 271.c-272.b, 1037.

[56] Ibid., 713.e-714.a, 1305. Emphasis added.

[57] *Vide supra* at footnote 37.

[58] Aristotle, *Politics*, trans. Ernest Barker, rev. R. F. Stalley (Oxford: Oxford University Press, 1995), Book 3.11, 111-112. [There is] one conclusion above all others. Rightly constituted laws should be [the final] sovereign; but rulers, whether one or many, should be sovereign in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement. But what rightly constituted laws ought to be

throughout history. In contrast, and some time later, in the Roman context, Cicero wrote about the importance of the mind/reason component for the inception of law[59] and yet he also breaks rank with Aristotle on unjust laws and essentially claims they are "no law at all", giving us a solid indication of where Augustine likely inherited this idea from.[60] Aquinas follows later with a very similar characterization of law's relationship to the mind and reason when he writes "law is something pertaining to reason."[61] It was the propositions of the practical intellect moving towards action which had the nature of law for Aquinas, sometimes sponsored by consideration and sometimes by habit.[62] Aquinas also puts emphasis on the fact that law regards, most importantly, an order which inheres to the common good,[63] and this "order" happens to be a key tenet to the theories of Ehlrich, Malinowski, as well as Berger and Luckmann. LAW as referent, similarly, places the sole emanation point for the referent/ideal as the human mind in the context of ordered interaction with other humans.

The list of philosophers and legal scholars who support this mind-axiom of LAW as referent – who explicitly acknowledge the human mind, variously under the guise of reason, consciousness, will, thought, conviction, etc. as the

is a matter that is not yet clear; and here we are still confronted by the difficulty stated at the end of the previous chapter. Laws must be good or bad, just or unjust in the same way as the constitutions to which they belong. The one clear fact is that laws must be laid down in accordance with constitutions; and if this is the case, it follows that laws which are in accordance with right constitutions must necessarily be just, and laws which are in accordance with perverted constitutions must be unjust." Aristotle, by positing that "laws must be good or bad, just or unjust" shows exactly where his thinking is on "right constitutions" so called. What is just or unjust for Artistotle seems akin to saying moral or immoral, and surely his "perverted" means immoral, speaking of both the constitution and *ergo*, if one follows his argument, the laws.

[59] Cicero, *Laws*, *The Great Legal Philosophers: Selected Readings in Jurisprudence*, ed. Clarence Morris (Philadelphia: University of Pennsylvania Press, 1959), Book 2.5, 51. "Therefore, just as that divine mind is the supreme Law, so, when [reason] is perfected in man, [that also is Law; and this perfected reason exists] in the mind of the wise man; but those rules which, in varying forms and for the need of the moment, have been formulated for the guidance of nations, bear the title of laws rather by favour than because they are really such."

[60] Ibid. "What of the many deadly, the many pestilential statutes which nations put in force? These no more deserve to be called laws than the rules a band of robbers might pass in their assembly." Similarly, Augustine wrote, "[t]hat which is not just seems to be no law at all." Augustine, *De Libero Abitrio* i, 5. It is common knowledge among Patristic and Augustinian scholars that Augustine had a fingertip grasp of almost everything Cicero would have written, being an integral part of the Latin education which Augustine was immersed in and which he himself taught at the highest levels for years. That Augustine naturally took it from Cicero can be inferred as a virtual certainty.

[61] Aquinas, *Summa Theologica*, Q. 90, Art. 1, 993.

[62] Ibid., Q. 90, Art. 1, 994.

[63] Ibid., Q. 90, Art. 3, 995.

epicenter of ideas upon which laws and societal order emanate[64] – would include Hugo Grotius, who wrote that "[t]his maintenance of the social order… which is consonant with human intelligence, is the source of law properly so called;[65] Thomas Hobbes writes, "[i]n sum, the discourse of the mind, when it is governed by design, is nothing but seeking, or the faculty of invention;[66] John Locke notes that "[t]he state of Nature has a law of Nature to govern it, which

[64] I have included in the footnotes, throughout this section, other examples of how these important philosophers understood the role of the mind in the formation of law, and most of the selections are in relation to early law formation within society.

[65] "This maintenance of the social order, which we have roughly sketched, and which is consonant with human intelligence, is the source of law properly so called. To this sphere of law belong the abstaining from that which is another's, the restoration to another or anything of his which we may have, together with any gain which we may have received from it; the obligation to fulfil promises, the making good of a loss incurred through our fault, and the inflicting of penalties according to their deserts." Hugo Grotius, *The Law of War and Peace: De Jure Belli ac Pacis Libri Tres*, trans. Francis W. Kelsey, et al., (Indianapolis and New York: Bobbs-Merrill Company, 1925), *Prolegomena*, 8, 12-13; "The law of nature is a dictate of right reason…," Grotius, *Law of War and Peace*, 1925, 1.1.10.1, 38; "If now the assertion is made that the nature of man possesses superiority over that of other living creatures in this, that it can convey to others the ideas of the mind and that words were invented for this purpose, that is true.," Grotius, *Law of War and Peace*, 1925, 3.1.8.1, 607-608; "…the principles of nature recommend right reason as a rule that ought to be of higher value than bare instinct." Hugo Grotius, *The Rights of War and Peace: Including the Law of Nature and the Law of Nations*, trans. A.C. Campbell (Washington: M. Walter Dunne, 1901), 2.1, 31.

[66] *Vide infra*. "Out of all which we may define (that is to say determine what that is which is meant by this word *reason* when we recon it amongst the faculties of the mind. FOR REASON, in this sense, is nothing but *reckoning* (that is adding and subtracting) of the consequences of general names agreed upon for the *marking* and *signifying* of our thoughts; I say *marking* them, when we reckon by ourselves; and signifying, when we demonstrate or approve our reckoning to other[s]…." Thomas Hobbes, *Leviathan*, ed. A. P. Martinich (Peterborough, Ontario: Broadview Literary Texts, 2002), 1.5.2, 34; "I have said before (in the second chapter) that a man did excel all other animals in this faculty, that when he conceived anything whatsoever, he was apt to enquire the consequences of it and what effects he could do with it. And now I add this other degree of the same excellence, that he can be words reduce the consequences he finds to general rules, called *theorems*…." 1.5.6, 36; A LAW OF NATURE (lex naturalis) is a precept or general rule, found out by reason, by which a man is forbidden to do that which is destructive of his life, or taketh away the means of preserving the same, and to omit that by which he thinketh it may be best preserved." 1.14.3, 98; "Concerning the thoughts of man, I will consider them first singly and afterwards in train or dependence upon one another. Singly, they are every one a representation or appearance of some quality or other accident of a body without us, which is commonly called an *object*. Which object worketh on the eyes, ears, and other parts of man's body, and by diversity of working, produceth diversity of appearances. (2) The original of them all is that which we call SENSE (for there is no conception in a man's mind which hath not at first, totally or by parts, been begotten upon the organs of sense). The rest are derived from that original." 1.1.1-2, 13; "In sum, the discourse of the mind, when it is governed by design, is nothing but seeking, or the faculty of invention, which the Latins call *sagacitas*, and *solertia*, a hunting out of the causes of some effect, present or past, or of the effects of some present or past cause." 1.3.5, 22.

obliges everyone, and reason, which is that law, teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions…;"[67] Montesquieu states that "Law in general is human reason, inasmuch as it governs all the inhabitants of the earth; the political and civil laws of each nation ought to be only the particular cases in which human reason is applied;"[68] David Hume writes:

[67] *Vide infra*. "But if this foundation [Sir Robert Filmer's position that men are not naturally free] fails, all his fabric falls with it, and governments must be left again to the old way of being made by contrivance and the consent of men (ἀνθρώπινη κτίσις) making use of their reason to unite together into society." John Locke, *John Locke: Two Treatises of Civil Government* (London: J.M. Dent & Sons Ltd, 1924), 1.2.6, 5; Book 2.2.4, 137. "To understand political power aright, and derive it from its original, we must consider what estate all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of the their possessions and person as they think fit, within the bounds of the law of Nature, without asking leave or depending upon the will of any other man." 2.2.4, 118; "The state of Nature has a law of Nature to govern it, which obliges everyone, and reason, which is that law, teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions…." 2.2.6, 119; "Men being, as has been said, by nature all free, equal, and independent, no one can be put out of this estate and subjected to the political power of another without his own consent, which is done by agreeing with other men, to join and unite into a community for their comfortable, safe, and peaceable living, one amongst another, in a secure enjoyment of their properties, and a great security against any that are not of it. This any number of men may do, because it injures not the freedom of the rest; they are left, as they were, in the liberty of the state of Nature. When any number of men have so consented to make one community or government, they are thereby presently incorporated, and make one body politic, wherein the majority have a right to act and conclude the rest."2.8.95, 164-165; "For in the state of Nature to omit the liberty he has of innocent delights, a man has two powers. The first is to do whatsoever he thinks fit for the preservation of himself and others within the permission of the law of Nature; by which law, common to them all, he and all the rest of mankind are one community, make up one society distinct from all other creatures, and were it not for the corruption and viciousness of degenerate men, there would be no need of any other, no necessity that men should separate from this great nad natural community, and associate into lesser combinations. The other power a man has in the state of Nature is the power to punish the crimes committed against that law. Both these he gives up when he joins in a private, if I may so call it, or particular political society, and incorporates into any commonwealth separate from the rest of mankind." 2.9.128, 181.

[68] *Vide infra*. "Laws, in their most general signification, are the necessary relations arising from the nature of things. In this sense all beings have their laws: the Deity his laws, the material world its laws, the intelligences superior man their laws, the beasts their laws, man his laws." Baron de Montesquieu, *The Spirit of Laws*, trans. Thomas Nugent, ed. David Wallace Carrithers (London: Nourse, 1750; Berkeley and Los Angeles, California: University of California Press, 1977), 1.1.1, 98; "Particular intelligent beings may have laws of their own making, but they have some likewise which they never made. Before there were intelligent beings, they were possible; they had therefore possible relations, and consequently possible laws. Before laws were made, there were relations of possible justice. To say there is nothing just or unjust but what is commanded or forbidden by positive laws, is the same as saying that before the describing of a circle all the radii were not equal." 1.1.8, 99; "…on the one hand, particular intelligent beings

> …we may observe, that the true idea of the human mind, is to consider it as a system of different perceptions or different existences, which are link'd together by the relation of cause and effect, and mutually produce, destroy, influence, and modify each other. Our impressions give rise to their correspondent ideas; and these ideas in their turn produce other impressions. One thought chases another, and draws after it a third, by which it is expelled in its turn. In this respect, I cannot compare the soul more properly to any thing that to a republic or commonwealth, in which the several members are united by reciprocal ties of government and subordination, and give rise to other persons, who propagate the same republic in the incessant changes of its parts. And as the same individual republic may not only change its members, but also its laws and constitutions; in like manner the same person may vary his character and disposition, as well as his impressions and ideas, without losing his identity.;[69]

are of a finite nature, and consequently liable to error; and on the other, their nature requires them to be free agents. Hence they do not steadily conform to their primitive laws; and even those of their own instituting they frequently infringe." 1.1.10, 100; "The law which imprinting in our minds the idea of a Creator inclines us to him, is the first in importance, tho' not in order, of natural laws. Man in a state of nature would have the faculty of knowing, before he had any acquired knowledge. Plain it is that his first ideas would be far from being of a speculative nature; he would think of the preservation of his being, before he would investigate its origin." 1.2.2, 101; "Law in general is human reason, inasmuch as it governs all the inhabitants of the earth; the political and civil laws of each nation ought to be only the particular cases in which human reason is applied." 1.3.11, 104; "…it is necessary People's minds should be prepared for the Reception of the best laws." 19.2. (title), 288; "It is the business of the legislature to follow the spirit of the nation, when it is not contrary to the principles of government; for we do nothing so well as when we act with freedom, and follow the bent of our natural genius." 19.5.3, 290; "Individual education consists in (1) acquiring ideasa and (2) proportioning them to the real nature of things. Now the number of ideas one has and the degree of accuracy with which these ideas are interrelated must greatly diversify minds. [10] Those who raise us are, in a manner of speaking, manufacturers of our ideas. They multiply them. They constantly give us new ways of being and perceiving." *An Essay on Causes Affecting Minds and Characters*, 2.9-10, 435-436.

[69] *Vide infra.* "*First*, as moral good and evil belong only to the actions of the mind, and are deriv'd from our situation with regard to external objects, the relations, from which these moral distinctions arise, must lie only betwixt internal actions, and external objects, and must not be applicable either to internal actions, compared among themselves, or to external objects, when placed in opposition to other external objects." David Hume, *A Treatise of Human Nature*, ed. L.A. Selby-Bigge (Oxford: Oxford, Clarendon Press, 1896), 3.1, 464-465; 2.3.2, 191. "Thus the course of the argument leads us to conclude, that since vice and virtue are not discoverable merely by reason, or the comparison of ideas, it must be by means of some impression or sentiment they occasion, that we are able to mark the difference betwixt them. Our decisions concerning moral rectitude and depravity are evidently perceptions; and as all perceptions are either impressions or ideas, the exclusion of the one is convincing argument for the other.

Rousseau asserts, "It follows from this survey that inequality, almost non-existent among men in the state of nature, derives its force and its growth from the development of our faculties and the progress of the human mind, and at last becomes permanent and lawful by the establishment of property and of laws.;"[70] Immanuel Kant suggests, "Laws proceed from the will, maxims from

Morality, therefore, is more properly felt than judged of…." 3.2, 470; No discovery cou'd have been made more happily for deciding all controversies concerning ideas, than that above-mention'd, that impressions always take the precedency of them, and that every idea, with which the imagination is furnish'd, first makes its appearance in a correspondent impression. These patter perceptions are all so clear and evident, that they admit of no controversy; tho' many of our ideas are so obscure, that 'tis almost impossible even for the mind, which forms them, to tell exactly their nature and composition." 1.3, 33; "…we may observe, that the true idea of the human mind, is to consider it as a system of different perceptions or different existences, which are link'd together by the relation of cause and effect, and mutually produce, destroy, influence, and modify each other. Our imporessions give rise to their correspondent ideas; and these ideas in their turn produce other impressions. One thought chases another, and draws after it a third, by which it is expelled in its turn. In this respect, I cannot compare the soul more properly to any thing that to a republic or commonwealth, in which the several members are united by reciprocal ties of government and subordination, and give rise to other persons, who propagate the same republic in the incessant changes of its parts. And as the same individual republic may not only change its members, but also its laws and constitutions; in like manner the same person may vary his character and disposition, as well as his impressions and ideas, without losing his identity. Whatever changes he endures, his several parts are still connected by the relation of causation. And in this view our identity with regard to the passions serves to corroborate that with regard to the imagination, by making our distant perceptions influence each other, and by giving us a present concern for our past or future pains or pleasures. 1.6, 261; "Now that there is a greater firmness and solidity in the conceptions, which are the objects of conviction and assurance, that in the loose and indolent reveries of a castle-builder, everyone will readily own. They strike upon us with more force; they are more present to us; the mind has a firmer hold of them, and is more actuated and mov'd by them. It acquiesces in them; and, in a manner, fixes and reposes itself upon them. In short, they approach near to the impressions, which are immediately present to use, and are therefore analogous to many other opertations of the mind." Appendix, 624-625.

[70] *Vide infra.* "This common liberty is a consequence of man's nature. His first law is to attend to his own preservation, his first cares are those which he owes to himself; and as soon as he comes to years of discretion, being sole judge of the means adapted for his own preservation, he becomes his own master." Jean Jacques Rousseau, *The Social Contract* and *Discourse on the Origin and Foundation of Inequality Among Mankind*, trans. Henry J. Tozer (*Social Contract*) & Lester G. Crocker (*Discourse*), ed. Lester G. Crocker (New York: Washington Square Press, 1967; 1971), (SC) 1.2, 8; These clauses, rightly understood, are reducible to one only, viz., the total alienation to the whole community of each associate with all his rights; for, in the first place, since each gives himself up entirely, the conditions are equal for all; and, the conditions being equal for all, no one has any interest in making them burdensome to others." 1.6, 18; "Laws are properly only the conditions of civil associations. The people, being subjected to the laws, should be the authors of them; it concerns only the associates to determine the conditions of association. But how will they be determined? ...Individuals see the good which they reject; the public desire the good which they do not see. All alike have need of guides. The former must be compelled to conform their wills to reason; the people must be taught to know what they

choice. In man, the latter is a free choice; the will, which is directed to nothing beyond the law itself, cannot be called either free or unfree, since it is not directed to actions but immediately to giving laws for the maxims of actions (and is, therefore, practical reason itself)",[71] Carl von Savigny writes:

require. Then from the public enlightenment results the union of the understanding and the will in the social body; and from that the close cooperation of the parts, and, lastly, the maximum power of the whole. Hence arises the need of a legislator." 2.6, 40-41; (Discourse) "Let the moralists say what they will, the human understanding is greatly indebted to the passions, which, on their side, are likewise universally allowed to be greatly indebted to the human understanding. It is by the activity of our passions, that our reason improves; we covet knowledge merely because we covet enjoyment, and it is impossible to conceive, why a man exempt from fears and desires should take the trouble to reason. The passions, in their turn, owe their origin to our needs, and their increase to our progress in science; for we cannot desire or fear anything, but in consequence of the ideas we have of it, or of the simple impulses of nature." First Part, 188-189; Let us consider how many ideas we owe to the use of speech; how much grammar exercises and facilitates the operations of the mind; let us, besides, reflect on the immense pains and time that the first invention of languages must have required: let us add these reflections to the preceding; and then we may judge how many thousand ages must have been requisite to develop successively the operations, which the human mind is capable of producing." First Part, 192; "It follows from this survey that inequality, almost non-existent among men in the state of nature, derives its force and its growth from the development of our faculties and the progress of the human mind, and at last becomes permanent and lawful by the establishment of property and of laws. It likewise follows that moral inequality authorized, solely by positive right, clashes with natural right, whenever it is not in proportion to physical inequality; a distinction which sufficiently determines what we are tho thinkn of that kind of inequality which obtains in all civilized nations, since it is evidently against the law of nature that children should command old men, and fools lead the wise, and that a handful should gorge themselves with superfluities, while the starving masses lack the barest necessities of life." Second Part, 246.

[71] *Vide infra*. "…reason commands how men are to act even though no example of this could be found, and it takes no account of the advantages we can thereby gain, which only experience could teach us. For although reason allows us to seek our advantage in every way possible to us and can even promise us, on the testimony of experience, that it will probably be more to our advantage on the whole to obey its commands than to transgress them, especially if obedience is accompanied with prudence, still the authority of its precepts *as commands* is not based on these considerations. Instead it uses them (as counsels) only as a counterweight against inducements to the contrary, to offset in advance the error of biased scales in practical appraisal, and only then to insure that the weight of pure practical reason's *a priori* grounds will turn the scales in favor of the authority of its precepts." Immanuel Kant, *The Metaphysics of Morals*, trans. Mary Gregor (Glasgow: Cambridge University Press, 1996), 1.1.6:216, 10; "According to Kant there are just two fundamental sources of cognition or knowledge – our own reason and experience, that is, what comes to us through our senses. Kant describes the latter, empirical knowledge, as learned in an "*a posteriori*" way, that is, from or *after* experience. By contrast, knowledge originating just in the activity of the mind gives us the conceptual framework that enables us to have experience. For that reason we become aware of it in the course of our experiences even though it is not drawn from any sensory experiences we have. Kant calls this "*a priori* cognition" or knowledge originating in an a priori way, that is, *before*

> In the earliest times to which authentic history extends, the law will be found to have already attained a fixed character, peculiar to the people, like their language, manners and constitution. Nay, these phenomena have no separate existence, they are but the particular faculties and tendencies of an individual people, inseparably united in nature, and only wearing the semblance of distinct attributes to our view. [72]

experience, and making experience possible." Roger Sullivan, Intro., viii; "For in terms of their form, laws concerning what is mine or yours in the state of nature contain the same thing that they prescribe in the civil condition, insofar as the civil condition is thought of by pure rational concepts alone." 1.2.1.44.6:312-6:313, 90; "The *faculty of desire* is the faculty to be by means of one's representations the cause of the objects of these representations. The faculty of a being to act in accordance with its representations is called *life*." 1.2.6:211, 11; "Laws proceed from the will, maxims from choice. In man the latter is a free choice; the will, which is directed to nothing beyond the law itself, cannot be called either free or unfree, since it is not directed to actions but immediately to giving laws for the maxims of actions (and is, therefore, practical reason itself). Hence the will directs with absolute necessity and is itself *subject to* no necessitation. Only *choice* can therefore be called *free*." 1.3.6:226, 18; "Now morally practical reason pronounces in us its irresistible *veto: there is to be no war*, neither war between you and me in the state of nature nor war between us as states, which, although they are internally in a lawful condition, are still externally (in relation to one another) in a lawless condition; for war is not the way in which everyone should seek his rights." Conclusion: Doctrine of Right, 6:354, 123; "…if *eudaemonism* (the principle of happiness) is set up as the basic principle instead of *eleutheronomy* (the principle of the freedom of internal lawgiving), the result is the *euthanasia* (easy death) of all morals. // The cause of these errors is as follows. People who are accustomed merely to explanations by natural sciences will not get into their heads the categorical imperative from which these laws proceed dictatorially, even though they feel themselves compelled irresistibly by it. Being unable to *explain* what lies entirely beyond that sphere (*freedom* of choice), however exalting is this very prerogative of a human being, his capacity for such an *idea*, they are stirred by the proud claims of speculative reason, which makes its power so strongly felt in other fields, to band together in a general *call to arms*, as it were, to defend the omnipotence of theoretical reason. And so now, and perhaps for a while longer, they assail the moral concept of freedom and, wherever possible, make it suspect; but in the end they must give way." 2 (Doctrine of Virtue).Preface.6:378, 143; "For I can recognize that I am under obligation to others only insofar as I at the same time put myself under obligaiont, since the law by virtue of which I regard myself as being under obligation proceeds in every case from my own practical reason; and in being constrained by my own reason, I am also the one constraining myself." 2.Doctrine of the Elements of Ethics.1.Intro.2.6:417-6:418, 173; "A human being has a duty to himself to cultivate (*cultura*) his natural powers (powers of spirit, mind, and body), as means to all sorts of possible ends. – He owes it to himself (as a rational being) not to leave idle and, as it were, rusting away the natural predispositions and capacities that his reason can someday use." 2.1.2.19.6:444, 194.

[72] *Vide infra*."That once again a diversity of opinions may exist; that once again the decision can be a subject of dispute, is one of the blessings which God has vouchsafed to us; for only from this diversity can a living and firm unity proceed, - the unity of conviction, for which our nature compels us to struggle in all matteres of mind." Friedrich Charles [Carl] von Savigny, *Of The Vocation of Our Age for Legislation and Jurisprudence*, trans. Abraham Hayward (London: Littlewood & Co. Old Bailey, 1831;1975), 1 (Intro.), 19; "During this period [middle of the eighteenth

Lastly, Hegel notes, "[t]he basis of right is, in general, mind."[73] The agreement between these aforementioned legal philosophers' assumptions about this basic

century and beyond] the whole of Europe was actuated by a blind rage for improvement. All sense and feeling of the greatness by which other times were characterized, [21] as also of the natural development of communities and institutions, all, consequently, that is wholesome and profitable in history, was lost; it's place was supplied by the most extravagant anticipations of the present age, which was believed to be destined to nothing less than to the being a picture of absolute perfection. This impulse manifested itself in all directions; what it has effected in religion and government, is known; and it is also evident how everywhere, by a natural reaction, it could not fail to pave the way for a new and more lively love for what is permanent. The law was likewise affected by it. Men longed for new codes, which, by their completeness, should insure a mechanically precise administration of justice; insomuch that the judge, freed from the exercise of private opinion, should be confined to the mere literal application: at the same time, they were to be divested of all historical associations, and, in pure abstraction, be equally adapted to all nations and all times…. [22] On comparing the present time with the past, we may be allowed to congratulate ourselves. An historical spirit has been every where awakened, and leaves no room for the shallow self-sufficiency above alluded to." 1, 20-22; "In the earliest times to which authentic history extends, the law will be found to have already attained a fixed character, peculiar to the people, like their language, manners and constitution. Nay, these phenomena have no separate existence, they are but the particular faculties and tendencies of an individual people, inseparably united in nature, and only wearing the semblance of distinct attributes to our view. That which binds them into one whole is the common conviction of the people, the kindred consciousness of an inward necessity, excluding all notion of an accidental and arbitrary origin." 2, 24; "But this organic connection of law with the being and character of the people, is also manifested in the progress of the times; and here, again, it may be compared with language. For law, as for language, there is no moment of absolute cessation; it is subject to the same movement and development as every other popular tendency; and this very development remains under the same law of inward necessity, as in its earliest stages. Law grows with the growth, and strengthens with the strength of the people, and finally dies away as the nation loses its nationality." 2, 27; "Law… has a twofold life; first, as part of the aggregate existence of the community, which it does not cease to be; and secondly, as a distinct branch of knowledge in the hands of the jurists. All the latter phenomena are explicable [29] by the co-operation of those two principles of existence; and it may now be understood, how even the whole of that immense detail might arise from organic causes, without any exertion of arbitrary will or intention." 2.28-29; "The sum, therefore, of this theory is, that all law is originally formed in the manner, in which, in ordinary but not quite correct language, customary law is said to have been formed: i.e. that it is first developed by custom and popular faith, next by jurisprudence, - everywhere, therefore, by internal silently-operating powers, not by the arbitrary will of a law-giver." 2, 30.

[73] *Vide infra* "…The truth about Right, Ethics, and the state is as old as its public recognition and formulation in the law of the land, in the morality of everyday life, and in religion. What more does this truth require – since the thinking mind is not content to possess it in this ready fashion? It requires to be grasped in thought as well; the content which is already rational in principle must win the *form* of rationality and so appear well-founded to untrammeled thinking…" Georg Wilhelm Friedrich Hegel, *Hegel's Philosophy of Right*, trans. T.M. Knox (Clarendon Press, Oxford: Oxford University Press, 1952), pref., 3; "…Right and ethics, and the actual world of justice and ethical life, are understood through thoughts; through thoughts they are invested with a rational form, i.e. with universality and determinacy. This form is law …law is the reason of the thing, and reason refuses to allow feeling to warm itself at its own

premise concerning law formation, that the human lawmaker draws exclusively on content emanating from their mind in the creation of laws, may seem somewhat self-evident; but here it is important to emphasize it for two reasons. First, it supports the theory of LAW as referent insofar as it confines the law creation process to the human mind, and not some outside *force majeure*. Second, the assertion that the source for law is confined to the faculties of the human being continues to be the foundation upon which more recent theorists have constructed a more detailed anthropological and sociological account of how humans order themselves, both in smaller groups and in larger, more complex societies.

B. Defining Law Sociologically and Anthropologically

LAW as referent in Ehrlich, Malinowski, and Berger & Luckmann

> Social order exists only as a product of human activity. No other ontological status may be ascribed to it without hopelessly obfuscating its empirical manifestations.
>
> Peter L. Berger & Thomas Luckmann, *The Social Construction of Reality*

private hearth." Pref., 7; "The basis of right is, in general, mind; its precise place and point of origin is the will. The will is free, so that freedom is both the substance of right and its goal, while the system of right is the realm of freedom made actual, the world of mind brought forth out of itself like a second nature." Intro., 4, 20; "When reflection is brought to bear on impulses, they are imaged, estimated, compared with one another, with their means of satisfaction and their consequences, etc., and with a sum of satisfaction, (i.e. with happiness). In this way reflection invests this material with abstract universality and in this external manner purifies it from its crudity…." Intro., 20, 29. ; third part, sub.sec. 2.A.217, 322. "…the March of mental development is the long and hard struggle to free a content from its sensuous and immediate form, endow it with its appropriate form of thought, and thereby give it simple and adequate expression. It is because this is the case that when the development of law is just beginning, ceremonies and formalities are more circumstantial and count rather as the thing itself than its symbol…." 3rd part: Ethical Life, 2.b.***β***, 139; third part, sub.sec. 3.270, 327. "The state is universal in form, a form whose essential principle is thought. This explains why it was in the state that freedom and thought and science had their origin. It was a church, on the other hand, which burnt Giordano Bruno, forced Galileo to recant on his knees his exposition of the Copernican view of the solar system and so forth." (172) "…if the state is to come into existence as the self-*knowing* ethical actuality of mind, it is essential that its form should be distinct from that of authority and faith." (173): 3rd part: Ethical Life, 3.a, 172-173;

Eugen Ehrlich

In the forward to his classic treatise, *Fundamental Principles of the Sociology of Law*, Ehrlich wrote that at both present and any time in history "…the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself."[74] The idea that the LAW is present in society and not dependent on ink and paper legislation – state law – accords with my present thesis that to think of the LAW as the laws is actually quite in contravention to the actual experience of humankind as far as we are familiar with it. The idea that the LAW is actually an ultra-state force stretches at least as far back as Friedrich Carl von Savigny, noted above, who sought to understand the elemental forces which go to the creation of law, similar to those putative forces which were at work in customary law.[75] Although he never followed through on this project, Ehrlich, Malinowski, and, later, Berger & Luckmann continued this quest and all of them maintain that LAW is in no way dependent on the state, courts, or any other kind of tribunal,[76] but is instead an inherent phenomenon at the very core of ordered society.

For Ehrlich, the "Social Order" is grounded in the social institutions of marriage, family, possession, contract, and succession.[77] He acknowledges the late accumulation of legal provisions in organized societies, but these come after a social order has been established. He notes that even then, legal provisions are not able to encompass the whole of the social order, and he states that the law is incapable of being included in legal provisions, even in his own day.[78] Ehrlich understands law arising immediately within society and ordering societal relations.[79] This fact speaks to the transitory nature of written laws in that, at best, they can only be a reflection of what is already conceded and established and not in any way considered *the* LAW. In terms of LAW as referent, the ideals which arise out of human society are present as a result of thinking persons who give order to their existence based on principles which govern the regulation of stable human exchange[80] – the LAW, or referents,

[74] Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, trans. Walter L. Moll, intro. Roscoe Pound (Cambridge, Massachusetts: Harvard, 1936), xv.
[75] Ibid., 16-17.
[76] Ibid., 24.
[77] Ehrlich, The Sociology of Law, 131.
[78] Ibid., 133.
[79] Ibid., 136. Ehrlich writes, "The great mass of law arises immediately in society itself in the form of a spontaneous ordering of social relations, of marriage, the family associations, possession, contracts, succession, and most of this Social Order has never been embraced in Legal Provisions."
[80] Such a statement is a confluence of the ideas of Ehrlich, Malinowski, and Berger.

guiding the norms/laws which arise in society are solely the product of the human mind. For instance, Ehrlich writes:

> Savigny and Puchta's chief endeavor was to establish most emphatically that the development of law goes on immediately within the legal consciousness. Usage is merely the shoot which reaches the surface. "Custom does not create law, it merely makes it possible to gain a knowledge of law," said Puchta in a reply to Beseler. But that is by no means a particularity of customary law; it must needs be true of every other source of law.[81]

Ehrlich notes, though, that legal *propositions* are not part of Savigny and Puchta's law in this sense, and that we can only think of legal institutions as developing in the above way.[82] Ehrlich's thesis goes to great lengths in specifying the need for these two ideas to be kept separate. For instance he writes, "every theory of the sources of law must carefully distinguish between the question as to the origin of legal institutions, and the question as to the creation of legal propositions."[83]

Ehrlich provides a basic support for my understanding of the LAW as referent, in that he, in part, separates the laws from the LAW – or propositions from institutions – and by so doing helps orient the reader away from juristic legal propositions and statutes to the essential requirements for laws. The LAW is not the laws. The norms/laws/legal propositions are in some way based on the primary institutions of society,[84] which I have suggested are best understood as arising out of human ideals: what I have styled, the LAW. The LAW, as such, arises in the minds/consciousnesses of those who create the legal institutions, and even past that to the laws which are based on those institutions. Hence, *ipso facto*, these human actors show their intimate connection to the referents which guide their lawmaking behaviors. Connected to this is the fact that, as I alluded to above, the LAW as referent is not wholly static either, though it may appear that way in many instances. The LAW as referent, just as with the social order, is not fixed or eternally unchanging, it is constantly in a state of flux.[85] Permutations may happen imperceptibly over long periods of time, or more quickly, but if we acknowledge that the LAW as referent is dynamic then we can more adequately account for the differences between societies, especially

[81] Ehrlich, Fundamental Principles, 444.
[82] Ibid., 455.
[83] Ibid.
[84] Ibid., 455. "It is only on the basis of these relations [foundational legal institutions] that juristic science and legislation create legal propositions."
[85] Ibid., 139.

those who sometimes go so far astray from what might be considered fair or just.

Bronislaw Malinowski

Malinowski was an early twentieth century anthropologist who spent a great deal of time with a Melanesian community who lived on the Trobriand Archipelago, north-east of New Guinea. Based on his research there he wrote his now famous treatise, *Crime and Custom in Savage Society*, in which, quite in opposition to the negative appellation in the title, is aimed at undoing so many of the unhelpful assumptions about indigenous peoples which were current in the literature of the time.[86] His book is explains what he calls, 'primitive legality'[87] or 'primitive law'.[88] He uses examples, such as the ordering of the fishing canoe, to show that there exists "a definite system of division of functions and a rigid system of mutual obligations, into which a sense of duty and the recognition of the need of co-operation enter side by side with a realization of self-interest, privileges and benefits."[89] Malinowski points out that here we find "law, order, definite privileges, and a well-developed system of obligations."[90] The communities trade and exchange goods within their own community and to their neighboring communities, and Malinowski notes how their legal system offers a system of enforcement to ensure rights are respected, reciprocity.[91] Further, the relations of reciprocity are stringent, not in any way haphazard.[92] Malinowski observed that the regard for the rights of others

86 Bronislaw Malinowski, *Crime and Custom in Savage Society* (London: Harcourt, Brace and Company, 1940). Malinowski writes, "Anthropology is still to most laymen and to many specialists mainly an object of antiquarian interest. Savagery is still synonymous with absurd, cruel, and eccentric customs, with quaint superstitions and revolting practices. Sexual license, infanticide, head-hunting, couvades, cannibalism and what not, have made anthropology attractive reading to many, a subject of curiosity rather than of serious scholarship to others. There are, however, certain aspects of anthropology which are of a genuine scientific character, in that they do not lead us beyond empirical fact into realms of uncontrollable conjecture, in that they widen our knowledge of human nature, and are capable of direct application." (1). "We are assured [by anthropologist Dr. Rivers] that 'unwitting' or 'intuitive methods', 'instinctive submission' and some mysterious 'group sentiment' account for law, order communism and sexual promiscuity alike! This sounds altogether like a Bolshevik paradise, but is certainly not correct in reference to Melanesian societies, which I know at first hand." (11). See also, page 30.

87 Ibid., 5.

88 Ibid., 14.

89 Ibid., 20.

90 Ibid., 21.

91 Ibid., 23.

92 Ibid., 25-26. "The sociological manner in which the relations of reciprocity are arranged, makes them yet more stringent. Between the two communities the exchanges are not carried out haphazard, any two individuals trading with each other at random. On the contrary, every

remains prominent in the *minds* of the Melanesians along with their concomitant behaviors.[93]

Along with reciprocity as an enforcement mechanism, there also existed in this Melanesian society their highest virtue of generosity, which is connected to their ambitions in the power which is garnered from the giving of gifts to others.[94] These observations give rise to mental and social forces which turn rules of conduct into law.[95] In summary, Malinowski defines Melanesian law in the following way:

> The rules of law stand out from the rest in that they are felt and regarded as the obligations of one person and the rightful claims of another. They are sanctioned not by a mere psychological motive, but by a definite social machinery of binding force, based, as we know, upon mutual dependence, and realized in the equivalent arrangement of reciprocal services, as well as in the combination of such claims into strands of multiple relationship.[96]

> It scarcely needs to be added that 'law' and 'legal phenomena', as we have discovered, described and defined them in a part of Melanesia, do not consist in any independent institutions. Law represents rather an aspect of their tribal life, one side of their structure, than any independent, self-contained social arrangements. Law dwells not in a special system of decrees which foresee and define possible forms of non-fulfilment [sic] and provide appropriate barriers and remedies. Law is the specific result of the configuration of obligations, which makes it impossible for the native to shirk his responsibility without suffering for it in the future.[97]

man has his permanent partner in the exchange, and the two have to deal with each other. They are often relatives-in-law, or else sworn friends, or partners in the important system of ceremonial exchange called kula. Within each community again the individual partners are ranged into totemic sub-clans. So that the exchange establishes a system of sociological ties of an economic nature, often combined with other ties between individual and individual, kinship group and kinship group, village and village, district and district."; See also, Lon L. Fuller, *Morality of Law*, 19-23.

93 Ibid., 28. "…the social constraint, the regard for the effective rights and claims of others is always prominent in the minds of the [Melanesians] as well as in their behavior…"

94 Ibid., 29.

95 Ibid., 29-30.

96 Ibid., 55.

97 Ibid., 58-59.

Based on Malinowski's observations while living with the Melanesians, the law was something sustained in the individual and was a key element in both their intra-community and inter-community relationships. The law existed without any institutional promulgation or intervention whatsoever, and found its epicenter in the mutually agreed minds and functional relationships of the Melanesians themselves.

Using Malinowski's observations, we see that laws existed, but not in any way we might now recognize. They were instead supported by a meeting of the minds within the particular community.[98] Laws existed quite apart from ink and paper, and yet there were definitely laws, and I suggest that this was an example of where LAW as referent was the guiding set of principles and ideals which supported their obligations to each other. There may have been no written laws from which we might ascertain what the nature of the referents were, but Malinowski did observe regular practices and obligations which were accepted by the group, and, in fact, one *can* infer from those social realities what the ideals/referents were. Here there was a direct relationship between the LAW in their minds, and their actions and obligations. The latter would be indicative of what their referent/ideals actually were.

Peter L. Berger and Thomas Luckmann

Berger and Luckmann were twentieth century sociologists who wrote a seminal treatise on the sociology of knowledge entitled, *The Social Construction of Reality*. Their basic contention is implicit in the title; they argue that reality is socially constructed.[99] These authors maintain, in line with my own theory of LAW as referent, that the reality of the world originates in people's thoughts, hence mind, as well as their actions.[100] This reality is apprehended by people as an ordered one, a pre-existing one, with language providing the necessary objectifications which posit order and give life meaning.[101] This reality is presented to the person as intersubjective, shared with others.[102] Berger and Luckmann, in keeping with Ehrlich and Malinowski, maintain that "empirically,

98 Ehrlich, *The Sociology of Law*, Ehrlich confirms Malinowski's findings, writing, "And the same result is reach if one seeks instruction concerning the law of other uncivilized or half-civilized people out of books of travel or reports of missionaries; he learns much about the regulation of marriage, family, and the ranks and stations in life, about landholding systems, contracts, and succession, but at the same time he finds nothing that can be compared with the Legal Provisions with which we are familiar." (132-133)

99 Berger & Luckmann, Social Construction of Reality, 1.

100 Ibid., 19.

101 Ibid., 21.

102 Ibid., 22.

human existence takes place in a context of order, direction, stability."[103] In answer to how such a context arises, they offer answers on two levels: first, the social order precedes organismic development, and second, in answer to how this social order comes about, they propose that such is a human production, ongoing, and it is produced by humankind in their ongoing externalization.[104] In agreement with my own theory, they also understand that this order is not due to the "nature of things" or the "laws of nature."[105] They write, "[s]ocial order exists only as a product of human activity. No other ontological status may be ascribed to it without hopelessly obfuscating its empirical manifestations."[106]

The authors suggest that the human organism is inherently unstable and therefore it is required of people to construct a stable environment.[107] This process of stabilizing is accompanied by habitualization, a recurrent phenomenon pursuant to all human activity[108] which, due to its tendency to reduce decision-making, gives room for deliberation and innovation[109] as behaviors are considered in the abstract, or mind. It is also at this juncture where institutionalization can arise given that there are reciprocal typifications of habitualized actions.[110] As with Malinowski's schema,[111] what is key is the *reciprocity* of the institutional typifications along with the typicality of both actions and actors within the institution.[112] The typifications of these actions are shared and available to all members of a group.[113] For instance, the law as an institution posits that only certain people can meet out punishment in a specific circumstance.[114] These kinds of fundamental building blocks of behavior have their referent LAW which gives rise to their dependent laws, and it is in the process of stabilization where such causal relationships bear forth the habitualizations leading to institutionalization. In other words, humans are guided by their basic referent LAW to sponsor habitual behaviors which will facilitate reciprocity in the community, and this latter observation is the same

103 Ibid., 49.
104 Ibid. Berger and Luckmann point to three main "activities" of humankind in their social construction of reality. Externalization is ongoing in human activity, objectification is the naming of things, and internalization is the adoption of the activities and meanings one is confronted with.
105 Ibid.
106 Ibid.
107 Ibid., 50.
108 Ibid., 51.
109 Ibid.
110 Ibid.
111 videre supra.
112 Berger & Luckmann, Social Construction of Reality, 51.
113 Ibid.
114 Ibid., 52.

contention Malinowski makes about the basis for primitive law.[115] Habitualizations then lead to institutionalizations.

Summary

The emphasis of Berger and Luckmann on the development of a social *institution* such as law, is that this process is grounded in the subjective experiences, the minds, of people who seek to stabilize their interrelationships – their society – using the instrumentality of habitualizations based on the reciprocal nature of communal existence. The LAW as referent enters the process as soon as one individual comes in contact with another. The ideals which inform the habit patterns between the two are akin to the ideals which, at the institutional stage, give rise to, eventually, written laws. Although the referents are not static, in most cases a basic framework of referents common to most societal experiments seem to fall in line, such as those which guard the reciprocal nature of living interdependently. The reader must keep in mind, however, that LAW as referent is not about defining a "legal system," it is about defining *the* LAW, in relation to given laws.

Malinowski's emphasis on reciprocal obligations preceded the work of Berger and Luckmann, but both treatises come to a similar conclusion, that the genesis of laws originates in the minds of humans living in society. Malinowski was not defining a legal system either, he was observing the presence of what he claimed was non-institutionalized and primitive law. Whether it amounted to a legal system was not Malinowski's concern at all, *Crime and Custom in Savage Society* was aimed squarely at refuting the false representations of indigenous peoples so common in the anthropology of his day. Malinowski's observations led him to the conclusion that there was a clear set of obligations and primitive "laws" which were at work in the life of the Melanesian community he observed, and these were largely grounded in what may fairly be called the referential LAW about reciprocity within the framework of community life. While there were no state institutions as such, there were laws which took the form of obligations which everyone in the community was aware of, and these served the role of binding laws, based as they were on the referential ideals that guaranteed continued existence for the society as a whole.

In a more generalizing and less abstract way, Ehrlich's sociology of law thesis puts the epicenter of "Social Order" in the social institutions of marriage, family, possession, contract, and succession.[116] His clear articulation of a "legal provision gap" – which occurs developmentally between the time when social

[115] videre supra.

[116] Ehrlich, The Sociology of Law, 131.

order is constitutive of the aforementioned institutions, and a later time when legal provisions appear for the first time in the guise of statutes, rules, and judgments – is indicative of his main thesis which separates social order/law from the mere aftereffect of their ultimately being codified. The social order is built off the referential ideals connected to obligations around the fundamental relationships within society such as family, marriage, etc. Ehrlich's description of the conception of social order assumes humans assenting to structure in these seminal institutions, mentioned withal, and, in fact, this same assent can deductively be inferred from Malinowski's observations of the Melanesian community in his study.

These three study's give support to my own thesis concerning the nature of laws and their referent LAW. In the most general way, Ehrlich's institutions are ones which are habitualized using the referent LAW in the minds of two or more people in a community who agree to order their existence under the rubric of a reciprocally beneficial relationship. Malinowski's study gives a more detailed account of such reciprocal interrelationships, and in the Melanesian community, while there was no "institutional" edifice for law as such, there were "laws" based on their referents of the mind[117] in the law-like societal realities such as marriage and the fishing party.

Berger and Luckmann give us an even more detailed picture of the development of the social order, and by implication they articulate the necessary conditions for LAW as referent. In the midst of human externalizations – activity – in groups of two or more, social order is achieved as a solely human deliberation based on the need for stability amongst a group of humans who happen to be organically unstable. The organic instability gives rise to perhaps the first referent, *deference to the other for mutual benefit*, and this general referent would seem to encompass a number of the basic "institutions" laid out by Ehrlich. Without deference or sacrifice of some kind to the other, the institutions simply could not hold up, so the obligations come into play immediately and refer directly to the referent, the LAW.

3.

A. Related but Distinct Characterizations of the Law

Robert Cover, Robert Dworkin, and Lon L. Fuller

[117] See text at footnote 74.

Robert Cover

Robert Cover is related to the preceding discussion in a fundamental way, in that he borrowed the concept of "nomos" directly from sociologist Peter Berger,[118] and was heavily influenced by the "world building" theory introduced by Berger and Luckmann.[119] Cover sees the normative universe held together by interpretive commitments,[120] and these are determinative of what the law means and what it shall be.[121] He maintains that law can be understood as a system of tension and/or a bridge joining the concept of reality to an imagined alternative, which can only be represented normatively via the device of narrative.[122] He goes on in this section to explicate his source for this "reality/alternative" bi-furcation, using the work of philosopher/translator George Steiner. Steiner introduced the concept of "alternity," meaning "the 'other than the case', the counterfactual propositions, images, shapes of will and evasion…"[123] which charge our minds and enable us to build the mostly fictive milieu for somatic and social existence.[124] Steiner's "other than the case" and Cover's imagined alternative, based as it is on Steiner's work, sounds similar to my own theory's claim that in reference to written laws, norms, and rules, the LAW are those ideals that serve as the basis for laws, and as such, this LAW is "not the case" in everyday experience. We could "simply" say that the LAW, specifically in reference to laws, is what is not the case. A closer look at Steiner in context shows that any cursory similarity to LAW as referent is "not" the case. He writes:

118 Peter Berger, *The Sacred Canopy: Elements of a Sociological Theory of Religion* (Garden City, New York: Doubleday, 1967), 19-20. Berger writes, "It may now be understandable if the proposition is made that the socially constructed world is, above all, an ordering of experience. A meaningful order, or nomos, is imposed upon the discrete experiences and meanings of individuals. (*) To say that society is a world-building enterprise is to say that it is ordering, or nomizing, activity (19)." * Berger notes "[t]he term "nomos" is indirectly derived from Durkheim by, as it were, turning around his concept of *anomie*. The latter was first developed in his *Suicide* (Glencoe, Ill., Free Press, 1951) (192)."

119 Robert Cover, "Foreword: *Nomos* and Narrative," *Harvard Law Review* 97.4 (1983-1984): 4. Ft. 2.

120 Ibid., 7. See also his discussion at 45-46.

121 Ibid.

122 Ibid., 9. Cover explains, "A legal tradition is hence part and parcel of a complex normative world. The tradition includes not only a corpus juris, but also a language and a mythos – narratives in which the corpus juris is located by those whose wills act upon it. They build relations between the normative and the material universe, between the constraints of reality and the demands of an ethic."

123 George Steiner, After Babel: Aspects of Language and Translation (London: Oxford University Press, 1975), 222. Cover, *Nomos and Narrative*, 9.

124 Ibid.

> Ernst Bloch… conceives the essence of man to be his 'forward dreaming', his compulsive ability to construe 'that which is now' as being 'that which is not yet'. Human consciousness recognizes in the existent a constant margin of incompletion, of arrested potentiality which challenges fulfilment. Man's awareness of 'becoming', his capacity to envisage a history of the future, distinguishes him from all other living species. This Utopian instinct is the mainspring of his politics.[125]
>
> *Language is the main instrument of man's refusal to accept the world as it is*. Without that refusal, without the unceasing generation by the mind of 'counter-worlds' – a generation which cannot be divorced from the grammar of counter-factual and optative forms – we would turn forever on the treadmill of the present.[126]

Now, if we turn to Cover, we read:

> The codes that relate our normative system to our social constructions of reality and to our visions of what the world might be are narrative. The very imposition of a normative force upon a state of affairs, real or imagined, is the act of creating narrative. …To live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the "is" and the "ought," but the "is," the "ought," and the "what might be."[127]

Steiner's explanation of how humans use language to get beyond their present state of affairs and think in terms of "what might be" is the exact idea Cover borrowed from him to make the same point, although specifically in relation to law. Falsity, counter-factuality, and contradiction are positive aspects in this process of imagining future possibilities, but they all relate to re-imagining the "what is" towards a vision of "what might be." Cover's "imagined alternative" is Steiner's – borrowed from Ernst Bloch – "other than the case." Steiner's theory, which Cover adopts, is that the progress of society is dependent on re-imagining what it might look like, thinking and talking beyond the extant conditions of now and placing them squarely in the future. This aspect of their theories, alone, distinguishes it from LAW as referent in that the kind of thinking they have in mind is *future* thinking, within human progress, a

125 Steiner, *After Babel*, 216-217.
126 Ibid., 217-218.
127 Cover, Nomos and Narrative, 10.

"redeemed" vision,[128] and re-imagining of the "what might be". LAW as referent suggests that the LAW *as* a referent is an ideal, in the here and now,[129] and is not focused on the future at all – unless in terms of reforming the law based on analysis of the referents/ideals.

Further, in terms of the law, Cover understands it as linking reality to some imagined alternative, but that alternative is exactly that, an alternative,[130] not ideals in reference to the laws.[131] LAW as referent is a theory about the link between laws and their referents, not their imagined future alternatives. Cover wrote, "[a] *nomos*, as a world of law, entails the application of human will to an extant state of affairs as well as toward our visions of alternative futures."[132] Cover also distinguishes his theory of nomos from any kind of idealness when he writes "it is neither utopia nor pure vision."[133] The referents are ideals that exist in the minds of those who make specific laws; and as mentioned earlier, they are ideal only in the minds of human actors, there is nothing intrinsically "morally good" about them,[134] and this is in a way reminiscent of Hart

[128] Our visions hold our reality up to us as unredeemed. By themselves the alternative worlds of our visions - the lion lying down with the lamb, the creditor forgiving debts each seventh year, the state all shriveled and withered away - dictate no particular set of transformations or efforts at transformation.

[129] If the ideal/referent exists in the minds of the lawmaker, then, by definition, since most of our "lawmakers" have passed away and those who live are not immortal, the ideal has no necessary connection to the future.

[130] Ibid., 19. "…alternative stories still provide normative bases for the growth of distinct constitutional worlds through the persistence of groups who find their respective meanings for the first amendment in the radically different starting points of Roger Williams and Thomas Jefferson. In this respect, as we shall see, the first amendment's religion clauses are not atypical."

[131] Based on the examples Cover himself gives – such as regard the Amish, etc. – in *Nomos and Narrative*, the *imagined* futures have to do with societal possibilities such as judges thinking in new ways so as to expand the nomos. As such, they are not concerned with what is not the case based on a given law, because the ideal with which formerly a law was brought into existence could, by definition, have nothing to do with the alternative vision of the future. The ideal, at most, belongs to the law-giver, who in most cases dealing with US constitutional law is dead, and those who have tacitly accepted the law based on the same ideal in the present. These ideals, not being platonic, do not stretch into any future in any way, but are dependent on the existence of the minds which contain them. See pp. 25ff.

[132] Ibid., 9.

[133] Ibid. The reader will remember that LAW as referent specifies that ideals which exist in the mind are in fact ideals, perfect in relative terms pursuant to the lawmaker, but Cover jettisons any kind of perfection such as this. His imagined future alternatives are ones in which things become incrementally better, not perfect.

[134] Here I take it that as ideal speaks to excellence, perhaps an end point of excellence as concerns the question at hand, one could just as easily imagine a negative ideal as a positive one. Can we imagine an ideal for a segregation law, or a law which discriminates in some way? We may eschew the use of such ideals, but that is no reason for ignoring their existence.

demonstrating to Fuller that there could be purposive activities such as poisoning which were not morally driven enterprises.[135] LAW as referent highlights what the referents of laws are in an effort to assess whether they are actually reflective of the goals of society. The referents are not imagined future "alternatives," they are the bases for laws as they currently exist.

Ronald Dworkin

In wanting to enrich the incomplete positivist account of the law, Dworkin turns to principles, and in some respect, these principles seem like they are akin to my suggestion of the LAW as referent, a set of ideals. When Dworkin does write about principles, he is primarily concerned with their use both in legal arguments and the decisions of judges.[136] In his attack on positivism, Dworkin first claimed that principles went along with policies as further standards, along with rules, which made up the definition of law.[137] Judges used these principles when the law seemed in doubt and they engaged them with varying degrees of weight, even subjecting them to being overridden by other legal considerations.[138] Dworkin then changed his perspective and put the emphasis on arguments of principles which affirm the existence of rights.[139] He concludes with a more holistic view, exemplified in his work, *Law's Empire*, wherein he fixes principles as those precepts which have common consent, are part of the law, and are identifiable at the pre-interpretive stage.[140]

Yet in *Law's Empire*, when Dworkin speaks of principle, he writes "why should we not embrace them [checkerboard solutions] as a general strategy for legislation whenever the community is divided over some issue of principle."[141] The claim about common consent is ostensibly rebutted at this juncture; there is societal division over principles.[142] He further adds that these kinds of

135 H.L.A. Hart, "The Morality of Law," Book Review, *Harvard Law Review* 78 (1964-1965): 1286.

136 Ronald Dworkin, *Law's Empire* (Cambridge, Massachusetts: Harvard University Press, 1986). 11. "For we take an interest in law not only because we use it for our own purposes, selfish or noble, but because law is our most structured and revealing social institution. If we understand the nature of our legal argument better, we know better what kind of people we are."

137 J.W. Harris, *Legal Philosophies*, 2nd ed. (London: Butterworths, 1997), 188.

138 Ibid., 188-189.

139 Ibid., 189.

140 Ibid., 190.

141 Dworkin, *Law's Empire*, 179. See also, "Rejecting the checkerboard solution seems perverse in the same way [as not rescuing any prisoners when we could rescue some] when the alternative willl be the general triumph of *the principle we oppose.* [emphasis added] (181); 183;

142 Certainly Dworkin is not claiming common consent in a universal way, and he further admits that his model of principle is "ideal," hence my use of the word "ostensibly:" in other words, the claim of common consent would be rebutted if he portrayed consent as universal,

checkerboard solutions have no overriding principle which can justify their defect of inequality.[143] For Dworkin, because these cases arouse division in society over principle, even though they seem very amenable to a bare definition of the "virtues" of fairness or justice, we must appeal to integrity.[144] He writes: "it is inconsistency in principle among the acts of the state personified that integrity condemns."[145]

Dworkin imagines a community of principle in which people accept that they are governed by common principles, and yet have political debate over "which principles the community should adopt as a system…."[146] The judiciary's decisions, under this model, presuppose and endorse a scheme of principles,[147] those common principles which society yet continues to disagree on. Political integrity is then accepted as a distinct political ideal which, even among citizens who disagree about political morality, constitutes a political community.[148] It is perhaps at this juncture, fixing integrity as an ideal, where Dworkin's ideas seem to have confluence with my own suggestion of LAW as referent, or as the set of ideals which are the basis for laws; yet, in this case, I would be forced into Dworkin's narrow focus on judicial decisions. Further, one wonders whether integrity is truly the overriding principle which settles the minds of those who feel strongly that the judiciary has erred in a case involving contended political moralities.[149] Also, integrity seems quite a separate idea from the referents which give rise to laws, because integrity, as Dworkin portrays it, is only applicable to judge made law on those most difficult cases where commitment

but that is impossible. See text at footnotes 131-132. It is enough to note that Dworking is talking about variously held, and hotly contested, common agreement on principles. In some ways the semantic tangles involved with "common consent" are too weighty, and one wonders whether using "common consent" in this way was really the best choice of words. He is really saying that within society there are select groups or sub-cultures which usually adhere to a common set of principles. His "common" is nothing like "common law" or "common height" etc., in fact it is somewhat particular.

143 Ibid., 180.

144 Ibid., 183. "Integrity is our Neptune."

145 Ibid., 184.

146 Ibid., 211.

147 Ibid.

148 Ibid.

149 One of the difficulties society has to deal with at the highest court and lawmaking levels is that the citizenry is almost always divided on some points of morality which are under the purview of the law. Dworkin's integrity is a reality he suspects is at work in the minds of lawmakers and judges when they come to an impasse based on a marked division over principle. I think a formidable difficulty in Dworkin's scheme is the tacit implication that large sections of society are supposed to accept that judges and lawmakers using integrity as the arbiter in the difficult cases is going to be a fair or just compromise. Perhaps it is only the lawmakers and judges who hold to integrity, but then how useful is an integrity which is delivered by so few, and yet affects so many, for better or for worse as the case may be.

to principle is deeply divided. Integrity appears as merely a tool that ameliorates the sacrificing of principles, jettisoned whenever judges change the laws based on the referents/ideals, which under my scheme, the reader will remember, are *not* the case in practice and in reference to the substance of laws. When judges make compromises and change the law in hard cases, at least as Dworkin frames it, integrity is championed.[150] Integrity arrives with the judge before he has heard or read anything in regard to the dispute, it is what Dworkin supposes everyone assents to, and what the judges already bring to the pre-interpretive stage of the legal process.[151]

Integrity, moreover, is a principle or ideal which Dworkin imagines engaged in the minds of people/judges *on* the law, rather than being the basis *of* it. Integrity is therefore primarily directed at the law for a flattening effect, and only appears as an add-on to the judge made law post-facto. But, again, it seems a dubious claim to say that once this threshold in the process is reached, that society will all agree that integrity is now an additional basis for any such law. Of course they will not, and Dworkin acknowledges this.[152]

Dworkin admits that his "models," including the model of principle, are ideal.[153] He defends this unworkable and fundamental aspect of his models by suggesting that we understand our practice being in line with the model of principle, so that society can then support its institutions as a matter of fraternity,[154] and the latter he does not classify as a principle. He emphasizes:

> I am defending an interpretation of our own political culture, not abstract and timeless political morality; I claim only that the case of integrity is powerful on the second, political dimension of

[150] It is a categorically different thing to assert first, that laws are referrers in relation to an ideal which is not the case, and second, that laws changed according to Dworkin's suggestion of integrity are being struck down or altered by a principle which is the case. Dworkin supposes integrity to be the principle which is and has been used to make decisions in those hard cases, and which exists at the pre-interpretive stage of the legal process, and presumably further back than this as all judges are equipped with it. In some ways integrity seems to be engaged like a rule would, whenever the circumstances arise, otherwise it remains the case as the all important part of previous "hard" cases and remains at the ready in the hands of the judiciary and law-making powers.

[151] See text at footnote 105.

[152] Ibid., 214. "We cannot suppose that most people in our own political societies self-consciously accept the attitudes of any of them."

[153] Ibid.

[154] Ibid., 214-215.

> interpretation, which reinforces its strong claims on the first dimension of fit.[155]

Dworkin is proposing a descriptive thesis justifying the status quo of "our" political system, he is not prescriptively asking us to "imagine new worlds" as Cover did.[156] LAW as referent is also a descriptive thesis, but it is not aimed at justifying the status quo at all. LAW as referent is pointing to ideals that were and are the basis for individual laws within a legal system, and by laying them bare aims to facilitate a more functional and critical assessment of these ideals in the process of determining whether these are truly reflective of a society which sponsors them by default.[157]

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[155] Ibid., 216.

[156] Gordon Christie has suggested to me that given the sorts of ideals that are indicative of the American system, the referents of their laws might be pulling in their imagination so that a certain kind of structure can be maintained. In light of what Dworkin is doing, explaining how "our" systems work, using a descriptive model of principle, I think such a suggestion is very attractive.

[157] By default I specifically refer to the fact that a very small group of citizens, many no longer alive, and a handful of judges are responsible for the written and judge-made "laws." Dworkin's principle of integrity, if we think about how LAW as referent would apply to it, might be characterized as the ideal which is responsible for the judge made law. But as I pointed out at footnote 131, Dworkin seems to be implying that integrity is not only "not the case" but has been the case in the sense that it has been responsible for the deciding of the "hard cases" for some time. Yet, one could also argue that integrity is not the case when the judge first comes upon the division over principle, and it is sounded out to come to a compromise law which, as a referrer law, has as one of its referents, the ideal of integrity. I would have no issue with such a claim, but I would point out that Dworkin and I, first, are characterizing the referents in different syntactical ways, for him a principle, for me an ideal; second, even if we consent to the semantic content being similar enough for the purposes of comparison, Dworkin is characterizing judges as applying the integrity principle, like an ointment, to the injured body of society, whereas LAW as referent is establishing that given laws, whether they be statutory or judge made, are the product of ideals/referents emanating from the minds of the lawmakers, and in the case of Dworkin's judge before the "hard case", the lawmakers would include those responsible for the law in question, perhaps long dead, as well as the judges who had altered the case in its evolution, and finally by the judge or judges applying integrity to it in the final instance. Here, also, there seems a difficulty, because all those intervening judicial amendments between the drafter and the final judge would have been, according to Dworkin, made according to integrity all the way along and yet integrity never quite seems to have worked in any kind of way that could be called ideal since it kept coming before the courts and may continue to into the future. Nonetheless, one could imagine the permanent principle of integrity existing in the minds of the judges through the decades of a society's existence, but the answer for that might be *ipso facto*. In other words, what Dworkin calls integrity may at times be judges making decisions which will encourage the society's existence in the most robust way and least compromise that same existence. Integrity, then, would be inextricably wound up in a state's ethos of self-preservation. One could hardly imagine the opposite happening: judges deciding in such a way as to risk compromising the state's existence, and by existence I mean

It may be that what Dworkin envisions is neither reflective of the status quo nor even possible. He claims:

> Integrity demands that the public standards of the community be both made and seen, so far as this is possible, to express a single, coherent scheme of justice and fairness in the right relation. An institution that accepts that ideal will sometimes, for that reason, depart from a narrow line of past decisions in search of fidelity to principles conceived as more fundamental to the scheme as a whole.[158]

As I mentioned above when discussing Dworkin's theory, and as we can see here, he is primarily concerned with an institution, such as the judiciary, as it searches for "fidelity to principles" in the process of deciding the hard cases. That the decisions are sometimes made on the basis of an appeal to principle I have no doubt, and after the decision becomes a law we can then discuss the referent or referents involved which are the basis for such. Thus, one of the main differences that distinguish LAW as referent from Dworkin's defense of principles is the locus of examination. Dworkin's theory is concerned with the engagement of principles in the decision-making process, whereas LAW as referent is anchored to the ideals/referents which serve as the basis for existing written laws, judge-made laws, norms, and rules.

Lon L. Fuller

Lon Fuller led the attack on positivism for many decades during the twentieth century, and his strategy was to understand law as being intrinsically related to purpose.[159] In the following section, I will distinguish LAW as referent, in so far as it centers on ideals, from Fuller's purposive account of law. J.W. Harris has divided the growth of Fuller's purposive argument in three stages, roughly stated as drafter's intent/purpose, the enterprise of governance as purposive, and in deliberately defining law to assist "good" legal enterprises.[160] First, Fuller wrote that we should be able to put ourselves in the position of the drafters so that we can know what they thought "ought to be"[161] in regards to given laws. Second, are Fuller's eight legal principles of the inner morality of law.[162] Third, purpose ostensibly exists in the definition of law, but here Harris engages in

stable existence because very few decisions would ever challenge the existence of a state, but there are a number of cases which could cause great disturbance and thereby de-stabilize their existence.

158 Ibid., 219.

159 Harris, Legal Philosophies, 145.

160 Ibid.

161 Fuller, A Reply to Professor Hart, 666.

162 Fuller, *Morality of Law*, 33-94; See also, Harris, *Legal Philosophies*, 146.

somewhat specious reasoning because his textual evidence from Fuller maintains merely a way to define the *functioning of legal philosophy*: "[t]hough there are no doubt many permissible ways of defining the function of legal philosophy, I think the most useful is that which conceives of it as attempting to give a profitable and satisfying direction to the application of human energies in the law."[163] This is not a definition of law, although one can certainly see the purposive elements of "profitable" and "satisfying" in relation to the direction of human energies in the law – and by this Fuller is speaking specifically about the time spent working in the field of philosophy of law.[164]

Laws as Purposive

While a law's purpose may seem, at times, to align with what I have called the ideal or referent, it does not in many cases, and this fact distinguishes my theory from Fuller's purposive portrayal of law. Do laws have purposes? Of course they do, but how can we know what they are? When a law is interpreted,[165] and when we see law applied, we see what it accomplishes and one would suppose we may here find a purpose. Take the most hated societal behavior: Murder, or the intentional killing of another. A law against this behavior, according to Fuller's *first* sense of individual laws, serves a societal purpose, but I maintain that this purpose is not the same as the ideal which brought the law into being in the first place. The law in motion shows fairly clearly that the offender is punished by some kind of jail term or capital punishment. The primary functional purpose of the law seems to be punishment of the offender; the drafter's wanted to ensure punishment. If we turn to LAW as referent, we ask, what was the ideal which brought such a law into existence? Clearly, the main referent at work is sanctity of life, or put another way, the principle that people have a right to live unharmed by others. If we contrast the purpose and the ideal, they are different. Some might insist that the ideal is also related to the purpose, for instance claiming the sanctity of life was part of the law's purpose.

163 Fuller, The Law in Quest of Itself, 2; Harris, Legal Philosophies, 146.

164 Fuller, *The Law in Quest of Itself*, 2. Fuller writes immediately following, "Viewed in this light, the task of the legal philosopher is to decide how he and his fellow lawyers may best spend their professional lives."

165 Another sense in which Fuller's purposive account is different from LAW as referent is how he attaches the purposive enterprise to interpretation. LAW as referent has no central attachment to interpretation as I have laid it out herein. Fuller, A Reply to Professor Hart, 667. "Can it be possible that the positivistic philosophy demands that we abandon a view of interpretation which sees as its central concern, not words, but purpose and structure?"; Ibid., 668. "Professor Hart seems to subscribe to what may be called the "pointer theory of meaning," a theory which ignores or minimizes the effect on the meaning of words of the speaker's purpose and the structure of language."; Ibid., 669. "…I believe we can say that the dominant tone of positivism is set by the fear of a purposive interpretation…."

Yet if that was the case, then the law clearly fails, because the law is not even engaged until the ideal has been compromised. Purposes and ideals for laws can be categorically different, although in many cases they appear similar.

The Legal System as Purposive and the Morality of Aspiration

Fuller writes that moral injunctions against killing rest on the truth that if humankind kill each other off, his morality of aspiration cannot be realized.[166] He claims the morality of duty is closest to the concept of law, and the morality of aspiration is in "intimate kinship" with aesthetics.[167] Fuller further clarifies this notion by writing that the morality of aspiration has to do with making the best use of our short lives.[168] He likens this to marginal utility, and notes that although it is claimed that the morality of aspiration implies a conception of the highest good of humankind, it fails to tell us what this is.[169] LAW as referent, on the other hand, suggests that referents exist which do tell us what these ideals are, found merely by inferring them from their particular referrer laws. LAW as referent "ideals," then, should not be confused with Fuller's morality of aspiration.

Further, on the subject of ideality, Fuller notes that the concept of utopian fulfillment of his eight principles is "not actually a useful target for guiding the impulse towards legality… nevertheless it does suggest eight distinct standards by which excellence in legality may be tested."[170] Fuller is denying the usefulness of perfection, or the ideal, as an impulse; yet LAW as referent assumes the perfect ideal *is* a law's sponsor, and is imagined by the lawmaker in their minds in the creation of laws which they hope will bring society as close to their particular ideals as possible. Fuller's eight principles, quite apart from being seen as ideals, belong squarely to his morality of aspiration or aesthetics, as he himself conceded.[171]

The concept that law as a whole is a purposive enterprise, mostly ensconced in his eight principles of lawmaking, is quite different from my theory of LAW as referent. I have no disagreement with Fuller when he writes "…Parliament's

166 Fuller, *Morality of Law*, 11.
167 Ibid., 15.
168 Ibid., 17.
169 Ibid., 17.
170 Ibid., 41.
171 Ibid., 43. "…the inner morality of law is condemned to remain largely a morality of aspiration and not of duty. Its primary appeal must be to a sense of trusteeship and to the pride of the craftsman."; In fact in some places, Fuller becomes positively morose in his expectations for the principles, "With respect to the demands of legality other than promulgation, then, the most we can expect of constitutions and courts is that they save us from the abyss; they cannot be expected to lay out very many compulsory steps toward truly significant accomplishment."

ability to enact a law is itself an achievement of purposive effort…,[172] such an assessment would seem to follow logically. There are obvious reasons why laws are made, and further, as seen from this last excerpt, the all-encompassing lawmaking ability of governments is understood by Fuller to serve the purpose of the need for subjecting some "human conduct to the explicit control of rules."[173] If this is what Fuller means by the whole program of law being a purposive enterprise, I agree fully, but where LAW as referent is concerned with specific ideals which are the basis for laws, norms, and rules, Fuller's purposive view of the legal system is a general observation about a single essential characteristic of an entire system.

Fuller's Definition of Law?

As pointed out above, Fuller does not ever, to my knowledge, give a point blank definition for "law as purposive" as Harris has suggested. Certainly he does not do this in the passage of text cited as evidence, nor the three lectures which make up the *Law in Quest of Itself*. Fuller defines legal philosophy, and he also defines positivism and natural law,[174] and it is clear that he chose to exert his "energies" of legal philosophy on natural law concepts and to show the sometimes tragic deficiencies of a positivist stance. Fuller, though, provides enough evidence contrary to LAW as referent so as to sufficiently separate them in my estimation.

Fuller does admit that humans seem to have a "natural hankering" for absolutes, and think often they are led by principles which "we can pretend to perfection."[175] He claims the illusion of natural law is that there is no limit to what human reasoning can achieve in the ordering of relations in society, but admits this is not possible.[176] But he does concede that "[t]he illusion of natural law has at least this presumption in its favor, that it liberates the energies of men's minds and allows them to accomplish as much as they can."[177] This reads very much like the freeing power of Robert Cover's imagined future alternatives.[178] Fuller also wryly observes that if "Renan was right in assuming that men have the capacity for developing the illusions necessary for their survival, we ought to be seeing a revival of natural law:" and this in 1940 when the European world seemed to be coming unglued because of a Nazi regime

172 Ibid., 148.
173 Ibid., 150; See also page 151.
174 Fuller, The Law in Quest of Itself, 5.
175 Ibid., 109.
176 Ibid., 110.
177 Ibid.
178 Vide supra

which arose, in part, due to the popularity of the tenets of positivist legal philosophy.[179]

Yet Fuller does more than merely characterize natural law as one of two illusions, he specifies that the idea of some extra-legal body of precepts connected to the laws "is to a large extent a creature compounded of paper and ink and philosophic imagination."[180] Apart from the inference taken from his "large extent," that somewhere there must exist a minimal extent, it seems clear that Fuller's natural law is one which sets aside the notion of ideals, quite in opposition to LAW as referent. His constant characterization of natural law as an illusion may seem like more than enough proof that he has sworn off ideals, but on the other hand, illusions are a product of the mind, and so here a tangential connection to the ideals, perhaps. That he understands law as functioning with purpose at the levels of the individual laws and legal systems, I have no doubt, and I agree with most of his argument on this tack. LAW as referent, on the other hand, is wholly concerned with the bases for laws, it is concerned with the "what is not the case in terms of the laws" as a way of understanding which ideals gave rise to them.

B. Conclusion

In a perfect world, the LAW would be what is; but in an imperfect world of destructive human behaviors, laws find their phenomenological epicenter in what is not the case, a set of ideals which are appealed to by the person or people making the laws. The locus for these ideals is the human mind. LAW as referent maintains that *the* LAW is best understood as the referent ideals of laws, the latter of which in turn are referrers to their concomitant ideals/referents. This way of portraying the LAW stipulates a semantic reminder to us that laws are, after all, a consequence of the human mind that is disposed to certain ideals. LAW as referent seems to clear the way for a more robust articulation of those ideals which are responsible for laws, and thus it may potentially assist in the critical analysis of legal systems to the extent that it highlights what exact referents continue to be the bases for laws. From this vantage point, the researcher can assess whether the referents actually reflect society's goals, and further, if they do, she can also determine whether the laws under particular referents are sufficiently connected *to* the referent. LAW as referent is a theory of law aimed at a better understanding of the dependent relationship between laws and their referential ideals.

[179] Fuller, The Law in Quest of Itself, 121-123.
[180] Ibid., 136.