AGAINST NOMOPOLIES[1]

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ABSTRACT

Legal pluralism stands in counterpoint to conceptions of law that sharply distinguish the legal from the non-legal. This essay considers a neglected feature of classical legal theory – prescriptivism – that sustains this binary ambition. Prescriptivists assert that legal artefacts such as norms are distinct from the human world upon which they operate. Each of centralism, monism, positivism and prescriptivism subsumes diverse associational nomoi into the nomos of a given community, often the State, thereby creating a nomopoly. To the prescriptivist, human beings are subjects under an external sphere of law. The anti-prescriptivist perspective invites legal subjects to imagine themselves as legal agents and to discover the normative potential of their own actions. In so doing, these legal agents are staking a position "against nomopolies", however constituted.

I. Beyond Legal Subjectivity

Legal Pluralism need not be understood as a revolutionary or even as an oppositional project. After all, rejection and resistance are only two of many strategies for affirmation in the face of dogma. Better to acknowledge openly the contingency of one's own position and, in doing so, to call upon those who offer competing symbolizations to justify positions previously asserted dogmatically. Still, such a reconstructive strategy is risky given the enthusiasm of legal theorists for exclusionary definitions parading as truth claims.

The desire to propound a single conceptual test for catechizing orthodoxy and extirpating heresies rests, at bottom, on a more general intellectual

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[1] This text is the fourth in a series of articles exploring different theoretical dimensions of legal pluralism. It elaborates upon themes developed in Macdonald, "Here, There and Everywhere…Theorizing Legal Pluralism; Theorizing Jacques Vanderlinden", in Kasirer (ed), *Mélanges Jacques Vanderlinden* (2006) [hereinafter Macdonald, "Here, There and Everywhere"]; Macdonald, "Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism" (1998) 15 *Ariz.J.Int'l & Comp.L.* 69 [hereinafter Macdonald "Metaphors of Multiplicity"]; and, Kleinhans and Macdonald, "What is a *Critical* Legal Pluralism?" (1997) 12 *Can.J.L. & Soc'y* 25. We are grateful to Jeremy Webber, who shared with us his essay "Legal Pluralism and Human Agency" (2006) 43 *Osgoode Hall L.J.* 11, and critically commented on several themes raised in this paper. Blaine Baker, Nicholas Kasirer, Desmond Manderson and Shauna Van Praagh also offered a close read of the text that helped us identify unstated assumptions and clarify our critique of prescriptivism.

commitment: the appeal to 'law as science'. Wresting law away from science and more particularly from the protocols of 20th century experimentalist science[2] requires re-casting the primary actors in its dramaturgy, re-framing their roles, and perhaps even re-writing the play. At once contemporary mainstream theoretical accounts, and the principal critiques of these mainstream accounts, conceive law as a set of relatively determinable institutions, practices and rules that are imposed on legal subjects.[3] For many scholars, the law so conceived is understood as the official law of the State, enacted by a legitimated authority, interpreted and applied by designated experts, and ultimately enforced by organized coercion. For others, this imposed law also embraces normativity that pops up in unofficial sites of human interaction: the "law" of the playground, of the barrio, the classroom, the market place, the workplace, the family.[4]

Despite important differences among themselves, these various visions of law share a shortcoming. Each presumes that people subject to (etymologically, "thrown" [jacere] "under" [sub-]) the law (conventionally described as legal subjects) are separate from it – that law is a social artefact external to the manner of its living by individual persons. The much-praised 'Rule of Law' is, on such a view, simply the domination of some people by other people – the latter claiming power expressed through what are said to be scientifically objective, abstract, impartial and politically legitimated norms.

That such accounts have a strong claim on the contemporary imagination in European and European-derived legal cultures is no surprise. For several centuries we have been delegating knowledge and the practice of knowledge to specialists such as scientists, technicians, doctors, accountants, professors, high priests and gurus. These experts assert authority as resting on their special insight into one or another frame of reference through which we might attend to that which is conceived as external (or in the case of

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[2] We have in mind here conceptions of science such as that advanced most notably by Popper, *Conjectures and Refutations: the growth of scientific knowledge* (1969). The position we develop in this paper, by contrast, has much resonance with the approach of Polanyi, *Personal Knowledge* (1956). The impact of natural science models on legal thought is explored in R. Berkowitz, *The Gift of Science: Leibniz and the Modern Legal Tradition* (2005) and H. Schweber, "The Science of Legal Science: the Model of the Natural Sciences in 19th Century American Legal Education" (1999) 17 *Law & Hist. Rev.* 421.

[3] To specify, without claiming to offer an exhaustive list, we would include in the former (mainstream) category those who claim to be legal positivists, legal realists, and scholastic natural law thinkers, and in the latter (critical) category, those post-realist postures advanced by adherents of law and economics, CLS, diverse feminist analyses, queer, critical race and post-colonial legal theorists.

[4] At one point these competing approaches tended to follow established disciplinary patterns. For example, most jurists, political scientists, economists and philosophers imagined law as an artefact of the State, while most anthropologists, sociologists, and cultural studies scholars attended to law as an interactional phenomenon. For an exposition and critique of this disciplinary dichotomy see Cotterrell, *The Politics of Jurisprudence* (2d) (2003). Today these competing symbolizations of law remain, although scholars in all disciplines may be found in both. A good early conspectus of anthropological approaches to legal pluralism may be found in Merry, "Legal Pluralism" (1988) 22 *L. & Soc.Rev.* 869.

psychiatrists, also internal) to us. How reassuring, then, to see the law in a similar scientific compass – as part of this exterior, objectively knowable realm. How convenient to delegate to specialists responsibility for proclaiming both its epistemology and its ontology; and how much easier to live as if human action generally could be governed, and our own actions actually were governed, by identifiable, determinable and determinate rules.

Even those commentators who are sceptical of an uncontroversial normative determinacy contribute to the objectivist fantasy. Indeterminacy does not automatically translate into agency. In the standard sceptical rendition, behind indeterminate rules lie power and domination, equally external and determinable, and equally governing of the legal subject. Whether law is a closed normative system, or whether its rules, practices and institutions are permeated by other social, economic and political norms is, for present purposes, immaterial. In both cases, the human person is ineluctably portrayed as legal subject.

Specialized knowledge marshalled to facilitate assembly-line production is such a dominant cultural metaphor that viewing human activity – and possibility – as other than a predictable iteration of subjects under legal rules becomes exceedingly difficult. Determinate normativity extends beyond first-order, official legal rules. Hence the idea of natural law (whether arising in divine law or in "human nature") comprising knowable principles of right conduct by which to judge first-order rules. While this historical view is now largely dismissed as a mythological "brooding omnipresence in the sky", its contemporary second-order surrogate, human rights, replicates the same self-positioning of subjugated human beings – only now under Declarations, Charters, and Bills of Rights and other trappings of law's empire such as unwritten constitutional principles.

The latter-day imperial fantasy of determinate law nonetheless confronts a paradox: although the institutions, practices and rules are becoming increasingly formalized and visible, their impact on human behaviour remains mysterious and adequate accounts of it elusive. Equal citizenship and political democracy are meant to legitimate processes of norm production and application, whatever the site of law. But when people feel alienated from formal political regimes (be these of the State, the trade union, the university, the corporation, the social club, the NGO) they cannot believe with any great commitment that the putatively "representative" laws enacted through these purportedly "legitimated" political processes reflect their agency.

The faltering of belief is general and is not limited to regimes characterized by official roles, processes and structures. Today people take as a given, even in informal institutional settings such as the family, a circle of friends, their neighbourhood, the shop-floor, or a social outing, that rules will be imposed upon them. Much of the law there generated does not feel like a reflection of decisions they either make or validate. More than this, to the extent that people directly participate in processes of norm-generation, and that decision-making is genuinely collective and consensual (and even more, to the extent that they are aware of so participating), they tend not to describe

the process in the language of law.[5] Rather, expressions like custom, convention, practice, common understandings, ways of doing things, and so on are more likely to be used to characterize these normative processes and sites.

In response to this felt distance between law and norm, typically translated by popular disengagement from formal processes of governance legitimation like elections or recourse to courts, legal theorists have recently expended much energy in developing and proclaiming new approaches to law. The thrust of their endeavour has been to present arguments to sustain the legitimacy of official normative institutions, and in particular official institutions of the political State: for mainstream theorists, the judiciary especially; and for critical theorists, the democratic legislature. While many critical theorists have not sought to reimagine practices and institutions of political democracy ("trashing" of doctrinal necessity being the preferred analytical mode),[6] mainstream theorists have found salvation in proclaiming diverse theories of adjudication that offer what they conceive as transparent formulae for discerning and interpreting the rules that guide or command behaviour and for tracing the responsibilities of authoritative decision-makers charged with so doing.[7]

We take a different tack in this essay. We do not proclaim yet another, alternative, understanding of the making and interpretation of legal rules by officials, and the modes by which these official activities may be legitimated.[8] Nor is our concern with enforcement (or compliance) and the reduction of the evident "gap" between what this newly relegitimated law ostensibly requires and human conduct. The inquiry, rather, is directed to the relationship between legal rules and those whom these rules cast as legal subjects, as seen from the perspective of the latter. Consider the questions:

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[5] Lon Fuller inadvertently caught this insight in his famous essay "Two Principles of Human Association", reprinted p.81, in Winston (ed.) *The Principles of Social Order* (2002), by distinguishing between organization to pursue a common end, and organization based on the *legal principle* (emphasis added). Of course, Fuller did not mean that disagreement and conflict are absent in collective decision-making. Indeed, collective decision-making typically presupposes at least initial disagreement, and more often than not, the ultimate imposition of a decision under some legitimated process. But the point is that even for legal theorists with as catholic a conception of law as Fuller, processes of social ordering that do not presuppose both rules of duty and entitlement, and third party decision-making, are not law.

[6] An important exception is, of course, Roberto Unger. For two powerful efforts, see *False Necessity* (1997) and, with West, *The Future of American Progressivism* (1998).

[7] This is not to claim that such theorists must adopt some form of legal positivism. For example, both Dworkin – see, *A Matter of Principle* (1985), and *Freedom's Law* (1996) – an unabashed anti-positivist; and Raz – *The Authority of Law* (1979), and *Ethics in the Public Domain* (1994) – an equally unabashed positivist, are engaged in the endeavour of explicating law by explicating authoritative, institutional adjudication and its agents.

[8] In recusing ourselves from such "re-inventive" political projects we should not be taken as denying their importance. See, *e.g.* works arguing for the inescapable need for a "paradigm shift" such as de Sousa Santos, *Toward a New Common Sense* (1996), and, in a more general context, Capra, *The Turning Point* (1983).

How do *legal subjects* imagine, invent, and interpret legal rules? What bearing does any particular formulation in language chosen by a court or legislature have on this inventive and interpretive activity? and, How do the actions and practices of *legal subjects* instantiate the rules they conceive and perceive?[9]

To understand why people act as they do, what standards and notions of justice guide their actions, we need set our sights not so much on the rules as on people themselves. As Robert Cover put it, associational activities of communities "create law as fully as does the judge".[10] But for Cover that creation operates "in the shadow of coercion".[11] He seeks to repatriate diverse associational *nomoi* into the *nomos* of the state – thereby creating a *nomopoly* – and calls for courts and officials to affirm this *nomopoly* by pluralizing their sources of understanding. Cover's emphasis on judicial officials is perhaps understandable given that he was writing the foreword to the Harvard Law Review's Supreme Court issue. Still, it is difficult to discern in his other writings an account of what it would mean to acknowledge the fluidity, diversity and relative autonomy of this *jurisgenerative* activity.[12]

This ambiguity raises a more fundamental point. We question the foundational, axiomatic character of what appears to be Cover's background premise: that law creation is social and episodic. We argue that interactional norms are not simply a type of proto-law contingent on or secondary to the legal violence of the State – replicating and reinforcing the patterns of coercion and domination found there. Nor are they parasitic on formalized 'associational activity' that can be functionally assimilated to the institutional processes comprising the legal regime of the State. Still less are interactional norms mere social customs and practices serving some implicit coordinating role. Finally, we argue that they are not uncontroversial and unambiguous descriptions of fact – simply observable regularities in behaviour – shorn of their claim of normativity.[13]

Put affirmatively, we claim both that interactional norms are legal (not just proto-legal) norms and, more importantly, that what typically are described as legal norms themselves are instantiated in interaction. Legal norms, in

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[9] Framing the matter this way recalls Paola Freire's idea of the pedagogy of the oppressed. See Freire, *Pedagogy of the Oppressed* (1970).

[10] Cover, "Nomos and Narrative" (1983) 97 *Harv.L.Rev.* 4 at 28.

[11] *ibid.,* at 40. By "shadow of coercion" Cover does not reference the violence attendant upon the associational activities of communities, but rather signals the omnipresence of the State and its apparatus.

[12] Cover's jurisprudence is hard to unpack here. See, for examples of divergent interpretations, Minow, "Introduction", in Minow *et al* (eds.), *Narrative, Violence and the Law: The Essays of Robert Cover* (1993), who claims, at p.9, that Cover did not concede the necessary superiority of state norms; and Ryan, "Meaning and Alternity", p.267, *ibid.,* who suggests the contrary. The essays in the Symposium on Cover's work in *Issues in Legal Scholarship* also suggest interpretive ambiguity. See especially Brooks, "Let a Thousand *Nomoi* Bloom: Four Problems with Robert Cover's 'Nomos and Narrative'", www.bepress.com/ils/iss8/art5, for a close but unsympathetic reading of Cover's conception of law. Ironically, this (we believe incorrect) interpretation of Cover aligns with the argument we advance here.

[13] In this we follow Webber, *supra* n.1, at 2–3.

whatever site of law, are imagined by human beings, given expression by human beings, lived by human beings, followed by human beings, modified by human beings, rejected by human beings – in a word, constituted by human beings not primarily as passive legal subjects, but above all as active legal agents. The obligational force of legal rules derives not from the normative status with which they are vested when ultimately wielded by officials, but from the normative status human beings afford them in their everyday lives.

A quartet of beliefs that inhere in standard accounts of the legal enterprise must be overcome in order for people to engage fully the dialectic of action and sufferance embodied in this conception of law. For convenience we adopt conventional labels for these commitments: monism (the belief in the unity of legal normativity), centralism (the belief that law and state are co-terminus), positivism (the belief that a hard *ex ante* criterion may be propounded for distinguishing between that which is, and that which is not, law), and prescriptivism (the belief that law is a social fact existing outside and apart from those whose conduct it claims to regulate).[14]

Numerous corollaries may be derived from this constellation of assumptions. For present purposes two, both relating to formal properties of legal rules, merit notice.[15] First is the proposition that only explicit norms – that is, norms the particular linguistic expression of which is delegated to an official institution like a legislature or a court – are truly normative. To require judicial formulation of custom, or the legislative codification of a practice, in order for these behaviours to have "normative force" are among the tactical fictions relied upon by contemporary mainstream theorists in order to maintain a homogenous symbolization of the rules-that-bind as officially imposed. Second is the proposition that formulaic norms – that is, norms that can be expressed in a canonical prescription like a legislative enactment – are the preferred mode for announcing legal rules. The desire to have courts elaborate a specific *ratio decidendi* of a case, or to specify the exact content of general principles of law that sustain a particular constitutional regime is driven by a perception that the statutory form is the optimal mode for elaborating legal rules.[16]

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[14] These beliefs are discussed in detail in Macdonald, "Here, There and Everywhere", *supra* n.1.

[15] The following paragraph encapsulates a normative taxonomy first elaborated in Macdonald, "Vers la reconnaissance d'une normativité implicite et inférenetielle" (1986) XVIII *Sociologie et Sociétés* 46.

[16] It follows that, in this schema, the logical structure of normativity can be plotted along two axes: the implicit/explicit, and the inferential/formulaic. Legislation is the best example of the explicit and formulaic norm and may be characterized as "manifest" normativity. Unwritten general principles of law are both implicit and inferential and for this reason may be conceived as "latent". Other combinations include "allusive" norms, which are explicit and inferential, such as those expressed in judicial decisions, and "routine" norms, such as customary practice or business codes, which are implicit but formulaic. For a further elaboration of this model of legal artefacts that embraces not only rules, but processes, methodologies and institutions, see Macdonald, "Les vieilles gardes: hypothèses sur l'émergence des norms, l'internormativité et le désordre à travers une typologie des institutions normatives', p.233, in Belley (ed.), *Le droit soluble: contributions québécoises à l'étude de l'internormativité* (1996) [hereinafter Macdonald, "Les vielles gardes"].

We reject both the assumptions and the corollaries. While we locate ourselves as legal pluralists,[17] we nonetheless take our distance from empirical, social scientific conceptions of legal pluralism.[18] As a further departure, we do not adopt a prescriptivist stance towards legal normativity. We deploy the word law here to mean "the endeavour of symbolizing human interaction as being governed by rules".[19]

Nor are we staking out new territory for jurists to conquer or colonize. A claim that "law is (potentially) everywhere" does not carry the implication that the writ of the jurist should be dominant in every social location. Because law does not pre-exist human recognition of it, where law is, and more particularly, whether law is everywhere is a question that only specific human beings can answer for themselves.[20] In this sense, law is everywhere in the same sense that "economics" is everywhere, or "politics" is everywhere. The universality of any theoretical hypothesis as an analytic

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[17] Of course, the expression covers a multitude of perspectives and manifold political projects. Compare Merry, *supra* n.4, at 890: "Legal pluralism provides a framework for understanding the dynamics of the imposition of law and of resistance to law…"; with Chiba, "Other Phases of Legal Pluralism in the Contemporary World" (1998) 11 *Ratio Juris* 228 at 242: "[L]egal pluralism is the coexisting structure of different legal systems under the identity postulate of legal culture in which three combinations of official and unofficial law, indigenous and transplanted law, and legal rules and legal postulates are conglomerated into a whole by the choice of a socio-legal entity"; and Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism" (1992) 13 *Cardozo L.Rev.* 1443 at 1443: "Legal pluralism rediscovers the subversive power of suppressed discourses".

[18] In this respect our position approximates that advanced, most recently, by Melissaris, "The More the Merrier? A New Take on Legal Pluralism" (2004) 13 *Soc. & L.S.* 57. For alternative critiques of social scientific legal pluralism see Tamanaha, "The Folly of the Social-Scientific Version of Legal Pluralism" (1993) 20 *J.L. & Soc'y* 192; "A Non-Essentialist Version of Legal Pluralism" (2000) 27 *J.L. and Soc'y* 296; and A *General Jurisprudence of Law and Society* (2001) at 171 *et seq.*

[19] The formulation is taken from Macdonald, "Here, There and Everywhere", *supra* n.1. Consider the implications of each of the following terms of the hypothesis. To say "endeavour" implies that law is an idea that can be understood only if it requires more of us than simple cognition – it demands that we commit ourselves to its achievement. "Symbolizing" implies that law results from the mental activity of perception and reflection. "Governed" implies the idea of orienting oneself and one's intentions and behaviours through a point of reference beyond the particular act or the intention – even in those cases where the reference point is largely of our own making. And "rules" implies norms or generalized hypotheses of action that are conceived, at least hypothetically, to pre-exist the human behaviour that is being symbolized.

[20] This assertion does not mean that power, domination and violence practiced by officials who claim the authority of law will disappear if those upon whom such domination is visited refuse to acknowledge the "legality" of that claim to authority. The point is rather that whether any such actions can be conceived as law requires two conditions to be satisfied: one or more persons must make a claim against another that an action is justified by law, and the other must acknowledge the legitimacy of the claim being made, both in general and in the particular instance.

tool does not compel the universality of its recognition by specific human beings.[21]

Our root claim is that it is possible to interrogate human practice and behaviour for its normative import without having to assume that this normative import must be judged against some kind of law that pre-exists and is external to its presumed legal subject. Indeed, we see this inquiry as central to achieving a better understanding of our responsibilities to ourselves and as members of normative communities.[22]

II. From Artefact to Agency

Those who essay a theoretical account of law today usually begin with a rather large inventory of the artefacts they conceive as necessary components of the legal enterprise: rules, concepts, taxonomies, institutions, officials, procedures, methodologies, techniques, assumptions, purposes, goals, values, ideologies, and so on.[23] This artefactual inquiry inevitably leads to an investigation of the institutional sites for making and applying legal rules and to the rules there made or applied. The dynamic *endeavour* of symbolizing human interaction as governed by rules is reduced to the end-product – the rules themselves.

Once this occurs, the human dimension in procedure, method and technique (what might be called the purposive dimension of law) is left aside and the analogies become scientific, mechanistic and structural. More than this, because the focus is on institutional actors, and not on those to whom the rules may be directed, the pedigree of norms rather than the goals being pursued (for example, justice, equality, liberty, social solidarity – or genocide, ethnic cleansing, class differentiation) becomes the criterion of legality. Finally, the investigation of pedigree concentrates attention on law-makers, a preoccupation that not only tilts reflection to law that has a literary deposit, but also promotes official interpretation of texts (typically by judges) as the central legal activity.

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[21] Conversely, to say that law does not pre-exist human recognition of it does not mean that anything human beings choose to consider as law is law. In this we do not follow the lead of Tamanaha, *supra* n.18. There is a particular content to law as a human endeavour that speaks to assumptions, modalities, procedures and aspirations. Hence the claim that law should be hypothesized as "the endeavour of symbolizing human interaction as being governed by rules". We develop this point below. For a further statement see Macdonald, "Triangulating Social Law Reform", p.121, in Gendreau (ed.), *Mapping Society through Law* (2002).

[22] The inquiry begins with particular human beings: particular human beings must first grapple with their relationship to norms, and interrogate their responses to any given social setting for its normative content. Of course, this "individual" response inevitably arises in a milieu already comprised of other human beings and consequently immediately begins to play a role in imagining that milieu or community. As human beings re-imagine their relationship to rules (or imagine rules in the first place), they participate in reconstituting (or constituting) the collective normative field.

[23] We draw this inventory from the domain of comparative law theory. For a brief encapsulation see Merryman, *The Civil Law Tradition* (1985), p.7. Not surprisingly, a similar inventory is, at least provisionally, advanced by those who take a functional approach to legal pluralism. See the discussion in Merry, *supra* n.4.

Let us invert the commonplace emphasis on descriptive categories of legal rules, preferring an inquiry into everyday human reactions to rules to *ex ante* conditions of their pedigree, structure or function.[24] Rather than developing a taxonomy to examine one or another property of norms, let us use different instances of norms in society to raise issues of "effectivity".[25]

We can start with normative technical or measurement standards such as the one kilogram, one metre, one litre, one degree Celsius, and one minute.[26] As norms, these are all meaningless unless we accept them, reject them, or in some other way use them to help us think about measuring and more directly perform measurements.[27] However important the field to be measured and the object of the standard, the key question is the relevance we accord this standard in structuring our lives, and not the actual source or origin of the norm.[28]

It is no different with behavioural norms. The rules of chess, Roberts' *Rules of Order*, Emily Post's *Etiquette*, the Code of Canon Law, and an edict with Parliamentary approval are equally irrelevant if they do nothing to

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[24] Because of their visual appeal (especially when arranged in second-order analytical tables rather than as simple lists) descriptive categories can hijack inquiry and understanding. Consider the following familiar techniques for "sorting" norms: pedigree (as legislation, judicial precedents, customs and usages); structure (as institutionally generated or informal, as canonical or iterative); function (facilitative, prohibitive, duty-imposing, power-conferring); or even their purposes (as retributive, commutative, distributive, allocative). What do any of these categories tell us about the role that the norms they classify play in everyday human life?

[25] The expression is taken from Lascoumes and Serverin, "Théories et pratiques de l'effectivité du Droit" (1986) 2 *Dr & Soc'y* 101. See also Garcia Villegas, "Efficacité symbolique et pouvoir social du droit" (1995) 34 *Rev.Int.E.Jur.* 155; and Rocher, "L'effectivité du droit", p.133, in Lajoie, *et al.* (eds.), *Théories et émergence du droit : pluralisme, surdétermination et effectivité* (1995).

[26] The examples could be multiplied several times over; we measure energy (Newton's, Joules, Watts, calories), acidity (pH factors), light (the visible spectrum), pressure (kilopascals), noise (decibels), properties of electricity (ohms, volts, amperes), angles, and so on.

[27] For example, we can puzzle about the contrast between formal measurement system and more "experiential" ways of measuring. What do we gain, and lose, by substituting a base-ten SI measurement system for inches, feet and yards, for ounces, pounds and tons, and for pints, quarts, gallons, barrels, gills, pecks and bushels? See for discussion, Macdonald, "Measure for Measure", p.64, in *Lessons of Everyday Law* (2002) [hereinafter Macdonald, "Everyday Law"].

[28] The point becomes obvious when we consider the difference between these types of technical standards and "scientific laws". Kepler's law, Newton's law, the law of conservation of mass and energy are not normative in that for most people they are not instrumental to some other purpose. A similar point can be made about various mathematical formulae. While counting on a base-two, base-ten or base-twelve system is like choosing between SI and Imperial measurement systems, certain mathematical formulae do not admit of human agency. There is a significant difference between a legislature adopting a statute proclaiming that consumer prices and currency values shall be expressed in a base-twelve system, and that same legislature proclaiming that the value of *pi* shall be 3.1 or the square root of 2 shall be 1.5.

encourage, repress, organize or define some human activity.[29] Their use, meaning and significance depend on people's lived interaction with them, and not their pedigree – their artefactual character in and of itself.[30]

In legal analysis, a preoccupation with form, origins and institutional expression distracts attention from inquiry into the conditions that have provoked the normative questions that the instantiated rule purports to address. Because normativity starts with actions and not the representations of these actions,[31] the meaning of a legal obligation ought to be the necessary starting point.[32] Curiously, however, much contemporary legal theory reinvents the inquiry into normative foundations as a cataloguing of sources of law. Cause is pre-empted by pedigree. The basic question becomes, 'What inventory of normative types is identified by a rule of recognition enunciated by a primary law-applying organ as valid within a particular normative system?'[33] In the manner of the Cartesian God, human beings, after setting the legal machinery in operation (and at least in democratic political theory occasionally formally revalidating it through an electoral process), have no further role to play – other than to be passive legal subjects.

The notion of official sources is revealed as a thin conception of law's normative foundations once we attend to the ways in which people constantly reconstitute the standards by which they live as they understand, interpret, and respond to these standards in their daily activities. Because the everyday law of everyday life is part of this ongoing interaction – a reflection

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[29] The expressions encourage, repress, organize or define are not meant to suggest that, as norms, their effectivity is co-terminus with their efficacy. A conscious departure from Robert's *Rules of Order*, or an action purportedly (but mistakenly) justified by reference to Roberts's *Rules of Order* are both instances of human beings engaging with these behavioural norms.

[30] The point is beautifully developed in a paper by Shauna van Praagh, exploring the jurisprudence of "Harry Potter". See van Praagh, "Adolescence, autonomy and Harry Potter: the child as decision-maker" (2005) 1 *Int. J. of Law in Context* 335.

[31] To say that actions are at the foundation of normativity does not mean that these actions must be self-consciously conceived as normative. Often we only become aware of the implicit law that structures our behaviour when called upon to explain how or why we have acted as we have.

[32] The point is now generally recognized in legal theory as a result of H.L.A. Hart's magnificent introductory text that developed the difference between internal and external points of view. See Hart, *The Concept of Law* (1961; 2nd ed., 1996).

[33] The sleight of hand is this. The human activity that grounds legal obligation and in respect of which inquiry into the internal point of view is necessary, is no longer that of legal subjects; it is rather the activity of judges, whose pronouncements about what that internal point of view leads them to conclude are inventoried as *sources* of law. Desmond Manderson neatly captures the point with his observation of the difference between dog *lovers* (who care for, nourish, and play with mutts as well as pure-breeds, and who think about dogs as being friendly or vicious, rambunctious or reserved, healthy or sickly, and so on) and dog *formalists* (who care only for a pedigree certificate and the conventional or predictable implications of that certification). Of course, a dog formalist may also self-identify as a dog lover; but his or her claim can never escape the question: to what extent does the "love" depend on a fetishism of pedigree?

of choices made and remade through time[34] – sources of law can never be more than hypothetical expressions of the ways by which that foundational interaction – these normative conditions – have been symbolized by officials who claim the authority to do so.[35]

Once people (and, especially, once jurists) come to accept the substitution of sources for foundations as a way of expressing normativity within a particular legal system, they symbolize themselves as subjects under an external rule. This shift carries an absolution: as legal subjects they are absolved of their first-order responsibility as law-creating agents. What then counts as law within any normative community is for others – most commonly, officials – to decide. What information and what inquiries are necessary for them to act with fidelity to law can be reduced to a procedural or methodological formula. What possibilities there may be for people to remake the normativity of the communities in which they live are constrained in advance to a single option: obey (comply, heed) or disobey (reject, ignore).[36]

All explicit instantiations of rules have a root that is implicit and inferential and that can be found in human interaction. These roots are implicit in that they are primarily lived, not spoken, and inferential in the sense of being more a kaleidoscope of concurrent, conflicting, contingent hypotheses than singular, elegant propositions. Manifest norms such as legislation may enjoy a better reputation among citizens and among mainstream jurists as real law,[37] but such pedigree characterizations are born of prejudice not truth.

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[34] Of course, not all action is a conscious choice by individual human beings. Much of the time, the "choices" that lead to (or are reflected through) our behaviour are not made by us, as individuals, *tabula rasa*. These "choices" are rather the product of some prior explicit or implicit collective choice that we adopt (whether consciously or unconsciously). Still, the point is that we, in fact, do have a choice and that when confronted with that possibility, will act in consequence. Moreover, to claim that choice is possible is not to claim that, even when recognized, it can be acted upon. Many who oversell individual agency err in abstracting from the actual life situations (disempowerment, fear, poverty) in which people find themselves so as to presume as fact what is often just possibility. We consider this point further in Part II of this essay. See *infra*, text at n.44-48.

[35] In other words, when courts and other "primary law applying agencies" act so as to give expression to a "rule of recognition" they are engaged in a foundational interactive practice. The mistake of much contemporary legal theory is to assume that the interactive practices of courts foreclose continuing interactive practices of those purportedly governed by the law so identified. Simply put, we would claim that all "legal subjects" are "primary law-applying agencies" giving expression on a daily basis to their own "rule of recognition".

[36] We leave aside institutional possibilities such as running for political office, lobbying legislatures, engaging in strategic litigation over the meaning of statutory texts, *etc.*, each of which also offers opportunities for remaking normativity, but each of which conceives the norm as external to the *legal subject.*

[37] To recall, manifest norms are those that have the characteristics of being at once explicit and formulaic. See *supra*, text at n.15–16. Two reasons for the "better" reputation of manifest norms come to mind. First, we may be conditioned to prefer linear, discrete representations of phenomena to complex, probabilistic uncertainties. Second, we may be trained to attend to the visible, to the written, to the institutional, rather than to look beneath surface labels.

Meaningful legal inquiry calls for rendering latent norms, concealed by an over-reliance on the manifest, visible.[38]

Take, as an illustration, the case of a group of adolescents organizing their activities within a Scout troop. Numerous manifest, clearly seen norms putatively operate on the group. Explicit and formulaic norms (*e.g.* state laws and by-laws, Troop by-laws, Scout law), diverse implicit and formulaic norms (uncodified but well-known standard operating procedures), and explicit and inferential norms (leaders' advice), all form part of a pre-existing normative matrix.

But no matter how well-known or how well-internalized these manifest norms, another set of practices and understandings, developed through experimentation, error and unself-conscious activity comes to attract the loyalty and commitment of members of the troop. As they acquire an aura of being obligatory points of reference for interaction among Scouts, they become norms – legal rules for that group. At this point, these rules then provide a first approximation of how the group defines itself, differentiates itself from other groups, frames its aspirations and conceives its achievements.

The interaction of these evolving normative understandings with the apparently pre-existing normative matrix creates a new *nomos*. Each Scout normally gives its troop's by-laws little thought until the yearly by-law review asks him or her to consider amending the formal rules in light of recent experience. The standard operating procedures are only helpful as guidelines so far as they are appropriated by the Scouts – adapted to new circumstances, tested against new ideas – and not merely "followed". Likewise, advice from leaders is meaningful when members have an experiential reference point and can position the advice as facilitating their own initiatives.

The dialectic between past and current practices, the writing of the past and the re-writing in the present, together constitute each Scout's perceptions of his or her relationship (and responsibility) to the group and its members. For all three types of visible representations of rules, the ones that speak to experience (whether as confirmation or disconfirmation), succeed most at giving meaning. These rules present themselves as real hypotheses of action; they enable members to perform the triage between norms that teach something about how to live and those that simply exist because at some point in the past they may have done so. The triage begins the *jurisgenerative* process of making and remaking norms, a process that allows the Scouts to discover possibilities within themselves and to renew commitments to each other and to the group.

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[38] Our latent norms are, *ex hypothesi*, invisible. Implicit in the present inquiry is the point that in holding open the possibility of latent norms, one thereby creates the conditions under which they can be rendered visible. Visibility is a precondition for valuing; once a shift in perspective is achieved, the current pedigree assignations may be discarded. For a further elaboration of this point see Brighenti, "Visibility: a category of the social sciences" (forthcoming 2006 *Current Sociology*).

Such rules speak to the Scouts as agents. They invite participation, interaction, transformation. Their normative reference point (the content of the rule, the rationale behind it, its effectivity) lies far from the putative laws that can be pigeon-holed as source-legitimated representations. Rather, it is located in the agents whose specific interactions constitute the terrain in which these laws are rooted.

Theoretical projects that examine human behaviour and recast the interactions in the language of sources as a means to identify or understand the normativity at play actually move in the opposite direction of this inquiry. Agency is not discovered by identifying the legal in the lived. It is rendered visible via attentiveness to the lived. To focus on agency by preference to artefact is to insert a pause in between observation and analysis, to avoid automatically ascribing normative power to the intellectual abstractions of visible (manifest) law[39] and to inhabit the concreteness of invisible (latent) normativity.[40]

When we move engagement with law from official pedigree (sources) to interactional foundations (conditions), from manifest to latent, from system (and systems analysis) to field (and field theory), and from artefact to agency we are rejecting the prescriptivist impulse that characterizes most contemporary legal theory. Because human activity is characterized by inconsistency, flux and contradictions, normativity is best seen as a patchwork of guidelines that are more often in tension with one another than they are in harmony.[41] Enter anti-prescriptivism. The anti-prescriptivist claim in its most robust form is non-positivist in that it rejects the nominalization of "norm" or "law" necessary to the criteria-seeking enterprise of legal positivism. The discovery of latent norms does not lead to the identification of discrete phenomena which can be used to subdivide the world. Rather, their identification forms the basis for further inquiry and exploration into our own situation and, ultimately, the human condition.[42]

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[39] The image of the pause is borrowed from Alfred Korzybski's groundbreaking "general semantics movement", which he memorializes in *Science and Sanity* (1941). Parallels can also be drawn to Sontag's essay "Against Interpretation", where she argues against a knee-jerk attempt to intellectualize art.

[40] Once these implicit and inferential norms are made visible, the challenge is to notice a double movement: first, how the form of law structures inquiry but does not exist apart from or unaffected by the inquiry being undertaken; and second, how the invisible is not thereby eliminated, but reinserts itself through everyday (so-called unofficial) practices of interpretation, resistance, and reconstruction.

[41] For elaboration in respect of enacted rules, see Macdonald, "The Fridge-Door Statute" (2002) 47 *McGill L.J.* 13 [hereinafter Macdonald, "Fridge-Door Statute"]; and for an application to the systemic claims of manifest legal orders, see Macdonald, "Kaleidoscopic Federalism", p 261, in Gaudreault-DesBiens and Gélinas (eds.), *The States and Moods of Federalism: Governance, Identity and Methodology* (2005).

[42] So long, of course, as we do not expect pat answers. Attentiveness to interaction requires embracing a chaos about the human condition with reverence for the tacit, unknowable knowledge that permits our humanity, our action. As Gadamer wrote in *Truth and Method* (1975), we can never fully illuminate ourselves. The desire to unearth some monolithic truth is antithetical to the antiprescriptivist claim.

III. The Emancipatory Power of Anti-prescriptivism

The prescriptivist claim is grounded in a belief that the central artefact of law is the legal rule authorized under some systemic "rule of recognition". Although such a systemic rule may permit a variety of normative forms to emanate from a variety of institutional sites, legal normativity is best understood by focusing on the properties of explicit rules directed to people (by contrast with those explicit rules directed to officials): their making, their application, their interpretation.[43] While diverse post-realist scholars devote much attention to the effects of legal rules on officials who interpret and apply them and on everyday legal subjects to whom these rules – either in their *ex ante* linguistic form or as interpreted by officials – are applied, the assumption is that the "rule-official complex" is all that the theory must address. Of course, much post-colonial, critical race, feminist and queer legal theory directly addresses impacts, but typically does so by presuming the legal subject as either passive or as re-active to an imposed external normativity. The pre-action of the ostensible targets of these rules does not form part of the reconstructive theoretical exercise. More than this, in the imaginary of mainstream theory, the prescriptivist claim implies both a pessimistic view of human nature, and a deterministic view of human capacities.

In the prescriptivist perspective, life is closely hedged by multiple *a priori* restrictions on human interaction: human beings are legal subjects, and have but a single choice open to them – to follow (obey) or to reject (disobey). By contrast, the anti-prescriptivist claim that human beings are normative agents and not simply legal subjects presumes that life is characterized by the possibility of choice: not just choice about the restrictions they will accept *ex post facto* on the range of their interactions with others, but also choice about the range of responses to purported rules that are open to them.[44]

In its framing of the re-active options of legal subjects as binary, the pessimism of those who adopt the prescriptivist perspective reveals itself.

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[43] Interestingly, however, many prescriptivists are preoccupied with institutional rules directed to officials: rules conferring powers on functionaries such as the police, or administrative agencies; rules conferring jurisdiction on courts; rules relating to the procedures of different governmental organs – the executive, Parliament, the judiciary; and so on. Nonetheless, they organize inquiry as if the issue could best be characterized as involving the "role" of such offices. As much as inquiry into legal rules directed to people (contracts, criminal law, tax law, regulatory law) is rarely undertaken by posing the question "what is the role of the citizen?", for a prescriptivist, inquiry into legal rules directed to officials is rarely undertaken (apart from the field of judicial review of administrative action) by posing the question "what does this rule require?"

[44] We have already acknowledged some of the difficulties with the word "choice". See *supra* n.34. Here we pose a further concern: to what extent do social location, socio-economic circumstance, socialization, and coercion impinge on or prevent choice, for example? This question is addressed in the final paragraphs of this section. For current purposes, the point is simply this: once one acknowledges that human life is not totally determined, the potential of agency arises. Thereafter, inquiry may be focused on questions such as "how much agency?", "under what conditions?", "with what degree of self-awareness?" and "to whose benefit?"

Human beings cannot be trusted to act wisely or justly towards others: law and legal rules are needed to regulate directly human conduct and officials are needed to ensure respect for the rules laid down.[45] In the anti-prescriptivist perspective, by contrast, law and legal rules are the symbols by which human beings make preliminary and provisional allocations of the range of choice appropriate to maximizing human freedom – both selecting the various normative communities within which they seek to participate, but also in selecting responses to the normative commitments that such participation implies.[46]

The way human beings establish, apprehend, interpret and interact with rules around them – whether apparently imposed or apparently inferred – depends on their attitude toward the genealogy of these rules.[47] If one understands a prescription to be the primary and definitive manifestation of the law, actions will be symbolized in a binary opposition – as either "legal" (or in broad conformity with the rule) or "illegal" (or not in conformity with the rule). Such a position deprives people of any personally meaningful choice; their response to law is either subservient or antagonistic. If they "break" the law, they know (more or less) what sort of sanction or violence will attend them, but if they obey, they learn nothing about themselves, their relationships or their priorities.[48]

Rather than viewing re-active normative choices (even when narrowly confined to the options "obey or disobey") as contiguous with the *pre*-active

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[45] Not surprisingly, the prescriptivist claim coheres closely with the Hobbesian justification for the "sovereign". The difference between tyranny and the Rule of Law is simply that the latter purports to find justification for imposed order in some process of democratic legitimation of legislative action and judicial impartiality and independence. Even contemporary "critical" scholars are fundamentally Hobbesian in perspective – the difference being their faith in some form of direct participatory democracy as a check on the corruption of the state by dominant class or economic interests. See, for an unrepentant statement, Kennedy, *Legal education and the reproduction of hierarchy: a polemic against the system: a critical edition* (2004).

[46] See Fuller's discussion on participation in "Freedom as a Problem of Allocating Choice" (1968) 112 *Proc. Am.Phil.Ass.* 103. In the second edition of his collection of Fuller's essays, Kenneth Winston offers a new interpretation of the role of the concept of freedoms in Fuller's thinking; see Winston, "Introduction to the revised edition", p.1, *The Principles of Social Order* (2001).

[47] This includes not only the genesis of the norm but also the process by which one norm comes to take precedence over others. However, the same caution should be taken in approaching this "sorting" stage so as not to fall into the same prescriptivist mode as the "source" inquiry does. The prioritization of competing norms (all of which derive from interaction) is also a process over which each agent has control: to dedicate the sorting realm to pre-established processes (such as voting, legislation, war, *etc*.) would succumb to the same structuralist conception that a preoccupation with source adopts.

[48] Some observers see this binary characteristic as the dominant "code of law". The autopoietic thesis is illustrative. See most recently, Patterson and Teubner, "Changing Maps: Empirical Legal Autopoiesis", p.215, in Banaker and Travers (eds.), *Theory and Method in Socio-Legal Research* (2005). But note that the model presumed is the criminal law – the easy referent for those who are pessimistic about people, and deterministic in their conception of human capacities.

normative choices of everyday life and, therefore, as moments of self-discovery, people under the prescriptivist illusion avoid engaging the normative question altogether.[49] The overwhelming majority of their experiences – their co-coordinating moments of quotidian social intercourse, their affective relationships, their emotions and shared aesthetic engagements – become simply extra-legal. In self-legislating this discontinuity, people then need sloganistic assurances such as "the state has no place in the bedroom of the nation", or meta-normative symbols like Charters of Rights to memorialize the subliminal understanding that their most intimate moments of self-discovery and understanding are necessarily separate from, and must be protected against incursions by, the "legitimated" centre of official decision-making in society.[50]

Despite the rhetoric, however, most people have an instinctive sense that the official rules aren't really the primary referent in their normative lives.[51] That is, intuitively they take an anti-prescriptivist position; they understand official prescriptions as the currently (but ultimately contingently) favoured representations of interactions just like those in issue. Whenever they wilfully break a rule (by, for example, jaywalking or using a cell phone in a library), or when they accept a penalty in order to enjoy the convenience of their transgression (for example, parking deliberately in a restricted zone, or smoking), or when they consciously refuse to exercise some right or facility ostensibly provided by official law (such as declining to formalize an affective relationship as a marriage, or to enforce a contractual remedy) they are rejecting the claim to normative monopoly on the field of interaction to which those official rules presumptively speak.

By accepting that manifest rules (especially the manifest rules of the state legal order) do not have a monopoly over their normative universe – a *nomopoly* – people compel themselves to confront these source rules *re*-actively with the same care that the attention to the foundational interaction (the *pre*-action) at the genesis of the rule requires. Prescriptions become yet another text or "text-analogue"[52] susceptible to an open-ended and self-relevant interpretation. The pedagogy is reciprocal. Thus the "norm" that engages everyday practices of crossing a street is informed simultaneously by by-laws prohibiting jaywalking, the physical street, the common response of the pedestrian/driver/police officer, the uncommon responses of these actors, the court system, statutes and principles of civil liability, the time of day, the time of year, the weather, and so on. As such, the "norm" is best

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[49] Admittedly, we make consciously *re*-active "normative choices" much more often when we contemplate "official" law, especially when this state-sanctioned rule is a proscription. But, under the prescriptivist hypothesis, the legal subject is deprived not only of the learning opportunity that attends these relatively rare moments of conscious resistance, he or she is blinded to the infinite other learning moments that attend the contemplation of normativity in the everyday.

[50] The point is carefully developed in Jutras, "The Legal Dimensions of Everyday Life" (2001) 16 *Can.J.L. & Soc'y* 45.

[51] For an extended discussion of this point see Macdonald, "Measure", *supra* n.25, and "Triangulating" *supra* n.21.

[52] The thought derives from Taylor, "Interpretation and the Science of Man", p.101, in Fred Dallmayr and Thomas McCarthy (eds.), *Understanding and Social Inquiry*, (1977).

apprehended as a set of ongoing interactions among diverse phenomena, only some of which are under the control of human agents. It is constantly susceptible to change according to the way in which individual agents prioritize these phenomena.

In releasing himself or herself to the pedagogic role of official prescriptions, the agent facilitates a reciprocal transformation. Thereafter, these prescriptions are conceived as inviting a non-binary range of re-actions – and an open set of questions – whose terms are authored by the agent under the same range of considerations as that agent's pre-active practices. The ongoing interaction of legal agents with the edict reconstructs its meaning; and the act of interpretation enables these agents to reconstruct themselves.[53]

The emancipatory potential of anti-prescriptivism (especially as directed at representations of the official state legal order) is not, however, self evident to many. At least four substantive critiques might be suggested. We label them the statist critique, the realist critique, the social justice critique and the false consensus critique.

Take first the *statist* critique. Doesn't the fact that most people follow the explicit and institutionalized prescriptions of the political state mean that the claim for agency and choice is illusory? Doesn't this mean that, whatever the theory, law dictates behaviour? To answer the statist critique it is necessary to think through the several possible relationships that can arise between human action and the representations of official law. What becomes apparent in pursuing such an endeavour is that the positivist understanding of conforming social fact being confirmatory of a statist nomopoly rests on the unproven assumption that people follow the state rather than the state following people. Moreover, the nomopolistic hypothesis confuses cause and correlation. Alternate explanations for behaviour apparently in conformity with state-prescribed rules abound.[54]

Sometimes people act in a particular way without awareness that a specific rule of law requires, counsels, permits or even advantages the behaviour in question. Sometimes people are aware of the norm of state law, but act as they do for their own reasons having little or nothing to do with that norm. Sometimes people act in the manner required by the state norm out of convenience, because doing so is of no great consequence to them. Sometimes people consciously elect to act as a rule prescribes because they consider the rule to be just and appropriate in the circumstances. Finally,

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[53] This point is explored with much subtlety in Kasirer, "Honour Bound" (2001) 47 *McGill L.J.* 237.

[54] In the three paragraphs that follow a variety of hypotheses about human action are presented. These hypotheses are not meant as empirical claims. Rather they are offered as an inventory of categories that cover actions where people are both aware of and, especially, not aware of, a legal rule purportedly governing those actions. Admittedly, there is a rich empirical literature exploring why people do or do not obey the law. See, for a leading example, Tyler, *Why People Obey the Law* (1990). Nonetheless, the Tyler monograph and similar studies focus on asking people (after the fact) why they choose to obey a legislative prescription, or more commonly, a court decision that they know about, thereby finessing the very question posed here: can one automatically extrapolate from factually conforming behaviour to the conclusion that the behaviour is caused by a legal rule?

sometimes people choose to follow a rule that they genuinely believe unjust, because of the larger claim that it is just to obey the rules of the state that aim at justice (even when they fail, in individual cases, to do so). Only in the last of these cases can it be said that there is a significant prescriptive weight attaching to the normative order of the state.

Human action not in conformity with the prescriptions of state law is equally diverse in its motivations. Sometimes people act contrary to a rule of state law because they are ignorant of it. Sometimes, as in much regulatory law, people do so unreflectively and carelessly. Sometimes contrary action is grounded simply in opportunistic and self-interested reasons. Sometimes people accept the justice of the rule as a general proposition, but not of its application in the particular case they are confronting. Sometimes people act in opposition to a legal rule of the state not because they imagine the rule to be unjust, but simply because it is contrary to some other rule, of some other legal order that they considered primary in the circumstances. Sometimes, the state rule may be irrelevant to the way in which they order their lives. Finally, sometimes their dissenting behaviour is based on their belief that the rule is unjust. This dissent finds different modes of expression depending on the type of law in question: so, for example, refusing to acknowledge a prohibition of the criminal law thought to be unjust is not the same as refusing to make a will because one believes that inter-generational wealth transfers upon death are unjust.

The legal rules of the State, then, do not necessarily operate to enjoin specific behaviour in cases when that behaviour is consistent with those rules. Moreover, even when people are aware of an official legal rule, their conforming behaviour may have more to do with indifference, prudential considerations or adherence to an identical standard arising in religion on personal morality than with deep commitment to official law. When they are known, the rules emanating from the State legal order function in many cases as institutional short-cuts that enable people to discern what action has been collectively imagined to be appropriate in what circumstances.[55] They are not, however, the final word on these matters. Short of brainwashing and other coercive manoeuvres aimed at consciousness rather than action, the individual conscience can neither be coerced nor dictated to by any external rule of just conduct. There is always a moment of judgement, of interpretation, of decision. Any rules elaborated by and through official institutions and processes, just like rules of appropriate conduct flowing from social conventions or the representations of social institutions, must always be seen as no more than hypotheses about, or approximations of, justice. All obedience to law is, in this light, the fruit of personal reflection – greater or lesser, conscious or tacit, according to the case – and a judgement about what justice requires.[56]

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[55] We have consciously used the word "appropriate" to embrace a variety of possibilities: sometimes collective wisdom is grounded in appeals to justice; sometimes to expediency or a simple coordinating function; sometimes to economic efficiency. What matters is less the specific justification for the collective imagination than it is the fact of the collective imagination being engaged in elaborating a legal rule.

[56] While the example responds directly to the statist critique, it also addresses prescriptivism in any other normative site – from the Catholic Church, to the

The *realist* or "power" critique is as follows: what good is it to be awakened to one's constitutive capabilities as a legal agent if one is at the mercy of a normative system (typically that of the state, but potentially that of a teenage gang, or the local imam, priest or rabbi, the union or one's employer, one's neighbours or family, or one's favourite television show) that is able to impose its own interpretations backed by coercion (whether psychological or physical)? The implied point is that power and violence are all around us and only the state – itself an agent of power and violence – can do anything about it. Without the state, the argument goes, life is "solitary, poore, nastie, brutish and shorte".

Cover may be interpreted this way – as prioritizing the judge's responsibility to be attentive to various *nomoi* of diverse constitutive communities over the normative agency of the everyday association.[57] Of course, Cover may also be read as arguing for this type of osmotic decision-making in all sites, including those of everyday association; but the language he uses and the examples he gives suggest a perception that non-state communities have an integrity, coherence and monistic character (an internal nomopoly), and that only the state confronts normative pluralism. Moreover, the institutional focus of Cover's injunction suggests that while all of us may have interpretive freedom and power, it is most important to awaken the imagination (and stoke the resolve) of judges. To frame such an institutional ambition is to have already internalized the prescriptivist ontology – the belief that there is some (often unnameable) power external to ourselves under which we are subjects.[58] It suggests that the most important normative moment is that relatively rare one when physical violence is visited upon us by some sanctioned authority.[59]

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workplace, to the sports field, to the Hell's Angels, to the workings of an international NGO. One should not, that is, imagine that the continuity of pre-active normative interaction and re-active interpretive engagement with diverse representations of rules exists only where the legal order of the state is in view. On this specific point see Macdonald, "Legal Republicanism and Legal Pluralism: Two Takes on Identity and Diversity", pp.43–70, in Bussani and Graziadei (eds.), *Human Diversity and the Law* (2005) [Hereinafter Macdonald, "Legal Republicanism"].

[57] Cover, *supra* n.10, at 66: "In our own complex *nomos*, however, it is the manifold, equally dignified communal bases of legal meaning that constitute the array of commitments, realities and visions extant at any given time. The *judge* must resolve the competing claims of the redemptive constitutionalism of an excluded race, on the one hand, and of insularity, the protection of association, on the other" (emphasis added).

[58] Parallels can be made with the "Position Two" of Margaret Atwood's "Basic Victim Positions" in *Survival* (1972). At p.37 she describes "Position Two" in the following terms: "To acknowledge the fact that you are a victim, but to explain this as an act of Fate, the Will of God, the dictates of Biology. . ., the necessity decreed by History, or Economics, or the Unconscious, or any other large general powerful idea".

[59] One can imagine countless examples in which the violence inflicted by authorities should eclipse all other considerations. But these instances should be considered to be exceptions, and not standard-prescribing limiting cases. To hold that one's position with respect to rules is a matter of choice only up until some threshold of violence is reached would confine agency too narrowly. The agent's approach to normativity should begin from the premise that it is almost always possible to be a

A response requires reorienting the terms from the material to the aspirational and imaginative. Because the interpretation is never-ending, anti-prescriptivism is a perpetually open project. It is aspirational in the same way that paradigmatic inquiries are. In order to re-order the world, we must first re-imagine it. We must re-imagine ourselves as sovereign.[60]

On a more pragmatic note, this reorients the role of judges, legislators and others vested with formal authority for our legal apparatus. By acknowledging that the sanctioned translations are only representational hypotheses, people who are preoccupied with governance would be less concerned about internal consistency, more tolerant of contradiction, and more open to pluralist approaches to legislation and adjudication.[61] Such pluralism would free judges and legislators from the impossible task of writing, interpreting and enforcing The Law, and instead conceive of them only as privileged – but not authoritative – spokespersons of a normative universe that is, at its root, heterogeneous.[62]

This response does not, however, fully meet the realist critique. The issue of power is not just about changes (or the absence of changes) to the fields of the legal, but to the directions and forms that change takes. Hegemonic power succeeds precisely, if paradoxically, because it is incomplete, always inviting the participation and cooperation of the subject.[63] Hegemonic power creates ostensibly participatory spaces not just for participation and engagement within its structures, but also for active resistance. By co-opting and normalizing such engagement, the argument goes, the hegemonic order pre-empts external, system-wide critique and resistance.

In the first place, if one adopts an anti-prescriptivist epistemology there can be no definitive, complete, and unique hegemonic legal order. In their everyday activity, all legal actors – citizens, legal theorists, officials, indeed anyone involved with law – are at once contesting and legitimating all possible legal normativities. The emancipatory potential of this approach is achieved through its denial that the state has a monopoly over the law, either institutionally or symbolically. One must examine not only how the legal orders of the state (today's hegemon) view non-state legal orders, but how non-state legal orders view the state legal order. The legal order of the state is constituted as much by the recognition of non-state orders as these orders are constituted by the recognition afforded by the state; and the

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"creative non-victim" in response to prescriptions (Atwood, *ibid.*, at 38–41). For an illustration of the imaginative potential in the face of oppression, see Roberto Benigni's film *Life is Beautiful*.

60 Of course, "sovereign" is a metaphor. We are clearly not sovereign with respect to the material conditions that precede our birth. But the point is that one's horizons are limited by one's position at a point in time, and that the possibility of movement and change implies a freedom to discover new freedoms.

61 For a discussion of the connection between plurality and dissonance in normativity, see Macdonald, "Les vieilles gardes", *supra* n.16, at 267-269; and Macdonald, "Fridge-door Statute", *supra* n.38.

62 A meditation on the necessary humility of official actors such as judges may be found in van Praagh, "Identity's Importance: Reflections of – and on – Diversity" (2001) 80 *Can. Bar Rev.* 605, at 617–619.

63 The point is derived from Gramsci, *Prison Notebooks* (1971).

representations of both are simply hypotheses to be interpreted by those who choose to afford them recognition.[64]

More importantly, to recognize the plurality of normative communities does not presuppose that these communities are of equal weight or worth. No legitimacy is conferred by the sole fact of acknowledgment. Taking the prescriptivist approach, one might see the characterisation of social relations as legal as conferring a gift – a power to prescribe – and therefore would wish to withhold the title wherever injustice reigns. The anti-prescriptivist inverts both the benefit and the burden: naming phenomena as normative imposes a substantive demand of justice upon them, for law "demands a responsibility".[65] The light cast onto human interaction under the hypothesis of law opens to contestation claims of authority, exposes misuses of legitimating instruments by those who claim power, and in doing so eliminates the shadows of neutrality and false necessity in which injustice could otherwise hide.[66]

This thought leads to consideration of the *social justice* critique. Anti-prescriptivism might be seen as a veil for conservatism – for justifying existing distributions of social power and wealth – thereby substituting the need to reform prescriptions with a practice for explaining them.[67] This evocation of legitimacy, authority, equality and identity points to some possible objections to the anti-prescriptivist perspective. Might it simply be just another formulaic accommodation of the *status quo*, and denial of the pathologies of power, and another reproduction of the cultural hegemony of established privilege?

This is also a significant objection for what it tells us about prescriptivist assumptions. To be sure, antiprescriptivism does not operate on a premise that relationships are unequal. It does not rest on an *a priori* critique of distributional differentials, but the attention to human interaction and especially our own practices can make us more attuned to injustice. If a prescription seems unfair, we are forced to interrogate our actions to find the source of the unfairness. By focusing on our own, specific pattern of interaction we can identify injustice more easily. Once the injustice is discovered, our attention to interaction positions us to re-iterate our practices and reform them. An anti-prescriptivist approach would contest pre-existing frontiers of knowledge – including the frontier between legal knowledge and social knowledge – and would lay bare the interpretive practices by which choices about knowledge categories are made. That is, by seeing diverse ways in which practices, interaction and community identification mutually

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[64] It is important to signal that this is not a libertarian claim for anarchy – for the unlimited power of agency to trump social and economic power. Nor is it a claim that people's conceptions of themselves as agents can exist independently of the social structures within which they are embedded. The real power of agency lies in the awareness of its contingency and limitations. See, in particular, Kleinhans and Macdonald, *supra* n.1, at 25; Melissaris, *supra* n.18.

[65] We owe this framing of the point to Desmond Manderson who develops the argument in *Proximity, Levinas and the Soul of Law* (2006).

[66] See Macdonald, "Metaphors of Multiplicity", *supra* n.1.

[67] For a discussion on how a constitutive conception of law is not tantamount to a co-optation by hegemony, see Macdonald, "Here, There and Everywhere", *supra* n.1; and, with MacLean, "No Toilets in Park" (2006) 50 *McGill L.J. 721*.

construct each other as legal representations, our access to law as social artefact increases. Our capacity to transform social relations also increases, as we are called on to reform our behaviour as a precondition for the effective re-writing of manifest rules.[68]

All three of these critiques – statist, realist, social justice – are incomplete because they ignore what is perhaps the most profound point of anti-prescriptivism: that effect or result is not the only standard by which to evaluate normativity. The symbolic aspect of normativity, the message that a particular means of conceiving of rules gives to citizens, is as important as any instrumental measure. Adopting an anti-prescriptivism stance empowers us to decide between the instrumental and the symbolic function of law. We not only constitute and choose among rules, we determine how we will consider the role of rules: do they constrict? empower? facilitate? do they teach? entertain? inspire?

Law – however variegated, diverse, complex, organic – is not only a machine for social production, it is a locale for discussion and discovery. At the very least, anti-prescriptivism demands that we consider this possibility. To say that considering interaction as foundational produces a conservative, impotent or misplaced result ignores the idea that the value of symbolizing law lies not just in the zone between facilitation of human activity and social control over it. It also always lies, if we take up the opportunity, in its reflexivity. Like literature, music, art and science, the legal enterprise at times invites introspection and learning. It effaces the discontinuities between the multiple locations of our normative commitments.

Accordingly, labels such as hortatory or descriptive do not adequately capture the legal pluralist project. Anti-prescriptivism involves extricating oneself from the sole goal of accounting for, or urging an account of, the normative practices of a community. The means by which a community decides among rules – the diverse, sometimes conflicting propositions that interaction creates – are as individual as the rules themselves. Of course, this affirmation invites what might be called the false consensus critique, namely, the objection that the anti-prescriptivist conception of "law as interaction" rests on an "artificial commonality".[69] That is, an important critique of social scientific legal pluralism is its propensity to imagine that the legal norms in question flow directly and unproblematically from interaction – that they are neither contested, nor constructed by, interpretation flowing from interaction.[70]

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[68] To repeat, this does not mean that the representational normativity of cultural practices is more fundamental, or more important than that of the state. The antiprescriptivist take on legal pluralism presumes an epistemological equivalence – every representational claim from whatever legal regime is grounded in *foundational* interaction – but does not presume a necessary and *ex ante* ranking of these regimes external to the legal agent.

[69] See the discussion in Webber, *supra* n.1.

[70] The folly of this critique, ironically, lies in its prescriptivist commitments. It rests on the idea that "law comes out of self", whereby each person is an atomistic, prescriptivist law giver. Antiprescriptivism attacks this premise, opposing the model of the normative agent who engages in an interactive conversation with norms themselves born of manifold prior interactions.

The objection, however accurate as a typecasting of certain forms of legal pluralism, folds in on itself once one takes an anti-prescriptivist position. For the objection depends on an assumption that there can only be one common authoritative mode of interpretation (finding meaning in interaction) and legitimation (choosing among competing rules) in any given normative site. Anti-prescriptivism proposes that even the dissenting or subordinated interpretation may "rule." To determine whether it does so rule would be an entirely empirical inquiry – possible, but of only partial significance. It is the possibility that the agent need not succumb to a communal mode of legitimation – that she is not bound by an externally imposed prioritization (such as the translation into manifest normativity known as legislation) that creates the distinctive power of the pluralist project. What is more, the confusion, incoherence and indeterminacy (the absence of commonality) are as much a part of official representations of law as they are the normative representations of manifold unofficial sites of human interaction.[71]

IV. Ago and Patior in Legal Pluralism

Anti-prescriptivism, like prescriptivism, is not a truth claim. It is a way of characterizing an interpretive choice for citizens about how they wish to conceive law, themselves and the relationship they have to law. The anti-prescriptivist perspective invites legal subjects to imagine themselves as legal agents – to discover the constitutive potential of their own actions. In so doing, their instrumental sufferance (*patior*) of legal rules demeaning them as legal subjects is replaced by the endeavour (*ago*) of symbolizing human interaction as governed by rules.

The practice of anti-prescriptivism is, consequently, foundation-building. We teach ourselves to examine our own interactions, and to learn about law, first and foremost, from ourselves.[72] Situating the project of normativity within the universe of learning also enables us to view prescriptions for their pedagogic value – and so pursue our self-discovery in tandem with our self-explorations about what is just. To reject the prescription as the source and force of law requires us to appreciate our own norm-constituting potential, to accept that interaction is fundamental to all normativity – however formalized, however explicit. Even that externalization of our implicit and inferential knowledge that we might call latent normativity is not self-generated. It arises in interaction with others.

While the anti-prescriptivist claim coheres with the general tenor of non-essentialist legal pluralism,[73] it does not, inevitably, drive one to legal pluralism. Those who assume the conflation of law and state – legal centralists – have much to gain from an anti-prescriptivist inquiry. Re-casting the most formulaic and explicit representations of legal prescriptions as opportunities for self-learning and reconstitution is good training for applying interrogative muscle to the more intimate aspects of our lives. Even the positivist animus (the binary attempt to find law) can help focus our

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[71] In this, the claim recalls the flux of reactions to official law in the novel by Garcia Marquez, *News of a Kidnapping* (1997).

[72] See Macdonald, "Everyday Law", *supra* n.25, "Introduction".

[73] For further development of this point see Melissaris, *supra* n.18.

introspection by reminding us that we have a choice to symbolize our interactions as speaking about normativity.

Each of monism, centralism and positivism reflects a different preoccupation with delineating the legal from the non-legal – either spatially (centralism), numerically (monism), or analytically (positivism). Prescriptivism is animated by the same ambition: it asserts that there are rules, and that there is the rest of the world on which they operate. Each of these four commitments is plagued by a commitment to nomopolies. While they may differ as to what sphere constitutes the nomopoly, one thing is consistent: the human agent is outside that sphere.

Prescriptivism makes possible the term "legal subject", a term that sharply divides the legal from what is thrown under the legal. It is this tacit ontology of otherness that the anti-prescriptivist perspective puts into play. Overcoming prescriptivism in legal theory is, we believe, the key to achieving a non-superficial legal pluralism. So long as the source of one's understanding of living in the world rests on an implicit separation between us and our world, all expressions of normative diversity are unhappy translations of the same dichotomous worldview that afflicts non-pluralist hypotheses.[74]

In turning our attention to unspoken understandings of how human beings interact with diverse representations of legal norms, we may discover that the commitments we hold – or tell ourselves we hold – are imperfect translations of a self we do not know, or want to know. We may learn something unpleasant about how we perceive human agency and surprise ourselves by our implicit psychology of subservience;[75] but such are the risks of declining the invitation to be simply a legal subject.

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[74] On this point see Macdonald, "Legal Republicanism", *supra* n.51, at 43.

[75] A similar self-revelation is nicely exposed in the well-known exchange between Richard Posner and Robin West. See West, "Authority, Autonomy and Choice: the role of consent in the moral and political vision of Franz Kafka and Richard Posner" (1985) 99 *Harv.L.Rev.* 384; Posner, "The Ethical Significance of Free Choice: A Reply to Professor West" (1986) 99 *Harv.L.Rev.* 1449; West, "Submission, Choice and Ethics: A Rejoinder to Judge Posner" (1986) 99 *Harv.L.Rev.* 1449. The last paragraph of the third article puts this issue squarely. We often take so-called "theoretical" positions for very "untheoretical" reasons – notably because we fear what we may learn about ourselves: our submissiveness, our flight from responsibility, and our refusal to recognize the harm our world-view creates, makes possible, or legitimates.