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Pluralizing Discourses of Law and Governance

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PLURALISM AND LEGAL PHILOSOPHY

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1. Two (Positivist) Dogmas of Legal Monism[1]

Legal pluralism celebrates the diversity of human organisations and (for some) emphasises the non-systematic, disorderly, nature of our normative relationships. It offers a vision of legal phenomena in counterpoint to the statist insistence on system, institutions, and coherence. In recent pluralist scholarship, there has been a general call for legal pluralism to be true to itself by becoming more pluralistic.[2] The observation has been rightly made that pluralism which is too wedded to the objective facts of social arenas or an essentialist concept of law, will ultimately reinscribe the singularity of a conceptual system in some form. A pluralist pluralism must therefore call into question one or preferably both of the central monistic dogmas of positivist sociology of law and positivist legal philosophy – that is, the dogma of the singularity of the social field of which law is a part, and the dogma of the singularity of the concept of law.

In this paper I ask what such a pluralist pluralism has to do with legal theory (understood as the theory of positive state-based law)[3] and argue that it is possible to see state law as both singular and plural. Most importantly, a pluralist approach to law is not in my view a theoretical end in itself but rather a means of disrupting the hegemonic forms of power enshrined in conventional state-based definitions of law. In this sense, using the language of pluralism to narrate a new understanding of state law will hopefully help to remedy its seemingly chronic deafness to the normative contexts of those symbolically or legally positioned as other to law.

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[1] With apologies to Quine, "Two Dogmas of Empiricism" (1951) 60 *Phil.Rev.* 20; whose 'two dogmas' are the dogma of the analytic-synthetic distinction in philosophy, and the dogma of reductionism – the notion that a meaning can be reduced to a factual state. The reference to Quine is not inconsequential, as his critique of these dogmas can be read as leading to interpretive and conceptual pluralism. Although Quine did not follow this path himself, preferring to reinforce a scientific behaviourism, to some his ideas indicated the cultural and conventional basis of all knowledge. I wish to thank Davina Cooper, Martha-Marie Kleinhans, Ngaire Naffine, Jeremy Webber and the referees for their comments on this article in its various forms.

[2] See in particular Manderson, "Beyond the Provincial: Space, Aesthetics, and Modernist Legal Theory" (1996) 20 *MULR* 1048; Kleinhans and Macdonald, "What is a *Critical* Legal Pluralism?" (1997) 12(2) *Can.J.L. & Soc'y* 25; Tamanaha, *A General Jurisprudence of Law and Society* (2001); Eberhard, "Towards an Intercultural Legal Theory: The Dialogical Challenge" (2001) 10(2) *Soc. & L.S.* 171; Melissaris, "The More the Merrier? A New Take on Legal Pluralism" (2004) 13(1) *Soc & L.S.* 57.

[3] Legal theory is sometimes understood as the theory of law in a global or even universal sense, asking 'what is law?' rather than 'what is law in Western liberal democracies?' It seems fairly clear that the second question rather than the first forms the real basis for most legal theory; therefore the legal theory I refer to has its cultural location in Western legalities.

Legal pluralism is traditionally understood to relate to a multiplicity of normative systems which coexist in a defined social or geopolitical domain. For instance, it has become commonplace to speak of legal pluralism in colonial and postcolonial societies, where the imposition of colonial law has not completely effaced or absorbed a pre-existing legal order. Two (or more) legal orders, each with at least some degree of independence from the other, exist in the one geographical area. In socio-legal scholarship, interconnected regulatory and normative structures in all spheres of social ordering are also increasingly referred to in the language of legal pluralism.[4] The legal pluralist approach has been effective in decentring state law and state power in the socio-legal analysis of how people and societies order their existences. It has also critiqued the notion, promulgated by a number of influential legal theorists, that the characteristics of 'law' and 'legal system' are typified by the positive law of nation states.

With the exception of a few contributions mainly published since the late 1990s, legal pluralist thought has focused on the understanding of the objective facts of legal order in society. It has taken little theoretical notice of the alternative readings of socio-legal spaces which play out in relation to multifaceted power relations.[5] As Desmond Manderson comments, "Legal pluralism multiplies legal systems, but it does not doubt their objective and defined content."[6] In its orthodox manifestation, legal pluralism positively identifies, describes and theorises the multiple normative relationships within a social terrain. In an influential article published in 1986, John Griffiths said that

> "Any sort of 'pluralism' necessarily implies that more than one of the sort of thing concerned is present within the field described. In the case of legal pluralism, more than one 'law' must be present"

Thus, he says, legal pluralism "is an attribute of a social field and not of law."[7] According to this fairly uncontroversial view, legal pluralism is something which can be observed and theorised in the socio-legal field. It is not a characteristic of law and nor is it a characteristic of the interpretability of the social. Pluralism is objectively attributed to the geo-political space in which law finds itself. Whatever definition of 'law' is adopted, the term 'legal pluralism' identifies and names the co-existence of legal orders in a defined space.

As Brian Tamanaha points out, legal pluralism has generally relied upon some theoretical account of what law is, and then studied a plurality of such 'laws' in a particular geographical or social landscape. One perceived problem with this approach has been the inability of legal pluralists to settle on a definition of law and the resulting difficulty that properly legal as opposed to merely social normative orders become poorly defined. Anxiety over expanding the concept of law into what might be regarded as legally

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[4] For an overview of these two forms of legal pluralism see Engle Merry, "Legal Pluralism" (1988) 22(5) *L. & Soc.Rev.* 869.

[5] Cooper, *Challenging Diversity: Rethinking Equality and the Value of Difference* (2004).

[6] Manderson, *supra* n.2, at 1060.

[7] Griffiths, "What is Legal Pluralism?" (1986) 24 *J Legal Plur* 1.

trivial spheres of normativity mirrors the legal philosophical desire for a bounded concept of law. (I think we could question whether these issues are as problematic as some insist, but that is not the purpose of this paper.) As an antidote, Tamanaha proposes what he terms a 'non-essentialist' legal pluralism, which recognises that law does not necessarily have an essence. As he explains it;

> "I assume that the label 'law' is applied to what are often quite different phenomena – sometimes involving institutions or systems, sometimes not; sometimes connected to concrete patterns of behaviour, sometimes not; sometimes using force, sometimes not. Thus, the plurality I refer to involves different phenomena going by the label 'law', whereas legal pluralism as typically conceived involves a multiplicity of one basic phenomenon, 'law' (as defined)" [8]

The departure from standard pluralist thought represented by Tamanaha's approach is that he does not insist upon a universally-accepted definition of law. Instead, "Law is whatever people identify and treat through their social practices as 'law' (or recht, or droit, etc.)." There can be a plurality of concepts of law, as well as (one would presume) plural manifestations of a single concept of law. However, Tamanaha maintains the position that pluralism is "an attribute of a social field." In other words, for Tamanaha, the pluralist enterprise remains essentially positivist and empirical – the description and theorisation of normative 'objects' in society. He says, for instance, that a "state of 'legal pluralism' . . . exists whenever more than one kind of 'law' is recognized through the social practices of a group in a given social arena." Tamanaha's method, while representing a significant departure from the assumption that the concept of law has a positive essence, reinscribes the orthodox pluralist focus upon a limited (categorically defined) and objectively present law. Moreover, although the statist focus of orthodox legal positivism is rejected by Tamanaha's socio-legal positivism, the separability of law from non-law is reinforced,[9] perhaps underlining a view of the singularity of the legal field.

2. Socio-Legal and Philosophical Approaches to Law

Later in this article I want to consider the nature of a pluralist pluralism in more detail. First, however, I want to summarise the points of resistance in mainstream legal theory to pluralist thought. It is not self-evident that an approach which has so much to say about the relationship between law and state should be so comprehensively foreclosed by a discipline which aims to understand the nature of law. Other sceptical approaches such as legal realism, feminist legal scholarship, critical legal studies, and postmodernism, have found a voice in theoretical accounts of law – even conventional positivist scholarship acknowledges the existence of these critical approaches to law, and increasingly enters into dialogue with the non-positivist

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[8] Tamanaha, *supra* n.2, at 194.

[9] See also Einar Himma, "Do Philosophy and Sociology Mix? A Non-Essentialist Socio-Legal Positivist Analysis of the Concept of Law" (2004) 24(4) *OJLS* 717 at 717.

approaches. Just why is it then that pluralist thought has made so little impact upon understanding the concept of law?

There are several rather obvious ways of answering this question which can be quickly sketched. At the level of discipline, legal pluralism has been situated within anthropological, ethnographic, and sociological scholarship on law. Its lack of influence in legal philosophy is first and foremost related to the intellectual history of disciplinary separation of empirical social-based disciplines from the speculative discipline of philosophy.[10] Such divisions have been reinforced in both the analytical and conceptual schools of positivist legal philosophy: against the likes of Eugen Ehrlich's social-based approach to law or Von Savigny's historicism, Hans Kelsen for instance insisted upon the difference between the 'natural' or behaviouristic interpretation of "sensible, temporo-spatial events" and their legal significance.[11] His pure philosophical approach to law concerned the immanent meanings of legally-significant events, while sociology of law was concerned with an external and factual account of law. In contrast to continental European legal theory, which has emphasised conceptual system-building, legal philosophy in the Anglo-sphere has generally had a more empirical focus on law as a social construction. This does not mean that law is seen to be fully embedded in the social, rather that, although originally derived from social sources, it achieves a separate institutional life of its own. Thus, the legal philosophical project of presenting law from the inside or according to lawyers has been largely continued in the analytical tradition, despite Hart's (unconvincing) claim in The Concept of Law to have written 'an essay in descriptive sociology'.[12]

In recent decades, it is true that both liberal and critical legal thought have strongly challenged the conceptual coherence of the inside/outside distinction in legal thought;[13] feminist and critical race theory have seen the distinction (with its associated language of legal reason and objectivity) as a means by which legal culture masks its participation in hegemonic forms of power, while poststructural analysis has regarded it as a deconstructible

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[10] On the division of socio-legal studies from legal theory see Tamanaha, *supra* n.2, at 134; Norrie, "From Critical to Socio-Legal Studies: Three Dialectics in Search of a Subject" (2000) 9 *Soc. & L.S.* 85; Lacey, "Normative Reconstruction in Socio-Legal Theory," in Lacey (ed.), *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (1998); see also Cotterrell, "Subverting Orthodoxy, Making Law Central: A View of Sociolegal Studies" (2002) 29 *J.L. & Soc'y.* 632 at 634-638. Jíří Příbáň emphasizes the continuities, especially between pre-postmodern critical legal studies and sociology of law in "Sharing the Paradigms? Critical Legal Studies and the Sociology of Law," in Banakar and Travers (eds.), *An Introduction to Law and Social Theory* (2002).

[11] See Kelsen, "The Pure Theory of Law" (1934) 20 *LQR* 474 at 479-480. Kelsen's comments were directed at those legal theorists, such as Eugen Ehrlich, who did not sharply distinguish between the social and legal spheres.

[12] Hart, *The Concept of Law* (2nd ed, 1996), p.v. As Roger Cotterrell notes 'there is a kind of sociological drift (but no serious sociology) in Hart's normative legal theory'; Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (1989), p.96.

[13] In terms of the liberal challenge to law's closure, see Dworkin, *Law's Empire* (1986).

consequence of discursive violence.[14] It is now commonplace to observe that the alleged institutional and conceptual separation of law from cultural, political and social processes is one of law's foundational fictions: law is not only a product of socio-political discourse as enshrined for instance in political institutions, law is fully embedded in, and in fact inseparable from, the socio-political field. However, this does not mean that critical legal thought has facilitated a practical coming together of legal theory and socio-legal thought. As Alan Norrie has argued the focus of much critical legal thought (especially that which takes place under the influence of Derrida's 'Force of Law') is, like traditional legal theory, upon an immanent rather than a socio-political critique. There are some instances, of course, where a socio-legal and a philosophical critique of law have been usefully merged: one of the most consistent areas is feminist legal theory where the analysis of the concept and nature of law has been combined with a critique of power in a socio-political context.[15]

At the same time, Nicola Lacey comments that the 'quasi-scientific stance' of some socio-legal scholarship and its failure "to take a sophisticated approach to the complexity of interactions between legal and extra-legal practices," provide critical legal theory with a reason for disregarding it as "theoretically and politically naïve."[16] Certainly much legal pluralist scholarship, in analysing pluralism as an objective fact about the socio-legal world, has not proven especially useful to postmodern theorists with their emphasis upon reflexivity or to feminist legal scholars with their emphasis upon the channelling of power through the dominant legal system.[17] The coming together of the terminology of postmodernism and pluralism is perhaps best epitomised by the work of Boaventura de Sousa Santos.[18] Santos characterises his work as postmodernist, but Eve Darian-Smith has critiqued this characterisation, saying that Santos "cannot think beyond the autonomous liberal subject that in effect locks him into a modernist frame."[19]

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[14] Derrida, "Force of Law: The 'Mystical Foundation of Authority'" (1990) 11 *Cardozo L.Rev.* 919; also published in Cornell *et al.* (eds.), *Deconstruction and the Possibility of Justice* (1992). Associated literature includes Rosenfeld, "Derrida, Law, Violence and the Paradox of Justice" (1991) 13 *Cardozo L.R.* 1267; Davies, *Delimiting the Law: 'Postmodernism' and the Politics of Law* (1996); Wolcher "The Man in the Room: Remarks on Derrida's Force of Law" (1996) 7 *Law & Crit.* 35; and, Davies, "Derrida and Law: Legitimate Fictions," in Cohen (ed.), *Jacques Derrida and the Humanities* (2001) [hereinafter Davies, Derrida and Law].

[15] See for instance, Lacey, *Unspeakable Subjects* (1998).

[16] Lacey, *supra* n.10, at 231.

[17] There is a great deal of anthropological work on gender and pluralism in postcolonial societies, but little on the implications of pluralism for a feminist analysis of Western law. Having said that, of course, a growing body of scholarship considers issues of cultural and religious diversity as it intersects with gender in the context of law, but rarely using the terminology or paradigms of legal pluralism.

[18] See for instance, de Sousa Santos, "Law: A Map of Misreading. Toward a Postmodern Conception of Law" (1987) 14(3) *J.L. & Soc'y* 279; de Sousa Santos, *Toward a New Legal Common Sense* (2nd ed.,2002), [hereinafter Santos, *Legal Common Sense*].

[19] Darian-Smith, "Power in Paradise: The Political Implications of Santos's Utopia" (1998) 23 *L. & Soc. Inquiry* 81 at 92. See also Santos' reply, de Sousa Santos,

While perhaps true for the time (1992), Teubner's claim that "[p]ostmodern jurists love legal pluralism"[20] does not reflect the trends of the later 1990s, when the immanent critique of postmodernism rarely came into contact with either empirical or theoretical forms of pluralism.[21] Nevertheless, this lack of interest on the part of critical scholars in the empirical dimensions of pluralism is perhaps countered by the attractiveness of some of its underlying political and ethical promises. These include pluralism's general challenge to the concept of state law, the 'critical pluralist' critique of the concept of law as a closed self-defining system, and the recognition of legal multiplicities which may be of strategic significance to the indigenous nations of colonial states.

3. Legal Theory and the Resistance to Pluralism

Despite the division between socio-legal studies and the more thought-based approaches to law, there are positive signs that the boundary between philosophical and sociological approaches is more permeable than it once was. Scholars such as Lacey, Cotterrell, Norrie and Tamanaha are actively attempting to dismantle this boundary. From the position of legal theory, however, there are several other points of resistance to legal pluralism beyond the disciplinary divide. For a start, legal pluralism decentres positive state-based law, regarding it only as a hierarchically superior system among various forms of law, or even downgrading its status so that it is only one among many laws, and possibly not even the most significant.[22] In either case, pluralism is based on the perception that the category 'law' contains more than the law of a state. For those with a commitment to the law-state monad this apparent degradation of institutional law may involve a category mistake (misunderstanding the real limits of law), a serious threat to liberal political structures, or simply a confusing and unwarranted extension of the terminology of law to non-legal spheres of control. Perhaps most importantly, the idea of a limited law – where the distinction between law and non-law is clear and defensible – remains of importance to many legal theorists.[23]

There is also an issue of epistemological positioning to consider. While some pluralist scholarship has focused upon the interconnections between normative orders,[24] it has also generally situated itself outside state-derived law. In contrast, as I have indicated, legal theory normally takes the

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"Oppositional Postmodernism and Globalizations" (1998) 23 *L. & Soc. Inquiry* 121 and comments by Gunther Teubner in, Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism" (1992) 13 *Cardozo L.Rev.* 1443 at 1443-44.

20 Teubner, *ibid*.

21 An exception is Manderson, *supra* n.2.

22 Santos, *Legal Common Sense, supra* n.18, at, 94-95.

23 Schauer, "The Limited Domain of the Law" (2004) 90 *Va.L.Rev.* 1909. Austin, *The Province of Jurisprudence Determined* (1832/1954). See also critical comments by Douzinas, Warrington, and McVeigh, *Postmodern Jurisprudence: The Law of Text in the Texts of Law* (1991), p.25.

24 See for instance, Teubner, "'Global Bukowina': Legal Pluralism in the World Society," in Teubner (ed.), *Global Law Without A State* (1997); Teubner, *supra* n.19.

standpoint of the specialist insider – the lawyer, judge, or legal official[25] – as central to knowledge about law. To the extent that the inside/outside distinction has practical force in understanding law, legal pluralism and legal philosophy need not even come into conflict as the former describes a situation of legal multiplicity in a social field whereas the latter takes just one of the existent forms of normativity and undertakes an analysis from the inside. Of course, there are real points of tension between legal pluralism and legal philosophy, for instance over the issue of when and how it is coherent to speak of more than one legal system within a geo-political terrain.[26] The legal philosophical identification of law with state law does not necessarily preclude examination of non-legal forms of normativity, though legal philosophy does generally attempt to reserve the use of the term 'law' to state-derived law. Insofar as legal pluralists have insisted that law can be identified in non-state arenas, their claim is directly at odds with the positivist view of law as essentially associated with state mechanisms.

Finally, legal theory has often assumed that one of its core functions is to analyse the concept and identity of law, notions which seem to be intrinsically monistic and exclusive. Rather than accept the coexistence of incommensurable forms or views of law, legal theory has emphasised coherence, comparativeness and hierarchical ordering. As Desmond Manderson has suggested, this is arguably the symptom of an aesthetic resistance to legal pluralism on the part of orthodox legal philosophical discourse.[27] The modernist inclination towards theoretical order, systematicity and coherence does not necessarily lead to a better 'truth', but is rather an aesthetic preference for totality and unity rather than disorder, contradiction and partial explanations. In its acceptance of a modernist paradigm of philosophical order, traditional legal theory is perhaps archetypally anti-pluralist: it is certainly set against William James' empirical pluralism, which he characterised as a 'turbid, muddy, gothic sort of an affair, without a sweeping outline and with little pictorial nobility'.[28]

4. Clearing the Ground

If legal theory is to become more receptive to pluralism these several points of resistance need to be opened up for re-examination within legal theory, and not just within the excluded discourse of legal pluralism. Is state law necessarily the single expression of the 'legal' in any society? Is the knowledge of positive law held by the legal official or expert epistemologically superior to the knowledge held by others?[29] (In any event, isn't expert knowledge also plural?) Philosophically, can positive law be reduced to a concept and an identity, or is it better understood as a plurality of concepts and a non-identity?

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[25] Consider, for instance, the role of legal officials in Hart, *supra* n.12; or the omniscient judge Hercules in Dworkin, *supra* n.13.

[26] Roberts, "After Government? On Representing Law Without the State" (2005) 68(1) *MLR* 1.

[27] Manderson, *supra* n.2.

[28] James, *A Pluralistic Universe* (1977, first published 1909), p.26; see also Davies, "The Ethos of Pluralism" (2005) 27(1) *Syd L.R.* 88 at 98-100.

[29] See, Kleinhans and Macdonald, *supra* n.2, at 40.

Critical legal pluralists have offered some tantalising hints about the nature of a pluralist pluralism, but so far this research direction is relatively undeveloped. Taking my lead from the critical pluralist theory of the mid-late 1990s,[30] in this and the next section I would like to offer a few provisional ideas about what a critical pluralist approach might have to offer to legal theory.

To begin with, in this section I need to articulate several presuppositions and theoretical qualifications.

First, the dangers of an undifferentiated or endless pluralism which fails to take account of the social discourses of power are all too evident.[31] It would be naïve to suggest that pluralism per se is an ethical good: we need to maintain the space and the capacity for critique of oppressive practices whether they are undertaken under the auspices of a pluralist or a totalising political philosophy. Pluralism should not be seen as a recipe for endless relativism, but rather as a technique for disrupting the fixity of dominant distributions of power. I do not examine here the need for such a disruption of the singular positivist concept of law: that task has been undertaken by numerous other scholars in several theoretical contexts.[32] Moreover, while I am assuming that there can be positive ethico-political consequences which would flow from a more open, heterogeneous understanding of law, this assumption is surely contextual since theories underdetermine political and ethical consequences. In other words, while a legal theory may certainly guide or influence one's ethical positioning, it would be wrong to suggest that it can fully determine a more just or egalitarian society.[33]

Second, insofar as my primary interest and expertise lies in legal theory or (as I have explained above) the immanent critique of positive law, the pluralist approach I am proposing here starts – perhaps paradoxically – as a pluralism of state-based law. In other words, the position is one of the inherent pluralism of positive law. In this sense, not only do I reject John Griffith's claim that pluralism "is an attribute of a social field and not of law,"[34] I also bracket – momentarily at least – critique of the law-non-law distinction. In other words, in order to focus upon positive law, I take as given something which I believe to be patently false – the thesis of the limits of law. Importantly, however, I do not take it as a factual or real given: rather, what I take as given is the conventional discourse of the limits of law which does, of course, have an operational impact on the practice of law. This is not to say that the law is factually or even conceptually closed – it simply operates upon a discursive fiction of closure. The other matter which is left to one side in this analysis is the plurality of concepts of law as described by Tamanaha.[35] While this is a theoretical direction which I would

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30 In particular the sources cited at *supra* n.2.

31 See generally, Cooper, *supra* n.5.

32 For a summary of the political obstacles posed by the positivist concept of law to an equalization of socio-legal power see Davies, *supra* n.28.

33 Koskenniemi, "'By Their Acts You Shall Know Them. . .' (And Not by Their Legal Theories)" (2004) 15(4) *EJIL* 839. See also Santos, *Legal Common Sense*, supra n.18.

34 Griffiths, *supra* n.7.

35 Tamanaha, *supra* n.2, at Chap.7.

certainly endorse, my focus at present is the inbuilt pluralism within what legal theory often takes to be a singular concept of law.

Third, I am not proposing here a new theory of law but rather a reorientation of theoretical questions and an attentiveness to the ethical positioning of the theorist of pluralism. Rather than theory, the few rather loosely structured points which follow might better be regarded as a series of meta-theoretical suggestions concerning the direction of legal theory. In themselves, they are insufficiently developed to count as an extended theoretical intervention, though they do crystallise what I see as some major elements in the nascent critical pluralist thought. Rather than a 'theory' of pluralism, which suggests conceptual stasis, I would prefer to speak of the 'ethos' of pluralism[36] – suggesting a mutable orientation towards theoretical diversity.

Finally, most of the points of departure for a pluralist pluralism presented here are drawn negatively, that is, as the counterpoint to (though not rejection of) the two dogmas of monism I mentioned at the beginning of the paper. The term 'counterpoint' is Wendy Brown's metaphor for the way in which two truths can be simultaneously affirmed for political purposes without contradiction, assimilation, or dialectical synthesis.[37] Given the multi-layered foundations of legal discourse in tradition, culture, language and politics, it seems nonsensical to insist upon a view of law which tries to avoid the co-existence of opposites. In other words, a pluralist pluralism, in my view, replaces the logic of 'either/or' with a more inclusive logic of 'both/and'. This is more than the presentation of a descriptively thick analysis of law: the 'both/and' refers not only to empirical depth but also to the co-existence of conceptual incommensurables which cannot be resolved, sublated, or assimilated to a greater unity.

My contention is therefore not that legal monism is at this moment 'false' in some absolute sense, as it clearly still plays a significant role in the practical understanding of law.[38] Legal monism and the associated language of law-state unity have a strong discursive force, and are accepted as paradigms of law within legal culture: on one level, law is monistic because legal subjects assume it to be so, and act in accordance with this assumption. But while the discourse of singularity pervades legal thought and carries much influence in the thinking of what law is, it is also possible to see law – including the centralist concept of law itself – as composed of plural dimensions. It is

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[36] Davies, *supra* n.28.

[37] Brown, "Gender in Counterpoint" (2003) 4 *Fem. Theory* 365 at 367: 'At once open-ended and tactical, counterpoint emanates from and promotes an anti-hegemonic sensibility and requires a modest and carefully styled embrace of multiplicity in which contrasting elements, featured simultaneously, do not simply war, harmonize, blend or compete but rather bring out the complexity that cannot emerge through a monolithic or single melody'.

[38] The evaluation of a theory as true or false is itself a theory-dependent exercise. On the one hand, I would say that monism does not correspond to the 'facts' about law, whether these are the social 'facts' of how people interact with law, the 'facts' of legal institutions, or even the 'facts' of judicial decision-making. On the other hand, centralist theories have the self-fulfilling truth of any discursively powerful social theory – that subjects behave *as if* the prevailing concept is true, and in so doing give a certain shape to the evidence, though never determine it completely.

possible to see law as being at once singular and plural, and not composed of any essence which would reduce it to singularity alone.

In this sense, to borrow a phrase from Jean-Luc Nancy, law has a 'singular plural being' – its being is both singular and plural.[39] Or, to use the spatial metaphor deployed by Desmond Manderson, law can be seen to be something like a fractal – a line or border of infinite length and complexity contained within finite space.[40] The monistic concept of law cannot simply be discarded as a falsity because it is the paradigm within which the practical reality of law is generally played out. Nonetheless, even the monistic doctrine is meaningless without the 'playing out' or the experiential performance of law, a dimension of law which inevitably leads to the thought of pluralism. Such characterisations of law replace the logic of 'either/or' (that law is either singular or plural, and that it is either finite or infinite) with a logic of 'both/and' (that law can and does encompass contradictions, including the contradictions between being at once coherent and incoherent, and being at once singular and plural).[41]

5. Conditions of a Pluralist Pluralism in Legal Theory

In summary, if legal theory is to enter into dialogue with legal pluralism, it must question a number of its theoretical foundations as follows:

- its aesthetic preference for coherence and theoretical integration;
- the notion that law can be understood as an identity and a concept;
- the idea that there is a single or essential understanding of law;
- the epistemic privilege of legal experts;
- the grounding of knowledge about law in a one-dimensional reading of social fact;
- the presumption that a theory of law is possible;
- the inside/outside distinction;
- the logic of either/or.

In this section of the paper I want briefly to elaborate on the notion of a 'singular plural' law emphasising what might be regarded as the formal dimensions of such an approach.

(a) What is Pluralism? 'Irreducible Outness'

Perhaps belatedly, it seems important to offer some sort of analytical definition of pluralism, in order to permit identification of minimal conditions for characterising a thing as plural rather than singular. My

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[39] Nancy, *Being Singular Plural* (2000), p.28. There are many other mutations of the 'singular plural' which are revealed in Nancy's text.

[40] Manderson, *supra* n.2, at 1066-67.

[41] See also Peter Fitzpatrick's analysis of the concurrent determinateness of law and its responsiveness; Fitzpatrick, "Law in the Antinomy of Time: A Miscellany," p.97, in Ost and Van Hoecke (eds.), *Temps et droit. Le Droit a-t-il pour vocation de durer? / Time and Law. Is it the Nature of Law to Last?* (1998).

working notion of pluralism is that it describes a situation in which incommensurable terms coexist in a comparative space. The definition is far from perfect, but it attempts to grasp the fact that pluralism generally refers to two or more theoretical objects (persons, legal systems, values, cultures) which come into contact with each other conceptually or physically, and which cannot be reduced to a singular form. So, for instance, while it would be possible to say that pluralism characterises the relationship between quantum physics and Western systems of musical notation, this is not a very theoretically interesting pluralism because the two exist in different spaces and rarely (one would imagine) come into theoretical contact. They do not co-exist, except in a rather trivial sense. In contrast, to use an example from Santos, the discipline of medicine might be said to consist of a plurality of different techniques and traditions[42] – in relation to a particular ailment there might be several possible treatments, but these cannot be reduced to a singular form, even though a 'politics of definition' works to centralise one tradition and exclude others.

As defined by William James, pluralism is the position that there are things which are irreducible, external or totally 'other';

> "Things are 'with' one another in many ways, but nothing includes everything, or dominates over everything. The word 'and' trails along after every sentence. Something always escapes. 'Ever not quite' has to be said of the best attempts made anywhere in the universe at attaining all-inclusiveness"[43]

And;

> "The irreducible outness of anything, however infinitesimal, from anything else, in any respect, would be enough, if it were solidly established, to ruin the monistic doctrine"[44]

For James, pluralism was fundamentally opposed to rationalism and idealism – approaches which, he argued, carved singular and discontinuous concepts out of the complex and continuous 'perceptual flux'.

Although there are other definitions of pluralism, James' 'irreducible outness' provides a simple explanation which I wish to take as the benchmark of pluralism, with the added criterion that things which are 'irreducibly out' must come into contention somehow for this to be of theoretical interest. A finite trail of 'ands' (x and y and z) is only pluralistic in the rather banal sense that no one system of thought can capture all that is, and therefore we need recourse to other systems of thought. It ceases to be banal when there is irreducibility between different understandings of the 'same' object (as in Tamanaha's non-essentialist pluralism) or when there is a radical irreducibility within the system or concept itself, making the doctrine of monism a pragmatic fiction.

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[42] Santos, *Legal Common Sense*, *supra* n.18, at 91.
[43] James, *supra* n.28, at 145.
[44] William James, as cited in O'Shea, "Sources of Pluralism in William James," p.27, in Baghramian and Ingram (eds.), *Pluralism: The Philosophy and Politics of Diversity* (2000).

In the tradition of legal pluralism, James' notion of 'irreducible outness' is perhaps best compared to John Griffith's useful distinction between 'weak' and 'strong' instances of legal pluralism. 'Weak' legal pluralism refers to a situation where a single grundnorm for all law is maintained and thus 'the legal order of the state exhausts the legal ordering of society',[45] but where nonetheless certain arenas of customary law are recognised and administered. In such a scheme, the plurality of law is contained within the state unity, and hence the pluralism is 'weak'. In contrast, 'strong' legal pluralism refers to 'the coexistence within a social group of legal orders which do not belong to a single "system."'[46] To use James' terminology, in weak pluralism there is assimilation of the other into the unity, whereas in strong legal pluralism, the 'irreducible outness' of legal orders is maintained. It seems nonetheless evident to me that a society may be described factually as incorporating both weak and strong pluralism: for instance, in Australia selected parts of indigenous law are to some degree recognised and administered by the state – the state legal system therefore enshrines a form of weak pluralism. But this does not account for the totality of Indigenous law, which maintains its own existence, its own 'irreducible outness', regardless of its partial recognition by the Australian state. Hence, in the geo-political terrain of Australia, strong legal pluralism still exists even though it is often sidelined by the ideological dominance of legal monism.

As I have said, I start with the inherent pluralism of state/positive law, a notion which has also been advocated by critical legal pluralism;[47] yet Griffiths has made it clear that such pluralism is 'weak' and not really pluralism at all. I agree with Griffiths that the only conceptually interesting form of pluralism is what he has defined as 'strong' pluralism, and at the same time the claim is made that this concept can be applied to state law as well as to the coexistence of state and non-state law. From an empirical-positivist perspective, the idea must seem bizarre, to say the least. However, critical pluralism is not a pluralism of positively identifiable objects but, like critical theory in general, theorises the interconnection between individual subjects, their cultural location and processes of knowledge production.[48] A pluralism of the different parts of positive law which are nonetheless all validated by the one grundnorm or rule of recognition is certainly a weak pluralism in the sense explained by Griffiths.[49] There is no 'irreducible

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45 Griffiths, *supra* n.7, at 5.

46 Griffiths, *ibid.*, at 8

47 Manderson; and, Kleinhans and Macdonald; *supra* n.2.

48 Horkheimer, "Traditional and Critical Theory," in O'Connell *et al.* (eds.), *Critical Theory: Selected Essays* (1968).

49 Hans Kelsen recognised as much when he said that the basic norm 'constitutes the unity of a multitude of law.' Kelsen, *Pure Theory of Law* (1967), p.193. See for instance the summary of the work of Hans Petter Graver in, Dalberg-Larsen, *The Unity of Law: An Illusion? On Legal Pluralism in Theory and Practice* (2000), pp.103-106. Drawing on Graver's work, Dahlberg-Larsen identifies five axes of what he terms 'pluralism in official law': the multilayered historical construction of law, the 'different decision-making centres', the pluralism of underlying values, pluralistic notions of 'rationality', and the distinctness of the different areas of law. While it is interesting to consider the factual pluralism which characterises any legal system, insofar as all of these dimensions of law could be accounted for by the one *grundnorm*, the situation described remains one of weak pluralism.

outness' because in the end all of the parts are legitimated by the legal structure (assuming, momentarily as I say, that it has limits). However, the pluralist approach to positive law which I am invoking, and which I think is in keeping with the direction of critical legal pluralism – especially that elaborated by Kleinhans and MacDonald – is an epistemological and an ontological pluralism and not just a pluralism of different elements of the one structure.[50] The point is, that positive law is not 'one structure' but is irreducibly other to itself, characterised by non-identity. Thus positive law is epistemologically plural, meaning that it is futile to try to reduce law to a single analysis: knowledge of the law is layered and multiple, not flat or singular. At the same time, it is an ontological pluralism because the fundamental principles of positive law which are the expression of its being – legitimacy, validity, limitedness – are also conceptually complex and irreducible.

(b) Epistemological Pluralism

'Irreducible outness' can therefore be said to characterise theoretical accounts of law in its common positivist sense – law 'properly so called' is susceptible to multiple conceptualisations. In other words, there are many critical and theoretical accounts of this law, each of which provide different insights into the nature of positive law but which cannot be consolidated into the one theory. Put simply, there is a plurality of frames of reference as well as a plurality of critical positions or discourses, according to which positive law may be understood. Only one of these 'perspectives' is the positivist theory of law itself (a self-fulfilling account which describes and reinscribes the actuality of positivism) which dominates the terrain of analytical jurisprudence.

To give just one of many possible examples, within its own terms, analytical jurisprudence is incapable of accounting for and responding to the ways in which various forms of social power reside in and are reinforced by legal structures, a critique advanced compellingly by feminist legal theorists and socio-legal scholars. This 'irreducible outness' of power to the rationalist-analytical approach to law is a consequence of its exclusionary acts of self-definition. For instance, the rationalist approach to law generally holds that the form and content of law are separable and that questions of power relate to content not form, which can accordingly be safely excluded from the analytical understanding of the politically neutral form of law. As Roger Cotterrell comments, '[t]raditional legal scholarship' sees power as 'external and opposed to law'.[51] Feminist legal theory and socio-legal research, on the other hand, consistently refuse to disengage law from its social and political context,[52] and therefore characterise this alleged neutrality as a sham – a mere justificatory cover up for the reproduction of systemic power. In consequence, positivist accounts of law are at odds with both feminist and socio-legal theory – irreducibly external in some fundamental respects – and

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[50] Mouffe, "Democracy and Pluralism: A Critique of the Rationalist Approach" (1995) 16 *Cardozo L.Rev.* 1533 at 1535.

[51] Cotterrell, *supra* n.10.

[52] Cotterrell, *ibid.* See generally, Conaghan, "Reassessing the Feminist Theoretical Project in Law" (2000) 27 *J.L. & Soc'y* 351.

will remain so.[53] The one cannot incorporate the other. Again, this is not to suggest that there can be no dialogue between critical and analytical approaches. And I would emphatically reject the contention that this kind of theoretical pluralism reduces all theories to 'equal but different' approaches: while it is true that theoretical approaches explain phenomena differently, and each may have its own abstract merits and its own level of purchase in cultural terms, there are often significant political and pragmatic consequences attaching to the choice of critical voice or theoretical approach.

(c) Ontological Pluralism

'Irreducible outness' is also to be found in positivist conceptions of law – even when understood on its own terms as a singular and coherent system of law. The singularity and coherence of law in both theory and in practice is merely the theoretical veneer of its multiplicity and incoherence.[54] What does it mean to say that pluralism is inherent in the positivist concept and practice of law? Essentially, it means that the identity of law is actually based on plurality or irreducible outness. It means that despite the best efforts of legal philosophers to find a concept of law which is coherent, unified, and separate, law is inevitably and irreducibly plural. Chantal Mouffe has made the point in relation to radical democratic thought;

> "For a radical and plural democracy . . . pluralism is not merely a fact, something that we must bear grudgingly or try to reduce, but rather an axiological principle, that is, something constitutive at the conceptual level. . ."[55]

Mouffe uses the phrases 'an axiological principle' and 'something constitutive at the conceptual level' to refer to the inherent pluralism of radical democracy. In other words, radical pluralism moves beyond description of social facts (cultural differences, plural systems of law, plural social subcultures and so forth) and situates the plural at the 'radical' level of the concept itself. Such a moment in the development of theory rejects the attempt to unify and systematise, and accepts that (as William James said) "something always escapes" and that the "word 'and' trails along after every sentence." It is not, as has sometimes been said, a pessimistic denial of the possibility of knowledge, but rather a plain recognition of the fact that attempts to systematise can only succeed by positively cutting off the 'and'. Putting the 'and' back into legal philosophy, especially where it joins incommensurable thoughts and constructions of law, is a central objective of a more inclusive jurisprudence.

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[53] See generally Lacey, "Feminist Perspectives on Ethical Positivism," in Campbell and Goldsworthy (eds.), *Judicial Power, Democracy and Legal Positivism,* (2000). Lacey concludes that Campbell's 'ethical positivism' (emphasising the ethical rationale for the positivist approach) may have some points of contact with feminist legal thought. However, because it maintains positivism's 'theoretical separatism' between the legal and the political, it cannot fully accommodate feminist concerns.

[54] See Davies, *Delimiting the Law: 'Postmodernism' and the Politics of Law* (1996). See also, Davies, *supra* n.4.

[55] Mouffe, *supra* n.50, at 1535; see also, Mouffe, "Political Liberalism, Neutrality and the Political" (1994) 7 *Ratio Juris* 314. Mouffe's argument for a conceptual pluralism is the stimulus for my argument in this article.

A 'pluralist' argument – though not necessarily named as such – is frequently made in relation to the multiple possibilities for the interpretation of law: that law is composed of multiple and indeterminate meanings or potential meanings which positivist and monist ideas of law constantly repress and normalise.[56] Conventions of interpretation among those legal readers with power to determine the law (judges, lawyers, legislators) ensure for the most part that the corpus of legal meanings remains relatively stable and predictable. Such conventions may include so-called 'legal' rules of interpretation such as the literal rule or the golden rule. They may include the general principles of legal reasoning which are so familiar to lawyers: the doctrine of ratio *decidendi*, the evaluation of relevance, judging similarity and difference. More importantly interpretation is constrained by broader, less definable constructions of legal culture – what it means to be a lawyer, what it means to apply the law, what legal reasoning consists of. In each case, interpretative constructions can never be wholly internal to (or defined by) positive law. Rather, they indicate the embeddedness of positive law in a pluralistic social environment. Law is constantly re-created within this environment: the plurality of potential legal meanings, combined with the inescapable social pluralism which is law's foundation, exists alongside the more conventional, and separated, image of positive law.

The 'singular plural' nature of law is therefore especially clear when we think about the ways in which legal meanings are constructed. A plurality of possible legal meanings is controlled by a tightly-defined conventional law, and this tension between the many and the one provides opportunities for alternative meanings to emerge. For instance, while the legal definition of 'marriage' as the union for life of one woman and one man has remained relatively stable for some time, it is nonetheless undermined by ambiguity, especially as to the appropriate definition of 'man' and 'woman'.[57] At the present time, such ambiguities – coupled with changes in social presuppositions about marriage – are posing a challenge to conventional interpretations.

Another, more technical, method of illustrating the "irreducible outness" of law to itself (or its inherent pluralism, to use the terminology of this article) is the well-established analysis of the paradoxical, self-contradictory foundations of law.[58] Problems with the foundations of law have been well known to legal philosophy and constitutional thought for a very long time;[59]

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[56] See, for instance, Goodrich, *Reading the Law* (1986), pp.220-221; Douzinas, Warrington and McVeigh, *supra* n.23. See also, Davies, "Authority, Meaning, Legitimacy," p.115, in Goldsworth and Campbell (eds.), *Legal Interpretation in Democratic States* (2002).

[57] See, for instance, the Australian case *In Re Kevin (Validity of Marriage of Transsexual)* [2001] FamCA 1074 (12 October 2001).

[58] See for instance, Derrida, *supra* n.14; Fitzpatrick, *Modernism and the Grounds of Law* (2001); Motha, "The Sovereign Event in a Nation's Law" (2002) 13 *L. & Crit.* 311; for a detailed exposition of Derrida's argument in 'Force of Law' in the context of legal philosophy, see Davies, Derrida and Law, *supra* n.14.

[59] Gunther Teubner makes the point that decades of deconstruction and other forms of critique of law have made virtually no difference to its operating presumptions. What is pushing change in this area are historical – economic and political – conditions in an era of globalisation. See Teubner, "The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy" (1997) 31 *L. & Soc'y Rev.* 763 at

the point of the recent critical interest in these matters has been to illustrate that paradox and self-contradiction are symptomatic of deep incoherence and irrationality in any 'concept' of law. Rather than a mere theoretical failure to solve a riddle, paradoxes of foundation express the dynamism, the irreducibility, and the non-systematic nature of law. According to these critiques, the ideational unity of law is only achieved by the force of definitional exclusion (original and ongoing) of everything defined as 'other' to law – including morality, politics, and social diversity. Thus the 'other' is in fact integral to the conceptualisation and definition of law. This is clearly not a question only about legal language, of the words from which law is composed, though that is obviously a significant issue. It is an issue for the very dimensions of law, of what it is and how it situates itself.

6. Subject-driven Law

The epistemological and ontological pluralism outlined above is also enshrined in the subject who is/constructs the law. Legal subjects know law in plural ways, and live it in plural ways. Thus one of the most prominent areas in which the language of plurality within law can be deployed is by reference to law's subjects or persons.[60] In this final section of the article, I want to offer some preliminary thoughts on this matter.

It is now commonplace to observe that law and legal theory idealise a particular type of subject. This subject tends to erase both the manifold contexts within which legal subjectivity arises and 'actual'/'natural' subjects whose subjectivities transgress the limits of law and are framed by a variety of social discourses little acknowledged by formal law (such as those relating to gender, heterosexuality, race, culture, level and type of education, and class).[61] Law and its idealised subject have for some centuries taken the form of an imperfect mirror image of each other.[62] Just as a national legal system is seen to be bounded, powerful within a limited domain, authoritative, and representing an objective order of norms, so the legal subject is classically seen as a rational, autonomous, self-possessed agent with control over his life

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768-69 and 770-71. 'Derrida Himself' (to use Teubner's tongue-in-cheek capitalisation), emphasises the role of reiteration in the formation of 'Truth' which is not revealed, but made (over time, and by repetition).

60 In both ordinary and philosophical language, the 'subject' is not the same thing as the 'person'; 'subject' implies subjection to a system and names an entity which is constituted within a language and context, whereas 'person' generally denotes a more naturalistic biological entity – centrally, a human being. However, since in positivist legal language a 'person' is often regarded as technically a fiction or construct of law, I think it is fair to say that the two concepts are much closer in legal language than in ordinary language, though not necessarily identical. See Naffine, "Who are Law's Persons? From Cheshire Cats to Responsible Subjects" (2003) 66 *MLR* 346.

61 See, for instance, Watson, "Power of the Muldarbi, Road to Its Demise" (1998) 11 *A Fem LJ* 28; Brown, *States of Injury: Power and Freedom in Late Modernity* (1995), p.152; Thornton, "The Cartography of Public and Private," p.11, in Thornton (ed.), *Public and Private* (1995); Irigaray, *This Sex Which Is Not One* (C. Porter trans., 1985), pp.23–33; Kapur, "'A Love Song to Our Mongrel Selves': Hybridity, Sexuality and the Law" (1999) 8 *Soc. & L.S.* 353.

62 The classic example, of course, is Thomas Hobbes' *Leviathan*, an entity representing the unity of law and state in the image of a man.

and context.[63] The subject repeats in his or her own sphere the image of the sovereign law. Thus, the images of subject and system in the liberal positivist tradition are premised on an idealised, neutralised, sameness – while the content of the system and the social identity of the subject may vary, their basic characteristics are conceptualised in a highly stylised fashion.

Social and political theory has moved beyond the notion that human individuals can be reduced to a formal type. Not only are subjects differently located and differently constructed in culture, they are also internally fragmented – not entities but rather pluralities. If the (non-necessary) tradition of legal theory mirroring the subject in order to construct its image of law continues, it stands to reason that the idea of law must also be headed towards plurality rather than a singular identity. Of course, that is somewhat speculative, but there are other reasons for associating the plurality of subjects with the plurality of law. If we take seriously the socio-legal perspective that law is fully embedded in social discourse, should we not then ask how the subject (always plural) sees, experiences and creates law? This is not intended to promote a 'subjective' notion of law, but rather a notion which takes adequate regard of the fact that social subjects are plural and that law is created by interactions in social spaces.[64]

The concept of law as presently conceived by positivist legal theory is regarded as an objectifiable thing, a definition which can be applied to certain kinds of normative phenomena. The singularity of law is based on this presumption. However, at least since Eugen Ehrlich argued in favour of 'living law' in the early 20th century, it has been clear that law is fully social: law lives in the social sphere and is not just an institutionalised reflection or crystallisation of selected social forms. Law exists in the living relationships and contexts of everyday life.[65] Ehrlich differentiated such 'living' law from official law. A more contemporary statement of this might be that law is performative – it is the net effect of collective readings, practices, discourses, and inter-subjective relationships which subsist in social practice as well as in the semi-controlled environment of formal law.[66] In the late twentieth century, the multiple environments of culture, race, gender, occupation, class and religion which condition such relationships became highly visible to legal theorists and legal sociologists. If we look at law as a dialogue between subjects themselves constituted by plural and

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[63] Nedelsky, "Law, Boundaries, and the Bounded Self," in Post (ed.), *Law and the Order of Culture*, (1991). See also, Naffine, "The Body Bag," in Naffine and Owens (eds.), *Sexing the Subject of Law* (1997).

[64] Hannah Arendt pointed out that the tradition of political philosophy tended to erase the plurality of human existence. I think this is an important point also to be made in relation to legal theory. See, generally Arendt, *The Human Condition* (1958).

[65] Ehrlich, *Fundamental Principles of the Sociology of Law* (Walter Moll trans., 1962); Ziegert, "A Note on Eugen Ehrlich and the Production of Legal Knowledge" (1998) 20 *Syd LR* 108. See also, Stone, *Social Dimensions of Law and Justice* (1966), Ch.9 ("The Dependence of Law").

[66] See *e.g.* Barthes "The Death of the Author" in Barthes, *Image, Music, Text* (1984), pp.142-48, and 145-6.

contradictory cultural messages[67] then law also must be regarded as inherently, irreducibly plural.

In this vein Kleinhans and MacDonald argue that critical legal pluralism "twists traditional analyses of law and society inside out" because it "investigates how narrating subjects treat law."[68] Similarly, emphasising the repeated indeterminate interpretations and acts of symbolisation that constitute law, Desmond Manderson argues that:

> "The human dimension of misreading is necessary to any genuine pluralism, for it rejects the reification of 'law', 'system', 'culture', or 'community', as a thing which can think or read. Law is not manufactured by a 'multiplicity of closed discourses' precisely because it is only realised through the actions of human beings who exist simultaneously in several discourses and who are, therefore, themselves plural" [69]

In other words, rather than ask how a reified and singular 'law' sees subjects, we need to be able to see the plurality of socially-situated subjects and their relationships and tensions as the starting point for law.

Arguably, HLA Hart partially effected this move towards the (normatively constructed) subject's reading of law by thinking of the secondary rules of law, including the rule of recognition, as that held to be such by legal officials.[70] Hart's 'readers' of law were not members of the general community as this 'would involve putting into the heads of ordinary citizens an understanding of constitutional matters which they might not have'. Rather, according to Hart

> "The officials of the system may be said to acknowledge explicitly such fundamental rules conferring legislative authority: the legislators do this when they make laws in accordance with the rules which empower them to do so: the courts when they identify, as laws to be applied by them, the laws made by those thus qualified, and the experts when they guide the ordinary citizens by reference to the laws so made" [71]

It is unsurprising – since those in a position to 'recognise' law were those whose identities are the most closely defined by it – that Hart ultimately reinscribes an objectivist, and singular concept of law. Reflection of lawyer's law (rather than the multiplicity of ways in which the term 'law' is used) is predominant in *The Concept of Law*. As a result, the nexus between the image of law and the image of the rational subject of law (in this case the even more limited subject in the form of officials) remains unbroken by Hart's theory. Similarly, but on a larger scale, Dworkin's attempt to find a (partial) source of law in community values erases the plurality of persons

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67 See, Lyotard, *The Postmodern Condition: A Report on Knowledge* (1984), p.15.
68 Kleinhans and Macdonald, *supra* n.2; Cotterrell, "A Legal Concept of Community" (1997) 12(2) *Can.J.L. & Soc.* 75; Melissaris, *supra* n.2, at 75; Cover, "Nomos and Narrative" (1983) 97(4) *Harv.L.Rev.* 4.
69 Manderson, *supra* n.2, at 1064.
70 Hart, *supra* n.12, at 61.
71 Hart, *ibid.*

and their communities in the name of a single identifiable entity, the ideal judge Hercules.[72]

Why limit law to whatever is regarded as law by such a circumscribed élite or an idealised judge? Why not think of it as the accumulated readings, interpretations, and practices of plural subjects in dialogue with each other in the context of established conventions and texts? There are at least two ways in which we are plural: first, subjects are plural in their own self-identity; and second, we are all irreducible to every other subject.[73] There is an 'irreducible outness' between one subject and another in that no aggregative model of a subject will be satisfactory; it will merely be a reduction to the same of different embodied subjects who have commonalities but are in the end unique. If law is not different from the social 'context', but embedded in it as a materialisation of multiple socio-political interactions, it must also be characterised by this plurality or otherness between us all. The central point is not that each person has their own experience and idea of law,[74] but rather that conceptions and practices of law circulate in multiple cultural and subcultural discourses.[75]

Certainly some conceptions, practices, or interpretations of law are more powerful and more uniformly crystallised and institutionalised than others: in Western societies, state law as defined by legal 'insiders' is the entity typically vested with the profile of law per se.[76] The apparent separateness of this version of state law from alternative legal conceptions is, however, undermined by its social and inter-subjective origins. Both the status and the content of state law are reliant on cultural dynamics, and cannot exist prior to social engagement: the separation of state law from other forms of law is a construction of, and therefore secondary to, social relationships. Moreover, subjects as law-creating agents are not separately bounded by a single normative space but co-exist across spaces, and cross-fertilise their normative presumptions: even Hart's 'legal officials' recognising and constructing law are also the subjects of socially plural environments.

Conclusion

It is at this point that we see a convergence of the social and philosophical dimensions of the deconstruction of the inside/outside or law/non-law distinction. The meaning of law (like all meaning) is essentially a social and inter-subjective meaning. While not necessarily denying the social origins of the meaning of law, legal theory often erases the multiple social sites and the dynamic nature of the process of legal meaning-making. In my view, even an adequate description of law[77] needs an appreciation of both the plural preconditions for any singular account of law and the political nature of the

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[72] See, Dworkin, *supra* n.13.

[73] See also, Lugones, "Playfulness, 'World'-Travelling, and Loving Perception" (1987) 2 *Hypatia* 3.

[74] It is true that each person is uniquely situated in relation to law, but this does not lead to individual or 'purely subjective' conceptions of law (much less solipsism), as subjectively-held concepts are in part the product of shared social meanings.

[75] For some illustrations, see Santos, *Legal Common Sense*, *supra* n 18.

[76] See, Cover, *supra* n.68.

[77] Assuming that description which does not presuppose normative choice possible.

'acts of definition' which determine monistic views of law (such as the idea that law should be identified with state institutions and state will). 'Horizontal' accounts of law do not necessarily supplant traditional vertical accounts,[78] but they can arguably uncover the pluralities and possibilities inherent in existing notions of law. Such narratives move beyond the traditional legal philosophical distinction between 'is' and 'ought': they are at once descriptive and aspirational because they illustrate how the pluralistic 'non-legal' domain not only intrudes into, but is essential to the definition and the practices of conventionally defined law.

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[78] See, Lacey, *supra* n.15, at 158-62.

PERSPECTIVE, CRITIQUE, AND PLURALISM IN LEGAL THEORY

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Introduction

Theories of legal pluralism have not quite managed to persuade socio-legal theorists or, indeed, legal philosophers that legal pluralism can provide an attractive alternative to the way that the law is currently conceptualised or studied as a social phenomenon. On the one hand, it is yet to prove that it has enough explanatory force for understanding what the law is. On the other, it must also show that it has enough critical force so as to not fail to provide standards by which the moral value of non-State legal orders can be assessed.

I have elsewhere joined the critics of theories of legal pluralism on similar grounds. However, this did not lead me to abandon the idea of legal pluralism altogether. I, therefore, attempted to reconstruct the project of legal pluralism in a way that will lend to it both explanatory and critical potential. I have argued that "legal pluralism ought itself to be pluralistic"[1] and that legal theory ought to become more attentive to instances of the legal developing outside the State. Somewhat overstating the point, I argued that:

> "[O]nly when the legal commitment of clubbers who queue patiently at a bouncer's orders is treated as seriously as the legal commitment of communities with religious or other moral bonds will the pluralistic study of the law be able to move away from the essentially positivistic external study of groups to the study of legal discourses"[2]

In this article I shall try to explain and develop in this article. My aim is twofold: Firstly, I want to highlight the failure of legal theory to become aware of its pluralist potential by relying too much on the assumption that the law is necessarily associated with the State. Secondly, and in a rather programmatic vein, I make a suggestion as to what direction legal theory ought to take, in order for it to make sense of and do justice to legal plurality. I turn my attention from how law and legal pluralism can be conceptualised to the methodological question of legal theory. I shall start by highlighting the methodological flaws of current legal theory, which result from its choice of perspective, which sets limitations both to its descriptive and its normative potential. I shall then consider more closely Brian Tamanaha's account of a pragmatist socio-legal theory and argue that it is a promising path to take, but that it lacks critical force. Finally, I shall take an alternative methodological tack on socio-legal enquiry as inter-perspectival, practical, and critical, and

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1 Melissaris, "The More the Merrier? A New Take on Legal Pluralism" (2004) 13(1) *Soc. & L.S.* 57 at 75.

2 Melissaris, *ibid*.

argue that this shift of perspective can reorient the research programme of legal theory.

Methodology in Mainstream Legal Theory

There is little doubt that contemporary legal theory, at least in the English speaking world, owes much to and has been greatly influenced by the legal philosophy of H.L.A. Hart, who claimed to be offering a social theory of law, by describing his *Concept of Law*[3] as an essay in descriptive sociology. Anxious to stick to his analytical guns and locate semantics in use and context, Hart argued that is only with a sociological observation of how participants in the law speak and communicate about the latter that we can arrive at conclusions as to what the law is or, rather, what the law *is held* to be.[4] As is well known, a key distinction in Hart's theory is that between the internal and the external points of view.[5] The former refers to the point of view of the participants in a legal system, whereas the latter to the perspective of the observer. MacCormick qualified this distinction and tried to address the fact that Hart clearly failed to consider the possibility of understanding social behaviour through a process of *Verstehen*. To do this he distinguished between hermeneutic and volitional aspects of the internal point of view. The former is assumed by the observer, the social scientist, who understands what participants in a legal system do but does not share their commitment. The latter accounts, in the final instance, for rule-following.[6]

There are several problems with the Hartian internal point of view which I shall argue are symptomatic of a more fundamental shortcoming. First, by singling out the point of view of officials of a legal system, the question arises as to whether a social theory can be sustained when the attitudes of the majority of participants in a social phenomenon are consciously demoted to second class.[7] Moreover, it leads to circularity to the extent that officials, whose use of the concept of law is central, already embody a legal institutional fact.[8] Secondly, and more importantly for my purposes in this article, Hart seems to be conflating the perspective of the participant with that of the observer. In order to draw his image of law as the union of

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[3] H.L.A.Hart, *The Concept of Law* (1994, 2nd ed.).

[4] I am conscious of the fact that positivists, including Hart, have vehemently denied the charge of semanticism. Their defences are not entirely convincing not least because they have not yet told us what exactly their methodology is and to what extent they rely on (criterial) semantics, in order to "describe" the law. However, this is not a debate I want to enter in this context. I simply take as uncontroversial that positivism offers a description of paradigmatic cases of law from the external point of view. See, Endicott, "Herbert Hart and the Semantic Sting", p.39; and, Stavropoulos, "Hart's Semantics", p.59, in Coleman (ed.), *Hart's Postscript* (2001).

[5] The distinction permeates *The Concept of Law* and it informs Hart's theory of obligation, the autonomisation of legal systems through the Rule of Recognition, as well as his account of the task of legal theory.

[6] MacCormick, *H.L.A. Hart* (1981), pp.32-40.

[7] Fitzpatrick, The Mythology of Modern Law (1992).

[8] Kramer, "The Rule of Misrecognition in the Hart of Jurisprudence" (1988) 8 *OJLS* 401.

primary and secondary rules, he focuses on Western legal systems or, in any case, legal systems structurally resembling the one he was participating in as a former practicing lawyer and a teacher and researcher in a Law Faculty. Perhaps it would be too much to expect Hart to sever his theorisation entirely from his intellectual environment, which was marked by an adherence to "black letter law;" after all, the discipline of law had not then awoken from its 150 year-long lethargy.[9] The teaching of law was still vocational in orientation and focused exclusively on the systematic and largely uncritical study of statute and precedent.[10] Perhaps, then, it would be unfair to ask him to provide anything other than "armchair sociology".[11]

Irrespective of how much weight we place on historical and biographical explanations, Hart's sociological method cannot be defended theoretically. His analysis seems to kick off from the assumption of the universality of the form that the legal has taken in specific cultural and political contexts.[12] Thus, his point of departure is necessarily *a posteriori* as he seems to have already tacitly or unconsciously selected the cohort of legal systems which qualify as such and then goes on to single out their commonalities and conceptualise the law in an abstract manner. Hence, first, his "descriptive sociology" becomes very much prescriptive, to the extent that the criteria of inclusion in the concept of law is formed from an epistemic, third person perspective, which is merged with the first person point of view. Secondly, it does not describe but one form of law rather than paradigmatic cases of the *concept* of law.[13]

MacCormick's appeal to *Verstehen*, a suggestion which Hart accepted,[14] does not provide a way out. The trouble is that *Verstehen*, especially if it is coupled with Hartian conventionalism, which MacCormick tried to refine rather than question, meets an insurmountable limitation. Namely, the observer, who assumes the standpoint of a participant, can only learn what she already knows.[15] The hermeneutic attitude still maintains the distance between observer and observed and relies on the assumption that the states of the two parties are parallel, symmetrical and commensurable. In order for a Hartian legal sociologist to recognise legality, when she sees it, she will have to refer to those paradigmatic cases in order to see whether the *prima facie* normative phenomena that she observes fall under the core meaning of law,

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[9] Duxbury, "English Jurisprudence Between Austin and Hart", (2005) 91(1) *Va.L.Rev.* 1.

[10] Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (2004), pp.155-178.

[11] Penner, "The Current Debate: The Semantic Sting: 'Soft Positivism,' and the Authority of the Law According to Raz", Chap.10 at 442, in Penner, Schiff, and Nobles (eds.), *Jurisprudence & Legal Theory: Commentary and Materials* (2002).

[12] Coyle, "Hart, Raz and the Concept of a Legal System" (2002) 21 *Law & Phil.* 275.

[13] This point is made very convincingly by Brian Tamanaha, who tries to disentangle conventionalism, functionalism, and essentialism in Hartian jurisprudence, in order to formulate a project of positivist socio-legal theory. Tamanaha's suggestions are extremely insightful and important – more on them will follow later in this article. See, Tamanaha, *A General Jurisprudence of Law and Society* (2001), pp.155 *et seq*.

[14] Hart, *The Concept of Law*, (2nd ed. 1996), p.243.

[15] Abel, "On the Objectivity of Social Science", in Dallmayr and McCarthy (eds.), *Understanding and Social Inquiry* (1977).

or whether they occupy some place in a broader conceptual penumbra. But this method is bound to leave out a number of phenomena, which, seen from a different perspective, could be of a legal nature.

Moreover, this version of hermeneutic legal theory is stripped of any critical force in two senses. First, it is normatively inert. Positivists often reiterate the Benthamite argument that it is only prior knowledge of the law that can make law reform possible. Hart too was a moral pluralist, so we are told.[16] As far as he was concerned, the law was an objectively identifiable crucible of diverse and often contradictory moral attitudes. So, it is only in the presence of a common point of reference that discourse about the merit or demerit of the law can become possible. In other words, if you don't know what needs fixing, how can you fix it or even want to fix it in the first place?

The Benthamite argument rests on two fundamental presuppositions. Firstly, it assumes that it is possible to conceptualise the law without reference to its normative content. This is easily recognisable as the never-ending debate in the philosophy of law, but thankfully I do not need to delve into it in much detail here. Secondly, the Benthamite argument presupposes that the law is imposed from above and beyond the community of people, which thus consider it law. This dichotomy is spelled out by Austin, and, with a careful reading, does not seem to have been abandoned by Hart. Despite the fact that Hart located meaning in use and rules in the fact of convergence of behaviour, when it came to conceptualising the law, he shifted the focus from the community of participants to the officials of a legal system. The participants in a legal community accept as such what officials consider law, but they do not also have to accept it as morally sound law. It is thus that, on a normative level, law reform becomes always external to the life of the law itself. Within such a depoliticised law, not only does the possibility of change evaporate but the role of the legal theorist also becomes trivial. The critical toolbox available to the Hartian legal philosopher is depleted and she falls in a trap set by none other than herself. She is faced with two options. The first is to reduce herself to a spokesperson for those with authority to enact the law. The second is to give up on her ability to make any meaningful comments as a legal philosopher about the content of the law. In order for her to be able to raise claims of law reform, she will have to switch the hat of the legal theorist for that of the political or moral philosopher or simply that of an informed citizen running, of course, the risk of not being taken seriously as either a legal or a political philosopher. But this epistemological schizophrenia is neither a reality, nor do I expect any legal theorist to find it desirable.

The second significance of the dichotomy between those employing the term 'law,' and those whose opinion concerning its real meaning in fact counts, relates to the conceptual question of *what law is*. According to Hartian positivists, it is the legal philosopher who is assigned the task of discerning and describing the meaning of the terms employed by a linguistic community. However, by drawing this divide between users of the term and those who can decipher its meaning, Hartian positivism does not allow for the possibility of the changing of beliefs concerning the concept of law held either by the participants in a legal-linguistic community or, indeed, by the

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[16] Lacey, *supra* n.10, at 221.

legal philosopher. If they stand in a distance with distinct roles, neither can learn anything from each other.

Dworkin has taken issue with that shortcoming. He criticises positivism, along with theories claiming to be *meta*-ethical, for claiming to assume the external, Archimedean point of view.[17] This, he argues, is, first, impossible, because when entering a theoretical discourse about concepts such as law, equality, liberty and so forth, one inevitably raises substantive claims as to the content of those concepts. Second, it is an unattractive alternative, as the Archimedean point of view attitude makes for a legal theory which is morally and politically impoverished and, indeed, irrelevant.

Thus, Dworkin opts for a different methodology. He collapses the conceptual into normative analysis and argues that every legal theory cannot help being substantively engaged with its object of study and therefore offers interpretations which will shed the best possible light on the law. And through that interpretation, the concept of law, which is inextricably linked to its content, will be continuously revisited and clarified. Dworkin accepts that there is *some* differentiation between the law and other normative orders even in the very weak sense that we refer to some normative phenomena as law, whereas to others we don't. To the positivist objection that if there are no criteria that need to be satisfied in order for something to count as law in the pre-interpretive stage,[18] then we would be led to indeterminacy as anything could be law, the interpretivist response is that all we need to look for in the first instance is widespread *prima facie* consensus as to what constitutes law.[19] But what this response leaves unanswered is the logically prior question of why such consensus is present in the first place. Why does the linguistic category of law exist? It is only by asking those questions that we will be able to ascertain whether there is such a consensus at all.[20]

Look at Dworkin's purportedly uncontroversial thin concept of law as the justification of prior political decisions. Despite the fact that interpretivists play down the importance of this *prima facie* concept of law, it is of paramount importance and inevitably taints the rest of their analysis. Interpretivism is meant to be essentially pluralistic. Every interpretation is acceptable, but only the one which passes the relevant tests set by the political community will prevail. But this pluralistic attitude comes one stage too late, in that it already rests on an assumption of the uniformity and homogeneity of the political community. Interpretivism has already defined the community in political terms, without explaining how this transition from the moral to the ethical/political takes place, and then goes on to promote the

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[17] Dworkin, "Hart's Postscript and the Character of Political Philosophy" (2004) 24(1) *OJLS* 1.

[18] Raz and Dworkin, "A New Link in the Chain" (1986) 74 *CLR* 1103.

[19] Stavropoulos, *Objectivity in Law* (1996).

[20] As Frank Jackson points out, conceptual analysis is necessary at this very first stage, in order for us to single out the subject matter of our enquiry. See Jackson. *From Metaphysics to Ethics*. (1998). For an argument against normativism along the lines of Jackson's account of conceptual analysis see Rodriguez-Bl;anco, "The Methodological Problem in Legal Theory: Normative and Descriptive Jurisprudence Revisited, *Ratio Juris* (2006) 19(1) 26 and Rodriguez-Bl;anco, "Method in Law: Revision and Description" in Coyle and Pavlakos (eds.), *Jurisprudence or Legal Science?* (2005).

internal point of view as the only possible vantage point from which to observe the law. Thus the interpretivist precludes the possibility of there existing other conceptual schemes, in the light of which the same data about the world of concepts and objects might be ascribed different meaning without this entailing that all but one will be *necessarily* and *objectively* wrong. Dworkin takes a rather robust tack on metaphysical and moral realism in assuming that *all* beliefs about the world are commensurable on *all* levels, simply because there are *some* things, the meaning of which is determined by themselves alone rather than by our mental states in relation to them. Such a robustly realist methodology would perhaps be adequate from *within* a conceptual scheme[21] but it would certainly not allow us to even begin to examine whether there are other conceptual schemes out there. In the context of a social science, such as legal theory, this can be crippling and have long-reaching consequences. Whereas the Hartian objectivist claims to take the hermeneutic point of view and goes on to raise context-transcendent claims about the concept of law without realising that she merely projects her experience and beliefs about the legal onto other phenomena, the interpretivist opts for the internal perspective and assumes that it is all-inclusive thus losing sight of any alternatives.

Tamanaha's "Social Theory of Law"

Brian Tamanaha offers an insightful reworking of positivism as a conventionalist socio-legal theory. One of his starting premises is that positivist legal theory has not managed to shake off an essentialism as to the concept of law. This essentialism sets a yardstick of measuring the legal nature of various practices of rule following, and thus potentially leaves out of the picture instances of legality, although they are understood and referred to as such by participants in those 'laws.' Natural law (in all its manifestations), on the other hand, disregards the fact that the law is a social construction, a convention constituted by our linguistic rules, which ascribe the world of institutional facts its meaning. Once Tamanaha has laid out his critique of mainstream legal theory on the grounds of its methodology, he goes on to propose a way of capturing the concept of law by wedding conceptual and sociological analysis. He subscribes to the two main positivist theses, namely the *separation* and *social sources* theses, but qualifies them substantially and substantively. He extends the former so as to cover functionality as well as morality and modifies the latter as follows;

> "Instead of applying this thesis only to state law, it will be applied to all manifestations and kinds of law, including customary law, international law, transnational law, religious law, and natural law. Their specific shapes and features will not be the same as those discerned by Hart for state law, but whatever distinctive features they do have will be amenable to observation through careful attention to the social practices which constitute them. All of these manifestations and kinds of

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[21] I take this to be Hart's argument too, when he claims that Dworkin's theory may be applicable to specific legal systems but not the concept of law as such.

> law are social products. The existence of each is a matter of social fact"[22]

It is on that basis that Tamanaha formulates his conventionalist social theory of law. His fundamental thesis is that the attention of the socio-legal theorist (indeed, any legal theorist, as the sociological ought not to be divorced from the philosophical) should be turned to the way people speak about the law. He explicitly privileges the external point of view as the appropriate one and argues that whenever a *sufficient number of people* (and anyone is a candidate here, not just those assigned with an institutional task like Hart's officials) with *sufficient conviction* refer to a social practice as law, that practice automatically becomes an object of enquiry for the social theory of law. He acknowledges that this is a rather broad understanding of the law, which will probably upset mainstream legal theorists but this, he argues, does not reveal a problem with his suggestion but rather the inability of such theorists to abandon the colonising method of essentialism, which has haunted legal theory for a very long time. Finally, he portrays a conventionalist social theory of law as an essentially and substantively pluralistic one. Tamanaha argues that it addresses the problems of early sociological and contemporary anthropological theories of legal pluralism as well as the reductivism of functionalism and the vagueness of post-modern theories by abandoning the essentialism that haunts the former while still dissociating the concept of law from the state and by offering a criterion for differentiating the law from other non-legal social norms.

To be sure, Tamanaha is right to reject essentialism as methodologically and substantively flawed. And I would also agree with him on a number of other points. First, legal pluralism is a project of reconceptualising the law and it cannot be accommodated in and by the existing models of theorising the latter. Second, the way linguistic communities speak about the law should be taken seriously, in order for legal theory to be able to overcome its patronising and colonising tendencies. Third, Tamanaha is right in suggesting that sociological enquiry should not be kept separate from the philosophical study of the law, not least because the latter is by and large a social phenomenon (I hesitate to call it a social construction and I shall show later why).

So, Tamanaha convincingly addresses most of the problems of mainstream legal theory which I singled out above. However, two interrelated problems persist and do not allow his 'social theory of law' to get off the ground. First, it is not clear what the aim of that social theory of law is. Tamanaha subscribes to a pragmatist approach to social enquiry and states the objectives of the social theory of law as follows;

> "[To] keep a close eye on what people – legal actors and non-legal actors – are actually doing relative to law, and to discover and pay attention to the ideas that inform their actions. These ideas, beliefs, and actions give rise to law, determine the uses to which law is put, and constitute the reactions to, and consequences of, law"[23]

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[22] Tamanaha, *supra* n.13, at 159.
[23] Tamanaha, *ibid*, at 165-66.

At the same time, he insists that the law has no essence beyond the linguistic conventions and practices constituting it. Still, he argues that it is, of course, possible, and indeed necessary, to differentiate between uses of the term 'law' which are relevant for a general jurisprudence and those which are not, such as the law of nature, laws of grammar and so forth. The criteria of the distinction, however, are loose and intuitive rather than strict rules of usage. That aside, any other use of the word law meeting the minimum semantic conditions, in which Tamanaha includes authority as the source of rules, are acceptable as proper uses of the word law.

So, why bother? What will the socio-legal theorist gain from that enquiry? At best, she will have some more rough information as to what various communities refer to as law, which she will map in a necessarily inconclusive and indeterminate manner. But, If she has already given up on the possibility of there being a trans-contextual concept of law, one that can be formulated and grasped irrespective of the instances of its application, there is little point in engaging in that enquiry, as there seems to be very little to be learned from such cataloguing. In fact, by setting a threshold beyond which certain practices count as law-relevant-for-jurisprudence, Tamanaha already concedes that there are *some* semantic criteria which pre-exist and, indeed, guide social enquiry into the legal phenomenon. He unconvincingly attempts to play down those criteria by arguing that they only reveal a very loose and vague *prima facie* content of 'law,' making a substantive and contested suggestion as to what the minimum content of law is by including authority in it. In other words, Tamanaha implicitly accepts that the point of socio-legal enquiry is clarification of the concept of law, a vague picture of which is already accepted by the socio-legal theorist and guides her enquiry.

This brings us to the second shortcoming of Tamanaha's suggestion. If there can be no overarching concept of law, all the various phenomena which are experienced and referred to as legal by the participants in the respective communities will be incommensurable with each other. This means that the socio-legal theorist will not be able to question the legal nature of the practices which she observes. With no yardstick available to her, she will have to accept the beliefs of the observed as true knowledge. Similarly, she would be unable to use that new data in order to question her own beliefs about *her* concept of law. In other words, the socio-legal theorist is deprived of any critical faculty. Any attempt at criticising a conception of law will in turn always be open to the critique of essentialism and paternalism. Indeed, the problem becomes ever more acute when one thinks that the law is essentially normative, a fact which Tamanaha seems not to take very seriously when he discusses the law as a practice virtually indistinguishable from other social practices. Could it be that various 'laws' can be commensurable on the normative level but not on the conceptual? Could a socio-legal theorist claim that a rule of a different 'law' is right or wrong, while at the same time maintaining that it is impossible to judge it as law? Such a claim could not be justified simply with recourse to the separation thesis but would rather disclose a selective realism about the world along the following lines: whereas some concepts, such as moral rightness or wrongness, are objectively identifiable, concepts such as 'law' do not have a trans-contextual existence. But, one who raises such a claim also has the onus of proving that there is such a difference between various concepts, which accounts for their different modes of existence. Not only does

Tamanaha not set this task for himself but, on the contrary, he tells us explicitly that his pragmatist social theory of law sets an argument against any kind of transcendentalism, moral or conceptual;

> "First, it [pragmatism] insists that any normative arguments based upon an alleged special insight into the Absolute are based on a false claim; secondly, it suggests that what counts when determining which normative assertions we should accept is whether, when acted upon, the assertions result in consequences we find desirable; thirdly, it reminds us that the best way to determine whether the consequences are desirable is to play close attention to the facts of the matter"[24]

There are various problems with this supposedly impartial and substantively thin pragmatism, such as the entailment of a clear-cut distinction between causes and effects, actions and consequences, as well as observing and being observed, which is far from uncontested. But, what I want to highlight for the purposes of this paper is that it is just as critically inert as Hartian positivism, as it does not allow for practical communication between different perspectives.

Inter-Perspectival, Critical Legal Theory

What can be kept from the analysis so far? Firstly, that mainstream legal theory fails in making any cogent claims as to the concept of law because it is riddled with methodological problems. In promoting either the internal or the hermeneutic points of view, that is the first or third/first person perspectives, as the only useful ones for observing the law, it fails to form a spherical view of the concept of law. Secondly, I agreed with Tamanaha that essentialism ought to be abandoned in favour of a methodology which will pay close attention to the views of participants in legal discourses in the light of the charity principle.[25] Thirdly, and this time *contra* Tamanaha, I argued that abandoning essentialism does not entail giving up on the possibility of critique. Gettier has shown us that justified beliefs do not necessarily constitute knowledge.[26] This does not necessarily clash with the charity principle. Not discarding what participants in a legal community believe to be law based on our essentialist preconceptions concerning the concept of law does not entail that those beliefs are necessarily true. By the same token, it does not mean that *our* beliefs of what the concept of law entails are necessarily true either. The combination of the two principles yields the following result: if law is, indeed, a concept and not simply a practice of social control, then there must be some thin description of it, which can serve as a basis for critique but also communication between various legal communities. Then, the question turns back to the methodological problem. How is it possible for legal theory to renounce essentialism and take a pluralist turn, while, at the same time, retaining its critical potential?

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[24] Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law* (1997), p.246.

[25] Davidson, "Radical Interpretation", reprinted in *Essays on Actions and Events* (2nd ed. 2001).

[26] Gettier, "Is Justified True Belief Knowledge?" (1963) 23 *Analysis* 121.

I would suggest that the pragmatism which Tamanaha advocates is a promising path to follow, but only if qualified so as to allow for a trans-contextual, thin concept of law and coupled with an intersubjective, discursive attitude towards social enquiry. In other words, the first and third person perspectives should give their place to the second person point of view. This is how James Bohman puts it;

> "[The] second-person perspective has a special and self-reflexive status in criticism. It is within this perspective that the social relationship of critic and audience is established in acts of interpretation and criticism. Such dialogical relations employ practical knowledge in the normative attitude, that is, knowledge about norms and the normative dimensions of actions and conditions of success. It is knowledge of the normative from within the normative attitude. As the attitude of the second-person interpreter, such practical knowledge is manifested in interaction and in dialogue and proves itself in terms of the success of dialogue and communication: in the ability of the interpreter to offer interpretations of the normative attitudes of others that they could in principle accept"[27]

This multi-perspectival social enquiry is inspired by Jurgen Habermas' discourse theory and the pragmatic slant given to it by Thomas McCarthy. Its central aim is to do away with the main shortcoming of idealism, namely the illusion that there can be a grand, all-encompassing social theory, which can adequately, sufficiently, and uniformly explain all social phenomena. At the same time, it aspires to remain critical and allow for the possibility of falsification of beliefs concerning what are our practices consist in. The first and third person perspectives are still useful but only as *prima facie* indications of what those practices consist in or what, indeed, they may mean. However, as I argued above against Tamanaha's suggestions, the plethora of possible interpretations brings the social scientist to an impossible epistemological position. She will either have to resort to extreme relativism or reconcile with the arbitrariness of her decisions.

The way out of that dilemma is to see social enquiry as a practical venture. That entails her entering into discourse with the participants in the practices which she observes, in order to start a process of self-reflection and justification under conditions of equal participation. Thus, the social theory will rid itself of the delusion of superiority, the Archimedianism that Dworkin argues against, while at the same time remaining committed to the possibility of theory. Inter-perspectival social enquiry makes the social theorist part of the social universe rather than a mere observer, whether it be an external one or one participating with a pretence of objectivity. All beliefs and practices, including those of the social theorist, are put to a constant test and they are always open to substantive intersubjective criticism and revision. The aim of social enquiry is, thus, not to find practices which fit

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[27] Bohman, "Participants, Observers, and Critics: Practical Knowledge, Social Perspectives, and Critical Pluralism", p.106, in Rehg and Bohman (eds.), *Pluralism and the Pragmatic Turn: The Transformation of Critical Theory (Essays in Honour of Thomas McCarthy)* (2001).

predetermined concepts, or to judge the effectiveness of the means and worth of ends from the external point of view, but rather to kick-start a process of self-reflection, which will result in the refinement of everyone's conceptions of their practices, a better mutual understanding and the regulation or, rather, co-ordination of the pluralistic universe by letting surface the loose connections between beliefs and conceptions facilitated by a thin metaphysics.

Let me explain, then, what consequences this inter-perspectival, intersubjective attitude has and how it can mark a turn for critical and pluralistic legal theory.

As Tamanaha also argues, the divide between legal theory and socio-legal theory is false. Inter-perspectival legal theory is necessarily sociological to the extent that it focuses on an examination of all instances of legality. At the same time, it is philosophical to the degree that it formulates general hypotheses about, and constantly revises, the thin and a-contextual concept of law.

The difference of that kind of legal theory to what seems to be the norm in Western legal discourses is striking. One can single out at least three distinct focal points in Western legal theory broadly conceived as any kind academic discourse about the law. First, there is the receding yet still prevalent discourse on State law often referred to in a derogatory vein as "black-letter law". Most legal commentators are preoccupied with following legislative and judicial practice, interpreting it in the light of the requirements of systematicity and, occasionally, putting forward normative claims as to the correctness of new law or court judgments. This kind of legal theory seems to have very little time for either a philosophical or a sociological study of the legal. Second, legal theory in the narrow sense, that is legal philosophy or jurisprudence, has still not managed to break free from the natural law–positivism debate. Most legal philosophers, although by no means all, are too busy locking their horns over the law and morality question. The debate is philosophical in nature and borrows heavily from metaphysics, philosophy of language, and moral theory. Thus it often becomes almost oblivious to law's necessarily social texture, treating it as another concept in the process of analysis rather than a reality which should somehow be observed and taken seriously. In the margins of that debate, critical legal theory, including post-modern and feminist legal philosophy, focuses on criticism of the presuppositions of mainstream legal theory and seeks to highlight the irresolvable tensions in the law as manifestations of its political genealogy and embarrass the law and mainstream legal theory by disclosing the fallacy of their claims to universality. However, very rarely does critical legal theory become aware, and try to rid itself of, its self-undermining aspiration of integration. While it highlights and criticises the imperialism of State law and its tendency to violently exclude the Other, when critical theory moves beyond criticism its aim seems to be the recognition and acceptance of the Other's point of view by State law.[28] On the methodological level, critical theory does not seem to have not managed to wed the sociological and the philosophical either. Legal sociological projects either take for granted a

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[28] Costas Douzinas speaks of the *nomophilia* of critical legal theory. See Douzinas, "Oubliez Critique" *(2005) 16 Law and Critique* 47.

State-centred concept of law, they stretch the concept so as to include all forms of social control or deny the relevance of any philosophical enquiry.[29]

Interperspectival social legal theory is well equipped to avoid these potholes. It combines the philosophical and the sociological in a substantive and organic way. Its focus is on the sociological exploration of how various communities employ legal language and engage in discourse with them in order to assess the rightness of their linguistic and normative practices. *Prima facie* indications of the legal nature of such discourses are provided by the concepts, terms, and practices that participants show a commitment to. This obviously entails active, empirical sociological research. At the same time, the starting point and the outcome of enquiry and discourse are both practical and philosophical, to the extent that they are based on a loose and thin conceptualisation of the law, which is shared trans-contextually and, indeed, is necessary for discourse to be possible at all and they result in the refinement and qualification of that conceptualisation of the law.[30]

Concepts, terms, practices, and beliefs should not be bought into wholesale simply by virtue of them being employed by a community, as Tamanaha suggests. They should form the point of departure for a practical discourse concerning the truth of participants' beliefs and the justification of their actions. Thus it will be possible for them to reflect on their practices as well for the legal theorist to review her beliefs concerning the concept of law. But this does not mean that there is one right answer to everything or that, if all-encompassing convergence and consensus are not achieved, only one of the competing beliefs will be true or right. The point of socio-legal enquiry is not to expand and establish "law's empire", to colonise other legal discourses with one context-specific interpretation under the pretension that it is possible to integrate the plurality of *nomoi*. On the contrary, the aim is to bring to the surface that plurality and maintain and nurture it without, at the same time, painting a picture of the world as disjointed and therefore meaningless as a whole. And this should be the task of all legal theory and not only philosophy of law narrowly conceived. *Every* instance of theorising about the law should take an interperspectival, critical turn and test the concept of law as well as concepts within the law discursively against the beliefs and communicative inputs of participants in other linguistic-legal communities. Thus, those concepts will be clarified through the identification of their context-determined limits.

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[29] A typical and extreme, example of this fallacious attitude is, Leith and Morison, "Can Jurisprudence Without Empiricism Ever be Science?", p.147, in Coyle and Pavlakos *supra* n.20, where the argument seems to be more than just that the analytical legal theorist should do a little more empirical work than simply think about the law in an armchair, in order to see how the concept is employed. The claim that the authors seem to raise is that empirical work is prior to, more important than, and unconnected to any kind of conceptual analysis. If this is the case, then the fact that legal practitioners, the socio-legal theorist or, indeed, anyone who speaks about the law, actually manage to refer to the same data and communicate meaningfully about them must be nothing but a miraculous coincidence.

[30] I discuss this in more detail in, Melissaris, "Diversity and Order in the Legal Universe: Robert Cover and the Philosophical Groundwork of Legal Pluralism", *Issues in Legal Scholarship* (*forthcoming*, 2006).

The point has been made forcefully by critical theorists that institutionalised law cannot accommodate pluralism. The law codes its functions, fixes the meaning of concepts and the content of norms in a way that excludes alternative interpretations, worldviews, and normative universes. Institutionalised law cannot be attentive to the other without assimilating the latter or sacrificing some of its own integrity because of its historical and political baggage. This realisation often leads critical theory to despair thus exhausting itself in critique, which understandably makes its critics rejoice and accuse it of nihilism. Inter-perspectival, intersubjective legal theory offers a solution. The metaphysical and normative relative closure of the concept of law is one of its fundamental premises but it does not allow that closure to disable it or limit its scope as a practical, critical venture. On the contrary, inter-perspectival legal theory *becomes* the forum of politicised, practical discourse about the legal and its content. Dworkin is correct in not accepting any difference between conceptual and normative analysis in the context of law. Every utterance about the law is a substantive one concerning its content and everyone speaking about the law engages in legal theory in one way or another. However, Dworkin is wrong in reserving for State law the special role that he does as the forum of principle, in which the right answer on *all* questions will shine, because institutionalised law is necessarily univocal. The judge *is* a legal theorist, but not one who can assume the third or second person perspectives so as to understand the communicative inputs of all of the participants in institutionalised legal discourse. The legal theorist outwith the institutional confines of State law has that ability to realise that hers is only one perspective in the discourse concerning the law.

Thus, the distinction between legal pluralism and legal monism collapses. *All* legal theory ought to be pluralistic. Otherwise, it simply *is not* legal theory but rather a first-person account of intra-systemic coherence. Inter-perspectival, intersubjective socio-legal enquiry cancels out the distinction between legal pluralism and legal monism, which various theorists have been focusing on for so long. Legal pluralism ceases to be just another socio-theoretical strand or school, and legal centralism ceases to be legal theory at all. Every methodologically sound theorisation about the law is conscious of the plurality of its object of study, which is symmetrical to the plethora of ways of theorising the legal. The point of legal theory is the critical, discursive testing of tentative concepts of law, the self-reflection of every legal theorist and legal community on their practices and preconceptions and the establishment or re-affirmation of a thin and indeterminate common metaphysical and normative point of reference. Of course, a central question remains open. Can legal theory feed that knowledge, which it will acquire through inter-perspectivism, critique, and self-reflection, back into State law? With the current institutional arrangements, it is rather doubtful but, in any case, this is not a question that can be addressed in this context.

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.

PLURAL CORPORATE PERSONS: DISPLACING SUBJECTS AND (RE)FORMING IDENTITIES[1]

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"I hope we shall take warning from the example and crush in its birth the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country"[2]

Introduction

Theories of legal personality have been impoverished by a need to distinguish humanity from its effects (by distinguishing entities, by maintaining reality for the human and fiction for the non-human, or by reducing the congeries of narratives of legal personality to a collection of artefacts of 19th century individualist philosophies). In response, it is proposed that we eschew these self aggrandizing theories and engage with a different story: a story which arises out of a pluralist (and narrative) approach to subjectivity and personality.

This paper takes as its starting point both a rejection of prevailing approaches of the nature of legal (corporate) personality and an assumption that critical legal pluralism is an analytic through which this personality may be better examined. Heuristically, critical legal pluralism is not an end, but a means of disruption of hegemonic state law and its progeny: law's plurality commands this disturbance of corporate personality.

It is my contention that law is created, contested, and adjusted through the narratives of its subjects, a fundamental presupposition of critical legal pluralism, and that subjectivity is best understood through the lens of narrative. By applying the insights of critical legal pluralism to a conceptual enquiry into legal subjectivity (personality), I suggest that we may find new and different answers to some of the questions which have been plaguing us.

By turning our attention to the innumerable subjective narratives that abound, different answers are presented to questions of the attribution of rights and responsibilities to legal subjects. It is through the very nature of subjectivity, as narrative, that the myriad modes of being and becoming blossom. Adjusting our lens to focus upon the narratives of legal (corporate) persons produces an awareness of the constellation of normativities in which these subjects participate and which they concomitantly create and construct. The aim here is not to resolve these inter-normative conflicts. Rather, it is

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[1] Thanks are owed to the many readers whose comments have been greatly appreciated and, especially, to: Davina Cooper, Margaret Davies, Carl Stychin, Sally Wheeler, Chris Hilson, Martin McGann and the anonymous reviewer of the *NILQ*.

[2] T. Jefferson, "Letter to George Logan, (12 November 1816)," p.42-3, in Ford (ed.) *The Works of Thomas Jefferson*, Vol. XII (1905).

hoped that by examining the negotiation of normative boundaries that we begin to see the prism-like nature of personality; so that through our investigation of the plural corporate person, we may see the political purchase which the form allots to the "other", apparently "non"-legal subject.

To many, the claim that theories of corporate persons have something of consequence to contribute to debates about nationality and expressions of identity would seem strange. However, as mentioned above, the taxonomy of persons and subjects of law is not limited to those whom we commonly refer to as individuals. In what follows the issues of cultural belonging and identity will be examined through the lens of the corporate legal person. The possibilities that reside in this legal person for the affirmation and, indeed, creation of new narratives of nation and citizen abound, and compel an encounter with existing structures of political institutions. In what follows, I shall further explore how we might begin to think about narrative subjectivity and critical legal pluralism with specific regard to the paradigm case of the legal person: the incorporated company. Accepting that narrating, by its very action, brings forth subjectivity, it becomes incumbent upon our theoretical journey to include within its scope an exploration of the spatio-temporal dimensions of these narratives.[3] Spatially, narrating requires a site from whence the narration is said to come (often, but not necessarily, given the form of a narrator); temporally, narratives achieve significance with regard to their chronological referents in terms of both duration and instance. mode. Through an analysis of two particular examples of incorporated company, I shall distinguish various positions of these narrative subjects which transgress the boundaries of the hermetically legal as well as the moments in which and through which they transcend the traditionally singular law of the state. In a sense, these subjectivities claim their normativity outside the State, but express the plural legality within the State-created corporate person.

In terms of space, I suggest that a first mistake is to misunderstand the myriad composite sites (bodies and artefacts) upon which corporate narratives are inscribed. Anthropomorphizing the legal entity leads us astray: we see the company as a schizophrenic person and not as the multiple-sited person that it narrates.[4] We proceed from an initial linguistic

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[3] By addressing both the spatial and temporal dimensions of narratives of legal personality, I hope to address, in some way, the criticism levelled by Blomley and Bakan that "[l]aw as it is presently constituted is indeed highly spatialized. While struggling to make sense of the complexity and ambiguity of social life, legal agents – whether judges, legal theorists, administrative officers, or others – represent and evaluate space in various ways. When we start looking, we discover that such representations are abundant and varied, touching all aspects of legal and social life, such as property, crime, contractual relations, and so on. The construction of such spaces can be seen, for example, when legal actors designate boundaries between public and private spaces, make decisions concerning the autonomy of local government actors, or consider questions of personal mobility or spatial equality." Blomley and Bakan, "Spacing Out: Towards a Critical Geography of Law" (1992) 30 *Osgoode Hall L.J.* 661.

[4] Joel Bakan describes the corporation as a "psychopathic institution" in, Bakan, *The Corporation* (2004). For a discussion of the role of schizophrenia as a limit in the production of an identity see Guattari and Deleuze, *Capitalisme et schizophrénie* (1980), at 42 *et seq*. Deleuze and Guattari argue that the production of an identity

premise of corporality to the creation of corporate bodies upon which narratives are inscribed and dissected. Instead of heeding the wisdom that the company has "no soul to damn, no body to punish,"[5] we proceed as if it has both and that both are brought together into a unidimensional and univocal legal person.[6] But if the space of the inscription of narratives is unitary, the spaces into which subjectivity is being projected must, in their turn, break down unitary conceptions of territory, space and law. We see this latter point in the increasing recognition of the plurality of the corporate person in stakeholder debates as the space of governance is expanded to include within the legally recognizable and responsible, myriad previously ignored subjects (for example, employees, local communities, the environment).[7]

In terms of time, Blackstone stated that legal persons "enjoy a kind of legal immortality."[8] These legal persons "hereafter exist", and become "one person in law, a person that never dies: in like manner as the River Thames is still the same river, though the parts which compose it are changing every instant."[9] Although the time of the narrative is one of continued duration (along a timeline), the serendipity of narrative is due to the flux, the changing/movement and passage, of narrative's time.[10] I contend that

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(and the concomitant "lines of flight" that are entailed by such production) risks collapsing either from the overwhelming ("fascist") paranoia that represses all into an over-determined, unitary oneness or from the chaotic explosion of schizophrenia.

5 The actual quote is, Blackstone, *Commentaries on the Laws of England [:] A Facsimile of the First Edition of 1765-1769*, vol. 1 "Of the Rights of Persons" (1979) at 464-465: "a corporation can neither beat, nor be beaten, in it's body politic . . . Neither can a corporation be excommunicated; for it has no soul."

6 One example of the univocality of the legal person is evident in recent debates about corporate governance; here, the univocal nature of corporations is attributed unthinkingly as parties to the debate argue about the role that boards of directors *inter alia* should play in responsibly governing corporations. Such debates neglect or obscure the often myriad voices emanating from the corporation and is subject to a related critique by Deleuze about the exclusion by dominant powers of minority voices, Deleuze and Guattari, "Qu'est-ce qu'une littérature mineure?," pp.29-50, in *Kafka [:] pour une littérature mineure* (1975).

7 See, *e.g.* Wheeler, "Works Councils: Towards Stakeholding" (1997) 24(1) *J.Law & Soc'y* 44; Payne and Calton, "Towards a Managerial Practice of Stakeholder Engagement: Developing Multi-stakeholder Learning Dialogues" (2002) 6 (Summer) *J.Corp.Cit.* 37; and Ireland, "Corporate Governance, Stakeholding, and the Company: Towards a Less Degenerate Capitalism?" (1996) 23 *J.L. & Soc'y* 287.

8 Blackstone, *supra* n 4, at 455.

9 *ibid*., at 456.

10 But let us go back (or perhaps forward) in time, for a moment, to delve into some articulations and machinations of "time" and its relation to narrative subjectivity. Paul Ricoeur argues that there are two "types" of time in every story (time as flux and time as duration). We have the story as something that both endures and which moves and passes. To support this conclusion, Ricoeur draws on Augustine's differentiation between human time (*tempus* - the instability of the human "now" – this is the moving and passing of narrative time in Ricoeur) and divine time (*aeternitas* - the stability of the divine "now" – Ricoeur's enduring time) (P. Ricoeur, *Time and Narrative*, trans. K. McLaughlin and D. Pellauer, 3 vols. (Chicago: Univ. of Chicago Press, 1984-1988), especially vol. 3). There is a piece missing from Ricoeur's story, however. Through an analysis of, and

narratives of corporate legal subjects purport to articulate positions within and outwith time: an apparently impossible task as they stand within the subjective time of narrative. Recent examples of how the actuarial subject can be variously constructed through accounting procedures and financial period manipulations point to the corporate subject as one of duration and flux.[11] These subjects may, then, step further afield in their attempt to inject a third notion of time into the narrative they recount. Indeed, differences arise in the manner in which legal subjects contemplate their own mortality, either through death or winding up.[12]

Concomitant with an inquiry into the spatial and temporal positioning of the legal person, we need to ask where and when these subjects belong? How corporeal is the corporation when stretched across territorial limits to span the globe? What is the character of the temporal existence of the legal person if it is not indeed mortal? The present article addresses the spatial positioning, concentrating upon corporate narratives of nationality, citizenship and belonging.[13]

Displacing Identities and Lacking Recognition?

Through the vehicle of the incorporated company, the State imposes its own form of cultural and personal identity, one that is often mistaken for a mere economic emanation of political expediency.[14] Notwithstanding its various ideological facets, it is generally accepted that this legal branding of personality is reserved for associations with economic purposes, thus cleaving the political from the economic with purposive justifications.[15] Indeed, in communication with their State-creator, corporations appear as merely those aspects of their identity that concern their instantiation as economic progeny of the State. A wealth of commentary has challenged this schism either by demonstrating how corporations have over-stepped their economic boundaries to invade political spheres, to both adverse and beneficial ends,[16] or arguing that they have a social responsibility that forces them across these borders.[17]

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extrapolation from, Middle Age Averroist debates about the Aristotelian doctrine of the "eternity of the world," I suggest that the creation of the corporate legal person is an attempt to introduce what I call an "angelic time" into subjectivity: a time with movement and a type of mortal infiniteness, because even the corporate subject is finite.

11 See Miller and O'Leary, "Accounting and the Construction of the Governable Person" (1987) 12(3) *Accounting Org. & Soc. J*. 235 for an explanation about how accounting techniques contribute to the construction of well-governed corporations.

12 Wheeler, "The Corporate Way of Death" (1996) 7(2) *Law & Crit.* 217.

13 Taking the discussion to the temporal realm and exploring further the secular and divine modes of the corporate legal person to reveal the multilayered temporal mode which the corporate person projects is incumbent, but it is a discussion which goes further beyond the already broad scope of this paper.

14 Gamble and Kelly, "The Politics of the Company," in Parkinson, Gamble, *et al.* (eds.), *The Political Economy of the Company* (2000).

15 Micklethwait and Wooldridge The Company: A Short History of a Revolutionary Idea (2003).

16 See, *e.g.* Klein, *No Logo: No Space, No Choice, No Jobs, Taking Aim at the Brand Bullies* (2000); Glasbeek, "Why Corporate Deviance Is Not Treated as Corporate

These more recent critiques of legal persons re-present the problematic inherent in the political use of the corporate form. As a type of economic association established and reinforced by the State, the corporation possesses a form which tends to conceal its own political identity from its creator. This is not to say that the corporation is not imbued with its own political identity; indeed, many examples exist of political groups taking advantage of the advantages afforded by the corporate form.

I would be remiss if I didn't draw to attention the ways in which the corporate form can be used to promote political ends. We have, indeed, seen for a long time now the overt use of corporations by so-called "political action" or "social movement" organizations (SMOs). One group which has gone even further (but, by no means the only one) is Greenpeace (the originally Canadian environmental and animal rights activist group from British Columbia born out of the Quaker tradition of bearing witness and a commitment to making "a green peace").[18] Now an international concern, Greenpeace has adapted its structure to one of a group of companies and, thus, mimics that of large multinational corporations: Greenpeace International (GI) is one company incorporated in the Netherlands and having its head office in Amsterdam.[19] The remit of this corporation is one which concentrates on fundraising and membership, rather than direct activism.[20] Its sister-companies across the world (for example, Greenpeace Canada, Foreningen Greenpeace Norden, Greenpeace (UK) Ltd.) are separately incorporated entities in the countries/regions in which they are

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Crime: The Need to Make 'Profits' a Dirty Word" (1984) 22 *Osgoode Hall L.J.* 393; Bakan, *The Corporation* (2004); Tomkins, "Happy Birthday Globalisation" (May 6 2003) *Financial Times* 14; and, Greenwood, "Review of *Corporate Power in Civil Society, an Application of Societal Constitutionalism* by David Sciulli" (2001) 11(5) *L. & Pol. B.Rev.* 249.

[17] See, *e.g.* Wheeler, *Corporations and the Third Way* (2002); Wheeler, "An Alternative Voice In and Around Corporate Governance" (2002) 25(2) *U.N.S.W.L.J.* 556; Aaronson and Reeves, *Corporate Responsibility in the Global Village: The Role of Public Policy* (2002); Parkinson. "Corporate Governance" (1999) *IALS Company Law Seminar Series 1999-2000*; Cheffins, "Corporate Governance in the United Kingdom: Lessons for Canada" (1997) 28 *C.B.L.J.* 69; and Payne and Calton, *supra* n.6, at 37.

[18] For a detailed history of the organization from its beginnings as a "crew of bickering environmental activists" to its present instantiation as "a global monolith," see Hunter, *The Greenpeace to Amchitka: An Environmental Odyssey* (2004).

[19] An excellent account of the fears that this shift has inspired amongst Greenpeace's Vancouver progenitors can be found in Weyler, *Greenpeace: How a Group of Ecologists, Journalists, and Visionaries Changed the World* (2004). Weyler tells a tale of how some veterans of the original Greenpeace campaigns chip away at the international monolith whose annual budget now stands at $243 million.

[20] Greenpeace International does do work of an indirect nature through negotiations and engaging in general lobbying efforts, especially in Europe, with governments and corporations to further the organization's goals of exposing global environmental problems and campaigning for a "green and peaceful future" (see, for example, recent deals with major food retailers to halt the deforestation for the expansion of soya farming in the Amazon). But the international corporation does not work on direct action campaigns, leaving these to its worldwide offices.

operative.[21] A license agreement between Greenpeace International and the individual companies (often called "national offices," even though many traverse national and state boundaries) binds the latter to guarantees that essential principles are jointly observed, (for example, the principles of non-violence, public utility, strict independence of state, party political and economic interests and orientation towards global protection of the environment).[22] It is these regional companies (the "national offices") which undertake direct action campaigning and which, as a result, have their assets targeted, inter alia, in civil action suits. The reason for this structuring by Greenpeace was purely pragmatic and merely reflected the very successful use of the benefits of corporate personality it had observed amongst many of it adversaries.[23] By setting up group company structures Greenpeace has been able, for example, to stave off many of the deleterious effects of asset seizure, especially following court judgements against them in jurisdictions that are decidedly unsympathetic to Greenpeace (for example, Norway's treatment of Greenpeace Nordic in civil action suits has been to impound the latter's vessels and seize all property thereon, whereas Greenpeace UK has been subject to much less harsh penalties in the United Kingdom).[24] These differences lead to different campaigning strategies and sometimes strained relations as between the different companies when collaborative work is required.[25] But these difficulties are accepted as inherent in a corporate structure of the organization which staves off many greater harms from its political opponents.

One might object here that after the myriad attempts above to direct attention to the political stories of corporate persons and away from the merely economic ones, we have fallen back upon the economic (of course, the objectives of Greenpeace are political but the justifications behind its

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[21] In accordance with company law in the Netherlands (where Stichting Greenpeace Council – Greenpeace International is incorporated), Greenpeace International compiles and presents combined financial statements for all their "national offices", but as independent companies/corporations in their respective regions, each organization is independently audited and accounted for within their region as required by regional state regulations on accounting practices.

[22] Günther, "Greenpeace und das Recht," 62-83 at 74, in Greenpeace (Hrsg.) (ed.), *Greenpeace-Buch: Reflexionen und Aktionen* (1996).

[23] A further benefit to this constellation of organizations is the ability of Greenpeace (International and "local") to appeal to those highly-valued qualities of transparency (in terms of the auditing and publication of its accounts) and democracy (in terms of the style of control of the executive bodies of the various companies). See, for example: *ibid*.

[24] For a different gloss on the way in which political activist organizations use the corporate form, I would draw the reader's attention to the use in Canada of two different corporate bodies representing Greenpeace: Greenpeace Canada and Greenpeace Quebec. The strong political discourse for the province of Quebec being a "distinct society" from the rest of Canada (for reasons of language and cultural distinctness *inter alia*) was recognized by Greenpeace as requiring a corporate commitment to the politics of the country and stills finds separate offices with separate political agendas for these two organizations within the same country.

[25] Furthermore, recent Greenpeace campaigns have become embroiled in internal political fighting often seen as a conflict between "those activists on the ground" and "the corporate bureaucrats."

corporate restructuring were economic). It is perhaps easier to pass comment upon how the multi-national-style structuring of Greenpeace helps it to protect itself against its "enemies", than it is simply to justify this structure as helping Greenpeace to project a global image for its political activities, projecting a narrative of a unitary global action group which, as it happens, is legally structured to provide local interpretations of this worldwide narrative.

But the claim made is not that the corporation is not imbued with its own political identity. However, when approached from a question of the addressivity of these corporations by the State, it becomes apparent that their self-styled political objectives do not form the basis of the relation between the State and these persons. Thus, in communication with their State-creator, corporations appear as merely those aspects of their identity that concern their instantiation as economic progeny of the State.[26] My objective is not only to demonstrate the slippages between discourses but also to reflect upon the under-utilized possibilities of narratives of corporate personality as being enabling, and forming one aspect of a constitutive and positive restructuring of the typical story of state-dominated power relations. Thus, instead of focusing on the addressivity by the State of these subjects, my interest as a critical legal pluralist begins with the ways in which legal subjects narrate "new" corporate persons and address, disturb and disrupt state law, with a discourse outside of this latter.

The aim of what follows is to recount a double-process of deconstruction, through both internal and external forces, of the legal person. This narrative, woven as it is through the fabric of political identity and personality, explores the complexities of the contestation between the notions of belonging or citizenship, and the State and its institutions.

Displacing Subjects or (Re)forming Identities

I begin this story by reflecting on the way in which aboriginal nations have used limited liability corporations, structural forms adopted originally to facilitate the disbursement of monies from state governments to communities ("development corporations"), as an expression of a strong national identity, and I evaluate the success and failures of some of these same nations in their subsequent negotiations with the State. Going beyond a mere use of the corporate form for political ends, corporation and nation become contemporaneous and codeterminant, giving rise to questions about how

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[26] For a discussion of how, for example, the terms of the economic discourse preclude the entry of political questions, see, Teubner. "Introduction to Autopoietic Law," pp.1-11, in Teubner (ed.), *Autopoietic Law: A New Approach to Law and Society* (1987); or in the language of systems theory: "long term structural linkages of sub-system specific structures and legal norms are set up. . . The important effect of structural linkage is that it restrains both—the legal process and the social process—in their possibilities of influence," Teubner, "Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?," p.3, in Joerges, Sand, *et al.* (eds.), *Transnational Governance and Constitutionalism* (2004).

legal personality is being re-written in these novel relations with the State-creator.[27]

To begin, the questions addressed here may appear banal from the point of view that they have no direct impact on the welfare of individual indigenous persons, nor indeed on any person who finds herself on the battlefield of rights, so-called "human." Or, in other words, it does not seem readily apparent why public lawyers and specialists in the (socio-legal) affairs of aboriginal or indigenous people should turn their eye to these aspects of private (corporate) law, but it is indeed my claim in what follows that they should.

Monolithic State Law Effaces "Its" Subjects

Without too much repetition of what was stated, we have seen for some time now the expansion and increasing presence of corporations (multi-nationals and others) on the political landscape. We hear in constant refrain today cries of concern that the State is ceding its powers to these immense structures of limited liability companies. Indeed, some authors have gone so far as to conclude that the presence and actions of the former have impoverished and weakened the State to such a degree as to have adversely effected both national State and UN abilities to deal with the myriad human rights abuses rampant across the world. Law finds itself constructed, created, manipulated and revised in these corporate hands with in-corporate form.[28]

Contorting Deleuze's insight, I suggest that we have "organs without bodies" on the political landscape and these constructions, creations and manipulations are produced by appeals to this discourse of corporate personality, which most have occasion to rely upon on a daily basis as an anthropomorphized association which stands distinct and far above the individual. Indeed, the stories recounted most commonly about the use of the corporate form for indigenous or aboriginal groups as some sort of political representation used to achieve recognition of their community, identity or to provide possibilities for legal land claims tend to pessimistically conclude that any use by such groups of the State legal apparatus of corporate legal personality will either have no effect other than an adverse one upon their objective of recognition (either of their identity as nations, or "other," or even of their legal rights); or, further, will undermine the very originality and

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[27] As a counterpoint, I would suggest that a recent project establishing a new European business vehicle: the *Societas Europaea* is similarly reformative, within the contours of a European "State." This new European corporation, as a new European person, puts into question the very nature of the ties between nation and person when personality is re-written with a supranational quality and forces interrogation of the relevance of these new legal persons to an agenda of European citizenship. An exploration of this project within the contours of critical legal pluralism is an obvious next step.

[28] See, *e.g.* Deva, "Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should 'Bell the Cat'? (2004) 5 *Melbourne J. Int. Law* 37.

difference of these groups by subsuming them within the purview of the incompatible, logocentric liberal state narrative.[29]

Reflecting upon the lack of success of one such project, Peter Fitzpatrick decries how

> "[n]othing more readily reveals the native as the projection of an irresolution in occidental identity itself than the hysterical and aggressive response of the colonist to the impertinent *évolué* who successfully takes on civilized abilities, denies deep or intractable difference, and thus exposes the fragility of imperial rule at its seemingly confident core. What the response to the *évolué* reveals is that the imperial project was, however, decidedly less about a bringing into the fold of civilization and definitively more about a creation and containment as different."[30]

To make his argument that the colonial situation provides "a terminal fracturing of law in its two integral dimensions" of responsiveness and determinacy,[31] Fitzpatrick narrates the story of the Tuki ni Buka, a development corporation set up by the people in part of the area of Papua New Guinea most generally known as Bougainville. The corporation was just one in a series which followed the apparent successful example of a company set up by the Tolai people of East New Britain and called the New Guinea Development Corporation. These development corporations were "usually initiated by established or aspiring leaders and they involved the participation of the members of some large 'traditional' grouping" and Fitzpatrick's role was that of a government consultant sent, first, to evaluate the use of these development corporations and, second, to facilitate the

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[29] Very little has been written about the specific incidence of the use of corporate forms by aboriginal or indigenous groups for either political representation, but the incidence of these corporations is proliferating as various legal regulations and treaties require that negotiating bodies be incorporated into state law. Examples of legislation which is reserved for aboriginal or indigenous group incorporators (in Australia) include the *Pitjantjatjara Land Rights Act 1983 (SA)*, the *Aboriginal Land Rights Act 1983 (NSW)*, and the *Aboriginal Councils and Associations Act 1976* (Cth). In Canada, various treaties and agreements have required First Nations and Inuit bands to incorporate so-called development corporations, for example: *The James Bay and Northern Quebec Agreement 1975*, *The North-eastern Quebec Agreement 1978*, *Nunavut Land Claims Agreement Act (1993, c. 29)*, and *Cree-Naskapi (of Quebec) Act (1984, c. 18)*. For a detailed analysis of the use of the corporate form under the *Aboriginal Councils and Associations Act 1976* (Cth). by aboriginal groups in Australia in order to make land claims, see: Mantziaris and Martin, *Native Title Corporations : A Legal and Anthropological Analysis* (2000); Mantziaris, "The Dual View Theory of the Corporation and the Aboriginal Corporation" (2000) 27(2) *F.L. Rev.* 283; and, Mantziaris and Martin, *Guide to the Design of Native Title Corporations* (1999); see also *contra*, Fingleton, "Back of Beyond: The Review of the *Aboriginal Councils and Associations Act 1976* in Perspective" (1997) *I.L.B.* 35.

[30] Fitzpatrick, "Magnified Features: The Underdevelopment of Law and Legitimation," pp.157-76 at 162, in Pardo (ed.), *Morals of Legitimacy: Between Agency and System* (2001).

[31] *ibid.*, at 164.

creation of one particular company: the Tuki ni Buka.[32] In the same way as the colonial situation necessitated the extension of law "into new found worlds" and the violent establishment of "a determined order," so too were the people of Buka island brought into law's order through their subjection to law, more specifically, through the subjection of their organizational structure and community being to the legalities of corporate formation.[33] The dominance and violence is not, at first, readily apparent. Indeed the State appears initially to be responding (and responsible) to these new corporations:

> "The State provided various forms of 'assistance' and loan capital and the law was administered somewhat more sensitively and supportively. The orientation of the law was turned more towards the recognition of 'traditional' ways, not only by providing for the incorporation of some groups organized on a 'customary' basis but also by enshrining respect for 'traditional' ways in the new national Constitution."[34]

But the support and assistance are, at best, short-lived and, at worst, disingenuous strategies of Law and her progeny. As the corporate formation of the Tuki progressed, legal opposition become more pronounced albeit in a more discreet form.

> "[A]lthough officialdom had perforce to be compliant to a degree, it was not as compliant as the story of the formation of the *Tuki* would so far suggest. Opposition of an outright kind would provoke adverse political reaction and so it took more unspectacular forms which just as effectively brought the *Tuki* within the determinate demands of the law."[35]

Through the intricacies of corporate law the limits of law's responsiveness were revealed: the Registrar of Companies disallowed the use of the term "tuki" in the corporate name because of its latent sexual symbolism, Buka terms for the offices and functions of people in the Tuki were to be translated into English, and instead of maintaining a structure which reflected Buka emphasis on trust and responsibility in and of corporate leaders, the Registrar imposed the more common model of "barely accountable, modern, directorial power" which, ultimately became the Tuki's downfall.

Indeed, the responsive vision of the State's endeavour to facilitate development corporations for the people of Buka island fits seamlessly into the project of the "analytical distribution proper to power" which Michel Foucault documents so painstakingly.[36] There are several superficial similarities between the techniques of incorporation and the techniques of power as described by Foucault: the meticulous recording of all events/meetings/correspondence, the monopoly on information by an elite few, the vulnerable visibility of the subject and the unrevealing invisibility of

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[32] *ibid.*
[33] *ibid.*, at 160.
[34] *ibid.*, at 163.
[35] *ibid.*, at 163-64.
[36] Foucault, *Surveiller et punir : naissance de la prison* (1976), at 196.

the legal experts, and the sense in which the reality of the subject is reshaped by the recorder of that reality into a truth accepted by its unknown audience. Upon reflection these seem to imply that the incorporation of legal personalities has the potential to become a powerful means of producing realities unwanted by, and foreign to, the very subjects of incorporation.[37]

Hence, Fitzpatrick's indictment is fierce. Law as state law fails both itself and as a mechanism of political resistance

> "This deathly disregard of the other marks one extremity of legal determination. It could, in one way, be seen as the apotheosis of legality, its perfected achievement. Here is law, supposedly, in its full determinative force. It has no responsive regard for its subjects, or objects, who are, to borrow Maine's and Bagehot's definitive descriptions, 'caught . . . in distinct spots', 'stationary societies' forever 'stopped' in their development. Lacking a responsive dimension, lacking any vibrant connection to what is beyond its immediate determinations, the laws of imperialism inexorably fail."[38]

Indeed, the inability of state law to recognize the aboriginal "other" is a claim that finds many supporters amongst contemporary theorists.[39] Peter Goodrich provides yet another example in his analysis of a land claim by the Haida Indians in the Queen Charlotte Islands and argues that the court in that instance was bound not to recognize the Haida claims, shrouded as the claimants were in their full ceremonial dresses and masks, unaccompanied by lawyers, and armoured with tellurian mythologies, traditional poems and heroic songs that, for them, demonstrated beyond any doubt their ancestral claim to the land.[40] Goodrich contends that the court had no choice but to refuse to accept a mythology that seemed to clash with its own, logocentric system. Any comparison between the logocentrism of state law and the aboriginal mythologies and images, Goodrich suggests, would raise

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[37] *ibid.*, at 194.

[38] Fitzpatrick, *supra* n.27, at 162.

[39] Examples of similar claims are found in: Torres and Milun, "Translating Yonnondio by Precedent and Evidence: The Mashpee Indian Case" (1990) *Duke L.J.* 625; Padgett, "The Lost Indians of the Lost Colony: A Critical Legal Study of the Lumbee Indians of North Carolina" (1997) 21 *Am. Indian L.Rev.* 391; Campisi, *The Mashpee Indians: Tribe on Trial* (1991); and, Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (1983). In the case of *Delgamuukw* v *R. in right of British Columbia* (1991) 40 D.L.R. (4th) 685 (B.C.S.C.), opening statements and claims for the Gitksan and Wet'suwet'en were made in full ceremonial dress and aboriginal concepts of evidence, history government and argument were presented. But these were contrasted with European understandings and anthropologists were called upon to support their claims about comparison with analogous European concepts and terms. Tully, *Strange Multiplicity : Constitutionalism in an Age of Diversity* (1995), p.132; and, GisdayWa and Delgamuukw, *The Spirit in the Land* (1992). Indeed James Tully argues that by focusing on the struggles of aboriginal peoples, "unnoticed aspects of its historical formation and current limitations can be brought to light," *op. cit.*, at 4. Further support for this approach can be found in, Webber, *Reimagining Canada: Language, Culture, Community and the Canadian Constitution* (1994).

[40] Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (1990) at 179 *et seq*.

questions of the self, of what it is that the court represents, which can be entertained only by undermining the basis of state law itself. The court would have to undertake a description of the legal system (a "self-description") which would be able to accommodate not only non-verbalised claims but also surprises, unaddressed expectations, circular perceptions and fluctuating binaries – that is, something totally alien to that which it projects as its very being.

Both Fitzpatrick and Goodrich provide similar arguments which, appropriately, sound warning sirens about the discourse of "recognition," and although each is different in intention, they agree as to ultimate effect: *viz*. the aboriginal "other" is not recognized and the State continues its existence unaffected by that which is outside its language or under its control. For Fitzpatrick, "the imperial project [is] decidedly less about a bringing into the fold of civilization and definitively more about a creation and containment as different."[41] The power to recognize or not the Buka people and respond to their differences as more than mere "secular savage" resides in the hands of the anthropomorphized State and consists in absolute domination of the aboriginal "other." The result of this imposed and enforced relation of power (that is decidedly unequal in its practice) is a failure of the legal edifice to reach the heights of its self-defined glory of responsiveness and trust. Goodrich is less exalting in his description of law. For him, state law just is intrinsically bound to clash with that outside of its logocentric realm, not because of an urge to dominate and secure command, but because of an inherent fatal flaw. However, Goodrich also relies heavily on an anthropomorphized State: one who's "self" is at risk and one which protects, as all "selves" do, its flaws by rejecting that which is exterior and threatening to its "being".

Both critiques, however, fail to take full account of the concept of power conceptualized by Foucault.[42] Fitzpatrick and Goodrich present tales of an omnipotent State which has or possesses a dominating and domineering power which the Buka and Haida do not. While Fitzpatrick provides a story which overtly reveals both "heterogeneous" facets of modern power as described by Foucault: as "a right of sovereignty" and as "a mechanism of discipline," this account is still found lacking. As a relational concept, power cannot merely be referred to or relied upon as an absolute domination or a zero-sum game,

> "Power is mostly relational [. . .] Even in the most unequal situations of relations of power, those subjected to power do exercise some choices, however limited."[43]

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[41] Fitzpatrick, *supra* n.27, at 161.

[42] I use the term "conceptualized" loosely here as Foucault, in fact, refused to define concepts like "power," but I hope that the brief, broad, brushstrokes provided of his project help challenge the limits of these corporate practices as top-down, legal colonizing ones with no room for the emergence of any other narratives beyond those of state law. For an excellent "mapping" of Foucault's work, see, Darier, "Foucault Against Environmental Ethics," pp.217-240, in Darier (ed.), *Discourses of the Environment* (1999).

[43] Darier (ed.), *Foucault and the Environment: Eco-Discourse, Environmentality and the Self* (1997) at 17.

Indeed, Fitzpatrick tells how the Tuki's ultimate failure is defined by its loss of funds through their investment in an ill-fated foreign venture (and one avoidable under the Buka's construction of the Tuki). As the failure is one constructed by and defined from the point of view of the State-created corporation (losses, not profits), Fitzpatrick neatly avoids any discussion of possible, albeit limited, successes that may have resulted (for example, the way in which the myriad factions or groupings came together under the umbrella of the Tuki). The critical edge of both Fitzpatrick's and Goodrich's arguments is not dulled by an acceptance of a broader normative field in which the power of the Buka and Haida may also find expression. "To know and understand the narratives of our *nomos* opens space for shifts: both in the shape of the narratives, and in their direction."[44] Surely, it is partial and imperfect successes, not incomprehension and utter failures of understanding, that typify the practices of recognition and its critique.

Moreover, one can but query that to which theorizing of this ilk condemns political action and resistance in these arenas. Critiques which take no account of the relational aspect of power must have deleterious effects upon just those whose activities are meant to be encouraged (albeit in a different direction). To argue that activists working toward greater recognition by state law of aboriginal "others" are labouring in ignorance or under some sort of false consciousness of a determined state of humanity[45] merely helps reinforce the apparent sovereignty of state law.[46] We must now turn toward the question of whether law, writ large by a critical legal pluralist perspective, suffers the same fate.

Corporate (Re-)forms: A Renaissance of Nations and Citizens through a Pluralist Legal Perspective?

To provide comparison, I would like to move forward in time and change place, to note how both variables contribute irrevocably to changes in the resistance provided by the corporate form. The setting for the example which follows is one in which an apparent systemic latitude necessitated the

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[44] Buchanan and Johnson, "The *Unforgiven* Sources of International Law: Nation-building, Violence, and Gender in the West(ern)," in Buss and Manji (eds.), *International Law: Feminist Perspectives* (2005). This sentiment is echoed in Hutcheon, *The Poetics of Postmodernism* (1987) at 13: "The very limitations imposed by the post-modern view are also perhaps ways of opening new doors."

[45] Engels, "Letter from Engels to Franz Mehring, London, July 14, 1893," in Ryan (ed.) [trans. Torr], *Marx and Engels Correspondence* (1968).

[46] I owe Ruth Buchanan my gratitude for bringing this point to my attention with regard to the work of many First Nations, activists and attorneys to put forward land claims in the Canadian province of British Columbia further to the Supreme Court decision in *Delgamuukw* v *R. in right of British Columbia* [1997] S.C.J. No. 108. Critical academic commentary in a seminar on the effects of *Delgamuukw* was spent entirely on the casting of doubt on the possibility of any First Nation being able to put forward a successful claim under the terms stipulated. The workshop was interrupted, however, by a lawyer and member of one of the First Nations in the territory of British Columbia who expressed his sincere hope that all the academics were wrong as he had spent the better part of several years, with the prospect of several more to come, on constructing just such a claim; and his clients joined him in a reserved, but optimistic, hope for success. Interview with R. Buchanan, (Vancouver, B.C.: September 2004).

specific corporate organization of some First Nations in the territory of the Canadian province of Québec. A landmark court decision in 1973, following a legal challenge by the Cree and the Inuit involving the James Bay hydroelectric project, marked an important stage in this evolution. Here the foundation was laid for the social, economic and administrative organization of a large segment of Québec's aboriginal people. Negotiations between the Government of Québec and the Cree and Inuit nations led to the signing of the James Bay and Northern Québec Agreement[47] in 1975, the first of its kind in Canada. It was a quality of economic pre-requisite in the system of negotiations between Quebec, Canada and the Cree and Inuit which required the latter to form into development corporations in order to implement the agreement.[48]

The James Bay and Northern Québec Agreement (JBNQA) recognized the rights and privileges of the Cree and Inuit living in northern Québec. Under the agreement, the Cree and Inuit relinquished their land claims on the region in exchange for absolute title to lands, monetary compensation and a body of rights related, among other things, to hunting, fishing and trapping, to health and education, to local administration, to the environment, and to social and economic development.[49] As a comprehensive claims settlement, they were to receive $225m in compensation from the Canadian and Québec Governments over a 10 year period beginning in 1975. The battles which led to the signing of the JBNQA took place on many fronts: legal battles were fought simultaneously with fights for public favour. The historical struggle between Quebec and Canada for the former's independence had shifted from the overt (yet "Quiet"![50]) revolution of the 1960s; the tension between separatists and federalists took on a public political face and the battle shifted to focus on, inter alia, improving provincial economic fortunes through mining and other mega-projects which took advantage of the myriad resource "discoveries" made in the province in the 1950s. Politically, the federalist Liberal Party of Quebec used their period of power to nationalize

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[47] 11 November 1975 (JBNQA).

[48] An overview of the JBNQA and development in Quebec is available in: Scott and Feit, *Aboriginal Autonomy and Development in Northern Quebec and Labrador* (2001).

[49] The JBNQA provides specifically that: "the James Bay Crees and the Inuit of Quebec hereby cede, release, surrender and convey all their Native Claims, rights, titles and interests, whatever they may be, in and to land in the territory and in Quebec, and Quebec and Canada accept such surrender" (s.2, 2.1) for which, in exchange, the territory subject to the agreement is divided into three categories: Category I (of which the Crees have 2,158 sq. mi.; the Inuit 3,130 sq. mi.) which are set aside for their exclusive use and the development of these lands is in the control of these nations; Category II (of which the Crees have 25,230 sq. mi.; the Inuit 35,000 sq. mi.) comes with the grant of an exclusive right of hunting, fishing and trapping, but do not provide any special right of occupancy, allowing Quebec to appropriate for development with the *proviso* that lands be replaced or their loss compensated to the Cree and Inuit nations; and, Category III which includes all lands not included in the previous two categories, general access to these lands is provided in accordance with provincial legislation and regulations concerning public lands (JBNQA, ss.5 & 7).

[50] See: Dickinson and Young *A Short History of Quebec* (2003) at 305-345 for a description of this period of massive social change in Quebec history between 1960 and 1969.

the province's electricity and begin a massive hydroelectric project in the James Bay area and instigated the claims of the Inuit and Cree against the province[51] which ultimately resulted in a period of two years of negotiations culminating in the JBNQA.[52] Indeed, it has long been claimed that the role played by the Canadian government in securing the JBNQA on the part of Quebec was instrumental in the subsequent support provided by First Nations in Quebec to the federal government against any move to separate the province from Canada.[53]

At the time the JBNQA was ratified, there were few formal Inuit or Cree organizations in the province, as is evidenced by the fact that the judicial actions were undertaken by chiefs on behalf of their bands and not by any group. But one of the primary effects of the JBNQA was an immediate increase and presence of Inuit and Cree institutions. Some of these organizations were required by the JBNQA for the disbursement of the vast sums of monies to be paid to its various aboriginal signatories. It is to a brief reflection on two of these development corporations that we now turn.

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[51] This announcement galvanized aboriginal peoples in the region, especially the Cree, into legal action opposing the development. In November 1973, the Quebec Superior Court granted an injunction halting the development based on claims that the development would violate Aboriginal rights and culture. (*Le Chef Max "One-Onti" Gros-Louis c. La Société de développement de la Baie James* [1974] R.P. 38.) Although the injunction was suspended one week later by the Court of Appeal (*La Société de développement de la Baie James c. Chef Robert Kanatewat* [1975] C.A. 166), it was clear to all parties that such a development could not proceed on a wholesale denial of Aboriginal rights. (Rynard, "'Welcome In, But Check Your Rights at the Door': The James Bay and Nisga'a Agreements in Canada" (2000) 33 *Can.J.L.Sc.* 211 at 215).

[52] The JBNQA was implemented federally by the *James Bay and Northern Quebec Native Claims Settlement Act* S.C. 1976-77, c. 32 and provincially by the *Act Approving the Agreement Concerning James Bay and Northern Quebec* S.Q. 1976, c. 46. The parties to these agreements have since signed numerous complementary agreements which deal mainly with additions or modifications to works provided for in hydroelectric projects and measures to mitigate environmental and social impacts.

[53] Grand Council of the Crees, *Sovereign Injustice, Forcible Inclusion of the James Bay Crees and Cree Territory into a Sovereign Quebec* (1995) at 171-217. Prior to the 1995 referendum on independence in Quebec, the James Bay Cree, the Inuit of Nunavik, and the Innu each held referenda. In every case, over 95 per cent of those voting rejected being separated from Canada without their consent, Sheppard, "The Cree Intervention in the Canadian Reference on Quebec Secession: A Subjective Assessment" (1999) 23 *Vt.L.Rev.* 845 at 851. The Inuit held a similar referendum at the same time as the 1980 referendum on independence in Quebec: Grand Council of the Crees, *op. cit.* at 317. The Inuit "have on four occasions, in four separate referendums, overwhelmingly expressed their desire to remain within Canada and not to allow themselves or the territory of Nunavik to be separated from Canada by a unilateral declaration of independence by Quebec": *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 (Factum of the Intervener Makivik Corporation at para.2) [Makivik Factum]. See also *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 (Factum of the Intervener Grand Council of the Crees (Eeyou Estchee) at paras.8-9) [Cree Factum].

The Makivik Corporation and the Grand Council of the Crees (Inc?)

The Makivik Corporation was created in 1978 pursuant to the signing of the JBNQA, of which it was the recognized Inuit signatory party. As a development corporation, Makivik oversees the disbursement of funds it receives pursuant to the JBNQA through Inuit development in the territory of Nunavik. Inuit peoples have inhabited this territory, comprising almost a third of the land falling within the province of Quebec's borders (660,000 km2) for more than 4,000 years. There are no road links to Nunavik (all travel to and from the area is accomplished through air or maritime links and is thus subject to great seasonal fluctuations). There are over 9,200 Inuit living in Nunavik (in fifteen different communities, one of which is a bicultural Inuit/Cree community) and each Inuit, as a Nunavik resident, is a member of the Makivik Corporation. Makivik was incorporated as a non-profit organization owned by the Inuit of Nunavik. The corporation restricts the transfer and issue of shares to members ("local persons") and these members decide upon leadership following democratic structures with which we are all more or less familiar.[54] Each member has one vote and shares in the company are held by individuals directly. Makivik's corporate structure is composed of sixteen elected members of the board of directors (with a five member elected executive), and five appointed Nunavik Governors. All of the former (directors and executives) are elected by the Inuit residents of Nunavik; the Governors are appointed by the Executive Committee and the Board, and act as the Elders Council. Makivik's central mandate is the protection of the integrity of the JBNQA and the corporation's work focuses on the political, social and economic development of the Nunavik region.

Although similar in pedigree, the evolution of the Cree organizations took a slightly different turn. The Grand Council of the Crees (GCC) was created and in 1974 during negotiations between the Cree (or Eeyouch) and the Québec and Canadian governments. In concert with its corporate partner, the Cree Regional Authority (CRA), the Grand Council distributes the funds received under the JBNQA to the Eeyouch in the territory covered by the agreement (comprising one-sixth of the land falling within the province of Quebec's borders, or 344,854 km2). There are over 14,000 Eeyouch living in eastern James Bay and Southern Hudson Bay in the territory of Northern Quebec (in nine different communities, one of which is a bicultural Inuit/Cree community) and each Eeyouch, as a resident of this area, is member of the CRA and has an equivalent right to vote in GCC elections.

What is different from the Inuit example of Makivik is the structure of the organizations in play. The Cree Regional Authority was set up as the so-called "administrative arm" of the Cree government and the Grand Council of the Crees was the political organization (the latter, in fact, is generally

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[54] This structural form of enterprise in the region is, however, in stark contrast to the sharp separation between ownership and control envisaged in the classic Berle-Means corporation. Indeed, the corporate form, under the *Canada Business Corporations Act* or the *Quebec Corporations Act*, has not been found to be the dominant form of enterprise in a recent Social Science and Humanities Research Council (SSHRC) research project based in Quebec, *per* Richard Janda, McGill University.

recognized as the Cree government and the CRA as but one aspect of its work, in much the same way as the James Bay Development Corporation is a corporation carrying on the work of the provincial government in the area of the hydro-electric project). They are different organizations with different goals, but, interestingly, not so dissimilar upon further inspection: the directors of both corporations are the same and the titles slip quickly from Grand Chief to Chairman or Deputy Grand Chief to Vice-Chairperson. The Grand Council of the Crees has twenty members: a Grand Chief (Dr. Ted Moses) and a Deputy-Grand Chief (Paul Gull) who are elected at large by the Eeyouch people, the chiefs who are elected by each of the nine Eeyouch communities, and one other representative also elected from each community. Thus, the board of directors of the Cree Regional Authority consists in its Chairman, a Vice-Chairperson and eighteen directors (that is, the chiefs and other representatives). This overlap extends beyond mere facility, however, as we shall see below.

(Re-)Developing National Corporations

Colonial law is now seen to transcend its previous denial of legal personality and instead requires the adoption of its mantle for recognition by the colonial State: to receive compensation monies provided for by the JBNQA, the colonized people must adopt the form of organization prescribed by the colonial State. Laws relating to economic organization which had previously been more or less strictly applied as against the colonized become more malleable in their response to new forms of organization required by these agreements. The element of political and economic leadership has become prominent, and even predominant, with development corporations, frequently providing a base for leaders to emerge at the national (and international) level, as we shall see.

My question does not centre on whether or not colonial law's recognition of the legal personality of aboriginal groups entails a reversal of its previous denial of same to the aboriginal peoples within its claimed space. Rather it is the other, national, subjects that have been constructed within/by these corporations and which have been projected out into a state normativity to provide conflict which fascinates me. Indeed, in work in the area, one cannot help but "bump up against" these new subjectivities and normativities.

One of my first encounters with these subjects came at a conference to which I was invited a few years ago at the Maison du Québec in London – the offices of the official government of Québec in London (the "Delegation") – during which the issue of the "pluri-national" character of Quebec was to be debated by and amongst Québec governmental representatives, and representatives of aboriginal nations. While the discussion centred upon the image of the Québec government as the province being a nation of nations, this was but a small part of the interesting features of the day. More intriguing by far was the way in which the participants self-identified, the way in which they presented themselves to everyone. Representatives of the aboriginal nations present introduced themselves in terms of the relation to the communities they represented as well as with their titles derived from the status as executives of the development corporations. So, participants from business, government and academe met the President of the corporation of The Grand Council of the Crees as well as its Grand Chief of the Eeyouch

(Ted Moses); and we met Pita Aatami, President of Makivik Corporation and leader of the Inuit of Nunavik.

What I am trying to expose here are the slippages between discourses, but I am also suggesting that these slippages are perhaps not unintentional and decidedly not without strategic effect. In fact, possibilities are opened up by and through the legal person to assert narratives of previously ignored subjectivities and normativities. This is evident even more through an examination of the corporate aims and objectives of these corporations.[55]

The Makivik Corporation, for example, has as its object: "To receive, administer, use and invest the compensation money intended for the Inuit, as provided for in the James Bay and Northern Québec Agreement." Up to here all is well: a corporation was created to deal with fiscal matters arising out of the JBNQA. But this was not at all how the representatives (re-)presented either the corporation or themselves. Rather it was in terms of leaders of an autochthonous nation during conversations at the Delegation. Nor were the Québec governmental representatives alone in the slippage of discourse between corporation and nation, the Makivik and Cree delegates played on both plains. Moreover, if we examine the respective corporate documents, we rapidly note that the objects of the corporations could easily describes the aims and goals of a nation (its constitution), among aims to economically develop the region are other, decidedly national ones, including:

- To relieve poverty and to promote the welfare, advancement, and education of the Inuit.
- To foster, promote, protect and assist in preserving the Inuit way of life, values and traditions.
- To develop and improve the Inuit communities and to improve their means of actions.
- To initiate, expand and develop opportunities for the Inuit to participate in the economic development of their society.
- To share with the world our vision of our nation.

Indeed, it cannot go without note that the Cree and Inuit of Québec are the only First Nations in Canada to have pushed their development corporations so close to their respective political organizations.[56] Ironically, one might suggest that the overt colonizing acts of Robert Bourassa's government in building "La Grande Hydro" (the James Bay Project) had a double-effect which has provided Québec First Nations a previously absent ability to exert their own sovereignty. The success of these sovereignty claims is undeniable. After a period in the 1990s, the Cree Regional Authority and the Grand Council of the Crees placed strong emphasis on building an apparently

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[55] Indeed, Annual Reports of the Cree Regional Authority contain statements from "Grand Chief Ted Moses" and "Deputy Grand Chief Paul Gull" but not from either a Chairman or a Vice-Chairman.

[56] The Naskapi of Québec, however, have started to show signs of adopting this strategy. Arguably, First Nations residing in other provinces have been hampered by different political hurdles which have not succeeded in any successful claims (against provincial or federal governments).

unitary Cree nation from amongst the myriad communities in the territory. This nation building project resulted in the election of Chief Ted Moses as Grand Chief. With his expertise in discourses of sovereignty and his international accreditation as an expert on indigenous human rights (Moses was a founding member, with Rigoberta Menchu, of the Indigenous Initiative for Peace), negotiations were re-opened between the Grand Council of the Crees and the provincial government of Québec with regard to the status and claims of the former as a sovereign autonomous nation. These negotiations have culminated in the signing, on 7 February 2002, of the historic La Paix des Braves[57] agreement between the Eeyouch and the Québec government which proclaimed the existence of a new "nation-to-nation" relationship between the two parties.

Narratives of national belonging are being written by Eeyouch and Inuit peoples in Québec using the corporate structure of the Makivik and the GCC/CRA. It is not just traces of "nation" discourse that we find in these corporations now, rather the novel corporate narrative is firmly embedded in nationhood. These developments seem to point to conditions for the emergence of new legal persons who can and do provide resistance to the State-centred narratives of nationality and belonging in multi-national states. The presence and projection of new identities is apparently possible through the use of a legal construct historically reserved for non-political (*viz*. legal or economic) ends. National subjects are born and project their normativity upon other subjectivities and toward other normativities.

Conclusion

The claim that legal personality presents a double-bind is neither novel nor incredible. As an emanation of the State, the legal person does reinforce state law, but this is not its only power: through a different legal optic, this same person is subverted and disrupted (as is its State-creator). The two examples draw our attention, once again, to the porous nature of the boundaries between so-called "public" and "private" law when we consider questions of identity and reveal how a critical legal pluralist perspective which appreciates the normativity of subjective narratives demands the exploration of the myriad normativities created by subjects both within and outwith the State and its progeny, and valorises this interaction as legal scholarship.

I hope I have shown in some small way how the forces of personality also contain narratives of novel subjects and normativities with which state law must reckon and which it behoves us to study more closely as means of

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[57] One should bear in mind that *La Paix des Braves*, signed on 8 February 2002, implies some $4.5 billion of investment in nine Cree communities in northern Quebec, with a large part of this investment reserved for job creation through aboriginal enterprises. Aboriginal communities themselves administer funds designed to promote aboriginal enterprises, and northern development projects typically reserve to them some proportion of the total value of contracts. It is therefore of obvious practical concern to inquire into the nature of aboriginal enterprises, first with a view to understanding the range of governance structures they adopt and second with a view to identifying factors that contribute to their successful functioning within aboriginal communities.

resistance to the monolith of the State. Indeed, as has been highlighted above, the apparently closed discourse of corporate law can be pried open to make space for discussions of nationhood, citizenship and identity drawn out by the narratives of these subjects of law. The projections by these legal subjects of new identities and constructions of novel normative frameworks is realized on both the legal and the political landscape through a vehicle of state law which has historically been reserved for apolitical means and either cast aside as a fiction or provided a hermetic corporality of strict (State) legality.

We have also, as a counterbalance, seen that European companies (via mergers and takeovers) are injecting notions of multiculturalism into the debate: it is no longer a question of a company walking into a different cultural context from that within which it came into being, but a coming together within the walls of the company of differing cultural conceptions of groups and persons. And, in contradistinction to the ever expanding discourse of the corporation as some form of ill-conceived, capitalism-protecting, anti-humanist, evil creation of money moguls and conservatives (whatever the political aims of the organizations),[58] narratives of national belonging are being written by aboriginal groups in Québec using the corporate structure and these corporations seem to instantiate conditions for the emergence of new legal persons providing resistance to the State-centred discourse of nationality and belonging in multi-national states.

Finally, it is my sincere hope that the present paper is taken as an opening up of an invitation to see the world (and more specifically the corporate world of legal personality) otherwise than as we tend to do through the tunnel vision narratives of state law.

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[58] For a small sample of this literature, see: Bakan; Glasbeek; and, Klein, *supra* n.14.

LEGITIMATING GLOBAL TRADE GOVERNANCE: CONSTITUTIONAL AND LEGAL PLURALIST APPROACHES

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Introduction

This article will take up the conversation about legal pluralism in the context of debates over transnational governance, where legal pluralism has of late attracted considerable attention.[1] Legal pluralism has its roots in legal sociology and anthropology, and particularly in the study of the co-existence of non-state, customary law or community norms with formal law.[2] In the transnational context, this original focus is expanded to include the co-existence, within a particular territory, of multiple normative regimes; local, national and international. What is important to note, however, is that in this shift the conceptual orientation of the term remains the same: the effort to provide an empirically accurate description of multiple positive legal orders. That is, legal pluralism is conventionally utilized to identify a relevant attribute of the social fields in which law operates.[3] So, most recent considerations of 'global legal pluralism' either invoke or illustrate the multiple, diverse and possibly even contested sources of law in transnational arenas, and argue for their growing sociological significance. As I will elaborate below, while legal multiplicity is highlighted and even valorized in some of these accounts, their analytic reach is circumscribed by a positive conception of law itself.

While it is difficult to disagree with the chorus claiming that transnational institutions must recognize pluralism as a relevant attribute of the global social fields that they seek to govern, it is also the case that this apparently modest descriptive claim embeds a number of assumptions about both law and the social that have for some time been subjected to considerable scrutiny within socio-legal scholarship.[4] At the very least, it appears to posit

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[1] See generally Perez, *Ecological Sensitivity and Global Legal Pluralism: Rethinking the Trade and Environment Conflict* (2004); Teubner, "Global Bukowina: Legal Pluralism in World Society", p.3, in Teubner, (ed), *Global Law Without a State* (1997); Wolfe, "See You in Geneva? Pluralism and Centralism in Legal Representations of the Trading System" (2005) 11 *Eur.J.Int'l Rel.* 339*;* Macklem, "Militant Democracy, Legal Pluralism and the Paradox of Self-Determination", 4 *I.J.C.L.*488 (2006).

[2] Melissaris, "The More the Merrier? A New Take on Legal Pluralism" (2004) *Soc. & L.S.* 57 at 58. For influential summaries of the field, see also Griffiths, "What is Legal Pluralism?" (1986) 24 *J. Legal Plur.* 1 and Engle Merry, 'Legal Pluralism' (1988) 22 *L. & Soc. R.* 869.

[3] Griffiths, *supra* n.2, at 2.

[4] As the relationship between 'law' and 'society' is the core concern of this field, the sources that could be cited are manifold. Some 'classic' considerations might include Trubek and Esser, "'Critical Empiricism' in American Legal Studies: Paradox, Program, or Pandora's Box?" (1989) 14 *L.&.Soc. Inquiry* 3; as well as the

as self-evident a distinction between the legal and the social fields, each understood as autonomous, coherent and therefore available for objective description. In some further accounts, which I will discuss in more detail, a normative claim is added to the empirical one, in which the 'problem' of legal multiplicity is resolved by reference to some higher regulative principle, such as a constitution.

In this article, however, I seek to invest legal pluralism with quite a different analytic status.[5] My approach has affinities with those who have identified legal pluralism as an aesthetic choice, an ethos, or a form of critical theory.[6] My point is neither to map a complex global legal environment nor to offer a theory of law per se. Rather, and very much like several of the other papers in this symposium issue, I am attempting to open up a space in which to engage in a dialogue about different possible ways of imagining law.

My own approach to the question of legal pluralism is historical, practical and critical.[7] It takes as its starting point a critique of the tendency in contemporary debates on global governance to think of law as a privileged vehicle for carrying us towards some shared horizon of aspiration, that is, some more perfectly democratic or inclusive or responsive legal order to come. That imagined future is rendered unattainable, I will argue, by the very conception of law in which it is conceived, a conception that also functions to limit our perceptions of legality in the present. An alternative might be found in the re-traversal of the terrain of legal theory from the perspective of an ethos or ethic of pluralism. Such an undertaking might invite a re-framing, at least provisionally, of such fundamental questions as the boundaries and form of law. It becomes, if only for a moment, possible to imagine legal forms and institutions as both contingent and continually revisable. Through such a re-framing, I seek to open up new avenues for re-conceiving dominant forms of global governance and new opportunities for those whose interests are inadequately addressed by current institutions.[8]

The article situates its practical critique specifically in relation to the World Trade Organization, and in particular, the range of responses to the widely articulated concern over that institution's 'crisis of legitimacy'. Concerns about legitimacy are frequently connected closely to the question of

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essays collected in Sarat, Austin, Constable, Engel, Hans and Lawrence (eds.), *Crossing Boundaries: Traditions and Transformations in Law and Society Research* (1998).

[5] This formulation was prompted by Professor Davina Cooper's probing commentary on an earlier version of this paper presented at the Annual Meeting of the American Law and Society Association, Las Vegas, Nevada, June 2005.

[6] See Manderson, "Beyond the Provincial: Space, Aesthetics, and Modernist Legal Theory" 20 (1995) *MULR* 1048; Davies, "The Ethos of Pluralism" (2005) 27 *Syd LR* 87; Kleinhans and MacDonald, "What is a *Critical* Legal Pluralism?" (1997) 12 *Can.J.L. & Soc'y* 25

[7] My orientation draws heavily on Tully's account of critical philosophy in "Political Philosophy as a Critical Activity" (2002) 30 *Pol. Theory* 533.

[8] As Tully, *supra* n.7, at 534, cogently describes it, the activity of critique "seeks to characterize the conditions of possibility of the problematic form of governance in a redescription (often in a new vocabulary) that transforms the self-understanding of those subject to and struggling within it, enabling them to see its contingent conditions and the possibilities of governing themselves differently"

pluralism. In the WTO context, perceived deficits of democracy and accountability are seen to undermine its claim to legitimate authority.[9] The domination of internal WTO agenda setting and negotiation processes by a few developed nations, and its relative impermeability to civil society organizations have been widely critiqued on the grounds that they reveal deep inadequacies of pluralism and democracy within the institution.[10]

Although the debate over how to address these inadequacies has been rich and multifaceted, the range of approaches can be summarized in terms of two contrasting ideal-types. The first is characterized by a formal, positive and singular conception of law, and might be described as the 'constitutional' approach. Constitutional approaches in relation to the WTO tend to advocate an expansive and hierarchical approach to institutional reform that would aim to incorporate actors and interests who claim to have been previously excluded, as well as to consolidate the WTO's legitimate authority over a broad swathe of contemporary transnational governance issues. A 'pluralist' or 'cosmopolitan' approach, in contrast, would include an attentiveness to norm creation at the informal level and a much more modest conception of the appropriate policy scope of the institution. It would posit the WTO as one norm creating body among many in the international community, and encourage an interactional process of norm-creation among variously situated international actors.[11]

This article will examine only one dimension of these broadly contrasting approaches, the legal-theoretical. On the premise that one's legal theory matters, that is, it has (material) consequences both for the design of institutions and for the conduct of actors within them, I seek both to investigate the concepts of law that are embedded within these debates, and to consider their effects. Further, the debate over the constitutionalization of the WTO is not considered in isolation, but as one animated by and illustrative of a more general concern: how to legitimate the exercise of public authority beyond the state.[12] This article takes the issue of the legitimacy of the institutions of international governance as its point of departure.[13] However, legitimacy is here understood as 'problematique': that is, a form of problematization that emanates from a historically contingent set of conceptions and practices relating to international institutions, law, and democracy.[14]

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[9] Krajewski, "Democratic Legitimacy and Constitutional Perspectives of WTO Law" (2001) 35 *J.W.T.* 167.

[10] Jawara and Kwa, *Behind the Scenes at the WTO: The Real World of International Trade Negotiations* (2003)

[11] Brunnee and Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39 *Colum. J.Transnat'l L.* 19.

[12] Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization* (2001), p.4. See also Howse, "From Politics to Technocracy - And Back Again: The Fate of the Multilateral Trading Regime" (2002) 96 *AJIL* at 94.

[13] Coicaud and Heiskanen, *The Legitimacy of International Organizations* (2001); Delbruck, "Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies?" (2003) 10 *Ind. J.Global Legal Studies* 29.

[14] Tully, *supra* n.2, at 551, in attempting a definition of "political theory" defines a "subaltern school" of political theory that does not seek a normative solution but

The 'Legitimacy Crisis' and Legal Formalism

The apparent intractability of the debates over the legitimacy of an international institution such as the WTO, my argument will suggest, is in large measure a reflection of the legal framework in which they are typically cast. A legitimacy critique already identifies the problem as a matter of institutional design. By calling into question the architecture of the institution itself, as opposed to its failure to achieve any particular desired outcomes, the critique invokes formalist debates over what H.L.A. Hart has called 'secondary' rules.[15] In Hart's hierarchical conception, secondary rules, the 'rules of the rules' or the rules that determine which rules are indeed 'law', are a necessary part of a mature and functioning legal system.[16] Indeed, Hart's question, considered in the final chapter of The Concept of Law, "Is international law really law?"[17] is one that continues to vex international lawyers.[18] Despite the obvious difficulties in adapting a positivist view of law to the contemporary international legal arena, it continues to exert a significant 'pull'.[19] Legitimacy critics (and defenders) routinely invoke a relatively narrow range of familiar legal theoretical presumptions, based on a questionable analogy with domestic legal realms, about the proper foundations of legal authority, and by implication, the necessary forms of legitimate legality, in the international realm.

The vast majority of participants in these debates, whether they might be broadly characterized as 'defenders' or 'critics' of the current institutional order, share certain foundational assumptions about the nature of the international community and the form of international law, even as they disagree over the specific legal and institutional arrangements that might best achieve the imagined ends. This 'shared sensibility' has been described as

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grounds itself in practical concerns. This type of political theory utilizes historical surveys in order to be able to see "practices and their forms of problematization as a limited and contingent whole", at 534. "If we are to develop a political philosophy that has the capacity to bring to light the specific forms of oppression today, we require an Enlightenment critical 'attitude' rather than a doctrine, one that can test and reform dubious aspects of the dominant practices and form of problematization of politics against a better approach to what is going on in practice", at 537.

15 See, *e.g.* Trachtman, in adopting HLA Hart's formalist hierarchy of primary and secondary rules to questions of constitutionalism at the WTO, proposes that a special type of secondary rule, a 'tertiary rule,' is necessary to determine the allocation of authority between constitutions in the international realm. Trachtman, "The WTO Constitution: Tertiary Rules to Untangle Intertwined Elephants" (2004) *unpublished* (on file with author), p.4.

16 Hart, *The Concept of Law* (2nd ed., 1961).

17 *ibid*., at p.209. "It is indeed arguable, as we shall show, that international law not only lacks secondary rules of change and adjudication which provide for legislature and courts, but also a unifying rule of recognition specifying 'sources' of law and providing general criteria for the identification of its rules. These differences are indeed striking and the question, 'Is international law really law?' can hardly be put aside."

18 Pahuja, "Power and the Rule of Law in the Global Context" (2004) 28(1) *MURL* 232; see also, Kennedy, "When Renewal Repeats: Thinking Against the Box" (2000) 32(2) *N.Y.U.J.Int'l Law & Pol.* 335.

19 Brunnee and Toope, *supra* n.12, at 22-24.

'cosmopolitan' or even 'messianic'.[20] It locates the antagonists of debates over international governance within a shared horizon of aspiration: a 'better', more inclusive and democratic world order which functions as an ever-present, yet continually deferred backdrop, to the discourses of global governance. As Anne Orford has described, in relation to the 'linkage' debate over trade and human rights, "proponents and opponents of the WTO both use an appeal to 'democracy to come' as the foundation of the arguments about the need to reform existing laws and institutions".[21]

My aim in this article is to consider in more detail what embedded assumptions about the necessary or possible forms of law are mobilized within these debates, and what role they might play in shaping the future of international governance. It is my argument that how we imagine the 'form' of law makes a significant difference both to our conceptualization of problem and the available range of possible solutions. Much work in this field envisions pluralism as an important vehicle by which to improve the legitimacy, democracy and accountability of the WTO and other institutions of transnational governance. Integrating non-governmental actors and 'disaggregating' conceptions of sovereignty or the state are typical pluralizing gestures found within this literature.[22] Yet, at the same time, these debates have tended to re-inscribe presumptions of about the positive and unified (monist) nature of law conveyed through their reliance on the language of coherence, linkages or constitutionalism.

Pluralizing the WTO from Within: The Mystical Appeal of Constitutionalism

Why is it that, in our heterogeneous and constantly changing global context, a 'constitutional' conception of law seems so compelling? In most accounts, the quest for a 'post-national' constitutionalism is described as emerging in response to perceived 'deficits' of governance at the transnational level: of democracy, legitimacy, accountability. It is also a response that seeks to draw from the deep well of signification that constitutional discourse carries in the west. As Neil Walker observes, "the normatively continuous idea of constitutionalism is linked in a powerful and resilient chain of signification to a whole series of core governance values– democracy, accountability, equality, separation of powers, rule of law and fundamental rights".[23]

The appeal of constitutionalism as an explanatory framework for current and anticipated developments in the international trading regime is multifaceted. Firstly, constitutional theory conventionally provides an account of the political foundations of legitimate legal authority, which as we've seen, has been called into question in the WTO context. Secondly, the 'hands-tying'

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[20] Buchanan, "Global Civil Society and Cosmopolitan Legality at the WTO: Perpetual Peace or Perpetual Process?" (2003) 16 *LJIL* 673: on the messianic, see Orford, "Trade, Human Rights and the Economy of Sacrifice" (2004) *Jean Monnet Working Paper*, and Koskenniemi "Legal Cosmopolitanism: Tom Franck's Messianic World" (2003) 35 *N.Y.U.J.Int'l Law & Pol.* 471 at 486.

[21] Orford, *ibid.*, at 4.

[22] Walker, "The Idea of Constitutional Pluralism" (2002) 65(3) *M.L.R* 317; Slaughter, *A New World Order* (2004).

[23] Walker, *supra* n.22 at 344.

quality of constitutionalism appeals to advocates of a liberalized global trading order, such as Ernst Ulrich Petersmann, who sees its benefits threatened by the potential capture of the domestic political process in member-states by various special interests.[24] Constitutional debates also hold out the promise of 'recognition' and 'accommodation' of diverse constituencies and normative claims within a single unifying framework. Hence, they resonate with those who are concerned with linkage issues, often identified as the range of 'trade and . . .' concerns: environment, human rights, labour, or sustainable development. Indeed, one might suggest that the turn to constitutional discourse at the WTO seems to offer all things to all people: it first grounds WTO law in political legitimacy, then sets it above the fray of politics, all the while promising a dispassionate arena for the fair resolution of fundamental normative disagreements.

What binds these very disparate approaches and perspectives together is a set of ideas about 'constitutionalism' that are, in turn, dependent upon a particular view of law. So it is that we find some commentators drawing our attention to points of convergence between WTO legal structures or practices and domestic legal forms, such as the juridification of the dispute resolution process by the introduction of the Appellate Body and the types of reasoning it has deployed.[25] Others base their arguments on the points of divergence; maintaining that the WTO as currently constituted must fail the test of constitutional adequacy because of its deficits in the realm of democratic representation, 'voice' or citizenship.[26] In both cases, however, the implicit standard is municipal or state constitutionalism. In this way, constitutional debates about the WTO have the effect of making our discussions of the global trading order look more like the formal and autonomous picture of 'state law' that implicitly functions as the standard of legality against which all other forms of normative ordering are judged.[27] They also have the effect of setting the WTO further apart from (and possibly above) other institutions (and mechanisms) through which transnational economic relations are governed, in line with the implicit assumption that 'legal orders' must be hierarchical. Debates about economic governance framed in constitutional terms resonate with a wide range of differently positioned actors in part

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[24] Petersmann, "Constitutional Primacy and 'Indivisibility' of Human Rights in International Law? The Unfinished Human Rights Revolution and the Emerging Global Integration Law", p.211, in Griller (ed.) *International Economic Governance and Non-Economic Concerns: New Challenges for the International Legal Order* (2002).

[25] Cass, "Constitutionalization of International Trade Law: Judicial Norm Generation as the Engine of Constitutional Development of International Trade" (2001) 12(1) *EJIL* 39.

[26] Krajewski, *supra* n.9; Howse and Nicolaidis, "Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?", p.73, in Verwej and Josling (eds.), "Deliberately Democratizing Multilateral Organizations": (2003) 16(1) *Governance.*

[27] "Much of the effort in recent inter-state trade, environmental and human rights negotiation has been directed to reducing the distance between these transnational and national normative constructs by recasting the former in the image of the latter": MacDonald, "Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism" (1998) 15 *Ariz.J.Int'l & Comp.L.* 69 at 80.

because they tend to transpose familiar arguments from the domestic realm onto the terrain of international economic law.

Further, constitutional discourses are frequently identified as a framework within which competing normative claims are balanced and accommodated. That is, constitutionalism is one vehicle within which the challenges presented by political pluralism for governance are to be managed, at both the national and transnational level.[28] Within the WTO, constitutionalism is often presented as offering both a principled way to integrate the acknowledged variety of 'trade and . . .' concerns that have accompanied the expanding agendas of recent negotiating rounds and a foundation for engagement with non-state or civil society actors. As has frequently been observed, fostering political pluralism requires the development of mechanisms of democratic accountability, as well as the capacity to facilitate political trade-offs between areas of jurisdictional authority.[29] Each of these presumes a 'totality' in relation to which the balancing or accounting is done. In its current form, the WTO is usually recognized as lacking both the jurisdictional scope and autonomy and the law-making authority to facilitate such balancing.[30] Advocates of WTO constitutionalism seek to redress this lack by expanding both the scope and the authority of the WTO, while scholars located within what I've described as the pluralist approach would prefer that these normative conflicts be resolved outside the institution.

Most fundamentally, I would argue, the attraction of constitutionalism is the view that, in purporting to ground legal authority in a founding act of political will, constitutional approaches offer a type of 'practical' solution to the "thorny issues of the non-foundational foundations of law."[31] A constitution is essentially an originary narrative, in that it offers an account of the source of both legal and political authority.[32] It does so by purporting to ground that authority in the political will of a 'people' understood to be capable of acting as a unified entity. The 'people,' however, cannot come into existence as such until after the founding inaugurated by the constitution. The constitutional 'moment', then, is always a type of 'pious fiction'.[33]

Critical scholars have for some time scrutinized this paradox of law's purported 'founding' in a constitutional moment – as Peter Fitzpatrick has perhaps put it most succinctly, that "the origin has to 'be' before and after the

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[28] Walker, *supra* n.22.

[29] Nanz and Steffek, "Global Governance, Participation and the Public Sphere" (2004) *Governance and Opposition* 314. See also, Howse and Nicolaides, *supra* n.27

[30] "WTO law allows for the *constraint* of policies that interfere with the trading rights of members, but there no institutional arrangements provide for the creation of new, agreed-upon policies that can rebalance such trading rights with other legitimate policy objectives"; Howse and Nicolaidis, *supra* n.27 at 84

[31] Teubner, "Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory?", p.3 *et seq.*, in Joerges, Sand and Teubner (eds.) *Transnational Governance and Constitutionalism* (2004).

[32] Pahuja and Beard, (eds.), *Divining the Source: Law's Foundation and the Question of Authority* (2004).

[33] Hart, *supra* n.17 at 153.

point of origination".[34] Debates over transnational constitutionalization that begin from the assumption that law's autonomy and authority are definitively secured 'within' the state, and that this foundational authority needs to be somehow replicated in the transnational sphere, miss this point about law's paradoxically divided origins. The insight that law is not unified, even at its point of origination, instead leads us back towards the ethos of plurality to which I will shortly turn.

Some scholars have identified 'the process of mutual constitution and containment' of law and politics as a necessary, indeed defining, feature of constitutionalism.[35] As Gunther Teubner puts it, "The point is continually to understand the paradoxical process in which any creating of law always already presupposes the rudimentary elements of its own constitution, and, at the same time, constitutes these only through their implementation".[36] This paradoxical relation is what holds law and politics, necessarily, both together and apart, enabling and constraining each.[37] But the pragmatic embrace of the paradoxical nature of law's foundations, an insight already central to much contemporary legal theorizing, doesn't yet answer the question that frames this section – what is the specific attraction of constitutionalism for these scholars?

The normative thrust of this argument finds its source in the 'reflexive' nature of constitutional discourse itself. Reframing public and scholarly debates in constitutional terms, for these scholars, contains the potential to transform the ongoing process of transnational juridification in such a way as to bring into being the conditions for legitimate constitutionalization that are currently lacking. As Walker puts it, "…in the final analysis the ideological dimension of constitutional politics…is not the enemy of a normative discourse of responsible self government but rather its necessary accompaniment, and indeed, a central part of its generative context."[38] For Teubner, it is to 'guarantee the chances of articulating so-called non-rational logics of action against the dominant social rationalization trend, by conquering areas of autonomy for social reflection in long-lasting conflicts, and institutionalizing them".[39] Both Walker and Teubner, albeit from within quite different theoretical models, appear to be basing their argument for constitutionalism on a belief in the salutary effects of constitutional discourse itself. In the end, this approach rests on the hope that constitutionalism will "(open) up a richer and more productive normative debate".[40] Even constitutional sceptics such as Howse and Nicolaidis acknowledge that this

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[34] Fitzpatrick, "Breaking the unity of the world: Savage Sources and feminine law" (2003) 19 *Aus Fem LJ* 47

[35] Walker, *supra* n.19 at 340.

[36] Teubner, *supra* n.31 at 16.

[37] Teubner, *supra* n.31 at 20; in the language of systems theory, "long term structural linkages of sub-system specific structures and legal norms are set up . . . The important effect of structural linkage is that it restrains both—the legal process and the social process – in their possibilities of influence.".

[38] Walker, "The EU and the WTO: Constitutionalism in a New Key", p.58, in de Burca and Scott (eds.), *The EU and the WTO: Legal and Constitutional Issues"* (2001).

[39] Teubner, *supra* n.31 at 13.

[40] *ibid*., at 54.

self-reflexive tendency of constitutional discourse may, over the longer term, contain some limited potential to contribute to a transformation of the currently inhospitable conditions for a pluralist politics at the WTO, even as they are highly critical of most efforts to 'bootstrap' the legitimacy of the WTO by relying on constitutional discourse itself as the vehicle to bring about the very conditions needed for its emergence.[41]

Ultimately, this argument brings us back to the question to what extent do even reflexive constitutional approaches pre-determine the parameters within which transnational legality must take shape? Two tendencies are of concern here. Firstly, there is the way in which a call for constitutionalism is responsive to the discourse of 'deficits' mentioned earlier. That is, constitutional discourse is posited as a supplement, something that will supply 'more' of whatever is currently 'lacking' in transnational legality; democracy, accountability, legitimacy, or even, self-reflexive constitutional discourse itself. Similarly, the call for constitutionalism implies both a hierarchy and a trajectory of transnational legalities, in which some emerging legal forms are imagined as more complete (constitution-like) than others. This trajectory, which might be said to parallel to the developmental hierarchy of states in the Westphalian order, has the effect of privileging certain legal forms, such as judicial norm-generation, over others.[42] Further, constitutional debate tends to focus on highly formalized and juridified entities such as the EU and the WTO, while an entity such as the World Social Forum, devoted to broadening and democratizing the public debate over transnational norms, is virtually ignored. In these ways, we can see that the potential of constitutional discourse to facilitate the pluralizing and/or democratizing of the practices of transnational governance is actually quite limited. Paradoxically, despite the prominence given to the need for pluralist institutional reform within contemporary debates over the legitimacy of the WTO, closer consideration of this scholarship also reveals an enduring rigidity: the persistence of the modernist preference for coherence and order in the imagining of legal forms.[43]

Pluralizing the WTO from Without: Civil Society Engagements

In recent years, there has been a dramatic expansion of transnational advocacy on the part of nongovernmental organizations focused on international institutions such as the WTO.[44] These transnational advocacy efforts and the networks that they engender are frequently described as a 'global civil society' whose emergence is then identified with a number of positive outcomes for global governance.[45] Organized civil society is often identified as providing a "discursive interface between international organizations and a global citizenry" capable of "monitor(ing) policy making

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41 Howse and Nicolaidis, *supra* n.27 at 91.

42 Cass, *supra* n.26.

43 See Manderson, *supra* n.7, for a discussion of this modernist inclination towards coherence and order as an aesthetic preference.

44 I have argued elsewhere that the picture of the nation-state in decline has been frequently overdrawn. Buchanan and Pahuja, "Law, Nation, and (Imagined) International Communities" (2004) 8 *Law, Text, Culture* 137.

45 See generally the various editions of the OUP *Global Civil Society Yearbook*, inaugurated in 2001.

in these institutions, …bring(ing) citizens concerns into their deliberations and empower(ing) marginalized groups so that they too may participate effectively in global politics".[46] The discourse of global civil society is sustained by a cosmopolitan sensibility, which underpins a vision of an imagined 'global community' that is simultaneously inclusive, plural and governable.[47]

Not surprisingly, the on-the-ground struggles of transnational advocacy networks are far removed from the utopian aspirations frequently projected upon them. All too frequently, the role of transnational NGO's in global governance is functional, technocratic and apolitical. The meetings and cooperative understandings of governance networks are usually private, informal, and lacking in mechanisms for accountability or transparency. Rather than facilitating political processes, transnational NGO's have been criticized as effectively helping to bureaucratize and de-politicize the activities of governments across borders.[48] Rather than an imagined 'voice of the people' idealized as distinct from the dictates of both governments and the market, transnational networks of NGO's have emerged in tandem with the shift to different styles of governing both at domestic and international levels. Moreover, the goals and interests of actors in governance networks cannot be imagined as 'autonomous' or 'objective', but are constructed through their myriad interactions embedded within these networks over time.[49] In these ways, it is possible to argue that the space for politics in global governance networks has been diminished, even as the participation of NGO's has expanded.[50]

The constraints on the capacity of NGO networks to engender pluralism in the practices of international institutions can be illustrated by recent developments in WTO/civil society relations.[51] Over the past six years, various coalitions of civil society organizations have pressed for greater access to both rule-making and dispute resolution processes within the institution.[52] Many NGO's and commentators would likely describe these

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[46] Nanz and Steffek, *supra* n.30 at 315.

[47] Buchanan, *supra* n.20.

[48] Higgott, "Contested Globalization: the Changing Context and Normative Challenges" (2000) 26 *Rev.Int'l. Stud.* 131 at 151; Chandhoke, "The Limits of Global Civil Society", in Glacius, Kaldor and Anheier (eds.) *Yearbook of Global Civil Society* (2002).

[49] Keck and Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (1998).

[50] Kennedy, "Background Noise? The Underlying Politics of Global Governance" (1999) 21(3) *Harv.Int'l.Rev.* 52.

[51] Tüerk, "The Role of NGOs in International Governance. NGOs and Developing Country WTO Members: Is there Potential for Alliance?", in Griller (ed.), p.162, *International Economic Governance and Non-Economic Concerns: New Challenges for the International Legal Order*, (2003).

[52] Action Aid/CIEL/Friends of the Earth International/IATP/WWF International (2001) Open Letter on WTO and Institutional Reform for the Fourth WTO Ministerial and Beyond, http://www.panda.org/resources/programmes/trade/latest.htm; Friends of the Earth International, *et. al.* (2002) "Letter to Honorable Luis Enresto Derbez Bautista, Mexican Minister of Trade" (2 April, 2002), http://www.foei.org/trade/mexico.doc; Raghavan, "WTO Ignores Calls for

efforts as having only very limited success, however, resulting in a few largely cosmetic institutional reforms.[53] That said, a focus on formal institutional resistance by the WTO to NGO demands for greater access and transparency may overlook some important but less visible shifts. A number of transnational nongovernmental organizations, at least since the Doha Ministerial Round in 2001, have increasingly targeted their advocacy efforts 'behind the scenes' on particular issues that will enable them to build relationships with delegates from various member-state governments. Several of these organizations have recently opened offices in Geneva to more effectively track the institution's activities and lobby member-state representatives.[54] Because they are in Geneva, building close relationships with delegates and members of the Secretariat, these groups are able to gain informal access, to disseminate to other NGO's, and even member country governments, a great deal of information that is not officially public. Some organizations have built very comprehensive websites that serve as clearing houses for reports of various negotiation developments, and detailed accounts are usually posted within days of these 'closed door' sessions occurring.[55] In general, a great deal of information about what is going on inside this allegedly closed and secretive institution is now widely available almost immediately, due to the work of a number of transnational legal advocacy and civil society groups.[56]

So, while many NGO's may profess frustration at the lack of progress on the institutional reform agenda, they would also acknowledge that the environment within which trade policy is both made and adjudicated by the WTO has changed significantly in the past decade. Significantly, transnational advocacy organizations have worked with developing country governments to bolster their capacities to participate effectively in trade

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Democratic Inclusive Processes for Cancun" (20 June 2003), www.globalpolicy.org/socecon/bwi-wto/2003/0620ignore.htm

[53] O'Brien *et. al.*, *Contesting Global Governance: Multilateral Economic Institutions and Global Social Movements* (2000); Charnovitz, "Opening the WTO to Nongovernmental Interests" (2000) 24(1-2) *Fordham Int'l.L.J.* 173.

[54] Nongovernmental organizations that have opened offices in Geneva for the purpose of WTO related advocacy since 2001 include Oxfam, the Center for International Environmental Law, and the International Gender and Trade Network. Much of the information cited in this section draws on interviews conducted by the author with a range of NGO representatives in Cancun, during the Ministerial Meeting in September 2003 and in Geneva, May, 2004.

[55] The Canadian NGO, International Institute for Sustainable Development (IISD) is one such organization, http://www.iisd.org/trade/wto/. It publishes Bridges, a weekly trade news digest, for the NGO and sustainable development community. During Ministerial conferences, Bridges updates are published daily and widely distributed. http://www.ictsd.org/weekly/index.htm. The Minnesota-based Institute for Agriculture and Trade Policy (IATP) also operates a useful site called the 'Trade Observatory' at http://www.tradeobservatory.org/ with a searchable archive of trade related news, documents and analysis from a wide range of sources.

[56] *E.g.* within weeks of its issuance on February 7, 2006, the Confidential Interim Panel Report in the dispute over the import prohibition of GM food products by the European Union was leaked, and made available on the Friends of the Earth site: http://www.foeeurope.org/biteback/WTO_decision.htm.

negotiations and in trade disputes.[57] Some have even provided assistance in the preparation of legal arguments for trade disputes to small country governments. Many seek to provide in depth information and research on issues of concern to particular member states, such as the campaign by Oxfam leading up to the Cancun Ministerial Round to publicize the impact of cotton subsidies on the West African nations of Burkina Faso, Benin, Chad, and Mali.[58] Such efforts on the part of NGO's in support of member country governments can raise the profile of issues, getting new topics on the agenda (as in the case of cotton subsidies) or even result in changes to negotiated text (as in the Doha Declaration on TRIPS and Public Health).[59] During the 2003 Ministerial Meeting in Cancun, NGO's convened at least a dozen parallel conferences and workshops on various trade policy issues, many of which attracted both 'official' members of delegations as well as academics and activists. Finally, in the realm of dispute resolution, the ongoing controversy over the consideration of amicus briefs has not prevented a number of organizations from continuing to prepare and file such briefs.[60] Even though they may not be formally cited or 'considered' by the Appellate Body there are good reasons to believe that they are indeed read, and that over time the submission of persuasive and well argued briefs from third parties may well function to 'broaden the perspectives' of judges.[61]

In the interstices of the relatively formalized procedures for dispute resolution, and in conference rooms and hotel lobbies in Geneva, Doha, Cancun and Hong Kong, ongoing debates over the appropriate scope and substance of trade policy are taking place. To the extent that a number of civil society organizations have invested their resources in developing the capacity to speak the language of trade policy and in closely monitoring current developments in Geneva, they have indeed become participants in the collective process of norm-generation in and around the WTO. Yet, even as trade governance has become pluralized in recent years, these developments don't appear to be leading to the type of institutional transformation that many have suggested is so urgently needed. This is because expanded participation in governance networks is a significant, but not the most significant, mechanism of pluralization. There must also be the opportunity for a plurality of institutional and legal forms to develop and evolve. While one form of plurality may lead to the other, it doesn't necessarily follow that

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[57] Tüerk, *supra* n.51.

[58] http://www.oxfam.org.uk/what_we_do/issues/trade/bp30_cotton.htm.

[59] "In my view, the [TRIPS and Health Declaration] is perhaps the most concrete result of this campaign of NGO's, of public demonstrations that have been seeking to rebalance the system of globalization rules. . ." Rubens Ricupero, Secretary General of the United Nations Conference on Trade and Development (UNCTAD) on the Trips and Health Declaration adopted at the WTO's Fourth Ministerial Conference in Doha, Qatar, November 2001; as quoted in Tüerk, *supra* n.51 at 170.

[60] See, for a recent example, the brief filed by the Center for International Environmental Law (CIEL) in the *Brazil-Retreaded Tyres* case at http://www.ciel.org/Tae/BrazilRetreadedTires_Amicus_7Jul06.html.

[61] Howse, "Membership and Its Privileges: the WTO, Civil Society and the *Amicus* Brief Controversy" (2003) 9(4) *ELJ* 496.

a more diverse set of participants will produce more diverse institutional arrangements.

One of the key claims made in this article is that the modest degree of success arguably achieved by recent NGO efforts to engage with the World Trade Organization and to influence both its institutional structure and its decision making processes fails to include a re-conception of legal forms and institutions, and for that reason, falls short of the degree of transformation that it seeks. I have argued that debates over the reform of the institution, while they rarely consider law in an explicit or conceptual manner, are frequently infused with an implicit notion of law as an autonomous and distinct realm, precise and technical in nature as opposed to indeterminate and political. This conception places a serious constraint on the scope of reforms aimed at pluralizing the institution and on the range of subjects who can be imagined as potential participants in World Trade Organization 'law-making' practices. To the extent that they deal with technical legal issues, only those groups from organized civil society that have developed the expertise to engage with these issues can participate. This constraint is also manifested in a growing divide between those civil society groups that have chosen to pursue 'inside' versus 'outside' strategies in relation to the WTO.

I have argued that, much like the constitutionalists, civil society engagements with the World Trade Organization have been oriented by the problematique of legitimacy. Their efforts are similarly hamstrung by a persistent idea that formal (positive) law is the source and guarantor of legitimacy. This is reflected, for example, in the focus on the need for formal legal reforms to improve the external transparency of the WTO, notwithstanding significant developments at the informal level. More generally, to the extent that advocacy successes at the informal level are not reflected in formal institutional reforms and/or clearly defined legal norms, they are seen as somehow lacking, inadequate or underdeveloped. It can also be seen in the way that they frame their call for pluralism in terms of participation, imagined as a separate matter from the actual legal frameworks that these subjects are engaging with. In arguing that there is no great distance between the 'pluralist' approach of civil society and the constitutional approaches discussed earlier, I am suggesting that for each, a monist conception of law itself functions as both an anchor and a limit to the re-conceptualization of global trade governance. Both fail to recognize the existent plurality of diverse and competing legal forms in the international, and circumscribe further developments by locating them within the utopian and perennially incomplete project of cosmopolitan law.

Global Trade Governance Unbound?

I have suggested that the apparent conflict between two approaches or styles of thinking about law has defined the space within which the debates over the future of the World Trade Organization as an institution are taking place. The debates tend to oscillate between two positions that might be identified as 'constitutionalist' and 'pluralist'. This final section will attempt to step back from the current debates to examine the question of the frame itself. Is

it possible to re-imagine transnational governance in a way that is not 'bounded' by these two poles of constitutionalism and pluralism?[62]

The apparent conflict between these two approaches obscures the fact that, as I've argued, they share a certain style or habit of thinking which foregrounds questions of 'legitimacy' and links them to a particular way of conceiving law. These approaches also share, with the constitutional approach, a tendency to think of law in terms of coherence, order, and totality. In this final section of the paper, I consider whether it is possible to open up a space for thinking about law in a different way. It should be clear by now that I am not seeking to offer a pragmatic alternative to currently mooted proposals for institutional reform. Instead, I am intentionally occupying a position that is both provisional and provocative. My modest aim is to interrupt the established parameters of current debates over WTO governance in order to speculate about what implications a metaphoric shift in our capacity to imagine legal forms might have in this context.[63]

Martti Koskeniemmi, a provocateur whose project has sympathies with my own, developed a dichotomy similar to the one I have outlined above, in a recent talk.[64] Koskeniemmi identifies these two approaches, 'constitutional' and 'legal pluralist' as reflections of the modernist tendency to pit narratives of unity and fragmentation against one another. In his account, unity or constitutionalism is considered as a hegemonic project, impelled by a totalizing logic of power, globalization, and empire; against which plurality is frequently posited as the counter-hegemonic vehicle of freedom and innovation. Koskeniemmi chooses to describe these contrasting approaches to representing law in the transnational as 'legal mindsets' rather than as legal theories, both to highlight their location within these wider narrative streams and to reveal their subjectivity and fluidity. According to him, both are responses to the problem of 'fragmentation' of international law and neither is entirely successful in meeting the challenge of mediating between the need for 'centrality and control on the one hand, diversity and freedom on the other".[65] They cannot be successful, in part, because he argues that as 'generalizing doctrines' the meaning of these approaches is not pre-determined; it depends on context. As he puts it, "their political significance

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[62] There are at least two scholarly variants of the 'pluralist' approach. The first is broadly oriented towards democratic accountability and representativeness. See for example, Nanz and Steffek, *supra* n 30; Krajewski, *supra* n 9; Charnovitz, *supra* n 54. The second approaches the question of pluralism in terms of the problem of establishing 'linkages' between the WTO and other transnational regimes of normativity. See for example, Howse and Nicolaidis, *supra* n 27; Snyder, "Governing Economic Globalization: Global Legal Pluralism and European Law" (1999) 5(4) *EJL* 334; Perez, *supra* n 1.

[63] For a powerful articulation of the significance of the 'imaginary' in constructing the realm of the possible, see the chapter, "A Politics of Economic Possibility" in J.K. Gibson Graham (2006) *A Postcapitalist Politics* (U of Minnesota Press). See also J.K. Gibson Graham, (1996) *The End of Capitalism (as we Knew it): A Feminist Critique of Political Economy.*

[64] Martti Koskeniemmi, "Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought" Presented at Harvard University, March 5, 2005.

[65] Professor Koskeniemmi, not incidentally, was functioning as the Chair of a Study Group on Fragmentation within International Law for the International Law Commission at the time.

is ambivalent. Each may be used to support as well as to challenge the existing state of affairs."[66] In Koskeniemmi's account, as in mine, the differences between constitutional and pluralist approaches are minimized. What is of greater analytic significance for each of us is the connections among these mindsets, rather than their clashes.

Where my argument differs from his is in what we make of this insight. He argues by way of conclusion that the task for critical lawyers should be to reveal the multiple and shifting politics of these competing regimes, and to politicize the discourse of multiplicity itself.

> "This is why I am not worried about the multiplicity of regimes or the clash of legal rationales. On the contrary, they are the platform for today's politics. The real concern is the homogeneity of the cultural and professional outlook of the participants, the pretense that the decision follow cognitive or technical grounds and are therefore immune to political contestation . . . I want to suggest that the discourse of multiplicity itself should be redescribed in political terms, as a competition between different systems and criteria for allocating resources between social groups."[67].

While I agree that it is important to understand the impact of competing normative regimes for differently situated publics, I'm not sure that shifting the analysis from the legal to the political register necessarily makes things more transparent. Representing international legality in this way seems to suggest that politics is something that is somehow 'outside' or 'beyond' the law, rather than already embedded within legal discourses and institutions. As Koskeniemmi well knows, while law and politics are interpenetrated, legal discourses cannot be equated in any straightforward way with political outcomes. Moreover, while a critical investigation of the politics of law in particular contexts can be quite helpful in revealing law's failures and exclusions, it has little to say about the productive or generative aspects of law, or about the capacities of legal subjects to contest or make new meanings out of the law.

I believe a more generous reading of Koskeniemmi is available, however. Of course he can be read as calling for more attentiveness to the particular effects of different ways of talking about law – this is clear when he speaks of the limitations of a technocratic, realist approach that draws heavily on certain branches of International Relations theory and sees little of value in the more aspirational discourses of public international law. But, he also reminds us of Kant's dictum that rules don't determine their own application. Rather, they must be interpreted and applied by legal subjects, operating within particular discursive and institutional contexts. Indeed, one of his signature contributions has been to draw greater attention to the work of these subjects in the making of international law.[68] So it would seem that his conception of law must also include an important role for the law creating function of legal subjects.

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[66] Koskeniemmi, *supra*, p.18.
[67] *Supra* p.21.
[68] Martti Koskeniemmi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1879-1960* (Cambridge, 2001).

This reading would bring Koskeniemmi much closer to my own provocation: which rests in the attempt to imagine law as itself inherently plural, a quality that I posit as emerging from an appreciation of the manifold potential of a world of law-creating subjects. While an understanding of subjectivity as law-making also underpins Koskeniemmi's account, he is more concerned with the relatively homogeneous professional category of international lawyers, whom he fears are lacking both creativity and political commitment. I am more interested in exploring what new pathways for thinking are opened up when we think of a much wider range of subjects as potentially law-creating in this way.[69]

My effort to re-imagine the 'bounded' discourses of global trade governance in this way has been inspired by the 'radical' or 'critical' legal pluralism of Rod McDonald, who has suggested that we need to think of law in terms of a 'metaphor of multiplicity'.[70] MacDonald's legal pluralism is quite distinct from the varieties of pluralism found in contemporary international legal discourse discussed above and from mainstream theories of law. It departs from the view that law is necessarily formal and can be exclusively identified with state action. Neither does it rely on a dichotomous construction of law and politics (or society).[71] Where this account of law differs most significantly from the conceptions that I have argued are embedded within the discourses of trade governance, including those identified with 'global legal pluralism', is in its resistance to the cosmopolitan urge to accommodate difference within some overarching totality.

Without the need for recourse to a unifying image of the constitutional moment, a radically legal pluralist imaginary could embrace multiplicity, heterarchy, and diversity. It might allow for the possibility of thinking about transnational legality without a 'centre', or normative hierarchy. That is, the relationship between emergent transnational regulatory regimes need not be reduced to a necessary relation of superior/inferior as judged by the extent to which they are more or less 'legal' or 'constitutional'. Rather, they could be understood in a variety of ways: overlapping, discrete, competing, interpenetrated, mutually constitutive. In this way, the public discussion about the emergence and evolution of transnational legal norms might both be opened up to include a much wider range of formal and informal, institutional and discursive mechanisms, and to consider them on their own terms, rather than in relation to where they sit on a spectrum of 'legitimacy' in which 'formal' law still occupies the highest rung;

> "A *radical* legal pluralism seeks neither a separation, nor an eventual reconciliation, of multiple legal orders. Normative heterogeneity exists both between various normative regimes which inhabit the same intellectual space, and within the regimes themselves. The flux of power within and between

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[69] On the creative and politically transformative potential of subjects, see Gibson-Graham, *supra* n.65.

[70] MacDonald, "Here, There . . . And Everywhere: Theorizing the Legal Pluralism of Jacques Vanderlinden", in Kasirer (ed) *Melanges Jacques Vanderlinden* (2006). See also MacDonald, *supra* n. 28; and Kleinhans and MacDonald, *supra* n. 7. A sympathetic approach is also found in Melissaris, *supra* n.2.

[71] MacDonald, *supra* n. 28 at 74.

> these regimes is determinative of their reconstruction within any given time-space. The condition of living through the construction of normative regimes frustrates any attempt to unify or order them. That is, a *radical* legal pluralism must be polycentrist"[72]

Debates within the frame of what I am calling legal plurality can be contrasted with dominant approaches in the ways they might envision the participation of global civil society. An illustrative example of the latter is found in the framework provided by de Burca and Walker, in their role as editors of a collection of essays on the topic of "Law, Civil Society and Transnational Economic Governance."[73] In their introduction, although they acknowledge the multiple discourses of civil society in careful detail, law is represented as a 'central steering mechanism': "One general and overarching question concerns the possibilities and limits of the role of law, in its institutional and discursive specificity, within the post national setting…does law, as a central steering mechanism, inevitably organize civil society in such a way as to reduce its autonomy?"[74] The way the question is posed here, I would argue, prefigures its answer. If law is conceived as both centralized and autonomous, that is, an institutionalized realm of 'coordination' that is separate from politics, it is hard to imagine it as capable of facilitating a multiple and diverse politics of global civil society. This is because in mainstream approaches, the legal/political subject (here, civil society) can only be constituted, or 'called forth,' by being 'called into line.'[75]

Far from being 'autonomous' actors that might be envisioned to redress current 'imbalances' in global governance, I have argued that organized civil society networks have emerged and taken shape in response to developments in transnational governance. The discourse, methods, and objectives of both civil society and governance networks must be understood as inter-subjectively constituted. What is important to stress, however, is that this insight has particular consequences for how one imagines the 'form' of law. Law can no longer be imagined independently from these ongoing processes of inter-subjective norm generation, but is itself generated by them.

I have suggested that concerns with the legitimacy of transnational governance turns our attention towards questions of legal form, rather than substance, so that its outcomes are necessarily framed in terms of processes or procedures rather than rules. Through the lens of legal pluralism, in contrast, the construction and contestation of normative frameworks by legal subjects becomes the focus of the inquiry. For example, while much work has been done to more fully integrate the reconsideration of questions of recognition and participation into constitutional approaches to the WTO, the risk of dealing with these issues in constitutional terms is that they will become just another institutional design problem; another procedural detail

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[72] MacDonald, *supra* n.28 at 21.

[73] de Burca and Walker, "Law and Transnational Civil Society: Upsetting the Agenda?" (2003) 9(4) *EJL* 387.

[74] *ibid.*, at 389.

[75] Christodoulidis, "Constitutional Irresolution: Law and the Framing of Civil Society" (2003) 9(4) *EJL* 401 at 426.

to be worked out by the institutional engineers of the global legal order. In my view, the answers to such questions cannot be pre-determined. Institutional frameworks, the meaning of participation and the sources of legitimacy can and likely will be a multiple, contestable, and evolving as the subjects that are to be governed.

Imagining law as polycentrist, intersubjectively constituted and non-prescriptivist also facilitates a reflexive approach to the relationship between law and politics in the international realm. Law is not a separate and distinct realm of normative ordering. As Koskeniemmi reminds us, law provides a fluid and evolving space and discourse within which competing normative claims are debated, engaged, negotiated and compromised. Yet, law and politics should not be imagined as discrete realms of activity, whether it is law or politics that is placed in the driver's seat. Rather, they need to be understood as intimately tied together in a mutual relation of 'constituent complicity'. It then follows that instead of being fixed and determinate, the form of law itself must also always be subject to re-conceptualization and transformation. Allowing ourselves to re-conceive of transnational legal institutions and the politics surrounding them in this way, I argue, could further the dual aims of fostering political pluralism and increasing the legitimacy of an institution such as the WTO.

For example, from within this perspective, we can consider how new instantiations of transnational political practice, such as those exemplified by various transnational movements for global social justice over the past decade, might influence the form of transnational legal regimes, as well as the converse. Global civil society exists and operates from within relatively more 'disorganized' and 'organized' manifestations, yet a focus on its relation to more 'constitution-like' legal forms such as the World Trade Organization will tend to highlight the activities of the relatively more organized nongovernmental organizations, and those activities in particular that are specifically directed towards the 'constitution' of that institution. Law need not only be imagined as the necessary 'institutional' container of an unruly and disruptive 'politics' that is 'prior' to law but must be authorized by it. The form of law itself might also be understood in its more 'disorganized' form, as potentially plural, disruptive, subject to re-conceptualization and transformation.

There is indeed a crisis of legitimacy in global trade governance. The need to democratize and pluralize transnational economic institutions such as the WTO is pressing. The most significant barriers to reform, however, are not in fact the formal, institutional obstacles that attract the bulk of attention. Rather, they are the conceptual foundations of the debate itself, including most importantly assumptions about the autonomous and 'monist' nature of law, and the institutionalized relationship between the realms of law and politics. Re-envisioning the form of law as itself plural and contested invites us to transcend the limitations of the constitutional (and constitutive) form in which we currently find ourselves compelled to imagine the relationship between law and politics in the realm of trade governance. In this conception, the parameters of law are determined by the potential of a diverse array of lawmaking subjects; its only limitations the limits of our ability to imagine alternative legal worlds. Unbounding our conception of transnational governance in this way frees us to engage with a much broader set of subjects and concerns than we might otherwise, and could provide a

more productive avenue through which to approach the pressing issues of inclusion, legitimacy and accountability.