Marquette Law Review

Volume 106
Issue 2 *Winter*

Article 4

Winter 1-1-2023

Interconstituted Legal Agents

Christian Turner

INTERCONSTITUTED LEGAL AGENTS

CHRISTIAN TURNER*

> *When I believed that my existence was a such a further fact, I seemed imprisoned in myself. My life seemed like a glass tunnel, through which I was moving faster every year, and at the end of which there was darkness. When I changed my view, the walls of my glass tunnel disappeared. I now live in the open air. There is still a difference between my life and the lives of other people. But the difference is less. Other people are closer. I am less concerned about the rest of my own life, and more concerned about the lives of others.*
>
> **—Derek Parfit**[1]

> *You are me, and I am you.*
> *Isn't it obvious that we "inter-are"?*
>
> **—Thich Nhat Hanh**[2]

Legal theory and doctrine depend on underlying assumptions about human nature and sociality. Perhaps the most common and basic assumption is that we are separate persons who communicate imperfectly with one another. While this separation thesis has been questioned, it still dominates legal theory. However, I show that understanding separation and connection as alternative perspectives, rather than as ontologically true or false, reveals that legal conflict often arises when these perspectives give rise to clashing intuitions concerning the meaning of community and what constitutes goals and harms. This Article organizes perspectives on social relationships in increasing order of intersubjectivity: isolation, interaction, interdependence, and interconstitution. The last of these, interconstitution, understands people as continuously becoming who they are on account of one another, not as separate

---

* Associate Professor, University of Georgia School of Law. I have benefitted immensely from many friends and colleagues in producing this Article. Some discussed the initial ideas and gave comments on early drafts. My thanks in particular go to Gregory Klass, Ani Satz (who encouraged growing the original, much smaller idea into something more but who deserves none of the blame for what it has become), and the participants at talks at the Association of Law, Property, and Society, the UGA-Emory Faculty Workshop, and the Utopia/Dystopia Workshop at UNLV. Thanks also to Taylor Bussey, Akash Shah, and Connor Correll for their research assistance.

1. DEREK PARFIT, REASONS AND PERSONS 281 (1984).
2. THICH NHAT HANH, *Interrelationship*, *in* CALL ME BY MY TRUE NAMES 154, 154 (1999).

agents who merely influence one another. Some theories of human developmental biology suggest that this perspective has as reasonable a claim, and perhaps a greater claim, on social reality as do the more familiar ones. I use several problems in law to demonstrate the importance of the choice among these perspectives, especially highlighting the valuable insights of interconstitutionalism.

I. INTRODUCTION

There is a frustratingly deep question lurking behind many debates over the nature of law and what its contents should be: What kind of creature are we? When people assert that "this is the law," or that "this should be my right," or that "this is my property" it does not take too many conversational nudges to land on a substantial assumption that embeds at least a partial answer to this basic question. As Robin West puts it, "Legal theorists must, perforce, answer this question: jurisprudence, after all, is about human beings."[3] Law is the name we give to certain systems of social rules: the plans we have to engage in joint action with and against one another. When we set out just what should happen

3. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 1 (1988).

in social circumstance *x* or *y*, we have in mind human beings in such circumstances and what our response, as human beings, should be.

Many possible answers to law's deepest question are familiar. Some assume human beings are ensouled, imperfect reflections of the divine.[4] Others describe us as rational bearers of preference buckets, driven to fill them at each discrete choice-opportunity.[5] If that conflicts with experience, then perhaps we can be understood as predictably irrational bucket-fillers.[6] Still others reject *homo economicus* altogether and conceive us as beings who aim to thrive by realizing core capabilities and particular states necessary for flourishing.[7] While some such models proceed from philosophical or religious commitments to notions of what human beings "really are," others are self-consciously derived as experientially validated models meant to give best answers in specific domains to what are thought to be otherwise hopelessly complex questions.

Despite their diversity, the dominant models share a common theme: the relative *isolation* of the self and its interests.[8] They mostly describe expected individual responses to social and other environmental inputs where the human being is a discrete thing acted upon and which then produces resulting actions. These effects are often aggregated to arrive at normative conclusions. Many models describe an individual's behavior and predispositions in terms of self-interestedness, whether that self values material acquisition or possesses a less tangible sense of thriving. On this sort of account, society and its many demands on the individual can seem at best a necessary evil. The individual gives up a little freedom to obtain the material rewards of others' specialized production and protection. The self gains more than the self loses by accepting these mutual constraints, and the justification for togetherness is found in that surplus over

4. *See, e.g.*, Nonna Verna Harrison, *The Human Person as Image and Likeness of God*, *in* THE CAMBRIDGE COMPANION TO ORTHODOX CHRISTIAN THEOLOGY 78, 78–79 (Mary B. Cunningham & Elizabeth Theokritoff eds., 2008); WILLIAM BLAKE, *The Divine Image*, *in* SONGS OF INNOCENCE AND OF EXPERIENCE (1789).

5. *See, e.g.*, Eduardo Fernández-Huerga, *The Economic Behavior of Human Beings: The Institutional/Post-Keynesian Model*, 42 J. ECON. ISSUES 709, 710 (2008) (describing "the methodological individualism upon which orthodox economics is constructed" as selecting rationally among choices offered by the environment and contrasting it with an institutional model of "individuals as social beings who are immersed in a cultural environment").

6. *See, e.g.*, Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476–79 (contrasting *homo economicus*, *see supra* note 5 and accompanying text, with a psychologically adjusted model intended to capture the "*actual* (not hypothesized) human behavior" of "real people").

7. *See, e.g.*, JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 154–56 (2011); MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP 70–71, 414–15 (2009).

8. *See* West, *supra* note 3, at 1–2 (noting cross-ideological embrace of the "separation thesis," whereby the "distinction between you and me is central to the meaning of the phrase 'human being' ").

isolation. The normative ideal is grounded in isolation but conceives of human beings as inevitably *interacting*.

While many have criticized the assumption of self-interestedness,[9] Robin West was among the first directly to attack the seemingly weaker assumption of separateness. In contrast to legal theory's "separation thesis," she introduced the "connection thesis." West's argument was that the assumption of separation pervades normative legal theory but is only true of men, leading to law that is fundamentally biased toward men.[10] Women, she argued, are "essentially connected" to others in ways material, moral, and social through pregnancy, heterosexual intercourse, breastfeeding, and care obligations.[11] These connections are so integral to life that they demand a model beyond not only isolation but also beyond routine interaction.

Other scholars have argued that the separation thesis inevitably fails to be true for all of us. We exist alongside one another beyond isolation and even beyond interaction. We are, rather, *interdependent*.[12] Where West identified the physical and social circumstances binding women to others, these scholars point out universal and inevitable human vulnerabilities—for example in infancy, sickness, and old age—and the connections on which we depend to survive despite them.[13] Law cannot be explained or justified, they argue, without taking account of the fact of our dependence on one another.

What if we take the thought of togetherness further, beyond interdependence? What if human beings are not isolated, are not merely interactive, and are bound to one another by more than dependence? Suppose that human beings in some sense *are* one another—that we are *interconstituted*. What if I am I only because of you?

Perhaps surprisingly, there is good evidence that this is indeed so. As summarized and drawn together in *Becoming Human: A Theory of Human Ontogeny*,[14] Michael Tomasello and other comparative psychologists have theorized that the human animal is inseparable from its cooperation with others. Comparing the development of human children and other primates, Tomasello concludes that we are made to share worlds, not to guard our own.[15] And so,

9. *See, e.g.*, Jeffrey L. Harrison, *Egoism, Altruism, and Market Illusions: The Limits of Law and Economics*, 33 UCLA L. REV. 1309, 1325–51 (1986).

10. West, *supra* note 3, at 2–3.

11. *Id.*

12. *See infra* Section II.C.

13. *See* Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13, 18–19 (2000).

14. MICHAEL TOMASELLO, BECOMING HUMAN: A THEORY OF HUMAN ONTOGENY 4 (2019) [hereinafter TOMASELLO].

15. *See generally id.*

more accurate models of human behavior must take account of more than our discrete interactions with others, because there is nothing that a human being even is that does not depend on the society in which she lives.

This new scientific literature suggests that we are interconstituted not in a purely philosophical or sociological sense.[16] Interconstitution is not the view that groups of humans behave differently when together than they would in isolation, not simply a nod to nurture—that our beliefs depend on upbringings that could have been otherwise. No, the argument here is that basic human developmental biology is inextricably bound to the biological fact of our sociality. We are not individuals who have evolved to enter minimal social contracts out of the tragic necessity of interaction but, rather, organisms whose basic biology positively drives us toward social integration, without which we would fail to develop many of the faculties we take for granted, including our very sense of self. One can only reflect on "I," because of experiences with "we."

The aim of this Article is three-fold. First, in the next Part, I propose a taxonomy of the models of human sociality on which legal thinking depends: a discretized spectrum ranging among *isolation*, *interaction*, *interdependence*, and, finally, *interconstitution*. These descriptions are models, in that they are simplifications of social life and reduce all the complexity of the relevant physical forces to categories bearing limited and prescribed dynamics. They are also habits of mind, in that we will turn to various of these models depending on our situation and the frame we have typically brought to such situations in the past.[17] No one of these habits is "correct." They are ways of seeing and

16. Most notably, in the philosophical literature Margaret Gilbert has elucidated "joint commitment," a situation arising among two or more individuals who have acted so as to commit, with respect to some phycological state, "to talk and act as would the representative of a single body or person with that goal, belief, and so on, aligning his utterances and actions with those of the others as needed." Margaret Gilbert, *Remarks on Joint Commitment and Its Relation to Moral Thinking*, 31 PHIL. PSYCH. 755, 757 (2018). And Christian List and Philip Pettit have advanced the concept of "group agency," a status qualitatively distinct from a mere collection of people or even groups of people who each understand they are members of a group. CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS 31–35 (2011). Group agency demands something other from a group than joint commitment, and, in fact, group agents need not be products of joint intention. Rather, group agency, like individual agency, describes the possession by a group of representational and motivational states combined with an ability to act on these states. *Id.* My focus here is not on analysis and comparison of these conceptual projects but on reckoning with the implications for legal theory if Tomasello's *biological* theory of human sociality is true. *See* TOMASELLO, *supra* note 14, at 4.

17. The identity between our mental habits and models is suggested by modern cognitive psychologists. *See, e.g.*, ANIL SETH, BEING YOU 174 (2021) (discussing the role of generative models in constructing the social self). And I have argued that our mental habits of perceiving our cooperation,

understanding, and sometimes one or the other will be more useful, simpler, or more accessible. Indeed, each of these habits of mind may at times feel intuitive, perhaps even so intuitive as to be transparent, in the sense that we feel as though we are seeing the world directly rather than from a model. And for each perspectival habit, there tend to arise corresponding habits of legal regulation. Whole regimes of law can turn on which of these habits predominates among practitioners and regulated entities.

The second aim of the Article is to support the validity of interconstitution as a legal habit of mind. In the third Part, I review Tomasello's account of the development of our capacities for sociality, emphasizing the key maturational periods at which social experiences give rise to concepts of self, morality, and society that our folk psychology often takes for granted and as natural.

Finally, in Part IV, the Article explores some examples of how the interconstituted stance might identify and analyze certain legal problems. For the interconstitutionalist, our experience with others powerfully shapes our beliefs and moral values. This has direct implications for our understanding of the nature of law itself and for more specific issues like the freedom of association.

The most important truth I attempt to explore here, though, is that our intuitions about the equities and wisdom of resolving disputed issues in particular ways turn on how we perceive these issues. And that perception arises from basic building-block assumptions about what it is that we believe we are perceiving. As I turn to describing the various models of human sociality, I recognize much of my own thinking in each. Just as I sometimes perceive a table as a bulk object, or in terms of its functions, or—especially if it needs repair—as an arrangement of components, I sometimes perceive others as more separate and sometimes more connected to me. Recognizing that fact and understanding how the quality of my perception affects the direction of my analysis can help explain why some cases seem hard, why we disagree, and how we might change our minds.

II. A LADDER OF CONNECTEDNESS

Legal theoretical models of human nature tend to share at least some of the following three representational assumptions, all of which we will come to question: (1) society as separate individuals whose unfortunate collisions must be managed, (2) social activity as the sum of inherently individual activities, and (3) the individual as a self-interest satisfaction machine. Following Robin

not laws of logic or analysis, constitute "the law," the constantly renegotiated common ground that undergirds and sustains our social cooperation. *See* Christian Turner, *Models of Law*, 2018 U. ILL. L. REV. 1293, 1293 (2018).

West's terminology,[18] I will call these three ideas together the "separation thesis."

Rather than elaborating a single "connection thesis" in opposition to the separation thesis, I propose a "ladder of connectedness" to exemplify the increasing quality of connection—and concomitant weakening of the separation thesis—we perceive under the mental models described at each step. Climbing the ladder, we ascend from isolation toward purer intersubjectivity, through the rungs of *isolation*, *interaction*, *interdependence*, and *interconstitution*. Each rung represents a habit of mind to which we all sometimes turn, perhaps even without awareness, when faced with this or that situation or question. We should not focus here on whether any of these habits reflects what is "true." They are all ways of seeing our situation, each sometimes a useful guide to understanding and sometimes a poor one. And with each of these perspectives on human beings come intuitions about law. The taxonomy can be summarized thusly:

Habits of Mind	*Habits of Law*
Isolation	Blackstonian property, anti-invasion tort and crime
Sporadic interaction	Learned Hand tort law, criminal law, and contract law
Continuous interaction	Calabresian tort law, corporate law, and private government (the institutional turn)
Sporadic interdependence	Fiduciary laws, subsidies, and safety nets
Continuous interdependence	Public and private institutions supporting dependents and caregivers, law (like the duty of good faith and fair dealing) supporting background cooperative norms
Interconstituion	Pedagogy, platform governance, social ecosystem management

A. Isolation

At the bottom of the ladder is self only: *isolation*. Here, we have the hardest of the hardcore separation theses. Even here, though, the view is not of a human

18. West, *supra* note 3, at 1.

being set apart from all else. Rather, we are mentally separate creatures for whom interactions with others are not different in kind from interactions with the other elements of our hostile universe.

This isolation model does not deny that humans will run into one another, but it affords no special status to their interactions. While this view might most intuitively be associated with hermits and misanthropes, we can see it as well in the attitudes many have toward "the other." Wherever people are accustomed to thinking of some other people as non-human animals or as mechanical burdens to overcome or to exploit, there is a trace of this habit, seeing the self as isolated in this sense. But the habit goes deeper than coarse bigotry. Even if one acknowledges that others have intentions and rich inner lives, one acts from the isolationist habit when those intentions and lives are of interest only instrumentally—again, as not distinct from physical impediments or affordances, many of which may also be complicated in their own ways.[19]

The isolationist embraces the psychological egoism of Bentham and Hobbes,[20] resulting in legal discourse where law is a solution to counter-productive wars of all against all that would otherwise occur in a state of the nature. Reason, under this view, teaches that we must band together to restrain how we would *really* act if only we could get away with it.

Bentham, famously:

> To enjoy quickly—to enjoy without punishment,—this is the universal desire of man; this is the desire which is terrible, since it arms all those who possess nothing, against those who possess any thing. But the law, which restrains this desire, is the most splendid triumph of humanity over itself.[21]

And so law is a corrective to our basic competitive and isolated instincts. We are each Ulysses, our immediate wants sirens, society the mast, and the law the ropes we use to bind ourselves to it. The physicality of this analogy is important. From the isolationist habit of mind, it is physical coercion that

---

19. This mental attitude is the one Tomasello associates with great ape cooperation and theories of mind, in contrast with the joint and collective intentional attitudes of human children. *See infra* notes 115–21 and accompanying text.

20. There is much argument about the degree to which, or even whether, either of these believed in psychological egoism, as such. For a good discussion, see, for example, ROGER CRISP, SACRIFICE REGAINED: MORALITY AND SELF-INTEREST IN BRITISH MORAL PHILOSOPHY FROM HOBBES TO BENTHAM 10–17 (2019). But the point here is only that their accounts have been taken by many to be consistent with the three characteristics of the separation thesis (which, again, can accommodate interests and preferences that are not purely selfish) in the sense of inclining toward experiencing pleasure and avoiding pain in ways disconnected from perceptions of others' pleasure and pain.

21. JEREMY BENTHAM, PRINCIPLES OF THE CIVIL CODE (1789), *reprinted in* THE WORKS OF JEREMEY BENTHAM 309 (John Bowring ed., 1843).

reorders our perceptions of what we ought to do given the physical presences and actions of others, just as a speed bump may cause us to slow down.

While no legal theories go so far as to assert or assume that we do not interact at all, the sort of isolationist habit of mind I describe here is common. Isolationism is an inclination to understand ourselves as fundamentally non-cooperative, where seeing the other as a mere physical bundle of potential action is an instinctively embraced biological fact with which law must reckon. This attitude is usually expressed as an assumption that humans are self-interested and that our actions relative to others are calculated solely with respect to this self-interest. Thus, isolationism is a habit of mind that fully embraces the three representational assumptions of the separation thesis: actual separation, society as a mere sum of individuals, and self-interest as our sole motivation.

The line between isolationism and models that assign exceptional status to human interactions is often indistinct when reading modern theorists—reflecting, despite how much turns on model choice, the function of context and mood when crafting legal arguments. But isolationist strains are evident. For example, John McGinnis writes that "[t]he first premise of human nature is that individuals act out of self-interest . . . . [T]here is no reason to expect individuals to act with substantially different motivations in the public and private sphere."[22] Here, the idea that humans are separate worlds unto themselves, the interactions of whom must be managed to prevent damage, is taken to be obvious, even prior to the "first premise" of self-interestedness.[23]

As Scott Fruehwald has noted, "The Framers considered man an 'atom of self interest,' and they based their view of politics on the theory that 'government cannot depend on man's benevolence or virtue.' "[24] Similarly, McGinnis writes, "The generally self-interested rational structure of individual behavior is an important factor in understanding the social structure of institutions. An enduring social regime will likely reflect a *compromise* between the self-interest of individual actors and their tendency to make deals with others."[25]

---

22. John O. McGinnis, *The Human Constitution and Constitutive Law: A Prolegomenon*, 8 J. CONTEMP. LEGAL ISSUES 211, 213–14 (1997).

23. *Id.*

24. Scott Fruehwald, *Behavioral Biology and Constitutional Analysis*, 32 OKLA. CITY U. L. REV. 375, 384 (2007) (quoting John O. McGinnis, *The Original Constitution and Our Origins*, 19 HARV. J.L. & PUB. POL'Y 251, 251–52 (1995)).

25. McGinnis, *supra* note 22, at 226 (emphasis added). The recognition of a "tendency to make deals" could be read as an expression of the interactionist habit of mind, described *infra* Section IV.B., suggesting here law's reckoning with two competing models—isolation and interaction—that give rise

The isolated human being features prominently in "state of nature" stories. Of course, writers can mean different things when using the device of "natural states" and so can be writing either from the grips of the isolationist habit or from conscious adoption of that perspective as a sometimes-useful model in particular domains. Some tell stories of pre-law human groups that either presuppose or infer the stories' truth, that humans must have actually developed law in response to genuine problems of colliding, atomic self-interest. For example, Grotius:

> For as soon as it was found inconvenient to hold things in common, before any division of lands had been established, it is natural to suppose it must have been generally agreed, that whatever any one had occupied should be accounted his own.[26]

One could look at Demsetz's "internalization of externalities" stories of property's emergence for similar tales in a more modern context.[27]

But some such stories use the state of nature not as a literal account of problems that actually arose and were solved "back in the day" but as a hypothetical construct that helps us to perceive reasons to maintain coercive regimes now, in light of human nature and what would occur without such regimes. For example, H.L.A. Hart, who took much of human nature to be contingent, identified features of human beings relevant to an assumed desire for survival.[28] Following from this basic desire are some constraints on law's minimal content. Hart acquiesced in calling this minimum "natural law," while taking pains to observe it was nonetheless contingent on wants, however primitive.[29] Humans are, by nature, vulnerable, approximately equal in strength and other abilities, limited in our altruism, limited in access to necessary resources, and limited in our understanding and willpower.[30] It is these

---

to conflicting intuitions about both the social good and how human affairs unfold. But we could also read this—"their tendency to make deals with others"—as mere individualistic behavioral tendency. A person may "deal," just as they "fight" or "climb." Dealing is what two or more people each do separately but simultaneously, not what they do together. My goal here is not to ascribe any particular view on this to McGinnis or anyone else. Rather, it is to illustrate the power a habitual way of seeing has over the intuitions we have about law.

26. HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE (1625), *reprinted in* THE RIGHTS OF WAR AND PEACE 89 (A. C. Campbell trans., 1901).

27. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 350–53 (1967) (claiming that "property rights develop to internalize externalities when the gains of internalization become larger than the cost of internalization" and relating the emergence of property among some groups of Native Americans when that condition arose from the fur trade in areas around Quebec).

28. H.L.A. HART, THE CONCEPT OF LAW 192–200 (2d ed. 1994).

29. *Id.* at 193.

30. *Id.* at 193–98.

vulnerabilities and limitations that make necessary mutual coercion. As Hart put it: with such exigencies, "reason demands . . . voluntary co-operation in a coercive system."[31] Hart's is a story of biological realities that would provide any group with reasons to develop law in light of them. While we may not "actually" be isolated, by dwelling in that frame for a bit, Hart uncovers some minimal truths about what people with our attributes and who sometimes do adopt this same frame might do and need.

Whether meant literally or as parables, "state of nature" stories tell of the coming together of the mentally isolated and are powerful to the extent we identify with their human characters, characters we probably imagine to be struggling. It is all too easy to take ourselves to be those separate—and desperate—entities and thus to picture ourselves outside our own society. We thus imagine how "we" would behave in a hypothetical war of all against all. Both sorts of state of nature arguments depend on our capacity and tendency to make this identification. At the very least, "human being as mentally separated want-filler" is a habit of mind that is adopted sometimes on a belief that it is true, sometimes because it seems and may truly be useful, and sometimes subconsciously.

Once adopted, the isolationist frame draws attention to the need for law to set coercive sanctions to deter the violations of boundaries that self-interest both wants to protect and wants to violate. The aim of the law from the point of view of the isolated mind is to protect this separate self from damage wrought by others and to collect the surplus they generate, as one would with respect to the rest of the natural and built environment. The doctrines and theories to which we naturally might turn to do so are those of non-invasion. There is thus much appeal in the more deontologically-grounded Blackstonian property theories, which take a harder, absolutist view of trespass and battery than other, more contemporary theories.[32] Keep out!

Similarly, deterrence theories focus on getting the levels of coercion just right, so as to counteract those of an individual's exogenous, selfish preferences that threaten the separateness of others.[33] From the isolationist stance, we seek not to *change* minds but to alter the decisional landscape on which those minds operate. Again, here the notion is of interaction with others as equivalent to other physical interactions in the environment. Law increases the cost of

31. *Id.* at 198.

32. *See* Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1895–1907 (2005).

33. *See, e.g.*, Richard Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1205–14 (1985); *see also* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 877–904 (1998).

crossing an interpersonal boundary as surely as—and for the same reasons—a fence increases the costs of crossing a physical one.

B. Interaction

Climbing a rung, we adopt a habit of mind that recognizes the specialness of human *interaction*. This remains an account consistent with the separation thesis, but it affords a singular place among events in the universe to what transpires between people. Here, humans are still like atoms but in a world with chemistry. Together, we seek to enable positive interactions and dissuade negative ones, but we do so through a cooperative process of norm-construction. The meaning and expectations arising from interactions is shaped by deeper understandings among one another than the isolated mind would perceive. Unlike our interactions with the rest of the physical world, with effects that seem to us objective, shaping the baselines and expectations against which human interactions operate is a special concern of the community in which such interactions arise. "*Keep out!*" more often becomes "*We will balance the concerns and create the right incentives here*."

The law of contract and closer analyses of when invasions are and are not tortious or criminal become important for an interactionist state of mind. Necessity exceptions to trespass, for example, are justified by piggybacking on shared notions of how we should and do live together, and their recognition creates, alters, and reinforces such notions. For example, in a sheep-raising community, dogs are going to stray across property lines.[34] Of course dogs being dogs is not a trespass! In a community that values rooting out wrongdoing, investigative reporters will be permitted to gain access to businesses by ruse.[35] In a bustling city, people will be bumped and jostled and should (politely) bump others when boarding a busy subway train.[36] The interactionist is not troubled by these "invasions," as they are all accommodations of the competing and complementary interests that compose a highly interactive society.

---

34. Ploof v. Putnam, 71 A. 188, 189 (Vt. 1908) ("[T]he court considered that the defendant might drive the sheep from his land with a dog, and that the nature of a dog is such that he cannot be withdrawn in an instant, and that, as the defendant had done his best to recall the dog, trespass would not lie.").

35. Desnick v. Am. Broad. Co., 44 F.3d 1345, 1352–53 (7th Cir. 1995).

36. *See, e.g.*, WILLIAM LLOYD PROSSER, W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 9, at 42 (5th ed. 1984) ("At the same time, in a crowded world, a certain amount of personal contact is inevitable, and must be accepted. Absent expression to the contrary, consent is assumed to all those ordinary contacts which are customary and reasonably necessary to the common intercourse of life, such as a tap on the shoulder to attract attention, a friendly grasp of the arm, or a casual jostling to make a passage.") (citations omitted).

The ubiquitous clarity of boundaries that came with the isolated mindset becomes blurrier as our attitude toward interactions becomes more welcoming but also more inquisitive. Where there was suspicion and a reflexive, black-letter search for consent before privileging the crossing of a boundary, the whole concept of "invasion" now appears to be one where condemnation and acceptance are more a matter of context, culture, and degree.[37] It is not that there are never clear lines between what is mine and what is yours. Rather, when the mind sees interaction as a regular, desirable, and natural human activity, it more readily delves into the finer details of any single interaction and the broader implications of rules that police boundaries.

For a further illustration of the distinction between isolationism and interactionism, consider Ronald Coase's famous paper *The Problem of Social Cost*.[38] The scene he summons is one of strangers, both of whom want to conduct enriching activities that cannot fully be realized because of their interaction.[39] Your trains will cast off sparks that will burn my crops. But, reciprocally, my crops, if protected, will make it infeasible to run your trains.[40] The world just is a place in which our desires can and inevitably do conflict. The isolationist instinct is to perceive and solve this problem in terms of clear boundaries. Ideally, from that perspective, we might not have to interact at all. We would instead maximize efficiency by receiving through some ethereal means the benefits of each other's production and would carry out our most valuable projects in the otherwise splendid isolation of the lower rung of the ladder. But the world is not ideal, and so we must choose: my crops, your trains, or some compromise in between that ultimately lets the factors of production be released here and instead put into use over there, minimizing the social cost of our tragically unavoidable interaction.

The mindset I associate with Coase, though, is not isolationist but interactionist. It conceives human beings as atoms, sure, but affords a special place to the conflict and cooperation among them. It is not enough for law to grant us the power to keep one another away from our lands, our bodies, and our affairs. Because we do interact and because we benefit and suffer, at times immensely, from interactions in ways unlike those of environmental interaction, law—itself a form of interaction—should do its best to guide and shape cooperation, conflict, and our expectations concerning them to avoid bad

37. *See, e.g.*, *Desnick*, 44 F.3d at 1352 (noting that the lines to identify the interests the tort of trespass ought to protect "are not bright").

38. R. H. Coase, *The Problem of Social Cost*, 3 J. OF LAW AND ECON. 1 (1960).

39. *Id.* at 2.

40. *Id.*

outcomes and encourage good outcomes. Indeed, Coase was correct to observe that law cannot help but to do so, no matter its content.[41]

Law should therefore promote compromise, encourage contract, and enable the maintenance of private organizations with legal incentives tailored to lead to the right choices. Yes, the goal is assumed to be maximization of an aggregation of individual utilities, but that might be achieved through collective regulation, organization of effort in firms, or by discrete transaction.[42] Coase's transaction cost economics paints a picture of separate entities self-consciously structuring interactions to deliver the most pleasure over pain.[43] It recognizes that while our world is one of competition and injury, it is also one of joint projects.[44] Fundamentally, Coase was concerned with the governance of systems of qualitatively distinct forms of human interaction, not mere sums of distinct events between strangers.

Guido Calabresi and Douglas Melamed go further,[45] and the magnificence of their *Cathedral* is in how it reveals systems of legal regulation to be such ornately designed contraptions of moving parts. The world is one of individuals, again, but individuals who continuously deal, hurt, love, and plan. Law helps to structure these interactions, ideally putting us in positions so that prosocial decisions are the ones we come to on our own. The isolationist perspective would have difficulty appreciating why we would consider gains, losses, the morality of distribution, and justice more generally to decide whether to protect a boundary absolutely, conditionally, or not at all.[46] Theirs is a perspective that makes little sense if no person thought about their interactions with other people as other than purely instrumental.

The point here is not to defend some ironclad discretization into Blackstonian and Coasean points of view. I describe here only habits of perspective-taking that spark differing intuitions and narratives that in turn drive our embrace of differing legal ideas. There arises in us a concern for much more than non-invasion once a society is seen as a product of human

41. *Id.* at 44.

42. *Id.* at 16–17 ("[T]he firm represents . . . an alternative to organising production through market transactions. Within the firm individual bargains between the various cooperating factors of production are eliminated and for a market transaction is substituted an administrative decision. . . . An alternative solution is direct government regulation. . . . The government is, in a sense, a super-firm (but of a very special kind) since it is able to influence the use of factors of production by administrative decision.").

43. *Id.* at 15–16.

44. *Id.* at 19.

45. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089 (1972).

46. *Id.* at 1089–90.

interactions rather than a place where interactions, like floods or animal attacks, sometimes occur. The clarity of Coase's and Calabresi's descriptions of social interaction and governance encourage and indeed make possible a kind of relentless playing out of likely consequences, the transaction cost economics that helps guide systemic choices concerning the allocation of entitlements (and thus expectations) in an interactive world. While I will turn later to describing and providing evidence for more tightly drawn together human beings, these interactionist models model well what they model well: The evolution of larger systems where transactions, generally conceived, are the primary concern. They are, therefore, sometimes extremely useful habits of mind to entertain.

The Coasean framework is hardly the last word on interactionist models of human behavior. Some more complex models of behavioral law and economics, for example, go beyond the rational actor model of traditional rational choice theory by capturing some of the "non-rational" things we all do.[47] But they do not depart from the model of social reality that has humans as atoms in a particle dynamics simulation and so do not transcend interactionism.[48]

Interactionism, though, is a potentially richer description than this chemistry of particles analogy may let on. Law can influence and manage interactions in exceedingly complex ways. For example, expressivist scholars have focused attention on how laws and norms function not just to take account of our tastes but to alter them.[49] Where the isolationist habit, with its tendency to view law imperatively, is to focus on coercion's capacity to deter and to provoke, the interactionist can find in human relationships, including law, the ability to change individual wants.

With this step, law is not just information that is run through an individual's preference-calculation machine but an influence on the machine itself, altering social meanings.[50] Expressivists differ on how best to explain this, whether

47. The canonical citation here is to Jolls, Sunstein & Thaler, *supra* note 6.

48. *Id.* at 1476–79 (laying out the systematic departures of the separate agents of behavioral law and economics from the standard, rational-actor model of law and economics).

49. *See* Maggie Wittlin, *Buckling under Pressure: An Empirical Test of the Expressive Effects of Law*, 28 YALE J. ON REG. 419, 419 (2011); Patricia Funk, *Is There an Expressive Function of Law? An Empirical Analysis of Voting Laws with Symbolic Fines*, 9 AM. L. & ECON. REV. 135, 135 (2007); Robert Cooter, *Expressive Law and Economics*, 27 J. LEG. STUD. 585, 585 (1998); Cass Sunstein, *On the Expressive Function of Law*, 144 U. PENN. L. REV. 2021, 2022–23 (1996); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 944 (1995).

50. Thomas A. McGinn, *The Expressive Function of Law and the* Lex Imperfecta, 11 ROMAN LEGAL TRADITION 1, 14–19 (2015) (summarizing various expressivist approaches and discussing some common expressivist examples of successes and failures in changing social values, including cleaning up after pets, consumption of sugary drinks, and dueling).

within or without rational choice theory.[51] But a key is to acknowledge that something is going on with law that cannot be explained in perfect analogy to physical obstructions and affordances. That is, law does more than alter the cost-benefit structure of decisions. It somehow, at least sometimes, affects what an agent considers to be a cost or benefit and the degree to which they may do so.[52]

Expressivists might be more accurately labeled effect-inclusivists. For example, Richard McAdams identifies expressive functions of law that are in addition to its more commonly understood deterrent and legitimizing effects.[53] He describes coordination and information provision as two such functions and gives two traffic law exemplars: yield signs (coordination) and the use of either solid or dashed centerlines to indicate whether passing is permitted (information).[54] The law manifested by such signs obviously promotes compliance irrespective of sanction or how the agent otherwise views the legal authority.[55] Seeing law as a means to enable and guide interactions, rather than just as erecting metaphysical boundaries on behalf of isolated individuals, is necessary for McAdams's analysis to feel intuitive.

* * *

Before leaving interactionism behind, note that there are in fact two interactionist rungs worth identifying. One mental habit is to see human lives as separately-lived but punctuated, perhaps often, by interaction with others, as with Coase's farmers. The task of law is to guide, adjudicate, and set expectations for these discrete interactions. The common law of tort and contract, with their focus on discrete instances of harm and agreement, seem to fit this understanding.

Contrast this *sporadic interaction* model with a *continuous interaction* model. If one's perspective on society is that it is a web of ongoing relationships, then these interactions often lack clear beginnings and endings. The law here concerns the regulation of relationships, encouraging some, discouraging some, shaping others. A more systemic model of contract law

51. *Id.* at 10–11, 17–18.

52. *See, e.g.*, Funk, *supra* note 49, at 135 (finding (a) some evidence of reduced voting after repeal of a voting mandate that had been enforced only through a negligible fine that could be paid effortlessly as part of one's annual taxes and (b) evidence that an initiative to make voting cheaper (postal voting) had no significant effect on turnout).

53. RICHARD H. MCADAMS, THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS 4 (2015).

54. *Id.* at 5–6.

55. *Id.* at 5–7.

emerges, including laws for corporations, partnerships, family formation and dissolution, and the private governance of homeowner associations. We see more clearly the importance of the law governing employment and workplace safety and a place for enterprise liability. And the critical role of secondary rules, the law of public governance as an ongoing endeavor, comes to the fore. In short, the *continuous interaction* habit of mind grasps the importance of institutions and, thus, their regulation.[56] An institutional turn can be found in seeing interactions as a continuous presence in time rather than discrete occurrences.

C. Interdependence

While many have written critically of the Coasean framework and especially the conclusions of normative law and economics, some scholars have more specifically questioned transaction cost economics' background model of human interaction. With the Coaseans, they acknowledge human beings are indeed interactive and not isolated. But, they argue, we are not *merely*—and certainly not tragically—interactive. We do more than just benefit from our dealings with others. Rather, we inevitably *depend* on the help of others to thrive and even to survive at all.[57] This is the *interdependent* society. Here we focus on the truth of our helplessness in infancy, financial vulnerability, old age, disability, and illness. Without care from others, we would be lost.

Because we need others if we are to continue to be us, this habit of mind is skeptical that it is helpful to view us as separate at all, at least from a regulatory perspective. Our interdependent *nature*, not just episodic circumstances of particularized wants, demands law to support it. Scholars of interdependence argue that laws aimed at discrete harms, at supporting voluntary associations, and even at enabling ongoing private institutions are not enough. Rather, the law should take stock of our inevitable vulnerabilities and impose duties that aim to support the care on which we depend. The law of fiduciary duties, family, economic subsidies, and disclosure obligations are a departure from the law of the lower rungs that usually approaches interactions as though between equals, each participant responsible for their own welfare and dependent only on predictable legal treatment. The interdependent framing sees the laws of care

56. Another way to say this might be that institutionalism assigns a living identity to cooperative groups of people. Such assignments of identity distinguish continuous interactions from sporadic ones.

57. MCADAMS, *supra* note 53, at 60.

for one another not as exceptions to the normal legal order but as intuitive and natural responses to our fundamental social circumstance.[58]

Robin West has given perhaps the most notable and direct rejection in legal theory of the separation assumptions that characterize the lower two rungs, describing them as "essentially and irretrievably masculine."[59] She notes that "most (not all) political theory" is united around the proposition that we live "separate lives,"[60] as "distinct individuals" whose individuality is "epistemologically prior as well as morally prior" to our connections with others.[61] West concludes that this view is of critical importance, as the fulcrum of the conflict between liberalism and critical legal theorists derives largely from different attitudes toward what both camps agree is the brute fact of separation, attitudes that take separation to be, respectively, a treasure to be protected or a source of alienation.[62]

For the liberal, separation entails freedom of action and fear of annihilation by separate others.[63] Thus, defaulting to the isolationist rung of our ladder, the liberal often embraces minimal government that does no more than enable and protect isolation and, thus, permit only voluntary interaction.[64] The critical legal theorist identifies separation as a source of alienation and dread that generates "longing for . . . connection."[65] And so, the supposedly apolitical and universal "desire" for freedom *from* the other that the minimal state so ably provides is a politically motivated fantasy.[66] This interactionist critique plays on the poverty of viewing all life as the isolationist war of all against all.

Rejecting the very premise of the debate she identifies, West argues that the separation thesis, while true for men, is false for women.[67] Women are "essentially connected" to others in ways material, moral, and social:

---

58. *Cf.* Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. Rev. 195, 217 (1987) ("The point of analysis like this is simply to unfreeze, to 'deconstruct,' this tiny exercise in worldmaking—to point out that certain kinds of familiar common-sense categories, such as the public-private distinction employed in contract discourse, can be turned upside down so as to shake up our conventional perceptions of reality.").

59. West, *supra* note 3, at 2.

60. *Id.* (citing ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 33 (1974)).

61. West, *supra* note 3, at 2 (citing MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 133 (1982)).

62. West, *supra* note 3, at 5.

63. *Id.* at 8.

64. *Id.*

65. *Id.* at 9.

66. *Id.* at 12.

67. *Id.* at 14 ("Women are actually or potentially materially connected to other human life. Men aren't.").

pregnancy, heterosexual intercourse, breastfeeding, and care obligations.[68] Her notion of connection and the law it demands goes beyond the management of interaction. Instead, women, at least, are inevitably connected or, in other words, interdependent.

Martha Fineman has argued more broadly against separationist ideology, noting that dependency on one other is a basic fact of the human condition.[69] At certain stages of life through which nearly all pass, such as infancy and illness, we are directly and physically dependent on caretakers. And there is a concomitant dependency of caretakers on others for the resources necessary to deliver necessary care. Caretakers, who Fineman notes have disproportionately been women, subsidize all of us when they support those who then happen to be in a state of "inevitable dependency."[70] She argues that justice thus requires that this universal condition be met with binding mutual obligation, a legal recognition of the fact of our interdependence.[71]

Some property theorists have also described an interdependent social world but one where the dependent connections are not restricted to ordinary vulnerabilities. For example, Carol Rose has argued that "claims to property only make sense in a social context where there is some level of cooperative behavior: if any given subject is to have control over any given object, others must understand the signals of ownership and acquiesce in them."[72] She means more by this than that we begrudgingly coordinate out of self-interest in the name of efficient allocation of resources. Rather, our "property regimes . . . rest on a *thread of cooperative behavior* that is quite out of line with a presumption of total moral fallenness."[73]

Similarly, in an elegant article representative of progressive property scholarship, Gregory Alexander has argued that property law is pervaded by a "social-obligation norm," the content of which derives not from implicit or even hypothetical contracts between people to win individual gains but, rather, from the fact that "a particular web of social relationships is a *necessary* condition for humans to develop the distinctively human capacities that allow us to

68. *Id.* at 3.

69. Fineman, *supra* note 13, at 18–19.

70. MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 36–37 (2004).

71. Fineman, *supra* note 13, at 22–23 (noting the ubiquity of subsidies in all our lives); *id.* at 26–27 (arguing for an active state that regulates labor markets to "positively respond" to dependency burdens and arguing more generally that "the state must use its regulatory and redistributive authority to ensure that those things that are not valued or are undervalued in market or marriage are, nonetheless, publicly and politically recognized as socially productive and given value").

72. Carol M. Rose, *The Moral Subject of Property*, 48 WM. & MARY L. REV. 1897, 1899 (2007).

73. *Id.* at 1900 (emphasis added).

flourish."[74] Alexander even raises the possibility that community is more than a prerequisite for individual "flourishing," speculating that "perhaps community even comprises humanity."[75]

These writings survey both the obvious (if often ignored) and the more hidden aspects of the interdependent perspective. It is obstinance to deny that infants, the very elderly, or the ailing depend for their basic welfare on caregivers and that caregivers depend on socially provided resources to render aid. The isolationist or interactionist who refuses to follow us this high on the ladder may suggest that these cases are departures from the normal case and probably agree that we might wisely make allowances for them as exceptions in the law. But they will insist that the general path of the law is the one of managing "normal" interactions, whether to preserve the benefits of our isolated natures or to maximize the fruits of the interactions of separate beings.

The work of Rose and Alexander suggest these "abnormal cases" are only the most obvious marks of a deeper truth.[76] Even the supposedly non-vulnerable among us depend for their welfare on the conduct of many others. And so, *contra* interactionism, the path of the law must instead be toward managing this evolving web of dependencies.

These descriptions of interdependence point toward another useful distinction: *sporadic interdependence* and *continuous interdependence*. When viewed as continuously interdependent, people are not only occasionally, even if inevitably, dependent on some others on account of acute vulnerability, but virtually always dependent on many others. Our thriving, on this view, depends on more than mere safety nets to protect us if we happen to fall but on supporting the full web of relations that is essential to our psychology and material well-being.[77] Here too, as with interactionism, the continuous version yields an institutional turn. The enforcement of fiduciary duties and other discrete obligations to assist the sporadically interdependent becomes the

---

74. Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 761 (2009) (emphasis added).

75. *Id.* at 761. As we will see, the proposition that community composes humanity, in the sense that biological capacities for joining and participating in community are key to understanding uniquely human behavior and culture, is the central lesson I take from Tomasello's body of work. *See infra* Part III. Alexander's "perhaps" is one of the only suggestions of a strong version of interconstitutionalism in the legal literature of which I am aware.

76. *See* Gordon, *supra* note 58, at 207–13 (arguing that the normal/exceptional distinction in legal doctrine, such as between governing by enforcing private choices and by regulating private choices was baseless and failed to stand up to seemingly equally sound rhetorical redescription).

77. *See* Alexander, *supra* note 74, at 765 ("[T]he social and material dependence of the capabilities necessary for human flourishing goes well beyond the physical dependence we exhibit at the beginning and end of life. Life, freedom, practical rationality, sociality, and their attendant functionings can meaningfully exist only within a vital matrix of social structures and practices.").

creation and maintenance of supportive institutions, public or private, to govern the continuously interdependent.

* * *

Interdependent people are inevitably connected by human needs. In contrast, interactionist accounts find connections either arising sporadically from wants or continuously maintained to satisfy continuously arising wants, but in either case leading to a departure from an assumed default state of some form of isolation. Whether interaction is seen as inevitable or merely propitious, however, there is still a residue of separation shared by both the interdependent and interactionist perspectives. The habit in either case is still to imagine us as something akin to classical atoms exchanging energy and mass, working together, even necessarily together, but still as fundamentally separate entities. When one person needs and depends on another, the tendency may be, as with the lower rungs, to see the needy and the needed as isolated points in space, bound by the transfer of what is needed, whether that be cooperation or resources. It is you who happens to need and I who can fulfill the need. Yes, the need arises inevitably, as part of our biological or social nature, but it is one that binds separate people.

D. Interconstitution

Thus far, I have identified the familiar habits of mind concerning human relations that we sometimes adopt when confronting legal and social questions. But there is yet another way to see ourselves that is not as often employed. Consider that we are not just the separate products of our interactions or even interdependent in the sense of truly needing each other to thrive or even to exist at all. Rather, we *are* each other. We are *interconstituted*, and our concern in governing together is how our actions and laws influence what we become together.

Lest the interconstitution model be taken as fanciful, I will describe in Part III a scientific theory that provides some support for it. But let us first make this conceptual model more concrete by contrasting it with weak but intuitively appealing forms of the separation thesis. The initial and primary difficulty here is our own intuition. Why even suspect there is a rung this high on the ladder when everything about our inner life seems to suggest we are living mentally and physically apart from others, however physically or emotionally close we might otherwise be to them?

Martha Nussbaum, in a retrospective on Robin West's *Jurisprudence and Gender*, poses this question well by noting some obvious truths.[78] Our physical bodies have surfaces that separate our insides from the outside world inhabited by others who possess similar separating skins.

> When Person B is taught to read and write, that education does not improve the skills of Person A, unless the separate body of Person A has also moved into the classroom and become an addressee of the education process. When Person B goes out to play, Person A does not automatically follow; she may remain shut up in a dark room. When Person B is taken to the doctor, Person A's health does not automatically receive care.[79]

This model of social reality is fundamentally the atomic one. But it is not necessarily isolationist. Rather, it is compatible with the weakest form of separation we have reviewed thus far, continuous interdependence. While that habit of mind focuses on our inevitable interaction, mutual need, and deep bonds, it still insists these are *between* separate things, billiard balls rather than a cake batter.

Nussbaum further argues that asserting the existence of mental connection constitutes a separate thesis needing support other than that we are sometimes physically united, as West had argued.[80] And she is surely on solid ground when she reminds us that "[a] profound part of human experience is the inaccessibility of any mind to any other mind."[81] Any reasonably reflective person likely nods in agreement when Nussbaum writes: "If a parent or lover thinks that she knows what her child or lover is thinking just by virtue of being a parent or lover, she is probably a very bad parent or lover."[82]

While Nussbaum's response casts doubt as to whether the mere existence of physical connections among people does much damage to the weakest forms of the separation thesis, the apparent strength of her response depends on a static conception of separation and connection. Yes, at a given moment, there is a spatial gap between the bodies of a parent and a grown child, between spouses, and certainly between strangers. Their thoughts in that moment are accessible to one another only through inference.[83] If all separation means is

78. Martha C. Nussbaum, *Robin West,* Jurisprudence and Gender: *Defending a Radical Liberalism*, 75 U. CHI. L. REV. 985, 987–91 (2008).

79. *Id.* at 988.

80. *Id.* at 990.

81. *Id.*

82. *Id.*

83. *Id.* ("All attempts to grasp the subjective experience of another are interpretations, not mergers."). Our access even to ourselves, though, may only be by way of interpretation and inference.

that the instantaneous connection between two spatially distant physical events is limited, then at least a weakened version of the separation thesis might indeed be a mostly accurate way of seeing the world. This assumption of "knowing only indirectly through inference," when applied to other people, is very often a useful habit of mind that can keep us humble about our capacity to know the inner lives of others.

But the weak separation thesis is still just an operative assumption underlying a habit of mind, not an inexorable description of the human everything. There is another way to understand connection that does not require belief in telepathy or the fundamental unity of physical bodies. Rather than extending selves and blurring them into one another, we can instead strip away the static notion of self just enough to see its dependency on all surrounding conditions and especially the past and present interactions with others.

Consider an analogy: A rock in a talus slope below a cliff is quite naturally taken to be a different object than the cliff itself. The rock may be swept away or roll downhill without the whole cliff following it. It may be collected and taken away from the cliff, and it may break or heat up or become wet or buried without the cliff's following suit.

But the connection between the rock and the cliff is more than the mere fact that the rock once broke off from the cliff. It is more than that the rock and cliff sometimes or even continuously interact in physical processes.

The rock once *was* the cliff. They share chemistry. The forces acting on the rock are influenced by the cliff, by its further exfoliations, by the wind, rain, and snow that are directed by, shielded by, and funneled by the cliff. If one wants to understand how this rock got here and what will become of it in the future, one must understand it as part of a bigger dynamical system, one including the cliff and neighboring rocks. And for many purposes and in many moments, we will just think of "the cliff" as the thing that includes all such rocks, past, present, and future. So indeed there is a habit of mind that sees the rock as one thing and the cliff as another. It is often useful. But there is another habit of mind that sees the cliff and rock as a single thing, changing over time. It, too, is often useful.

See, e.g., PETER CARRUTHERS, THE OPACITY OF MIND: AN INTEGRATIVE THEORY OF SELF-KNOWLEDGE 1–3, 68–72 (2011) ("[J]ust as these sensory representations need to be interpreted when ascribing mental states to others, so do they need to be interpreted when we ascribe propositional attitudes to ourselves."); GILBERT RYLE, THE CONCEPT OF MIND: 60TH ANNIVERSARY EDITION 137–38 (2009) ("The sort of things I can find out about myself are the same as the sorts of things I can find out about other people, and the methods of finding them out are much the same."). The direct/indirect dichotomy assumed to exist between self and other is an instance of a default assumption about our individual nature. If the sensation of "direct access" is only illusory, then an argument from this distinction has done less work than it might seem.

The sense of connection I am exploring here, like that between rock and cliff, is one that understands separation as a matter of perspective. It isn't that boundaries do not exist, necessarily, but that convention and utility, not essence, lead us to identify them. It is these constructed boundaries that define categories that are useful or not depending on our purposes.

For this initial effort at tracing the intuitions about legal theory that arise from this perspective, I propose the following model. Generally, the interconstituted human being is one whose tastes, moral identity, and motivations are a constantly evolving product of joint and collective intentional interactions.[84] The agents of this model are highly motivated to engage in such cooperative enterprises, even when solitary action would appear to be a more efficient means of directly achieving a goal. Group membership does not just give rise to interactions that *then* have the effect of generating incentives and influencing tastes. Rather, cooperation within groups gives rise directly to a dynamically generated understanding of self and the self's tastes, values, motivations, and goals. Rather than an agent with views that are influenced here and there by discrete interactions, the interconstituted agent's inner voice is some product of the joint and collective interactions in which the agent participates.

Interconstituted agents have much in common with Michael Sandel's description of a community as an "enlarged self," in which individuals may experience their own sacrifice not as the cost of a personally enriching bargain but as contributions to "the realization of a way of life in which [they] take pride and with which [their] identit[ies] are bound."[85] Sandel contrasts this "constitutive conception" of community with the "instrumental" and "sentimental" conceptions, which are compatible with the assumptions of liberal theories of justice.[86] The instrumental conception is of community in which "individuals regard social arrangements as a necessary burden and cooperate only for the sake of pursuing their private ends," an isolationist description.[87] The sentimental one conceives community as "not uniformly antagonistic" and one in which participants have some shared ends and "may take account of others' welfare and seek to promote it," an interactionist description.[88]

---

84. These terms will be defined and discussed at greater length *infra* Section III.A. But, for now, they refer to cooperation in which the participants are knowingly and intentionally acting together, with some common basis of knowledge of which they know they are all aware.

85. MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 143 (2d ed. 1998).

86. *Id.* at 150.

87. *Id.* at 148.

88. *Id.*

In contrast, the constitutive conception of community describes "the good of community [as] penetrat[ing] the person more profoundly so as to describe not just his feeling but a mode of self-understanding partly constitutive of his identity, partly definitive of who he was."[89] While this conception obviously has much in common with the interconstituted perspective, it is not identical. For one, Sandel's project was not to identify the consequences of an inter-subjective perspective for legal theory or doctrine but to observe that such a perspective was a necessary consequence of some arguments for a liberal conception of justice with which it is incompatible. Second, it did not take these differing conceptions as habits of mind, or models, that we sometimes employ and that get at deeper truths only in the way of any approximation.

The goal here, in contrast, is to begin to notice how our adoption from time to time of these different habits of mind explains why legal problems are sometimes hard, why they are conceived how they are, and how problems habitually seen one way, on account of one habit, may be seen differently by adopting another. If there is ultimate truth in any of these perspectives, I suspect it lies closer to interconstitutionalism, but ultimate truth is not the aim, if it is even attainable. We deal here with the effects of our conventions and see them for what they are.

In the next Part, I summarize a scientific theory that suggests that this sort of interconstituted perspective accurately describes, at the very least, the path of our biological and social development from birth to the school-aged "age of reason." More generally, that theory points to an understanding of our extraordinary capacity for sociality that depends on biological adaptations for, experience with, and deep motivation to engage in jointly and collectively intentional enterprises.

I will discuss in more detail in the last Part some implications of the interconstituted perspective for legal theory. For now, let us just observe the

---

89. *Id.* at 161 (emphasis omitted). The constitutive perspective extends to smaller units of cooperation.

> Friendship becomes a way of knowing as well as liking. Uncertain which path to take, I consult a friend who knows me well, and together we deliberate, offering and assessing by turns competing descriptions of the person I am, and of the alternatives I face as they bear on my identity. To take seriously such deliberation is to allow that my friend may grasp something I have missed, may offer a more adequate account of the way my identity is engaged in the alternatives before me. To adopt this new description is to see myself in a new way; my old self-image now seems partial or occluded, and I may say in retrospect that my friend knew me better than I knew myself. To deliberate with friends is to admit this possibility, which presupposes in turn a more richly-constituted self than deontology allows.

Id. at 181.

most obvious contrast between interconstitution and the habits of mind of the other rungs.

First of all, isolation and interaction both lead naturally to a preoccupation with costs and benefits to individuals and to understanding social welfare in terms of some aggregate of these individual welfares. The interdependent perspective, though, highlights our inevitable dependency on the support of others and the necessary connections within a group. Under that view, welfare cannot adequately be conceived without consideration of the presence or absence of group behavior. But the interconstituted frame is more group-minded yet, positing that we do not merely depend on one another to thrive or even to exist, but that we become who we are because of others.

Because it is our sociality that constitutes us, the law among the interconstituted must be concerned with which groups we form and how those groups operate relative to one another. While an accurate description of the interconstituted perspective is useful whatever normative position one takes on *how* we should manage our interconstitution, I will argue, generally, for the maintenance of a rich ecosystem of both joint and collective intentional opportunities within a society.[90] A diverse set of such opportunities, especially in childhood, requires constant resort to our capacity to see others as equivalent to ourselves,[91] and may widen our intuition of what constitutes the in-group and narrow notions we harbor of the out-group.[92] Diversity not only trains us to cooperate with others, but it is the opposite of totalitarianism, which I conceive to be the dystopian social environment of a completely impoverished ecosystem of groups.[93] Importantly, such impoverishment might arise in forms other than that of Orwellian state and self only. We also find poverty in "boss and self only" and "patriarch and self only." Any ecosystem of groups that includes only one or a few opportunities for interaction, especially when that interaction is not among equals, will harm our development and maintenance of self, because the self, from the interconstituted perspective, arises by virtue of cooperation with others.

Interconstitutionalism is particularly interesting for the light it sheds on why certain areas of the law are fraught. Social media platforms, for example, are places where wildly diverse groups (both in terms of their content norms and their norms of participation) are available to join. While this would seem to

90. *See infra* Section IV.C.

91. *See* TOMASELLO, *supra* note 14, at 200 ("[P]articipation in joint intentional collaboration leads young children to understand others as, in some sense, equivalent or equal to themselves."); *id.* at 201–02 (arguing that the normative judgment that others should be treated as equivalent arises when capacities for collective intentionality mature the bare factual insight into self-other equivalence).

92. *See infra* Section IV.B.

93. *See infra* Section IV.C.

present an interconstitutional utopia, raw numbers are deceiving. The interconstituted perspective reveals only that such groups are *powerful* not that they are necessarily beneficial.[94] If groups can form and change us, then platforms, which not only enable but also influence group formation and dynamics, are especially powerful, with a far greater ability to shape what we become than that of traditional advertising's non-group-based, one-way messaging. That we have many options for becoming does not necessarily tell us the value of any of those options.

Closely related to but older than platform regulation, is the law of expressive association. The ability of groups to define their missions and how they are constituted is, obviously, critical to their existence as groups. But here again, the mere existence of options for interconstitution through groups does not necessarily speak to the value of such options. In Part IV, I will contrast the interconstitutional perspective on this problem with the others, which primarily focus on balancing the value to individuals of autonomy to choose to join and express themselves through groups against the value of socially beneficial projects like racial and gender inclusion.[95]

Before going further with how the interconstituted habit of mind might yield different habits of law, though, let us consider the scientific evidence that we are in fact interconstituted in a significant way. If the lower rungs are sometimes insufficient to appreciate how we should and in fact do make and enforce law, there must be substance in this rung. And indeed there is evidence that joint and collective interactions are biologically central to our development, that we are positively motivated to form such interactive groups, and that our very sense of self and moral development are generated from them.

III. CONNECTION AND BIOLOGY

By and large, the understandings of human beings discussed so far and that pervade legal theory rest on introspection. The theorist sets out the nature of a human being (from which the nature of society is induced) by asking what seems must be so in light of his or her own experience and some deployment of logic. We are, after all, us, and presumably some facts about us are indeed accessible to us. Perhaps, though, the deeply intuitive view that interactions with other humans are events "out there" from which we should attempt to maximize gains and minimize losses, the view from the rungs of our ladder below interconstitution, gets it wrong. Introspection is a powerful tool, but how

94. *See, e.g.*, Tiana Gaudette, Ryan Scrivens, Garth Davies & Richard Frank, *Upvoting Extremism: Collective Identity Formation and the Extreme Right on Reddit*, 23 NEW MEDIA & SOC. 3491, 3491 (2021).

95. *See infra* Section IV.B.

we seem to ourselves is not always a reliable way of knowing how we are or how we came to be this way.

The same is true of our understanding of rules. Often, I believe that I know, at least in general, how I think about rules and how I think about the body of law they compose. But even if I were justified in these beliefs, there are questions about law that introspection alone cannot answer. How did my sense of apprehending the law and its criteria develop? How do people arrive at, evaluate, change, and apply rules? Are human beings the only creatures that do this? What causes people to follow or breach rules, and how do others experience such adherence and non-adherence? These and similar questions make up a complex of interrelated inquiries into law as a social practice among human beings.

If we turn not to an algebra of introspectively determined concepts but, instead, to a scientific theory of human sociality and cognition, interconstitution may become a more plausible account of ourselves than it may otherwise seem. To illustrate this plausibility, I turn to a theory of developmental and social psychology developed over decades of experimentation and recently summarized in Michael Tomasello's *Becoming Human*.[96] I will review his work in some detail in this Part not because it directly aligns with interconstitution or with the way the ladder of connectedness delineates habits of apprehending the social world. Indeed, it is not proof of the correctness of any particular habit. Rather, it provides a striking and often counterintuitive account of the development of our dynamic and highly social selves. In doing so, it certainly calls into question the reliability of using only the isolated, interactive, and even interdependent perspectives to understand how humans make decisions together and acquire norms. The interconstituted account of legal agents responds to the portrait Tomasello paints, reflecting his description of the development of the moral, reasoning, and interacting self. But more evidence and further development of this and other theories will certainly arrive. Looking at what Tomasello and others have found may help unfreeze our default theoretical habits and point us toward future engagement with the sciences of social ontology.

Whatever we find in such engagement should affect our view of how to solve challenging legal problems. If, for example, we determined that inhabitants of another world, through a science-fiction McGuffin, controlled human beings' emotions and habits of mind and if we discovered how they used this control, we would come to see our legal institutions, practice of law, and efforts at social control as indirect consequences of the alien manipulation. If we discovered, however, that these basic facts about us were the products of

96. *See* TOMASELLO, *supra* note 14.

natural selection and social experience, then, no less than in the case of alien control, we should expect our understanding of law to depend on our understanding of these forces. Let us turn to such a theory.[97]

A. Tomasello's Portrait of Human Development

Michael Tomasello is a developmental and comparative psychologist studying cognitive and social development in great apes and human children.[98] His research projects have cast a wide net, but one way to put an important core of the inquiry is: "Why do humans have cities, but chimpanzees do not?"[99] Humans, he notes, have cumulative culture, a result of some "ratchet effect" whereby things learned by one individual are not just transferred to another by passive observation but actively shared and passed down through generations, ultimately preserved as part of the group's cultural common ground.[100] The ratchet effect has created a chasm between the human world and that of other animals. We have cities, supreme courts, and space travel, the results of applying knowledge that cannot possibly be acquired by a species in the span of a single lifetime. So how did this happen?

The general thematic backdrop of *Becoming Human*, as Tomasello pulls many studies together, is a specific strand of "ontogeny recapitulating phylogeny,"[101] meaning that, in the special case of the development of

97. I am heavily influenced in my approach here by the suggestion of Gregory Klass and Kathryn Zeiler that legal academics should work at the level of scientific *theories* rather than working directly with individual studies or experiments. Gregory Klass & Kathryn Zeiler, *Against Endowment Theory: Experimental Economics and Legal Scholarship*, 61 UCLA L. REV. 2, 57, 63, 64 (2013). The latter holds a special allure for lawyers, who are trained in induction of principles from specific instances. *See id.* But experiments are not cases. They are selected for their power to falsify the theories that scientists have induced. *See id.* And it is a theory that Tomasello advances here. There are competing theories, and I intend in this Article to introduce and explore some of the implications of Tomasello's theory. I do not separately assert its truth.

98. *See Michael Tomasello*, DUKE UNIV., https://scholars.duke.edu/person/michael.tomasello [https://perma.cc/8KLZ-FLCE].

99. *See, e.g.*, TOMASELLO, *supra* note 14, at 3. Some critics have challenged Tomasello's focus on human exceptionalism. *See, e.g.*, Kim A. Bard & David A. Leavens, *A Menagerie of Human Concepts: Review of M. Tomasello,* Becoming Human: A Theory of Ontogeny, PSYCHOLOGIST, June 2019, at 65 (criticizing Tomasello for neglecting explanations of children's social skills based on "prior learning histories" that would avoid a sharp discontinuity with understanding of nonhuman animals and for extrapolating from studies primarily of western children).

100. TOMASELLO, *supra* note 14, at 4.

101. This phrase is due to Ernst Haeckel:

> Ontogeny is a recapitulation of Phylogeny; or, somewhat more explicitly: that the series of forms through which the Individual Organism passes during its progress from the egg cell to its fully developed state, is a brief, compressed reproduction of the long series of forms through which the animal ancestors of that organism

cooperative faculties in a single human animal, we can discern the evolutionary pathway that led to this pattern of development.[102] And so, Tomasello and others have looked for capacities in great apes that are initially found in young children. They then observe how these develop into more socially powerful and uniquely human capabilities, recapitulating in ontogenetic form the gradual development of that same capacity through natural selection.[103]

For Tomasello, it is not tool use or opposable thumbs that set us apart from other primates.[104] Nor is it (probably) even the ability to construct a theory of mind.[105] Rather, humans, unlike other primates, belong to various collective agents by virtue of constructing socially shared realities, possessing an objective common ground that facilitates recursive mental simulation, and engaging in logical and moral argumentation. This uniquely human collection of capacities, constituting *collective intentionality*, arrives from pathways that begin as mental skills we share with the great apes, like mental modeling, intentional communication, reciprocation, basic forms of sympathy and friendship, simple cooperation, social learning, and helping.[106] With two great maturational leaps, provided they are accompanied by adequate social experiences, these social capabilities we share with other primates become collective intentionality: the individual development of an objective point of

---

> (or the ancestral forms of its species) have passed from the earliest periods of so-called organic creation down to the present time.

ERNST HAECKEL, THE EVOLUTION OF MAN: A POPULAR EXPOSITION OF THE PRINCIPAL POINTS OF HUMAN ONTOGENY AND PHYLOGENY 6–7 (1st ed. 1879).

102. TOMASELLO, *supra* note 14, at 8 (noting that the "ontogeny of human cognitive and social uniqueness . . . [m]irror[s] the phylogenetic sequence"); Michael Tomasello, *Response to: Rethinking Human Development and the Shared Intentionality Hypothesis*, 12 REV. OF PHIL. & PSYCH. 465, 468 (2021) ("*[I]n this particular case*—that is, the transition from joint intentionality to collective intentionality—ontogeny does indeed follow the same ordering as phylogeny (which might even be surprising).").

103. TOMASELLO, *supra* note 14, at 8–9.

104. *C.f.* Vicki K. Bentley-Condit & E.O. Smith, *Animal Tool Use: Current Definitions and an Updated Comprehensive Catalog*, 147 BEHAVIOUR 185, 190–96 (2009) (cataloging tool use across the animal kingdom and classifying by type and purpose of use); Ian Stirling, Kristin L. Laidre & Erik W. Born, *Do Wild Polar Bears (*Ursus maritimus*) Use Tools When Hunting Walruses (*Odobenus rosmarus*)?*, 74 ARCTIC 175 (2021) (documenting accounts of polar bears hurling rocks and ice at walruses, using rocks to disable traps and safely take the bait, fashioning sea ice into smooth weapons, making uncannily spherical balls of ice for cubs to play with, and otherwise using tools).

105. "Theory of mind" here refers to an organism's capacity to represent the mental states of others. *See, e.g.*, Fumihiro Kano, Christopher Krupenye, Satoshi Hirata, Masaki Tomonaga & Josep Call, *Great Apes Use Self-Experience to Anticipate an Agent's Action in a False-Belief Test*, 116 PROC. NAT'L ACAD. SCIS. 20,904, 20,904, 22,907–08 (2019) (providing evidence that great apes are able to use their own prior experiences, in this case with an object, to conclude whether an agent they are observing has a true or false belief).

106. *See* TOMASELLO, *supra* note 14, at 309–22.

view, symbolic communication, pedagogy, reason-giving, justice, and morality.[107]

i. The Critical Ages

One way to get one's non-expert head around the picture of human development that Tomasello has drawn is to keep in mind three critical ages for cognitive and social development:

- nine months and the development of "joint intentionality;"[108]
- three years and the development of "collective intentionality;"[109]
- and six years as the "age of reason."[110]

While these discrete ages are remarkably consistent across children and cultures,[111] they also demonstrate just how complex and dynamic human beings are. We are not merely an end product of successive generations of naturally selected animals, born as a certain and fixed thing that persists until death. Rather, we are each a richly detailed, temporally unfolding stream possessing different biologies at different points in time. Natural selection has not endowed us with a genetic code that dictates what we are fully formed. That code is expressed dynamically over time, with different physical and mental capacities enabled at different ages.[112] And so, we should not be thought of as a singular lump of naturally selected material, but instead as a kind of program that is launched onto the scene and set to change, sometimes dramatically, over time. Our own evolving programs interact with other dynamic biological programs.[113] Maybe our development is not outwardly as dramatic as the transition from caterpillar to butterfly, but our code has evolved to produce a radically changeable creature nonetheless.

---

107. *Id.* at 317–26, 330–36.

108. *Id.* at 308–17.

109. *Id.* at 317–22.

110. *Id.* at 188, 330–33.

111. *See id.* at 268–69.

112. In fact, new capacities do not arise only as novel genetic blocks coding for new capabilities. Rather, "by far the most frequent source of new traits is changes in the timing and manner in which already existing genes are expressed and transact with the environment." *Id.* at 5.

113. I do not mean to push too strongly an analogy to computer code here. *See, e.g.*, SETH, *supra* note 17, at 260–63 (discussing the pitfalls of the analogy of human consciousness to computers). The suggestion is only meant to gesture toward our biological dynamism, that we are perhaps best thought of as a series of entities, each with different mental capabilities.

ii. The Nine Month-ish Revolution: Joint Intentionality

It is the first of these stages, the development of joint intentionality, at which critical, and, Tomasello argues, uniquely human,[114] cognitive abilities become possible. A human infant has in common with the great apes a capacity to develop a theory of mind and to take others' perspectives.[115] Great apes, like us, are able to model how others see the world.[116] Unlike mature humans, though, great apes seem to use these models in a purely instrumental way.[117] They learn about the environment and how to achieve their own goals by observing and understanding the intentions and actions of others.[118] And they put this into use to achieve their individual goals, ignoring the irrelevant actions of others.[119] They attempt to emulate the *effects* they observe others producing

114. In *Becoming Human*, Tomasello goes further than describing a theory of what our developmental pathways are. He also gives an evolutionary explanation of our social development, namely that these capacities were favored in a cooperative breeding context. TOMASELLO, *supra* note 14, at 24–27, 311. But to be helpful to theories of law, we need not be concerned with whether this evolutionary story is correct. Nor do we even have to take sides in a debate over whether the capacities of joint and collective intentionality he describes are unique to humans. Maybe some primates, mammals, or even other animals have similar capacities. *See, e.g.*, Daniel J. Horschler, Emily E. Bray, Gitanjali E. Gnanadesikan, Molly Byrne, Kerinne M. Levy, Brenda S. Kennedy & Evan L. MacLean, *Dogs Re-Engage Human Partners When Joint Social Play Is Interrupted: A Behavioural Signature of Shared Intentionality?*, 183 ANIMAL BEHAV. 159, 164–66 (2022) (finding dogs exhibit re-engagement behavior, in which a partner in a task attempts to reinitiate the cooperation after the other breaks it off, and noting that this is "a key behavioural marker of joint intentionality"). But Tomasello does make the case for the critical role of cooperation in producing recognizably human traits and culture. Uniqueness among animal species is immaterial to the centrality of cooperation to the human experience and for this portrait of human beings to contribute to legal theory.

115. *See* TOMASELLO, *supra* note 14, at 299, 309.

116. *Id.* at 47–49 (describing studies showing chimpanzees "can imagine the actual [psychological] content of what others" are seeing, hearing, knowing, and inferring and what this means for their impending actions).

117. *Id.* at 106, 194. Tomasello conceives of great ape sociality in the way I have described isolationism: Interaction with others, though following its own pattern of cause and effect, is not different in kind from other features of the physical universe.

> [C]himpanzees acting in groups to acquire food are working with a kind of strategic trust. The notion of strategic trust is something like reliance on the laws of nature: we trust that a bridge will not collapse as we traverse it or that our dog will swim to shore if he jumps into the lake. . . . [A]lthough chimpanzee collaboration appears on the surface to be similar to the human version, in reality—in terms of the phycological processes involved—it is less like working together mutualistically and more like individuals using one another to achieve their individual ends.

Id. at 194.

118. *Id.* at 194.

119. *Id.* at 145.

but do so using their own, individual strategies.[120] And their mind-reading is mostly used in competition with others, not cooperatively.[121]

Where the infant departs from great ape development is in developing joint attention. Joint attention is something more than just attending to what another is attending: "I know that you are looking at something or doing something." Rather, to establish joint attention is to attend to another's attention toward one's own attention.[122] Yes, that's a mouthful. But it is the ability to think that "I know that you know that I know" and thus to establish some common ground.[123] It means having a recursive theory of mind, and it unlocks the ability to share an experience and share worlds, to see or do a thing *together*.[124] The profundity of this new ability seems impossible to overstate. It is at this stage of development that a pair can develop common ground, meaning the set of things that each individual knows that both individuals know, and thus do things together.[125]

Joint attention is one aspect of *joint intentionality*, a complex of competencies and attributes that enables recognizably human sociality between two people.[126] With joint intentionality comes cooperative conversation, which helps align perspectives, and imitative learning that focuses on the processes and methods of one's cooperative partner and not just their results.[127] Human children, but not great apes, exhibit *over*-imitation, taking what researchers have called a "ritual stance" and copying another's exact actions, including arbitrary gestures and conventions.[128] While human children will imitate obviously inefficient behavior, great apes seem only to emulate behaviors that

120. *Id.* at 136–38.

121. *Id.* at 43.

122. *Id.* at 56.

123. *See id.*; Elisabeth Pacherie, *The Phenomenology of Joint Action: Self-Agency vs. Joint-Agency*, *in* JOINT ATTENTION: NEW DEVELOPMENTS IN PSYCHOLOGY, PHILOSOPHY OF MIND, AND SOCIAL NEUROSCIENCE 343, 352 (Axel Seemann ed., 2012).

124. *See* Margaret Gilbert, *Walking Together: A Paradigmatic Social Phenomenon*, *in* MIDWEST STUD. IN PHIL., no. 15, 1990, at 1, 3 (describing "strong shared personal goals").

125. TOMASELLO, *supra* note 14, at 16 ("Being able to recursively embed one intentional or mental state (*attend*) inside another (*intend*) was another new ability with enormous cognitive consequences.").

126. *Id.* at 308–15.

127. *Id.* at 311–12.

128. Michael Tomasello, *The Ontogeny of Cultural Learning*, 8 CURR. OP. PSYCH. 1, 1 (2016); Patricia A. Herrmann, Cristine H. Legare, Paul L. Harris & Harvey Whitehouse, *Stick to the Script: The Effect of Witnessing Multiple Actors on Children's Imitation*, 129 COGNITION 536, 537 (2013) (distinguishing in children's interpretations of social situations an "instrumental stance," in which they seek out a rationale for actions based on physical causation and a "ritual stance," in which they seek out a rationale for actions based on cultural convention).

prove efficient at achieving a goal they already have.[129] Children's inclination to conform is so strong that they will even copy others' actions having already mastered an effective strategy of their own.[130] And they will protest others' omissions of irrelevant actions.[131]

The faculty of joint intentionality enables what Tomasello calls "dual-level collaboration."[132] Children between one and three years of age, with ever greater facility as they gain more experience with this maturational capability, begin to perceive joint goals, to identify common ground, and to align attention and attitudes with their cooperative partners.[133] They do so by understanding themselves and their partner as equal, second-personal agents in the cooperation.[134] You and I become a plural "we," with "we" goals that we each have a known role in achieving.[135] Toddlers are able to create these shared worlds and goals with others because they can recursively embed the perspectives of their partners in their own cognitive states and have the mental ability to reverse roles in the joint activity.[136]

Joint intentionality also unlocks an ability to initiate cooperation through helping behavior. From as early as one year of age, human children, like chimpanzees, are able to help others and can distinguish helpful actions from unhelpful ones.[137] But with joint intentionality comes a different kind of helping. Toddlers begin to help and share out of "Smithian sympathy,"

---

129. TOMASELLO, *supra* note 14, at 142–44. Tomasello collects studies demonstrating that young children, but not apes, will imitate actions with respect to an apparatus that are obviously irrelevant to the outcome, even if they are told the actions are irrelevant. *Id.* at 145. In one study, chimpanzees ignored actions on a box (alternatively opaque and clear) containing a food reward that were clearly not effective, but children faithfully reproduced them without regard to effectiveness. *Id.* (citing Victoria Horner & Andrew Whitten, *Causal Knowledge and Imitation/Emulation Switching in Chimpanzees (*Pan Troglodytes*) and Children (*Homo Sapiens*)*, 8 ANIMAL COGNITION 164 (2005)).

130. TOMASELLO, *supra* note 14, at 144–45 (citing Daniel B.M Haun, Yvonne Rekers & Michael Tomasello, *Children Conform to the Behavior of Peers; Other Great Apes Stick With What They Know*, 25 PSYCH. SCI. 2160 (2014) (experiment involving an apparatus dispensing a food reward when balls are inserted in a particular hole and showing that human children will switch to a different hole after observing peers but that chimpanzees will stick with a successful strategy)).

131. TOMASELLO, *supra* note 14, at 145.

132. *Id.* at 195–202.

133. *Id.* at 196.

134. *Id.*

135. *Id.* at 188–89.

136. *Id.* at 196–97. "The cognitive basis for this role reversal is the ability of young children to simulate the role and perspectives of their partner during collaboration." *Id.* at 199. Studies here demonstrate toddlers, but not chimpanzees, reversing roles by, for example, responding to having their arm tapped by tapping an arm back, holding out a plate of toys that had been held out to her. *Id.*

137. *Id.* at 225. Studies have also demonstrated that human 18-month-olds, like chimpanzees, will help, even if at some personal cost, without regard to reward. *Id.*

imagining themselves in the shoes of the recipient and then acting paternalistically to help in a way they realize would be helpful to themselves were it them in the predicament.[138] Such help is about more than aiding to complete the immediate task another is trying to complete. As Tomasello puts it: "I fetch him not what he wants but what I would want if I, given my current knowledge, were in his shoes."[139] If Tomasello is correct that other primates lack the ability to take others' perspectives and then simulate from those perspectives *as if they were their own*, then it would explain studies finding, for example, that apes, but not children, will fetch an unhelpful tool an experimenter is reaching for instead of the helpful one. Human children process the intention behind the reach and fetch the helpful tool.[140] What's more, they are intrinsically motivated to help, and rewarding them only undermines this tendency.[141]

While the joint intentional child is cognitively able to engage in perspective taking, she is also highly motivated to share and align intentional states.[142] Young children positively seek out the experiences that will develop these maturational capacities. Tomasello points to studies showing that human toddlers, unlike other primates, prefer collaborative activities over solo activities, even when both activities hold out the same reward, and they are just as motivated by cooperative but unremunerative games as they are by cooperative activities that have a material goal.[143] We are, at least as children, driven to cooperate rather than to compete self-interestedly.

But before the age of three, executive self-regulation in children is like that in great apes, which is to say self-interested and without much regard to the

---

138. *Id.* at 227–28. The reference here is to Adam Smith's work, *The Theory of Moral Sentiments*.

> Sometimes we feel for someone else a passion that he doesn't have and apparently isn't capable of having; because the passion arises in our breast just from imaging ourselves as being in his situation. . . . When we blush for someone's impudence and rudeness . . . that is because we can't help feeling how utterly embarrassed we would be if we had behaved in such an absurd manner.

ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 3 (Jonathan Bennett ed., 2017) https://earlymoderntexts.com/assets/pdfs/smith1759.pdf [https://perma.cc/2MK5-NYSQ] (ebook).

139. TOMASELLO, *supra* note 14, at 227.

140. *Id.*

141. *Id.* at 226.

142. *Id.* at 196–97.

143. *Id.* (citing Felix Warneken, Frances Chen & Michael Tomasello, *Cooperative Activities in Young Children and Chimpanzees*, 77 CHILD DEV. 640 (2006) (finding that two-year-old children, but not chimpanzees, attempt to reengage a cooperator who has stopped participating in a joint task and that they will attempt to reset the experiment to begin the cooperation again)).

impressions left on others.[144] Dyadic interactions involve joint intentional scenes in which there is an understanding of role-based responsibilities and equality. But there is not an internalized sense of who one really is with respect to the group more broadly or what one ought *generally* to do, outside joint interactions.[145] That more general way of thinking requires an ability to take an objective perspective and to appreciate group conventions more broadly.

iii. The Three-Year Revolution: Collective Intentionality

It is at around age three that a human child begins to make the objective and normative turn. At this age, also the natural age of weaning, she begins to interact with peers rather than restricting her attention to authoritative adults.[146] Before this age, much peer interaction is parallel and, unlike interactions with adults, does not involve shared world-building.[147]

Collective intentionality requires active coordination of perspectives to create a group-based, objective perspective. Not just "I know that you know that I know" and thus "you and I know together," but "this is in fact so for our group and so is true for us even though you and I have not previously interacted." With the ability to participate actively in objective construction, the human child at age three begins to move from communication with adults (with gestures and imperative communication, where words are tokens with a corresponding rudimentary grammar developed with adults) to mastering conventional communication.[148] That becomes possible when they understand that when communicating they are conforming to an objective, group-wide convention.[149]

This collectively intentional understanding of convention allows for instructed learning, as the preschool capacity for imitation within joint attentional scenes transforms into realizing that one is learning the group's objective common ground from representatives of the entire group.[150] "This

144. *Id.* at 315–16.

145. *Id.* at 38 ("[F]rom sometime during the late preschool period, young children self-regulate both their thinking and actions not just by how efficacious they will be in the current context (as do apes), and not just by how they will affect a particular person's thoughts or evaluations (as do younger children), but also by the perspective of how these will fit with the normative expectations of the social group.").

146. *Id.* at 318.

147. *Id.* at 31.

148. *Id.* at 119–22.

149. *Id.* at 120 ("[W]hen one- and two-year-olds are using a language, they are simply doing what they see others doing. . . . But they do not understand the conventionality of the linguistic items they are using in the sense of their sharedness and normativity in the community (but not outside the community) or the fact that they are derived by agreement.").

150. *Id.* at 320.

fruit is poisonous" is understood by the collectively intentional child as a fact that the group knows and that is being transmitted to her. In the same way, the child can acquire both an understanding of fairness and social norms and a moral identity, as the individual sense of what one should do in dyadic interactions graduates to a bigger sense of what one *generally* "ought" to do.[151]

A capacity to see from an objective point of view also makes possible joint *commitment*, as one can now invite joint action, which was possible at nine months, and also take a normative view about sticking with it.[152] Rather than the opportunistic participation in joint activities with adults that occurred before the age of three, there may now be a normative obligation, arising seemingly external to the cooperation itself, to continue participating once cooperation has begun.[153] A jointly intentional toddler can become upset when a jointly intentional scene is cut off, but the collectively intentional child can protest, in normative terms, defection from cooperation if defecting violates the group's norms.[154]

Importantly, the child's motivation after age three is not just to seek out joint intentional opportunities but to be group-minded and normative.[155] Again, at this age, we are positively driven to cooperation and, now, to taking an objective view of these cooperative enterprises as instances of a more general sociality among our group.

It is only now, at the age of collective intentionality, that the child gains what we would likely recognize as "self." After age three, she can extend the joint intentional ability to simulate others' perspectives on herself to an ability to take a group-based, birds-eye, objective view of herself.[156] She internalizes the judgments she now knows the group would make and feels them (and maybe hears them as an inner voice) as an internal sense of obligation, guilt, or aggrievement.[157] Externally, she will begin to protest violations of the group's

151. *Id.* at 293–94.

152. *Id.* at 213–15; *cf.* Gilbert, *supra* note 124, at 6–9 (defining a joint commitment arising from voluntarily becoming a "plural subject," characterized by a simultaneous and interdependent binding of wills, and triggering standing to rebuke for defection).

153. TOMASELLO, *supra* note 14, at 213–15.

154. *Id.* at 208–10.

155. *Id.* at 305.

156. *Id.* at 317–18, 326–29.

157. *Id.* at 281 ("[B]eing able to simulate the judgments that others are making about oneself—seeing oneself from the outside, as it were—is the cognitive foundation for the moral capacity to have a conscience, to feel guilty for transgressions, and for holding oneself accountable to standards.").

norms.[158] Internally, she begins to have feelings and judgments about herself.[159] The important point, for this Article, is that both these norms, feelings, and judgments, and a "sense of self" arise from collective intentional interactions.[160]

iv. The Six-Year "Age of Reason": Cooperative Thinking and Moral Identity

Six years of age is when children in most cultures are prepared to attend something like school. Tomasello conceives the capabilities reached at this age as the result of experience.[161] Joint intentionality at nine months and collective intentionality at three years mark maturational developments. By six, those biological capacities, if fueled by experience, unlock sophisticated cognitive and social abilities.[162]

Much practice with collective intentionality leads children to cooperative thinking, the sorts of interactions that involve debating propositions by giving reasons.[163] At the same time, children each develop a moral identity, in which this process of reason giving occurs within the child's mind.[164]

School-aged kids can make up and run their own games (providing ever more practice for participation in rule systems generally, perhaps).[165] And they shift from equally dividing spoils and rewards from activities, seemingly a young child default, to using more complex, group-defined norms for division.[166] For example, at this age, children are much more likely than toddlers to take into account need and labor inputs when determining fair divisions, all the while incorporating the group's norms and using them in a reason-giving process.[167]

---

158. *Id.* at 214.

159. *Id.* at 281 ("I cannot help but assess myself, as I assess others, with respect to some impartial standards of human conduct.").

160. *Id.* at 288 ("As soon as children begin evaluating themselves from the point of view of 'we' in the community, they may be said to have a sense of self.").

161. *Id.* at 332.

162. *Id.* at 188, 330–33.

163. *Id.* at 171–73.

164. *Id.* at 288–91.

165. *Id.* at 259–62.

166. *Id.* at 265–69.

167. *Id.* (citing Marie Schäfer, Daniel B. M. Haun & Michael Tomasello, *Fair Is Not Fair Everywhere*, 26 PSYCH. SCI. 1252 (2015) (finding school-age suburban German children distribute unequal rewards according to productivity in producing the reward but that children from an African hunter-gatherer community were far more egalitarian)); *see also* Erin Robbins & Phillippe Rochat, *Emerging Signs of Strong Reciprocity in Human Ontogeny*, FRONTIERS PSYCH., no. 2, 2011, at 1, 4, 11 (finding evidence of costly reciprocity in children at age five but not at age three and finding a lesser effect, and thus more egalitarianism, among Samoan children than among children from the U.S.).

To see how the development of collective intentionality unlocks the ability to engage in rule-following and rule-understanding in the non-imperative sense, consider the case of a claim to ownership of a thing by virtue of possession. Many species will fight to maintain a thing they possess and will make threats to enforce their continued possession.[168] Such threats rely on their conspecifics having a theory of mind, thus being able to model one another from an intentional stance. But no plural agency is required.

Appreciating ownership, rather than mere possession, involves understanding objective meaning and reasoning about the group's norms as they relate to possession. Preschoolers recognize owners from first possession, who seems to control the permission to use, and an object's history, including the identities of any creators.[169] School-aged children take this abstraction further, using their capacities for normativity and symbolic convention. They can describe who can use, sell, and destroy an item based on the group's conventions.[170]

There have been illustrative experiments in which five-year-old children and chimps watch or participate as others acquire objects through work. Given an opportunity to acquire the objects, only human children avoid the acquisitions of others.[171] Cross-cultural variation in this context arises only in middle childhood.[172] The researchers observe a change from initially increasing egalitarianism with age for non-costly sharing and decreasing generosity for costly sharing to cultural-norm-based behavior.[173] Virtually all children across the world respect property by school age, but what property means is variable, depending on cultural norms.[174]

---

168. Michael A. Cant, *The Role of Threats in Animal Cooperation*, 278 PROC. ROYAL SOC'Y 170, 170 (2010).

169. TOMASELLO, *supra* note 14, at 266.

170. *Id.* at 267 (citing Sunae Kim & Charles W. Kalish, *Children's Ascriptions of Property Rights with Changes of Ownership*, 24 COGNITIVE DEV. 322 (2009)); *see also* Federico Rossano, Hannes Rakoczy & Michael Tomasello, *Young Children's Understanding of Violations of Property Rights*, 121 COGNITION 219, 224 (2011) (showing that when presented with a puppet saying it would take someone else's object home with him, two-year-olds object only if the object is theirs, but three-year-olds object even if the object belongs to another adult and will frame their objection in normative language).

171. Patricia Kanngiesser, Federico Rossano, Ramona Frickel, Anne Tomm & Michael Tomasello, *Children, but Not Great Apes, Respect Ownership*, 23 DEV. SCI., May 2019, at 1, 10–11 (2020) https://doi.org/10.1111/desc.12842 [https://perma.cc/BKC9-JADZ].

172. TOMASELLO, *supra* note 14, at 268–69.

173. *Id.*

174. *Id.*

B. The Interconstituted Individual

If we take Tomasello's theory of development as a starting point, the separationist accounts lose some of their luster as the realistic and resolutely physical alternatives to what might otherwise seem metaphorical notions of interconstitution. The separate agent, bearing idiosyncratic preferences and communicating with others through actions and language across a gap of air, seems too static a picture of the creature Tomasello describes. Rather, these agents arise from highly integrative social interactions in childhood. Our motivations to be social, rather than to retreat into isolation, are biologically necessary to develop not just social skills but even an ordinary sense of self.

Tomasello's account does not stand for interconstitution throughout adulthood. But it does suggest we are creatures built for cooperation, motivated to cooperate, and with identities arising from cooperation. And when we cooperate, jointly or collectively, we are doing more than interpreting "messages in a bottle" from one another in isolated fashion. Rather, we are representing reality together. As Sarah Hrdy puts it:

> "[I]ntersubjective sharing" (defined . . . as two humans "experiencing the same thing at the same time and knowing together that they are doing this") is the key sociocognitive difference between humans and other apes. . . . [C]reating "a shared space of common psychological ground" lays the foundation for a broad range of collaborative activities with shared goals as well as human-style cooperative communication.[175]

What the separationist accounts miss is that we become something quite different when we engage with others as plural agents. While Tomasello's work is an account of childhood development and not a full-fledged theory of social consciousness, I take it as supporting the plausibility of the core of what I have defined as interconstitution. To repeat:

> Generally, the interconstituted human being is one whose tastes, moral identity, and motivations are a constantly evolving product of joint and collective intentional interactions. The agents of this model are highly motivated to engage in such cooperative enterprises, even when solitary action would appear to be a more efficient means of directly achieving a goal. Group membership does not just give rise to interactions that *then* have the effect of generating incentives and influencing tastes. Rather, cooperation within groups gives

175. Sarah B. Hrdy, *Development + Social Selection in the Emergence of "Emotionally Modern" Humans*, *in* 21 NEW FRONTIERS IN SOCIAL NEUROSCIENCE 57, 59 (Jean Decety & Yves Christen eds., 2014) (internal citation omitted) (emphasis omitted).

> rise directly to a dynamically generated understanding of self and the self's tastes, values, motivations, and goals. Rather than an agent with views that are influenced here and there by discrete interactions, the interconstituted agent's inner voice is some product of the joint and collective interactions in which the agent participates.[176]

At the very least, this dynamic and cooperationist account of how we become recognizably human should at least upset any strong convictions we might have about our mental isolation, inherent competitiveness, or the optional nature of groups and cooperation. We are world-sharers.

IV. A LAW FOR THE INTERCONSTITUTED

Law cannot be made sensibly without some conception of ends. And achieving ends requires an understanding of the subject of law. The problem, of course, is that our understanding of that subject, us, is necessarily incomplete. I have traced habitual views we take from time to time of ourselves and others and have identified four categories of such views. The last category, interconstitution, is the least familiar in legal theory and yet, as the last Part demonstrated, plays an important role in how we develop and behave. Now I turn to indicating how some doctrines and theories appear from the interconstituted perspective. In some cases, interconstitution makes particular answers seem obvious that are otherwise not so obvious or even obviously wrong from the other perspectives. In other cases, comparing interconstitution with the other rungs on our ladder explains why an area of law is difficult.

The goal here is not to invent rhetorically appealing arguments for normative results. Rather, it is to connect the perception of obviousness, or of difficulty, with these perspectives. In doing so, we contribute to understanding law's general aspects in the only way it is reasonably possible to do so: clarifying what depends on what.

A. General Legal Theory

The isolationist state of mind is most at home in an imperative framework. Law is orders backed by threats.[177] An order is given to an agent, and it is the individual act of following these orders that, when aggregated, produces law-abidingness in a society. These orders and expected sanctions for breach are then signals of what can be expected from others. Each agent separately will

176. *Supra* Section II.D.

177. JOHN AUSTIN, *Lecture I*, *in* LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 88, 88–106 (Robert Campbell ed., 1869) (characterizing law as the commands of a sovereign, habitually obeyed, backed by threats).

experience these incentives after comparing the expected legal outcomes of actions with their tastes. In this way law deters by threat, speaking to us individually in ways calculated to affect our isolated decision-making.[178]

The interactionist will find compelling more complicated accounts of law's action. When there is a special status afforded human interactions, we become more interested in their peculiarities, and we become more open to notions like acceptance of rules from an internal point of view.[179] If the Holmesian "bad man" is the isolated individual navigating a world that happens to contain human beings,[180] with coercive commands as physical obstacles, the Hartian legal actor is an interactive individual who can see the rules and reasons given by others as guidance, not just threats.[181] The interactionist follows Hart's argument that the gunman barking "your money or your life" is not making law.[182] A law, on the interactionist view, does more than set up yet another brute physical fact about the world. Through its guidance, it structures human relationships, a social fact that will be used by interacting individuals in their ongoing coordination.

The interactionist, though, may still be confused about how the descriptive communications about law can turn into reasons for action. How does the "is" of legal statements become the "ought" of legal obligation? There are many possible answers to this question.[183] But interconstitutionalism has no problem

178. *See supra* Section II.A. (describing law's coercive effect as akin to physical impediments or affordances that alter an individual's isolated decision-making).

179. HART, *supra* note 28, at 89 ("When a social group has certain rules of conduct, this fact affords an opportunity for many closely related yet different kinds of assertion; for it is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct. We may call these respectively the 'external' and the 'internal points of view.' ").

180. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

181. HART, *supra* note 28, at 40 ("Why should not law be equally if not more concerned with the 'puzzled man' . . . who is willing to do what is required, if only he can be told what it is? . . . The principal functions of the law as a means of social control are . . . to be seen in the diverse ways in which the law is used to control, to guide, and to plan life out of court.").

182. *Id.* at 82–85 (arguing that such a gunman creates no obligation in the sense of providing a reason or justification for a demand for compliance). The point is not necessarily to do with the use of the word "law" but that the gunman's order is qualitatively distinct from municipal laws adopted in accordance with secondary rules that are ultimately accepted by a sufficient group of officials to perpetuate the system.

183. *See, e g.*, SCOTT J. SHAPIRO, LEGALITY 195–232 (2011) (describing a "planning theory" of law where descriptive legal statements are morally binding from the perspective of legal institutions operating under a master plan, though perhaps not from the perspective of those living under them); Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L.J. 1160, 1193–95 (2015) (arguing that law's normativity arises not from law itself but from ordinary moral obligations in the context of the social practice of law).

here. From Tomasello, we learned how the dual-level collaboration of joint intentionality in toddlers became normative with the emergence in the school-age years of a capacity for collective intentionality.[184] It is when we become able to take the objective, birds-eye view of the group that we can form meta-ethical judgments about continuing or breaking off cooperation, and joint *commitment* becomes possible.[185] Tomasello describes normativity as arising, evolutionarily and developmentally, from individual pressure about what one ought to do to achieve one's goal. With collective intentionality this pressure becomes what *we* ought to do to achieve *our* goal, and then what *one* ought to do in order for *us* to achieve *our* goals.[186]

Indeed, feelings of guilt, Tomasello suggests, are the voices of our groups moved inside our own heads.[187] The possibility here is that some version of Hartian positivism fully captures what law is, and that Hume's objection, that one cannot derive an "ought" from an "is," is answered not within that theory itself but in understanding better its objects: us. Our feeling of obligation, which is all we need to explain if our goal is to understand law as a social practice, arises from the "is" of collective intentional interactions.[188] The normativity of a group's rules arises from our felt association with that group, not from the rules themselves, the concept of rules, or any instrumental or moral logic.[189]

---

184. *See supra* note 151 and accompanying text.

185. *See supra* notes 152–54 and accompanying text.

186. TOMASELLO, *supra* note 14, at 343 (describing how the normative notions of reason and responsibility in a group arise from initial "instrumental pressure—the sense that I ought to do *x* in order to attain *y*—as a self-regulatory process" and are transformed into group-minded normative pressure with the faculties first of joint intentionality and then collective intentionality).

187. *Id.* at 214 ("In this hypothesis, the sense of obligation is basically the internalization of an interpersonal commitment (given an agent who already has a sense of instrumental pressure to do what is needed to attain goals), and guilt is likewise the internalization of an interpersonal process of second-personal protest (given an agent who already engages in executive regulation)."); *id.* at 281–84 ("[T]hese moral judgments are coming not from myself as an individual but rather from something larger than myself.").

188. *See id.* at 214; Gilbert, *supra* note 16, at 763 (arguing that joint commitment obligates those who have committed in the sense of granting standing to each to "demand or rebuke" with respect to the cooperation and distinguishing joint commitment from "moral ideas"). Notice the close similarity of Gilbert's notion of "standing to rebuke" to Hart's identification of social rules with practices that create grounds for criticism in the case of their breach. Hart, *supra* note 28, at 57 ("What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought', 'must', and 'should', 'right' and 'wrong.' ").

189. *See* Turner, *supra* note 17, at 1352 ("[O]ur judgments concerning the ought-inducing effect of rules are completely parasitic on our attitudes toward the cooperation from which the rule structure is inseparable.").

And that felt associations develop from cooperation is a biological fact about human beings. As Tomasello puts it: "The child growing up on a desert island would not develop this sense of obligation or guilt because she would have none of the requisite social interactions to internalize."[190]

The interconstitutionalist believes that we become ourselves because of our groups. And to defect from a group is to wrestle with our own identity. So the choice to break a rule is bound up with the perceived centrality of the rule to the group, the group's normative attitude toward giving reasons for rule-breaking (including both what reasons count and their weight), and the degree to which the individual feels bound to the group. All that seems to capture my own feelings when I imagine breaking less important rules, like the technically applicable speed limit on a road, and more important rules, like the requirement to pay taxes or rules against fraud. But the isolated perspective, with its Austinian and "bad man" theories, seems best to fit my perspective on rules of competitive but friendly games where all agree we are trying to outdo one another within the rules. In that context, I work it out alone, and, in that somewhat peculiar context, I may think of my friends and their stratagems as akin to physical impediments.

A fully worked out jurisprudential theory from mixed conceptual and biological grounds is beyond the scope of this Article. But these initial remarks demonstrate the sensitivity of theoretical descriptions to underlying models of social reality. When asking what law is and why it obligates, our answer will depend on why we are asking because the "why" of our situation is what will lead us to choose, consciously or not, a perspective on ourselves and others.

B. Expressive Association and Discrimination Norms

The constitutional doctrines governing rights to associate in groups are an obvious place to look for the influence of the habits of mind we have surveyed. Some basic legal questions here include what limits a state may place on the formation and privacy of groups and how it may regulate groups' membership. The former arises in cases where the state attempts to ban groups altogether,[191] demands membership lists,[192] and regulates a group's practices.[193] The latter

190. TOMASELLO, *supra* note 14, at 214.

191. Scales v. United States, 367 U.S. 203, 205–06 (1961) (infamously upholding a conviction under the Smith Act for membership in the Communist Party of the United States).

192. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 466–67 (1958) (reversing a state court judgment requiring disclosure of the NAACP's membership list).

193. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 444–45 (1963) (striking down Virginia's attempt to bar the NAACP's impact litigation efforts).

appears prominently in challenges to a group's liability under state or federal antidiscrimination laws.[194]

An isolationist, viewing association with others as an indistinct species of more general environmental interaction, would object to governmental control of association the same way one would object to the taking of property. It is the intrusion into the pursuit of personal advantage that is objectionable. The substantive nature of the group, however expressive or intimate it might be, contributes only rhetorically to the core argument that the group should be left alone to govern itself. A discriminatory practice that would be widely understood, including by an isolationist, as invidious if performed by the government, would, therefore, not seem problematic if performed by a private group. Ultimately, isolationism looks to regulation as an aid to protecting the separate self, and it would be incongruous to seek public aid to force private cooperation.[195] For the isolationist there is no tension between antidiscrimination norms and associational rights because the former just do not apply at all in the context of the latter. The most important thing about groups is that one can retreat into them and retreat from them, just as one can into one's land and from the lands of others.

Within mainstream legal discourse in the United States, however, the contours of the liberty to associate are predominantly a consequence of the interactionist habit of mind. The Supreme Court's cases in this area turn analytically on a dichotomy of group types: (a) associations serving an instrumental role in protecting and promoting free expression and democracy-enhancing discourse and (b) intimate associations that depend on privacy protections.[196] While the division between expressive and intimate associations may seem so substantial as to be, essentially, two distinct areas of law—one based in the First Amendment and the other in a Fifth Amendment right of

194. *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640, 643–44 (2000) (protecting the prerogative of the Boy Scouts to revoke the membership of a gay scoutmaster on account of his sexual orientation, state antidiscrimination law notwithstanding).

195. *See, e.g.*, Peñalver, *supra* note 32, at 1896–1902 (describing proponents of "property as exit" as committed to the isolationist view and to community as purely voluntary).

196. As to the former, see Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 983–89 (2011) (succinctly describing the history of the Supreme Court's recognition of association rights and noting that after *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), "membership in organizations was protected no longer as an independent political freedom but as an aspect of free speech"). The latter are described in *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618–20 (1984) (describing the importance of intimate associations to individuals and to culture and identifying those associations as "intrinsic element[s] of personal liberty").

privacy—the Court's rhetoric acknowledges considerable fluidity of rationale between the two.[197]

The doctrines evince the simultaneous "human-relationship exceptionalism" but "individualistic focus" characteristic of the interactionist perspective. Consistent with interactionism, the Court's expressive association jurisprudence consistently carves out a special place for idea exchange among the events in a human life. That we can persuade others and be persuaded by others—and not just impose costs on them and grant benefits to them—is a latent assumption of democratic governance,[198] and it is a central assumption of interactionism.[199] Interactionists seeking to protect democratic governance will thus naturally focus on the value of both intragroup, deliberative expression and of inter-group and extra-group expression meant to engage the public.[200] These ends, though, are achieved by individuals and for the benefit of individuals, with associational forms serving as the special vehicle for achieving them.[201]

Interactionists also recognize the importance of intimate association. But from this perspective too, intimacy is valuable *to* an individual for what the relationship provides *to* an individual. These values might be other-regarding and even altruistic, but they are separately experienced. For example, the Court has justified its doctrine protecting intimate associations on account of "the role

197. *See, e.g.*, *Roberts*, 468 U.S. at 620 ("Between the[] poles [of truly intimate associations and impersonal business enterprises], of course, lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State. Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments."). Similarly, groups can be more or less expressive. Despite some similarity in rhetoric and in the nature of association generally, though, the Court has maintained the doctrinal distinction. *See* John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. 485, 557–61 (2010).

198. *See, e.g.*, *Dale*, 530 U.S. at 647–48 (citing *Roberts*, 468 U.S. at 622) (grounding the right to association in individuals' rights of expression and in preserving the ability of individuals to air dissenting views); Whitney v. California, 274 US 357, 375 (1927) (attributing to the Founders a belief "in the power of reason as applied through public discussion").

199. *See supra* Section II.B.

200. *See* Luise Papcke, *Reaching a New Balance in Freedom of Association: The Goods Approach*, 50 POLITY 366, 369–75 (2018).

201. *See Roberts*, 468 U.S. at 622 ("An *individual's* freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding *dissident* expression from suppression by the majority.") (emphasis added) (citations omitted). The collective form must be protected, the argument goes, *in order to* protect the individual.

of such relationships in safeguarding the *individual* freedom that is central to our constitutional scheme."[202]

In addition to these two forms of association, interactionists may also find valuable other consequences of group life, beyond groups' capacity to serve as instruments of channeling, revising, and amplifying individual expression or as instruments to fulfill individual needs for intimacy. Once such values are identified, pressure for their protection and promotion with legal doctrine intuitively follow. Luise Papcke, for example, has argued that associational rights are important because groups provide individuals with a broad array of important goods, such as economic opportunity, social networking, and community belonging.[203] It may well be that the Court's seemingly category-based approach—expressive, intimate, or business—is in practice a more general weighing of governmental exigencies against the multidimensional goods of association, where some of those dimensions, like the autonomous and instrumental values of political expression and family life, happen to be particularly strong.[204]

If we venture beyond interaction to interdependence, the shift we experience in analyzing associational rights lies more in an altered assessment of consequences and the magnitudes of various values than in letting go of a focus on individuals. The interdependent perspective found interactions between individuals to be more than just special events in the universe or sources of advantage and disadvantage. Rather, in interdependence, we identified a *necessity* to individuals of interaction, either because of inevitable vulnerabilities or to maintain a baseline of cooperation that is necessary to support all other interactions.[205] And so supporting interaction is at times essential for our survival and, perhaps at all times, for our thriving.[206]

The interdependent analysis of associational freedoms would be especially concerned with intrusions into intimate, caregiving relationships. But rather than focusing exclusively on negative rights, the interdependent habit tends toward demanding positive rights for supportive associations, especially for intimate family associations. This qualitatively different stance arises from a

202. *Roberts*, 468 U.S. at 618 (emphasis added).

203. *See* Papcke, *supra* note 200, at 380–84 (analyzing the tension between antidiscrimination norms and associational rights by shifting from valuing associational expression to a broader array of associational goods).

204. *See, e.g.*, Raymond H. Brescia, *Social Change and the Associational Self: Protecting the Integrity of Identity and Democracy in the Digital Age*, 125 PENN. ST. L. REV. 773, 809–10, 810 n.204 (2021) (arguing that the Court's conclusion in *Boy Scouts* would be better explained as applying a First Amendment analysis to democratically significant, rather than just expressive, associations).

205. *See supra* Section II.C.

206. *See supra* notes 72–75 and accompanying text.

quantitatively different assessment, where these relationships are viewed as far more individually important than the interactionist view assumes.

The interdependent perspective on marriage, for example, would focus on doctrines reinforcing expectations of support, perhaps making marriage more difficult to dissolve and favoring maintenance obligations. While interactionists would appreciate the special place of marital and marital-like relationships and tend toward protecting them from state intrusion and even supporting their formation with incentives, they may not be as sensitive as proponents of interdependence would be to the vulnerabilities to which marriage responds and that it creates. The legal rhetoric of interdependent marriage would emphasize such vulnerabilities, the importance of relying on a marriage's mutual aid in the face of travails, and marriage as a cooperative platform for joint engagement in social life. Marriage, on this view, satisfies inevitable social and material needs. In contrast, the interactionist understands marriage as an intimate arrangement that responds to individual desires, with, like all associations, an array of costs and benefits.

Both frames are evident in Justice Kennedy's opinion in *Obergefell v. Hodges*, but a close look reveals many descriptions of marriage as existing between interdependent people and supportive of their—and the usual word for them is suggestive—dependents.[207] Marriage "shape[s] an individual's destiny."[208] "[B]ecause 'it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition.'"[209] And the marriage association makes possible the exercise of "other freedoms," including "expression, intimacy, and spirituality."[210] The lofty descriptions continue, noting that marriage responds to a universal "fear" of loneliness and that it "safeguards" children and families, including by lending legal structure to the relationship to promote "permanency and stability" in the interests of couples' children.[211]

While the majority opinion does give us both more rhetoric than is strictly needed to defend a right for same-sex couples to marry on liberty grounds and, at the same time, less than is needed fully to set out a theory of what that liberty is, Justice Scalia's notorious "I would hide my head in a bag" dissent largely misses its point.[212] Whatever one thinks of the style of Kennedy's writing or its

207. *See* 576 U.S. 644, 665–70 (2015).

208. *Id.* at 666.

209. *Id.* (quoting Goodridge v. Dep't of Pub. Health, 440 Mass. 309, 322 (2003)).

210. *Id.*

211. *Id.* at 667–68.

212. *Id.* at 719–20, 719 n.22.

precision, his opinion is an attempt to describe the marital relationship as responding to universal needs, and the law positively assists its formation and maintenance in part because of these needs. And so his argument is not purely the interactionist one: That same-sex partners should have an equal right to the individual advantages conferred by this associational form and that their individual liberty is enhanced by being able to choose and live it—though, his argument is that too. But it is also that this form of cooperation, marriage, is one of committing ourselves in such a way as to be able to depend on one another in ways required for our thriving.[213] It describes marriage as a uniquely beneficial relationship that responds to inevitable human needs and vulnerabilities and that provides "a thread of cooperative behavior" on which community and family life can be based.[214]

What unifies the isolationist, interactive, and interdependent approaches to apprehending and protecting a group's value is the individualistic frame of reference. Compare how these different perspectives conceive the conflict between associational freedom and antidiscrimination laws. While, as discussed, the isolationist view would not wrestle at all with this conflict, it is a live concern from the interactive and interdependent perspectives. The effect of human cooperation from both of these latter perspectives is to provide special individual benefits and impose special costs. And inclusion of unwanted others in a group comes at a cost to those individuals within the group who would experience a conflict between the inclusion and the values they derive from the group. But both perspectives also admit of the potential for some expressive value in law and norms.[215] Initially forced inclusion might, over time, relax the impulse toward exclusion, which might be judged a social good.[216]

The view from interdependence is even more complex. It would take account of those areas of social life as to which exclusion from groups deprives the outcast or outcast group of necessary material or social resources or cuts them off from the cooperative thread that is the platform for other interactions. If this is our view, we will be especially inclined to permit antidiscrimination laws to overcome associational interests in systematic exclusion, except,

213. This is not to say that marriage is the only way to respond to such needs. In any event, the point here is to describe a perspective on others; it is not normative.

214. *See supra* note 73 and accompanying text (quoting Carol Rose, *Law and Morality: Property Law: The Moral Subject of Property*, 48 WM. & MARY L. REV. 1897, 1900 (2007)).

215. *See supra* notes 49–52 and accompanying text.

216. This issue is, needless to say, complex. *See, e.g.*, Kristin Pauker, Colleen Carpinella, Chanel Meyers, Danielle M. Young & Diana T. Sanchez, *The Role of Diversity Exposure in Whites' Reduction in Race Essentialism Over Time*, 9 SOC. PSYCH. & PERSONALITY SCI. 944, 946–50 (2018) (finding that racial diversity in social contexts was associated with a reduction in belief in race essentialism).

perhaps, in the most tightly drawn groups where inclusion is flatly incompatible with existence of the group—assuming the group is found to have any value.

These differing perspectives might explain what is potentially difficult about a case like *Boy Scouts of America v. Dale*, in which the Boy Scouts' First Amendment rights empowered them to revoke a scoutmaster's membership because he was gay, state antidiscrimination law notwithstanding.[217] It is an easy case for the isolationist: Boy Scouts obviously win. But for the interactionist, the outcome would depend on the perceived costs and benefits of forced inclusion to the participants and excluded members,[218] including a values judgment as to whether and how we should account for the changes in individual preferences forced inclusion might cause over time. From the interdependent perspective, we undertake a similar analysis, but we pay special attention to the systemic effects of this exclusion and ones like it. Are the excluded members cut off from our society's essential cooperative threads and denied the bundle of *necessary* resources? This depends on the role of Scouts within the community. How essential is the group as an institutional thread, and to what degree does it incubate relationships that will blossom into further associations, business or social?

The interconstitutional perspective finds the case, and the entire field of associational interests, to be more challenging yet. For an interconstitutionalist, groups are constantly creating the individuals that compose them. To control our membership in groups is, therefore, to control what will influence what we become.

Raymond Brescia draws on social-movement theory in his definition of "the associational self,"[219] which an interconstitutionalist might just call "self." Brescia describes this individual joining with others to achieve ends she cannot realize alone and thus "multipl[ying]" her "[i]ndividual autonomy."[220] That sounds interactionist. But, interestingly, Brescia argues that associating with others is not only about force multiplication but that one can "realize[] the self in such associations and movements."[221] Indeed, the tying of individual identity to the group's collective identity is critical to the group's maintenance of a common perspective on a social problem and their role in society.[222] But "[t]o partake of a collective identity is to reconstitute the individual self around a

217. Boy Scouts of Am. v. Dale, 530 U.S. 640, 644–45 (2000).

218. *See supra* note 203 (discussing the bundle of associational goods).

219. Raymond H. Brescia, *Social Change and the Associational Self: Protecting the Integrity of Identity and Democracy in the Digital Age*, 125 PENN. ST. L. REV. 773, 789–99 (2021).

220. *Id.* at 790.

221. *Id.* at 791.

222. *Id.* at 792.

new and valued identity."[223] Self defines group. Self is defined by association with group.

But whether from a social-movement perspective or the interconstitutional one, the influence of groups on self is not only the promise, but also the problem: Groups influence what we become. If groups are such powerful instruments of individuals' futures and identities and also such powerful determinants of culture, then it seems obvious that they will be a focal point of exactly that conflict. To permit systematic exclusion by groups would tend toward siloing individuals in separate engines of norm creation and individual growth, which would exacerbate the separation of people themselves, which would then make exclusion seem even more desirable and natural, *ad infinitum*. The segregated groups would only drift apart through their ongoing but separate collective intentional interactions.

From the interconstituted perspective, group participation is central in our lives. For this reason, the ability of groups to define themselves is of greater importance than it would be for an interactionist, for example. But groups' onward social effect is *also* seen as more powerful than from the other perspectives. The conflict is both more critical and more polarized.

There is obviously much more to be said about associational problems in law from an interconstitutional perspective. But even an initial foray from this point of view illustrates the depth of the problem, especially when group formation is mediated and influenced by commercial and sometimes malign actors.[224] The power to control group formation and non-formation is, for an interconstitutionalist, a lofty one indeed. However we choose to proceed, though, we must acknowledge that we are managing an ecosystem of joint and collective intentional interactions that likely continue to shape who we are at a very deep level.

C. Freedom and Totalitarianism

For now, it may be worth at least highlighting one additional implication of interconstitutionalism that is likely a common thread among many other applications. If through law we ultimately manage the ecosystem of decision-making and associational bodies, public and private, the interconstituted perspective has something to add to assessing the health of that ecosystem. And that assessment is closely connected to traditional notions of freedom and liberty.

---

223. *Id.* at 793 (quoting Debra Friedman & Doug McAdam, *Collective Identity and Activism: Networks, Choices, and the Life of a Social Movement*, *in* FRONTIERS IN SOCIAL MOVEMENT THEORY 157 (Aldon D. Morris & Carol McClurg Mueller eds., 1992)).

224. *See, e.g.*, Gaudette, Scrivens, Davies & Frank, *supra* note 94.

From the interconstituted perspective, the central concern of traditional libertarians, protection of the self from the state, is too focused on an isolationist vision of self, even as they are surely correct to fear a totalizing state. An interconstitutionalist critique of totalitarian statism would not focus directly on the state's intrusion and our inability to exit from its grasp. Rather, the problem is that we are diminished when totalizing rules reduce or eliminate the possibilities for forming diverse, normative social groups. Such rules lead to an arid desert of sociality, just individual and state, rather than a more complex ecology. The basic human drive of joint and collective intentionality is unslaked. Contra the libertarians, the nightmare is not that the individual is deprived of her own agency—the individualism of which is only illusory—but that the individual is deprived of a true diversity of collectively driven possibilities for becoming. Diversity of collectivity, not mere collectivity or the absence of collectivity, is the goal.

We are made to share worlds. Flattening those worlds—to state and individual—is at war with our motivations and a smothering of the flourishing Alexander and others have cited as our chief desideratum.[225] But so too is flattening our ecosystem of cooperative worlds to only boss and individual or only father and child. It is not statism per se that diminishes us but the failure to have access to diverse reason-giving, dynamic collectively intentional groups that expand our possibilities and broaden our minds. And so the interconstitutionalist sees threats to freedom not only from an Orwellian state but also from an overly oppressive capitalism that reduces existence to performing for the boss.

IV. CONCLUSION

Because law is an ongoing coordination of human relationships, our mental models of those relationships will drive our intuitions about both the nature of law and about what our law should do. This Article is an initial exploration of the legal consequences of progressively intersubjective understandings of ourselves and others. I have indicated some of the ways that our perceptions of relative closeness to others affect the apparent obviousness of legal theories and doctrines, from basic jurisprudential questions, to the content of tort law, to associational rights.

Thirty years ago, Robin West pioneered an argument that separation was a mere background assumption of male-dominated legal theory and not a universal truth. An omnipresent sense (or even brute fact) of connection, which she argued women cannot avoid, is concomitant with wanting from our

225. *See supra* note 74 and accompanying text.

collective governance something other than the enforcement of those interpersonal boundaries deemed important by men. While West focused on women's physical connections to others, recent scientific theories, including Tomasello's, have suggested that ever more connectionist accounts of human relations are plausible.

In our own thinking, we can notice that we sometimes perceive others as closer, sometimes farther, sometimes receding into the background altogether. The ladder of connectedness is a map of the kinds of perspectives we can take when we think about ourselves in relation to our community. Isolation, interaction, interdependence, and interconstitution are modes of understanding our ties to others. What seems obviously harmful in one mode may seem obviously beneficial in another.

While describing the perspectives helps make better sense of the legal culture we have, I think the human beings of the higher rungs are less metaphorical than those of the lower. Indeed, the dynamic and socially integrated honuman of comparative developmental psychology stands in stark contrast to those assumed to be consistent with the separation thesis. A human is not a mere atom of the social universe, born of fusion, dying in decay, and stable while alive. We are always changing, with these profound changes most easily seen in childhood. What is missing from the picture of the lower rungs is the temporal contingency of the dynamic self, that we exist as continuously developing creatures over time, and are products of both a genetic program that is itself dynamic and the experiences that program is adapted to making sense of.

The work of Tomasello and others suggests that our felt obligations to and interests in one another are not compromises we either choose or are programmed to make but integral to our development. There is not something recognizably human without our ability to construct shared worlds, to run shared simulations, and to coordinate with one another as a plural "we." From before we can walk, we are *highly* motivated to seek out cooperative circumstances and to form collectives. It is the combination of this ability and the experiences it makes possible from which we develop the ever-changing inner life we associate with self. This is in stark contrast to the atomized picture of social contract theory or Coasean accommodation, in which our colliding interests are mere facts, perhaps even inconvenient facts. Instead, we have a basic drive for connection, without which we would never become us.

When we see ourselves in this way, as interconstituting one another, our concerns change, just as they do as we shift among the other, more familiar perspectives. The examples explored here only hint at the new ends and means interconstitutional thinking might unlock: from better understanding (and perhaps even measuring) the normativity of law and the source of that

normativity, to seeing freedom as the maintenance of a rich ecosystem of joint and collective intentional experiences, to understanding the problem of associational liberty in a way that sheds light on what can make it feel difficult, especially in a world of diverse online interactions guided and nudged by diverse platforms.

So many more narratives about law are cramped into the boxes of isolation and interaction. Taking an interconstitutional perspective may more sensibly describe, and even solve, legal conflicts, large and small. For example, we might better understand how to design deliberative bodies, including courts and legislatures. Tomasello's model is one in which humans develop the capacity for collective decision-making through perspective-taking and reason-giving. It is not about instrumental preference-satisfaction simpliciter. Rather, groups form a plural *We* that we are biologically inclined to join and understand. Perhaps this suggests that efforts to rationalize social choice given individual preference inputs misses something important. Why should we expect social choice to be rational if grounded in the mathematical aggregation of individual preferences? Social choice is a collective act and not just a collective fact. When groups are understood through the lens of Tomasello's theory, impossibility results only show that the collective will is an internal *process* of reason-giving and justification, not a fact that a group either discovers or fails to discover. As such, it cannot be a fact inferred by a neutral observer by polling individuals. And this suggests cultivating reason-giving and cooperative virtues is the critical design goal for important social institutions.

The interconstitutional perspective finds little more important than pedagogy, not only what we teach but in how we teach and who we comprise as teachers and learners. Racial and other kinds of valuable diversity ought to be a goal in pedagogical environments not only to do justice to those groups that have been consistently excluded, though also for that reason. It is through intentional interactions that children, especially, form their moral identities, their sense of groups, and the objective common ground of their community. When we compose groups, we thereby compose the individuals within them and set a future course for the whole community, whether to thrive together or to lock ourselves into jealous, intergroup competition and domination.

Just as everything else in our experience, law is a function of our consciousness. For a long time, the domain of this function has seemed beyond us, at best a set of introspectively derived axioms. We can now do better.