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Custom Made—For a Non-chirographic Critical Legal Pluralism

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Introduction—Preaching and Practice

A contribution to a *Festschrift* or a *mélanges* aims to weave together a personal appreciation of a colleague, an extrapolation of his or her intellectual accomplishments, and a positioning of the theoretical significance of those scholarly contributions in broader context. In this essay I use my own reflections about the possibility of a non-chirographic¹ critical legal pluralism to situate and celebrate Jean-Guy Belley's *œuvre scientifique*, an *œuvre* thoughtfully explored in many of the other contributions to this special issue.

Three general claims ground the faith of those who characterize themselves as “strong” legal pluralists: (1) All human cultural artefacts, however we may apprehend and label them, are plural; (2) within any particular category of human artefact—morals, religion, socio-cultural practices, art, music, law—and as between these categories, we often confront not only incompatible but also incommensurable instantiations; and (3) this incommensurability rests on independently justified foundational claims and therefore confronts legal agents with tragic choices—the fact of choosing a

* This essay has had an extraordinarily long gestation. Parts of it were first delivered in January 1990 as the Lansdowne Lecture at the Faculty of Law, University of Victoria, under the title “Custom Made.” This lecture then led to two published essays: R.A. Macdonald, “Les Vieilles Gardes. Hypothèses sur l'émergence des normes, l'internormativité et le désordre à travers une typologie des institutions normatives,” in *Le droit soluble [:] Contributions québécoises à l'étude l'internormativité*, ed. Jean-Guy Belley, 233–72 (Paris: LGDJ, 1996), and R.A. Macdonald and M.M. Kleinhaus, “What Is a Critical Legal Pluralism?” *Canadian Journal of Law and Society* 12 (1997): 25–46 (in a special issue edited by Jean-Guy Belley). Many years later, I had occasion to reflect on the significance of chirographism to the construction of orthodox legal theory in a paper titled “Non-chirographic Legal Pluralism” presented to the 2008 joint meeting of the Law and Society Association and the Canadian Law and Society Association in Montreal. Numerous colleagues—not least of whom was Jean-Guy Belley—have read, re-read, and critiqued these various iterations. To them I am most grateful. I should also like to thank Tom McMorrow, Suzanne Bouclin, and Philipp Kastner (DCL candidates at McGill University); Devyani Prabhat (a doctoral candidate in law at NYU); and my colleagues Evan Fox-Decent, Hoi Kong, Robert Leckey, and Victor Muñoz-Fraticelli for comments on earlier drafts of this essay.

¹ I use the word *chirographic* to signal any approach to legal theory that holds that law is primarily (if not exclusively) about norms (policies, principles, rules, concepts) that can be, and usually are, fully expressible in written words arranged discursively. For further development of the idea see below at Part 2, text at notes 27 *et seq.*, and Part 5.

particular course of action requires us to give up the possibility of acting in accordance with some equally significant belief or beliefs that we continue to hold.²

Through my long-standing association with Jean-Guy Belley I have been made acutely aware of the demands that adopting a strong legal pluralist approach makes upon scholars and citizens. I first encountered Jean-Guy shortly after I joined the McGill Law Faculty in 1979. I recall vividly one spring meeting of the Association des professeurs de droit du Québec where Jean-Guy was presenting a characteristically outstanding paper. I turned to my then Dean—John E.C. Brierley—and asked “Who is that guy?” John replied, “A recent hire at Laval, but if we ever get a chance to recruit him, we should.”

Fifteen years later, the Faculty of Law at McGill was in that enviable recruitment position, and Jean-Guy joined the faculty as Sir William Macdonald Professor of Law, succeeding to the chair once held by John Brierley himself. My own connections with Jean-Guy had become more personal and more multifaceted several years earlier. In 1988 he was appointed a Scholar of the Canadian Institute for Advanced Research (CIAR) and charged with developing its “Quebec Network.” I was about to take over as director of the CIAR’s Law and Society Programme myself, and I had the good fortune of working with Jean-Guy on several projects over the next seven years.

In our twenty-year friendship since then I have watched Jean-Guy live the life of a strong legal pluralist in its fullest dimensions: a Quebecker attempting to build within the North American sociological framework of the CIAR’s law and society initiative a research program more sensitive to contemporary trends in European sociology of law; a legal academic with a deep appreciation of the constructed forms of interactional law, contesting with an advisory council of statisticians and economists who saw law as a simple one-way projection of state authority; a francophone working within a predominantly anglophone legal and cultural environment; a legal sociologist of contract law who took on the challenge of understanding the deep conceptual structure of the field by teaching in a doctrinally oriented trans-systemic program; a baptized Roman Catholic who later in life found occasional solace in Protestant theology; a proud Saguenayan who progressively exiled himself first to Quebec City and then to Montreal; an activist whose inclinations to the left of the political spectrum and to the aspiration of Quebec independence seemed at odds with the popularly presumed orientations of the majority of professors at the law faculty of McGill University.

Many of us who self-identify as strong legal pluralists, ironically, find ourselves located in largely monistic intellectual, social, cultural, linguistic, and

² I derive this particular formulation of the general contours of a pluralist epistemology from my colleague Victor Muñoz-Fraticelli, for whose insight I am most grateful. I have slightly adapted the initial formulation for application to *legal* pluralism. On the initial framing of the distinction between “strong” and “weak” versions of legal pluralism (only the former of which I consider in this essay), see John Griffiths, “What Is Legal Pluralism?” *Journal of Legal Pluralism and Unofficial Law* 24 (1986), 1.

political environments. We, and I include myself here, perceive the puzzles of legal pluralism from the relative comfort of a stable location where diversity and multiplicity are primarily “out there” rather than a central part of our daily lives. Not so Jean-Guy. I write this essay with deep affection for a colleague and friend who, in his own scholarly career and in each aspect of his own life, has exemplified what it means to be a strong legal pluralist.

In this essay I make claims for the significance, and indeed the primacy, of implicit and inferential normativity in life and in law. I begin my discussion by considering a movement of thought that subordinates the implicit and inferential to the explicit and authorized. Part 1 traces parallels between religious and legal evangelicalism and notes the increasing attraction of interpretive fundamentalism for legal scholars. Part 2 presents an alternative theoretical framework, outlining the principal features of a critical legal pluralism. Part 3 considers the various ways in which regimes of written rules are made over by those whose conduct these regimes are presumptively meant to govern. Part 4 assesses what others have, without apparent irony, called *the grammar of customary law*, and develops a distinction between custom as mere practice and custom as interaction giving rise to implicit and inferential normativity. Part 5 then explores the import of this distinction for reconceiving legal pluralism theory as independent of the requirement that normativity be expressed in the written words or symbols of a natural language.

1. Three Moments of (Legal) Evangelicalism

In *Burning to Read: English Fundamentalism and Its Reformation Opponents*,³ James Simpson argues that the sixteenth-century conflict provoked by those who believed that the Bible and not the Papacy was the sole authority in matters of religion was a product of a recent technology—the printing press. He claims that without the wide dissemination of sacred texts made possible by the printed book, and especially by a Bible printed in vernacular language, the Protestant Reformation would have been impossible. Whatever the truth of Simpson’s claim about the role of the printing press in the process, it is difficult to discount his broader thesis that popular distribution of the Bible led to a reconsideration of the place of institutional authority and authoritative text in human society generally.

Luther, admittedly, tacked up his ninety-five theses in Latin, and he certainly intended them to be read by his ecclesiastical superiors rather than by the lay public. Luther well understood that the authority of the Church lay in its control of the text of the Bible (not just of the books of scripture deemed appropriate for inclusion, but also of the languages of the Bible and the mode of biblical expression).⁴ Luther also knew that this control gave the Church a

³ James Simpson, *Burning to Read: English Fundamentalism and Its Reformation Opponents* (Cambridge, MA: Belknap Press, 2007). Frank Kermode’s review, “Wars over the Printed Word,” *New York Review of Books* 54, 19 (6 December 2007), 50, is the source of many ideas developed in the following paragraphs.

⁴ Of course, it was exactly this understanding that led to the work of William Tyndale and Thomas Cranmer in the early sixteenth century, prefiguring the “King James” version of

privileged position as authoritative interpreter, and as the institution within which such authoritative interpretation could be made real in the everyday lives of believers through extra-biblical practices, rites, and sacraments.

Conventionally, historians claim that the sixteenth-century reformers laid the groundwork for modern liberal political thought. Protestant doctrines freed humankind from the chains of canonical dogma imposed by official religious institutions. By making the enlightenment of the Bible available to anyone, and by propounding a direct relationship between “man and God” mediated only by individual conscience, these doctrines undermined the claim of the Church (and, ultimately, of the Prince) to divine legitimation. In this new evangelical creed, the Bible itself was sufficient to frame the life of the faithful. Ecclesiastical rituals and sacraments were no longer a necessary route to salvation in the hereafter; secular institutions were no longer seen as established by the Prince in the image of God. However much the just exercise of secular and religious authority may have been inspired by God, the institutions through which this authority was manifest were created by human beings.⁵ This point led Luther to conclude that the citizen owed no absolute loyalty either to the Church or to the state: “No law, whether of men or of angels, may rightfully be imposed upon Christians without their consent, for we are free of all laws.”⁶

Another dimension of the Protestant claim lay in the promotion of literacy, which three centuries later nourished a second moment of evangelicalism. For the Bible to be truly sufficient for the faithful, it would have to be read. Unlike rites that may be institutionally framed and mastered in an oral culture, engagement with text presupposes literacy. So, fundamental to nineteenth-century life in North America, and especially to life in North America at the time of the second great awakening (*ca.* 1800–1840),⁷ was the creation of public education. To take a Canadian example, Edgerton Ryerson was a Methodist minister who founded a printing press with the initial objective of making copies of the Bible available cheaply to inhabitants of Upper Canada, and who in the first half of the nineteenth century established Ontario’s system of compulsory public education to grade 10. For Ryerson, the “three Rs” (reading, ’riting, and ’rithmetic) were the foundations of a pious life in the service of God.⁸ The family Bible was at once the moral code and, in its liminal pages, the record of a family history, genealogy, and filiation. More than this, for Ryerson as for Luther, the Bible was alone

the Bible in vernacular English in 1611. See M.H. Black, “The Printed Bible,” in *The Cambridge History of the Bible*, vol. 3, ed. S.L. Greenslade, 408–75 (Cambridge: Cambridge University Press, 1963), 429.

⁵ This reframing of the source of secular authority was, of course, the ambition of Thomas Hobbes, *Leviathan* (1651; reprint, Oxford: Clarendon, 1909).

⁶ Martin Luther, *Three Treatises*, trans. C.M. Jacobs, A.T.W. Steinhaeuser, and W.A. Lambert (Philadelphia: Fortress Press, 1960), 193.

⁷ For a general discussion of the first and second great awakenings, see R.J. Carwardine, *Evangelicals and Politics in Antebellum America* (New Haven, CT: Yale University Press, 1993).

⁸ See J.H. Putman, *Edgerton Ryerson and Education in Upper Canada* (Toronto: Briggs, 1912).

sufficient as a guide to moral behaviour. Yet not all who welcomed the campaign for literacy and popular dissemination of the Bible in vernacular language agreed. Many saw Bible reading by the congregation only as a home-study complement to rituals, dogmas, catechism, and creed—which together comprised the inherited traditions of Christian worship and conduct. Consider the words of John Henry Newman, writing at about the same time in England: “The Bible is not an independent entity, but a partial and subsidiary resource of the Church. Outside that set of resources, an independent Scripture would collapse.”⁹

Let us now fast-forward to a third moment of evangelicalism, the contemporary period, and to Jimmy Carter’s recent book, *Our Endangered Values: America’s Moral Crisis*.¹⁰ Carter’s book is an instructive study of how evangelicalism, and particularly Protestant evangelicalism, has been recast by religious fundamentalists. Those in what has come to be called the evangelical tradition, like Luther, Ryerson, and Carter, believe that faith alone (and not good works) is the key to salvation. More importantly, they hold that faith must be grounded in careful study and personal interpretation of the text of the Bible and not primarily, if at all, in the practices, traditions, rites, and sacraments of religious institutions. Many of today’s evangelicals, however, are of a different stock. For them, the Bible is literal truth, to be read and followed to the letter; the authority of the text, itself the inspired word of God in contemporary vernacular, bears or permits no human interpretation—personal or doctrinal.¹¹ And yet, the divine inspiration is sometimes uncertain: for example, how are we to know that the message of I Corinthians 13 is best rendered in English by “charity,” as derived from *caritas* in the Latin Vulgate (the choice of the King James version of 1611), or as “love” as derived from *agape* in the Greek sources (the choice of William Tyndale and the Geneva Bible of 1560)? Despite the interpretive choice apparently opened by divergent translations, today’s evangelical fundamentalists see no need of scholastic or contextual referents, whether oral or written, to understand biblical wisdom. A text has a meaning ordained by God, and this original divine intention can be apprehended in literalism.

These evangelical moments are the background to central themes of this essay. They suggest that the era we call “modern” in Western law perhaps dates to the Reformation, rather than to the eighteenth-century Enlightenment. The US Declaration of Independence, its Constitution of 1789, and the French Declaration of the Rights of Man and the Citizen were the archetypal expression of the revolution spawned by Gutenberg, and were already prefigured in the great sixteenth- and seventeenth-century

⁹ John Henry Newman, *Apologia pro vita sua* (1864; reprint, New Haven, CT: Yale University Press, 2008).

¹⁰ Jimmy Carter, *Our Endangered Values: America’s Moral Crisis* (New York: Simon & Shuster, 2005).

¹¹ The paradox, of course, is that fundamentalist evangelicals are among the Christians most reliant on preaching by official preachers (Pentecostalism) to guide their “literal” interpretation.

doctrinal works of law and politics in Europe. As constitutional texts, they became the first objects, and remain primary artefacts, of contemporary legal evangelicalism.¹² Together with the great European codification projects of the nineteenth century (from Napoleon's *Code civil des français* and Jeremy Bentham's proposals through to the *Bürgerliches Gesetzbuch* of 1900), they served as the foundation of a monistic legal culture that transformed understandings of law and reduced authority to text and its literal (exegetical) interpretation.¹³

Woven through the following sections are three related claims. First, I believe that contemporary legal evangelicalism poses a threat to our practices of law and legality, both domestically and in the global arena. Domestically, a culture of overweening attention to text breeds excessive recourse to legislation and subordinate legislation as normative artefact; internationally, in its colonizing forms of conventions, model laws, legislative guides, and, perhaps most recognizably, the Universal Declaration of Human Rights, it undermines the very aspirations to legality and the practice of the rule of law that these texts are meant to promote. Second, I believe that contemporary legal evangelicalism breeds a reliance on the rituals, catechism, and creed of official institutions that focus on the word (especially on the definitive pronouncements of the *curia* that sits at the top of an institutional hierarchy) and disparages local interpretive *collegia* that also rely on self-generated rite, practice, and custom to inform meaning. Third, I believe that contemporary legal evangelicalism leads to a trivializing of other forms of (unwritten) law and other sites of (unwritten) legal ordering. I do not, of course, claim that a commitment to legal evangelicalism is incompatible with recognizing a plurality of legal orders. There are, after all, several non-state legal orders where constitutive (or organic) normativity is predominantly written: the Roman Catholic Church, the International Red Cross, the National Hockey League, the United Way, the Canadian Bar Association, McGill University, and so on. The idea is simply that legal evangelicalism has become such a powerful ideology, in North America especially, that it trivializes unwritten normativity even in non-state legal orders.¹⁴

¹² Perhaps the most ardent defender of the centrality of written constitutional text as self-sufficient at this point was Thomas Paine, *Common Sense, Rights of Man, and Other Essential Writings of Thomas Paine* (New York: Signet Classics, 2003). I do not discount the *Magna Carta*, the 1688 *Bill of Rights*, or the 1701 *Act of Settlement* in England as constitutional artefacts, but the precise words of these texts are no longer canonical. Alone among the states of western Europe and their colonial offspring, the United Kingdom has retained what can plausibly be called a "common law constitution." For elaboration see Mark D. Walters, "Written Constitutions and Unwritten Constitutionalism," in *Expounding the Constitution: Essays in Constitutional Theory*, ed. Grant Huscroft, 245–76 (Cambridge: Cambridge University Press, 2008), 245; Mark D. Walters, "The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law," *University of Toronto Law Journal* 51 (2001): 91–150.

¹³ For a further examination of this development in the private law and its consequences see R.A. Macdonald, "European Private Law and the Challenge of Plural Legal Subjectivities," *The European Legacy* 9 (2004): 55–66.

¹⁴ I leave aside for the purposes of this paper whether Latin American liberation theology provides a counterpoint to legal evangelicalism in its explicit recognition of the power of

As a conceptual introduction to the challenges posed by contemporary legal evangelicalism I should like to recur to Max Weber's basic ideal-types of legal thought as applied to law-making and adjudication in the epochs of Anglo-American legal evangelicalism.¹⁵ As a first moment of legal evangelicalism, the Reformation period began the transformation of legal reflection from what Weber characterized as theological-legal substantive irrationality toward a substantive rationality in legal ordering, a mode of doing law that dominated from the sixteenth through the eighteenth centuries in Europe. The promise of the second moment of legal evangelicalism, exemplified in the great legal texts of the late eighteenth and nineteenth centuries, lay in its ambition to move law and politics from substantive rationality to a pure archetype of formal rationality. In the shift, first, from Bacon, Bodin, and Grotius to Mansfield, Blackstone, and Pothier, and second, from Mansfield, Blackstone, and Pothier to Kelsen, Somló, and Hart, European legal theory has tracked European political philosophy.

The third transformational moment, reflected in contemporary, fundamentalist legal evangelicalism, reflects yet another Weberian archetype. The dominant practice of law today bears witness to the move from formal rationality to a formal irrationality of the type Weber characterized as oracular jurisprudence: the repetition of mantras and formulae by designated mystics (Parliament, judges, lawyers, and law professors). While legislatures may continue to assert that the language deployed in statutes they enact and judges may still argue that the justifications they offer in judgments they write are rational (in Weber's sense of rationality as the logical deduction of meaning),¹⁶ it is often difficult to see the basis upon which such claims are made. The commitment to legislating coherently within an existing conceptual structure no longer disciplines parliaments; haphazard, one-off ukases deploying the linguistic formula of the moment typify the contemporary statute.¹⁷ Judges too are wont to imagine justification as pointing to some *ex post* outcome consistent with a metric (economics, political philosophy, sociology, etc.) external to the *ex ante* conceptual structure of the law (its

rite, ritual, and action in the construction of normativity. After all, the central resources of liberation theology are those of the Church; the focus of legal evangelicalism on unmediated biblical contemplation denies a role to these institutional resources. See Norbert F. Lohfink, *Option for the Poor: The Basic Principle of Liberation Theology in the Light of the Bible* (Berkeley, CA: Bibal Press, 1987).

¹⁵ For elaboration see *Max Weber on Law in Economy and Society*, trans. M. Rheinstein and E. Shils (Cambridge, MA: Harvard University Press, 1954), 64ff.

¹⁶ This characterization of Weber's concept of rationality is derived from A. Kronman, *Max Weber* (Palo Alto, CA: Stanford University Press, 1983), 72–95.

¹⁷ By "existing conceptual structure" I mean at once the internal logic of a piece of legislation (say a Bankruptcy Act), the internal logic of an entire field of private law (as represented, say, in a Civil Code), and the conceptual structure of the legislative enterprise (in the sense of Lon Fuller's eight canons of the internal morality of law). Hence, what I call statutory ukases pay little attention either to internal conceptual fit or to the idea of legislation as relatively stable norms meant to facilitate self-directed human action and interaction. For development, see R.A. Macdonald and H. Kong, "Patchwork Law Reform: Your Idea Is Good in Practice, But It Won't Work in Theory," *Osgoode Hall Law Journal* 44 (2006): 11–52.

internal rationality) and to deploy more abstract terms (liberty, equality, discrimination, fairness) as a cover for oracular pronouncement.¹⁸

Today, the puzzle is to discover the extent to which legal texts issued by legislatures and courts constrain official action and interpretation in a manner cognizable by the citizens to whom they are directed and whose conduct they are meant to guide, and the extent to which they are conceived of, and deployed as, mechanisms to authorize a stylized conversation that only tangentially touches the manner in which citizens experience the everyday normativity of everyday life. To exploring whether contemporary, fundamentalist legal evangelicalism also stands as an impediment to imagining a critical legal pluralism independent of any expression of normativity in the words of a natural language, I now turn.

2. Anatomy of a Critical Legal Pluralism

Over the past four decades various scholars have explicitly advanced a pluralist conception of law that stands in contrast to statist understandings of the legal enterprise.¹⁹ Whether the plurality is intra-state (or weak)²⁰ or extra-state (or strong)²¹ the dominant mode of pluralist theory has been social-scientific.²² For social-scientific legal pluralists, typically working with the conceptual apparatus of sociology or of anthropology, the competing legal orders are observable data, and their central features are analogous to those of official legal orders.²³ Since my own first efforts to articulate a strong version of legal pluralism,²⁴ I have sought to uncover and elaborate the foundations and necessary preconditions of a pluralist approach to legal phenomena.²⁵ The

¹⁸ Of course, I acknowledge that once an external metric has been incorporated into the common law (as in the Learned Hand test in the law of torts) or into the interpretive structure of a statute (the measure of a proceeds claim under the Personal Property Security Act) or a constitution (the *Oakes* test in Charter interpretation), this metric will be as constraining upon judges as such internally generated conceptual notions as “the reasonable person.”

¹⁹ For an interpretation of the historiography of legal pluralism see Kleinhans and Macdonald, “What is a *critical* legal pluralism,” 29–34. See also S.E. Merry, “Legal Pluralism,” *Law and Society Review* 32 (1988), 869; Sally Falk Moore, “Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949–1999,” *Journal of Royal Anthropology Institute* 7 (2001), 107; Margaret Davies, “The Ethos of Pluralism,” *Sydney Law Review* 4 (2005), 27; and Mitra Sharafi, “Justice in Many Rooms since Galanter: De-romanticizing Legal Pluralism through the Cultural Defense,” *Law and Contemporary Problems* 71 (2008).

²⁰ Santi Romano, *L'ordre juridique* (Paris: Dalloz, 1975); H.W. Arthurs, *Without the Law* (Toronto: University of Toronto Press, 1985).

²¹ G. Woodman, “Legal Pluralism and Justice,” *Journal of African Law* 40 (1996), 152; B. de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in Paradigmatic Transition* (New York: Routledge, 1995).

²² See, notably B.Z. Tamanaha, *Realistic Socio-legal Theory* (Oxford: Clarendon Press, 1997); B.Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2001).

²³ The point is nicely developed in D. Jutras, “Legal Dimensions of Everyday Life,” *Canadian Journal of Law and Society* 16, 1 (2001), 45.

²⁴ R.A. Macdonald, “Recognizing and Legitimizing Aboriginal Justice: Implications for a Reconstruction of Non-Aboriginal Legal Systems in Canada,” in *Aboriginal Peoples and the Justice System* (Ottawa: Royal Commission on Aboriginal Peoples, 1993), 232.

²⁵ J.-G. Belley, “Le pluralisme juridique de Roderick Macdonald : une analyse séquentielle,” in *Théories et émergence du droit : pluralisme, surdétermination et effectivité*, ed. A. Lajoie et al.

goal has been to develop the implications of a *critical* as opposed to a social-scientific conception of legal pluralism: that is, to understand legal pluralism as hypotheses rather than as a claim about the true “nature of things legal.”²⁶

The endeavour led me first to a consideration of salient features of orthodox, analytical legal theory and to assess their relevance to different legal pluralist alternatives.²⁷ Five tenets of this orthodoxy (monism, centralism, positivism, prescriptivism, and chirographism) struck me as primary. Each of these tenets has an exclusionary ambition and reflects a different preoccupation with delineating the legal from the non-legal—whether numerically (monism), institutionally (centralism), analytically (positivism), ontologically (prescriptivism), or semiotically (chirographism).²⁸ One might summarize

(Montreal: Thémis, 1998); M. Coutu, “Juridicité et normativité dans la théorie sociojuridique de R.A. Macdonald,” *Revue générale de droit* 28 (1997), 337.

²⁶ In making this claim, I do not also mean to assert that those who hold to critical legal pluralist hypotheses do not ground their ideas in claims or assumptions about the “nature of human beings” as endowed with agency, or about the “nature of human society” as not being a war of all against all. See Kleinhans and Macdonald, “What is a critical legal pluralism?”; R.A. Macdonald, “Critical Legal Pluralism as a Construction of Normativity and the Emergence of Law,” in *Théories et émergence du droit : pluralisme, surdétermination, effectivité*, ed. A. Lajoie et al. (Montreal: Thémis, 1998), 12; R.A. Macdonald, “Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism,” *Arizona Journal of International and Comparative Law* 15 (1998): 69–91; R.A. Macdonald, “Here, There . . . and Everywhere: Theorizing Legal Pluralism; Theorizing Jacques Vanderlinden,” in *Étudier et enseigner le droit : hier, aujourd’hui et demain—Études offertes à Jacques Vanderlinden*, ed. N. Kasirer, 381–413 (Montreal: Yvon Blais, 2006). In the past fifteen years other scholars have taken up similar approaches to legal pluralism, typically resting on similar assumptions about human agency and the possibilities of social life. See, notably, Jacques Vanderlinden, “Return to Legal Pluralism—Twenty Years Later,” *Journal of Legal Pluralism and Unofficial Law* 28 (1991), 149; J. Vanderlinden, “Vers une nouvelle conception du pluralisme juridique,” *Revue de recherche juridique* (1993), 573; J. Vanderlinden, “Trente ans de longue marche sur la voie du pluralisme juridique,” *Cahiers d’anthropologie du droit* (2003), 21; Margaret Davies, “Pluralism and Legal Philosophy,” *Northern Ireland Legal Quarterly* 57 (2006), 577; Emmanuel Melissaris, “The More the Merrier? A New Take on Legal Pluralism,” *Social and Legal Studies* 13 (2004), 571; E. Melissaris, *Ubiquitous Law: Legal Theory and the Space for Legal Pluralism* (Farnham, UK: Ashgate, 2009).

²⁷ For a summary presentation of these tenets see R.A. Macdonald and D. Sandomierski, “Against Nomopolies,” *Northern Ireland Legal Quarterly* 57 (2006), 610; and R.A. Macdonald, “Pluralistic Human Rights; Universal Human Wrongs” (conference paper delivered on 12 October 2006; on file with author).

²⁸ Together they comprise the core of twentieth-century analytical jurisprudence as propounded by Hans Kelsen (see, e.g., H. Kelsen, *The Pure Theory of Law* (Berkeley, CA: Stanford University Press, 1967), H.L.A. Hart (see H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon, 1961; (2nd ed., 1994), and Hart’s followers (see, e.g., R. Gavison, *Issues in Contemporary Legal Philosophy: The Influence of H.L.A. Hart* (Oxford: Clarendon, 1987)). I acknowledge that there is nothing in Hart’s version of analytical jurisprudence that *requires* acceptance of the first and second tenets, although invariably adherents do adopt them. For example, Hart never claimed that the normative regime of the Roman Catholic Church could not be a legal system; nor did he adopt Kelsen’s normative monism. I also acknowledge that in recent years, many analytical jurists have seriously attenuated Hart’s separation thesis, which purportedly serves as the positivist litmus test; see notably J. Raz, *The Authority of Law: Essays on Law and Morality*, 2nd ed. (Oxford: Oxford University Press, 2009). In like fashion, it is not necessary for analytical jurists to hold to the chirographic commitment and to claim language as the exclusive (or even necessary) vehicle of legal normativity. Nonetheless, prescriptivism seems to be an essential feature of analytical orthodoxy. (It is, to be sure, an orthodoxy of other approaches as well. For example, social-scientific legal pluralists typically take this view of each of the competing legal orders they acknowledge, discounting the

the orthodoxy as resting on the idea of a nomopoly (a *nomos* monopoly). As noted, while each tenet points to a different criterion for constituting the nomopoly, one thing is consistent: the human being (conceived as *legal subject*—that is, as being subject to law) is outside that sphere.²⁹

In pursuing this dimension of critical legal pluralism, I focus on one of these exclusionary tenets—chirographism, or the belief that law is primarily (if not exclusively) about norms that can be (and usually are) fully expressible in written words.³⁰ To situate this claim, it is important to distinguish it from other types of claims about the *word*. Thomas More and Cardinal Newman (even more so Luther and Tyndale) held that because the Bible was divinely inspired, it was central to Christian practice. But for More and Newman, salvation lay in the meaning propounded by official institutions, and in the sub-jacent rites and practices by which this meaning was made present in the lives of the faithful. By contrast, for Luther and Tyndale, neither text nor institutional practice could coerce action or belief. The biblical texts were allegories, parables, and hypotheses of right conduct, points of reference for the practice of faith.³¹ In orthodox legal theory, the written law (constitution, legislation, regulation) is central to civic practice. Whether analytical positivist or legal realist, and whether dogmatic or postmodern in orientation, most Anglo-American and continental legal theorists see the text (including the text creating the institution) as constituting normativity. While sympathetic to the Protestant perspective, a *critical* legal pluralism begins the quest for law elsewhere. Legal subjects are not just law-obeying or law-abiding. They are law-creating, generating their own legal subjectivity and establishing legal order as a knowledge process for symbolizing inter-subjective conduct as governed by rules. In such an aretaic conception, every human being in interaction with others is both law-maker and law-applier—a “legal agent.”³²

constitutive character of discrete human interaction and focusing on the role of “social norms.”) In the prescriptivist hypothesis there are authorized rules of the legal system exclusively enacted and administered by authorized officials, and there is the “rest of the world” upon which these authorized rules and these authorized officials operate: see W.A. Adams, “‘I Made a Promise to a Lady’: Critical Legal Pluralism as Improvised Law in *Buffy the Vampire Slayer*” (unpublished essay, 2010).

²⁹ For further elaboration see R.A. Macdonald, “Unitary Law Re-form, Pluralistic Law Re-Substance: Illuminating Social Change,” *Louisiana Law Review* 67 (2007), 1113.

³⁰ I acknowledge that legal theorists sometimes distinguish their differing positions by the content they give to the word “norm.” An analytical positivist, for example, might hold that law comprises rules and decisions, whereas a pragmatic positivist (legal realist) might hold that law comprises *ex post* predictive summaries of judicial decisions, and a sociological jurist might hold that law comprises rules, decisions, principles, policies, and practices. For present purposes, nothing turns on these definitional differences. My focus, rather, is on how jurists conceive the written word as expressive of norms, and not on the character or scope of the written norms that are to be considered as legal.

³¹ Admittedly, the rites and practices in local Catholic churches (the congregation or collegium) can generate or facilitate interactive normativity, and do not necessarily yield coercion. Even highly prescribed rituals such as the sacraments have different normative saliences when practiced in Mary Queen of the World Cathedral in Montreal and in a slum in Managua. The distinction I am drawing relates to the “necessity” of official Church practice—of whatever political or social extroversion—for salvation.

³² For an application of this idea to the judicial function, see L. Solum, “Virtue Jurisprudence: An Aretaic Theory of Law” (unpublished essay, October 2004). In a legal pluralistic

As agents, legal subjects understand the normativity of law as originating in their own actions and interactions; that is, they learn about law, first and foremost, from themselves.³³ This is not to say that they reject the *word*. What they reject is the notion that the pre-existing *word* and accompanying institutional rituals, sacraments, and dogma are the source and force of law. A *critical* legal pluralism requires human beings to appreciate their own norm-constituting potential, that is, to accept that interaction is fundamental to all normativity—however formalized, however explicit, however informal, however implicit. The meaning of the *word* is to be understood in actions and interactions. It is to be understood not just in the institutional rites of dogmatic interpreters but in the continuing interpretive communion of the congregation. In such a perspective the *word* is only one of the many symbols through which a congregation becomes a community, and through which congregationalists are enabled to communicate—expressing their aspirations, holding each other to account, and sometimes even oppressing each other: art, music, dance, rite, gesture, and action ground the *word* in everyday life.³⁴

To appreciate the implications of this last observation, one might consider the etymology of the word *chirographic*. According to the *Oxford English Dictionary*, a “chirograph” is “an obligation or bond given in one’s own handwriting.”³⁵ The OED also states that “chirograph” is a term “applied technically to various documents formally written, engrossed, or signed.” The focus on the written evidences a society and a culture in which belief and trust either can no longer be taken for granted or cannot be understood without adopting a uniform instrumental vehicle for symbolizing it. Human beings often use written *words* expressing duties and entitlements to distance themselves from their everyday acts of law-making and law application, to avoid having to acknowledge that they are the agents of law and that they (rather than their official mandataries) are directly responsible for its

conception, everyone is a law-maker and a law-applier, but some actually are in authority by virtue of their wisdom. The manifestly foolish human being, interacting with others, is a law-maker and a law-applier, but no one accepts her or his actions as authoritative; by contrast, the wise human being, engaged in the same activities, can be taken to be an authority, and other human beings—even as agents—will defer to her or his understandings. See also R.A. Macdonald, “Triangulating Social Law Reform,” in *Dessiner la société par le droit*, ed. Y. Gendreau, 119–52 (Montreal: Thémis, 2004).

³³ R.A. Macdonald, *Lessons of Everyday Law* (Montreal: McGill-Queen’s University Press, 2002).

³⁴ I have attempted to explore how these diverse symbols play a complementary role to language in R.A. Macdonald, “Legal Bilingualism,” *McGill Law Journal* 52 (1997), 119, and in R.A. Macdonald and C. Kehler-Siebert, “Orchestrating Legal Multilingualism,” in *Jurilinguistics: Between Law and Language*, ed. N. Kasirer and J.-C. Gémard (Montreal: Thémis, 2005), 377. The central point is that human beings have a rich array of artefacts for inter-subjective communication, each of which (assuming that we have sufficiently developed our capacity to deploy them) is capable of the same expressive nuance as words.

³⁵ *Oxford English Dictionary [OED]*, s.v. “chirographic.” In civil law states, a “chirographic creditor” is a creditor whose claim is witnessed by an informal writing as opposed to, for example, a notarial deed. In both cases, the writing stands for the claim, although the informal writing of the parties bears a closer relationship to “law-creating” agency than the state-imposed formalism of the latter.

content. In *Dilemmas of Trust*,³⁶ Trudy Govier reaches a disturbing conclusion: as human beings, we seek to enact formal legal texts that aim to be authoritative and definitive when we are uncertain about the “other,” which is to say, ultimately, when we are uncertain about ourselves.³⁷

3. That’s Not Cricket

I would like to develop this last point about agency allegorically, by reference to another type of cultural artefact that, like law, can be understood as having the ambition to subject human conduct to the governance of rules: sports, and, in particular, cricket.³⁸ Today, there are forty-two basic rules of cricket, developed, augmented, and refined since 1787 by the Marylebone Cricket Club.³⁹ In 2000, the Marylebone Cricket Club undertook a revision and restatement of the Rules of Cricket for the new millennium.⁴⁰ The revision was prefaced by the following quite remarkable statement:

In this Code, the major innovation is the introduction of the *Spirit of Cricket* as a Preamble to the Laws. Whereas in the past it was assumed that the implicit Spirit of the Game was understood and accepted by all those involved, now MCC feels it right to put into words some clear guidelines, which will help to maintain the unique character and enjoyment of the game.

Thereafter appeared a Preamble to the Laws, beginning with the obvious point that

Cricket is a game that owes much of its unique appeal to the fact that it should be played not only within its Laws but also within the Spirit of the Game. Any action which is seen to abuse this spirit causes injury to the game itself.

The Preamble continues with seven more detailed rules explaining, among other things, that “the Spirit of the Game involves RESPECT for ... the

³⁶ T. Govier, *Dilemmas of Trust* (Montreal: McGill–Queen’s University Press, 1997).

³⁷ I do not claim that in human affairs there is likely to be a stable state in which each of us can confidently go about our activities confident both about our own behaviour and motivations and about the behaviour and motivations of others. We all constantly seek reassurance against the unknown. Moreover, the aversion to uncertainty manifests itself in numerous other mechanisms by which human beings seek security in relationships: a financial bond, the offering of a hostage, the surrender of arms, self-denial in the mob, and, in the Hobbesian universe, deference to a sovereign. Seen in this light, the use of a text as a surrogate for security is not to be disparaged.

³⁸ I use the words “the ambition to ...” advisedly. Lon Fuller once characterized law as the “enterprise of subjecting human conduct to the governance of rules” (*The Morality of Law* (New Haven, CT: Yale University Press, 1964), 106). In my view this characterization could be improved were it framed as the “enterprise of symbolizing human conduct as governed by rules” (Macdonald, “Here, There and Everywhere,” 393.) While Fuller could be read as acknowledging that the central “subjection” in his understanding is self-imposed, the claim has usually been understood as prescriptivist, a position that directly contravenes his basic epistemology (Fuller, “Human Interaction and the Law,” *American Journal of Jurisprudence* 1 (1969), 3; Fuller, “Law as a Means of Social Control and Law as a Facilitation of Human Interaction,” *Brigham Young University Law Review* (1975), 85.)

³⁹ See <http://www.lords.org/laws-and-spirit/laws-of-cricket/laws/>

⁴⁰ See *ibid.*

game's traditional values" (rule 4) and that "it is against the Spirit of the Game . . . to indulge in cheating or any sharp practice . . ." (rule 5).

Perhaps the most important of the laws that follow this Preamble is Law #42: "Fair and unfair play." This law, which has been modified several times over the years, now comprises seventeen very detailed sub-rules. It commences by enjoining captains to ensure that "play is conducted within the spirit and traditions of the game, as described in The Preamble—The Spirit of Cricket, as well as within the Laws."

What are we to make of the fact the self-appointed guardians of the game that gave us the popular, but never officially declared, expression "that's not cricket" as general description—by the negative—of how the (and more generally "any") game should be played, has found it necessary, after more than two centuries, to enact injunctions to "play according to the Spirit of the Game" and to "respect the game's traditional values," as well as to provide an authoritative, written, discursive formulation of fair play?

The answer, I believe, lies in an insight of C.L.R. James in his classic work *Beyond a Boundary*.⁴¹ The sport is cricket, and the scene is the colonial West Indies. James shows how, in the rituals of performance and conflict on the field, we are witness not just to prowess and technique but also to politics and psychology. West Indian cricket is precisely "cricket by the rules"; but it is, for all that, "not Marylebone Cricket Club cricket." What disturbs the protagonists upholding the integrity of MCC cricket is not the adjustment and attenuation of specific rules to accommodate local conditions. No, what disturbs is the appropriation by colonials of the *Spirit of Cricket*. The tension in the novel flows from contested authority. The game is still played by the rules (perhaps even by the spirit of individual rules), but not according to the presumed spirit of the game (or, at least, according to a spirit reflecting the "class prejudices" of English public schools). When this happens, the official laws of the colonial administrator (in this instance, the Marylebone Cricket Club) lose their prescriptive authority. The rules are no longer enough, because the social and class context that informs their meaning is no longer accepted as controlling. Legislating the contours of the *Spirit of Cricket* appears to be the only way both to reassert authority over the practice of cricket (that is, to transform the game, as played and modified by local interaction, by reimposing authorized practices) and thereby to maintain normative hegemony.⁴²

⁴¹ C.L.R. James, *Beyond a Boundary* (Durham, NC: Duke University Press, 1993).

⁴² I am aware, of course, that debate about the Spirit of the Game long antedated James's novel. Indeed, perhaps the most egregious example of pushing the limits of fair play was not a colonial contrivance but was indigenous to England. The bowlers on the English team touring Australia for the "Ashes" competition in 1932–1933 were ordered by their upper-class captain to deploy a technique called "bodyline bowling" in order to intimidate Australia's superb batsman, Donald Bradman. This episode produced, in 1935, a substantive amendment to Law #42, which thereafter stated, "The bowling of fast short pitched balls is dangerous and unfair if the umpire at the bowler's end considers that by their repetition and taking into account their length, height and direction they are likely to inflict physical injury on the striker . . ." For an account of the controversy,

Let me pursue cricket as allegory for legal evangelicalism by contrasting four visual representations of the game. The first—a five-part documentary titled *1977 Centenary Test Series*—provides a perfect illustration of how a game can be played according to rules but without explicit reference to those rules.⁴³ This documentary celebrates the cricket of the MCC; it lionizes the authorized and official way of acting without even directly stating what that way of acting might be. The game itself defines itself. Its officials and its institutions, more than its laws, are its canon. Practices develop, but they are recognized as appropriate only when incorporated into the authorized canon. Today, even edgy tactics like bodyline bowling, while officially proscribed, are routinely accepted as the game evolves.

Sometimes, however, the official rules fail to take hold of the human situation to which they are directed. The popular Quebec film *La grande séduction* perfectly illustrates the point.⁴⁴ To know the rules, or even to dress and act in conformity with the rules, is no proof that the rules are being followed, let alone understood. Normativity is more than a rote practice or an unthinking habit. It is not enough to know the rules. It is not sufficient even to know the rules *and* the spirit of the game. In the absence of an intention to organize conduct purposively to achieve an objective internal to the game, one is not “playing the game”; one is simply “playing *at* the game,” or possibly playing *with* the game.

This latter alternative suggests that a set of rules and practices can be the occasion for playing out another human drama. The popular Indian film *Lagaan* shows how practices that develop in particular places and particular times can provide a context and meaning for the game that stands proxy for a political struggle.⁴⁵ Increasingly, in international sporting events, the game is played for an instrumental purpose beyond the skilled practice of the game itself. As James observes, there can be “cricket by the rules” that is “not cricket.” But he also suggests that there can also be “cricket by the rules and by the spirit of the rules” that is also “not cricket.” When the

and its class implications for the “lower-class” English bowler who refused to recant and apologize, see D. Frith, *Bodyline Autopsy* (Canberra: ABC Books, 2002).

⁴³ See <http://www.youtube.com/watch?v=s-QT19IJ7nI>. This documentary at no point contains a voice-over narrative explaining the game. The viewer unfamiliar with the object of the game, its strategy, and its tactics would have little understanding either of what was going on or of why any of the particular scenes included in the documentary were deemed to be worthy “highlights.”

⁴⁴ See <http://www.youtube.com/watch?v=FbyiPs53nJw>. In this film, an isolated fishing community on the Gulf of St. Lawrence attempts to induce a doctor to open a practice by pretending that cricket (of which the doctor is a fanatic partisan) is popular with residents. Having studied the rules of cricket and watched the game on the Internet, the residents are able to put on a mock game, dressed to the nines, which from a distance looks like cricket, even though the village players have no understanding of the motions they are performing.

⁴⁵ See <http://www.youtube.com/watch?v=7aZsHRLIsWE>. Here the setting is indigenous resistance to British colonialism in late-nineteenth-century India, and features the appropriation of the colonizer’s game (and its cultural subtext) as a vehicle for an alternative cultural assertion. The recent film *Invictus* is of the same genre. Although played within the rules and the spirit of the rules, the game depicted is less about the spirit of rugby than about the politics of reconciliation in South Africa.

game is not played for its own sake but is subservient to an external politics, a gulf opens between the “spirit of the rules” and the *Spirit of Cricket*.

Finally, sometimes the rules of cricket are merely a backdrop for, or initiator of, another game, another context of interaction, which transcends in significance whatever the rules might mean. Surprisingly, however, in such cases—where the ostensible game is integrated into a larger set of social conventions—the *Spirit of Cricket* survives. In the documentary *Trobriand Island Cricket* one perceives how the rules, the spirit, and the authorized practices of the rules have been subsumed in the performance of a community celebration and feast. The game being played only remotely resembles cricket, but the play in this novel endeavour is skilful. Indeed, despite the extensive makeover of norms, purposes, and practices, the palpable *Spirit of Cricket* permeates the new game—without need for or reference to a written Preamble.⁴⁶

In each of these vignettes one sees the complexity of the interaction among a written rule (and even a second-order written rule, such as the *Preamble* to the Laws of Cricket, that seeks to control the meaning of other written rules), an official institution that claims prescriptive authority, and the human conduct envisioned by these official rules. Just as the rules themselves are in part derivative of practice, the practices and the possibilities of play are derivative of the rules. This complex interaction between word and deed opens an inquiry that challenges both orthodox legal theory and social scientific legal pluralism. Might it be the case that what we call *practice* is, in fact, normative and what we call *official rules* are simply the practices of officials?

4. Making Custom

The salient contemporary movements in legal pluralism theory—the diminishing concern with weak, intra-state pluralism and the increasing attention to strong, extra-state pluralism (occasionally labelled *legal polycentricity*),⁴⁷ and the complementing of the phenomenal (descriptive or socio-scientific legal pluralism) with the noumenal (*critical* legal pluralism)⁴⁸—have raised important new questions about law as a normative phenomenon.⁴⁹ Part 3 above considers the relationship between, on the one hand, explicit written rules, and, on the other hand, the aspirations that motivate those rules and the normative projects within which those rules operate. I shall now argue

⁴⁶ See <http://www.youtube.com/watch?v=0jTP7a9I0dU>. This 1950s documentary shows how the spirit of a game (perhaps particularly a team sport) can be detached from the spirit of its rules and incorporated into the performance of a cognate team activity. The *Spirit of Cricket* is abstracted from any particular rules or the spirit of these rules and transcends any particular practices, however remotely connected to the primal game.

⁴⁷ See, e.g., H. Petersen and H. Zahle, eds., *Legal Polycentricity: Consequences of Pluralism in Law* (Aldershot, UK: Ashgate, 1995).

⁴⁸ Melissaris, “The More the Merrier”; Melissaris, *Ubiquitous Law*; Davies, “Pluralism and Legal Philosophy.”

⁴⁹ Compare Macdonald, “Triangulating Social Law Reform,” with S. Roberts, “After Government—On Representing Law without the State,” *Modern Law Review* 68 (2005), 1.

that informal, unwritten rules are significant not just because they are evidence of “the law in action” but also because they are independent forms of regulation and because they are resources from which explicit, written rules typically draw their power and content.⁵⁰ In this section I also argue that informal legal institutions and, more generally, informal legal orders are significant because they are the indispensable ground upon which formal legal institutions and formal legal orders are erected.⁵¹ As a heuristic for exploring these themes I should like to consider three dimensions of the expression that serves as the title of this essay: “custom made.”⁵²

First, I should like to consider the valences of normative transformation. The inquiry involves several considerations: By what processes do unwritten and unofficial norms (the informal rules of informal groups) become transformed into formal rules of informal groups? By what processes do unwritten and unofficial norms (the informal rules of informal groups) actually migrate across normative orders and become transformed into formal rules of formal groups? And by what processes do the informal rules of formal groups become transformed into the formal rules of formal groups?

I believe that while there is a difference between implicit law (or usages and practices) and explicit law (or legislation), the difference between law which is *custom* and law which is *made* has been overstated in legal theory.⁵³ To borrow a figure from the Roman jurist Gaius, one could say that, as normative phenomena, legislation is “written custom” and custom is “unwritten legislation.” This juxtaposition has two features.

On the one hand, I suggest that orthodox legal theory provides an inadequate account of the process by which human beings use established, specialized institutions to make legal rules—whether these institutions are, for example, a parliament, a faculty council, or a tennis club. For example, classical jurisprudence textbooks understand legislation to be a new and arbitrary act of conscious will; once the text has been enacted, the common-law rule or the customary rule that gave rise to it is deemed no longer to be normative.⁵⁴ From this assumption derives the idea that the specific rationality of

⁵⁰ In much of what follows the influence of Fuller, “Human Interaction and the Law”; G. Postema, “Implicit Law,” *Law and Philosophy* 13 (1993), 47; and J. Webber, “The Grammar of Customary Law,” *McGill Law Journal* 54 (2009), 579, and “Legal Pluralism and Human Agency,” *Osgoode Hall Law Journal* 44 (2006), 167, is apparent.

⁵¹ In two previous essays I have considered the relationship between typologies of norms and typologies of institutions. See R.A. Macdonald, “Vers la reconnaissance d’une normativité implicite et inférentielle,” *Sociologie et sociétés* 18 (1986), 42, and Macdonald, “Les Vieilles Gardes,” 233. For an application of these typologies to the ongoing normative dimensions of a micro legal system see R.A. Macdonald, “Office Politics,” *University of Toronto Law Journal* 40 (1990), 385.

⁵² On the relationship of customary practice to legislated law, and the remaking of legislative law by customary practice, see R.A. Macdonald, “The Fridge-Door Statute” *McGill Law Journal* 47 (2001), 13.

⁵³ The observations of H.P. Glenn, “The Capture, Reconstruction and Marginalization of ‘Custom,’” *American Journal of Comparative Law* 45 (1997), 613, are especially pertinent.

⁵⁴ For exemplary expositions see J. Ghestin and G. Goubeaux, *Traité de droit civil : introduction générale*, 4th ed. (Paris: LGDJ, 1994), and P. Fitzgerald, ed. *Salmond on Jurisprudence*, 12th ed. (London: Sweet & Maxwell, 1966).

the legislation lies primarily in the process by which it is made. For example, public-choice theorists make no claim to rationality in the normative output of the legislative process; their claim is that the process itself is subject to rational explanation involving bargaining, trade-offs, and strategic responsiveness to powerful actors.⁵⁵ That is, the rationality of legislation is not given by highly refined internal literary casuistry (as is common-law adjudication) in which language and syntax presume to control meaning and belief; rather, it emerges from the often unconscious social interaction from which the political trade-offs of rule-making arise and to which they relate (a collective rationality).⁵⁶

On the other hand, I suggest that most theorists of customary law have an inadequate account of how custom acquires its normative force—either for individuals or for groups. For example, it is common to explain customary rules as nothing more than conventions of long usage that emerge from repetition (usually an unthinking or unconscious repetition), and therefore the product of arbitrary, non-rational action.⁵⁷ This conception of custom occludes the imperative elements that underlie the generation of our social practices. The imperative of practice is not, however, an aleatory or radically egoistic one (as is a child's reflex to fear) in which neither consistency nor consequences control activity or forbearance. Rather, customary practice emerges explicitly from the structures within which it operates.⁵⁸ However rational, however functionally efficient as coordinating mechanisms, customary norms, when brought to consciousness and acknowledged as normative claims, reveal themselves as more than generalizations of individual human action; rather, they can best be understood as the outcome of a congeries of acts of conscious will (collective fiat).⁵⁹

Reflecting on the complexity of processes through which made law in the form of legislation acquires its rationality, and implicit law in the form of custom acquires its normative force, reminds us of the independence but interdependence of these two forms of law. In this light, the word *custom* directs our attention to the purposive practices reflected in quotidian human interaction. This directs attention to the (sometimes implicit) structures of engagement that organize relationships: "the practice of habitually resorting to a particular place to give patronage or support."⁶⁰ Just as there

⁵⁵ W. Eskridge, P. Frickey, and E. Garrett, *Legislation and Statutory Interpretation*, 2nd ed. (New York: Foundation Press, 2006).

⁵⁶ To put it slightly differently, just as a set of conventions for interaction arises through individual actions over time, legislation aimed at the same goal arises through individual actions compressed in time, but is no less a collective project for that. For development of this point see J. Waldron, *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999).

⁵⁷ Consider Austin's position in J. Austin, *Lectures on Jurisprudence*, vol. 1, 4th ed. (London: John Murray, 1879), 100f., explaining customary rules as merely proto-law.

⁵⁸ See Fuller, "Freedom—A Suggested Analysis," *Harvard Law Review* 68 (1955), 1302.

⁵⁹ R.A. Macdonald, "Unitary Law Re-form," 1114.

⁶⁰ See *OED*, s.v. "custom" #5.

can be no knowledge disciplines without disciples, there can be no custom if there are no customers.⁶¹

Second, the expression *custom made* directs our attention to the conditions under which individual and group behaviour are modified by the enactment and enforcement of formal rules, including the extent to which informal rules and problem-processing proto-institutions themselves are transformed by competition from formal enactments emanating from formal enforcement. To hint at the complexity of this interrelationship I should like to use the connotations of the expression in the retail industry as a didactic vehicle. Our ordinary understanding of the term *custom-made* is, I believe, associated with the notion of customizing—the process of tailoring of standardized or off-the-shelf products to the particular needs of individuals. Hence it is easy to see how, among the many substantive functions it may perform, legislation can be understood as a customizing endeavour; the reformulation of general and unspecific customary practice into detailed and explicit rules is analogous to the tailoring of these standard-size social practices for explicit use in specific societies or for specific types of activity.⁶² Of course, these standard-sized practices may exist across many different societies—think of the common law, for example, or the general rules of Napoleonic Code derivatives.

A classic example of such customizing of unwritten rules into written rules can be found in the redaction of the *Custom of Paris*. Likewise, the legislative transformation of the contracts of sale, insurance, or lease so as to sharpen up by statute the general regime of contractual obligations in the civil law of obligations reflects the attempt to generate canonical written rules to replace customary rules of practice. This statutory sharpening up typically occurs not only within an intellectual field given by the law itself (i.e., the law of contracts or the law of torts), but also over territory (i.e., the Canadian law of torts differs from that of the United States, especially in those areas where there have been statutory innovations) and over time (i.e., because the common law is held in traditional theory to remain static—being never made by judges, but always only discovered—it is statutes and statutory amendments that permit us to modernize common-law rules).

The process of legislative formulation and sharpening of a legal system's default rules into norms that respond to the intellectual, territorial, and contemporary particularities of our social world is not the end of custom but rather the beginning of a new practice.⁶³ Prior to enactment, the interactions

⁶¹ This idea is implicit in the film *La grande séduction*. The game of cricket played by the villagers is not exactly cricket, but is a customary game emerging from purposive interaction. Whether the game is cricket matters little; what matters is that there are players, each contributing to the community endeavour.

⁶² I do not argue that this is the only function of legislation. Often, legislative rules are meant to establish general patterns that regroup a diversity of particular practices. The great Chalmers statutes of the late nineteenth century—Bills of Exchange, Insurance, Sale of Goods—are an excellent example of the reverse use of legislation.

⁶³ This point is developed in Macdonald and Kong, "Patchwork Law Reform," 11. That is, not only do formal institutions remake the informal practices of informal groups, informal groups can also remake the informal rules of formal institutions into formal rules.

giving rise to the custom were the practices of primary actors, even when courts were authorized to recognize and give linguistic expression to these practices in a judgment. Following enactment, the norm is formally amputated from the practices that gave it content, and the controlling practices are those of the courts charged with interpreting the legislation in question—that is, judicial custom. In this sense, custom made has complementary features. At a primary level, the expression directs our attention to how it is that primary customary practices are reformulated in language and made into explicit rules.⁶⁴ At an institutional level, the expression reminds us that each formalization of a norm leads to the development of new practices, whether by the unofficial institution that previously assumed interpretative jurisdiction or by a new, official institution that has been delegated the interpretive task. In both cases, enactment leads directly to the making of a new custom.⁶⁵

A third dimension of the expression *custom made* is complementary to the second dimension just elaborated. Simply because formal norms and formal dispute resolution institutions have been created to displace primary practices and informal regulatory institutions, we should not presume that primary practices have become *désuet* or have been transformed from law (norms) into fact (mere data). Quite the reverse. Formal norms and formal institutions continue themselves to be transformed by informal normative orders and proto-institutions, and often wind up becoming co-opted into reinforcing the patterns of behaviour they were meant to modify or regulate. Customary practice is the vehicle by which off-the-shelf legislation is tailored for individual circumstance.

This remaking of custom can occur in two different ways, depending on the manner in which the legislative norm is drafted. Sometimes, legislators can be self-conscious about the limitations of their enactments; in such cases statutes are drafted either to explicitly refer out or to implicitly defer to the practices of individuals or communities so as to complete their general regulatory framework (i.e., these statutes delegate the task of norm specification not to courts called upon to interpret legislative language but to the very norm-subjects targeted by the statutes). I suggest that the classical cases in which legislators are particularly self-conscious about the limitations of their enactments can be found where strong and continuing interpersonal normativity already exists: the family (especially spousal and parental relationships); *inter vivos* or *post mortem* gratuitous transfer of property; commercial practices between insiders (i.e., businesspeople and traders within a particular sector); and, increasingly, relationships between unions and management.

Most often, however, legislators are not self-conscious of the limitations of their enactments. The pretence of modern legislation is to regulate

⁶⁴ See OED, s.v. “custom” #2.

⁶⁵ This idea is implicit in the film *Lagaan*. The competition for normative authority in the interaction between indigenous colonized peoples and the colonizer does not end with its transformation into a cricket match; rather, the commitment to displaying authority through performance according to the rules of cricket signals the beginning of a new set of practices.

comprehensively and in detail all our social practices in a given field of action. In such circumstances, however, the pretence is short-lived. Statutes are at best a legislature's optimal hypothesis of how to channel social practice and to induce norm-subjects to reflect upon the course of conduct they prescribe. Everyday social practices quickly encrust legislation with barnacles of interpretation and action. Of course, theorists of legislation acknowledge that interpretation is constantly remaking statutory norms. So, for example, they cite the fate of the original English Sale of Goods Act, or the fate of risk-based liability in the *Code civil des français*, to illustrate how one type of interpretative particularization has occurred—that which comes from successive judicial interpretation of the statutory text until judicial variations, and not legislative theme, acquire normative precedence.⁶⁶

But statutes are most often not customized by courts; they are shaped by a succession of individuals interpreting and acting without the sanction of a formal normative institution to give meaning to their interpretations. Sometimes the practices are those of other officials operating within the formal legal order; consider, for example, practices relating to police discretion to arrest, grant bail, and so on in different parts of the country, or even in different parts of the same city. Sometimes the practices arise in informal institutional settings; consider the give and take of shop-floor practices that constantly modify (if not overrule) the terms of collective agreements in particular areas of a large plant where the demands of certain tasks require such nuance. Sometimes the practices arise when more powerful parties use general property norms to shape the practices of those who are neither consenting nor even cognizant of the normative change; consider, in particular, how over time the practices of landowners (in particular, owners of shopping malls) have changed the terms of occupier's liability statutes by privatizing public space.

In each of these settings, the customizing occurs by informal practice, not by explicit act; and it occurs without any recognizable delegation of authority to do so within the legislative instrument itself. The historical distinctions between custom *praeter legem* and custom *contra legem* are inadequate to capture the point that in these circumstances custom is not merely a gloss on a legislative norm; the customizing results from human interaction as a distinct source of normativity. The making of custom is bidirectional: implicit and informal norms are often explicitly made into customized legislative norms, and explicitly and formally made legislative norms are often implicitly made over into customized informal norms for everyday use. Moreover, this latter customization through practice does not occur only in informal settings or in informal institutions but is also found in the practices of formal or

⁶⁶ While this thesis found its first jurisprudential expression in O.W. Holmes, "The Path of the Law," *Harvard Law Review* 10 (1897), 457, and J.C. Gray, *The Nature and Sources of Law* (1909; reprint, Boston: Beacon, 1963), it became canonical with the rise of realism in the United States in the 1930s. See, notably, K. Llewellyn, "A Realistic Jurisprudence—The Next Step," *Columbia Law Review* 30 (1930), 431.

official institutions.⁶⁷ In this sense, *custom made* means the customizing of normative regimes to suit the particular coordination requirements of particular subsets of a society or subgroups.⁶⁸ Any existing (as opposed to historical, or merely hypothetical) normative order that has taken the step from what Hart calls the pre-legal to the legal world by institutionalizing processes of law-making and law-application in specialized offices confronts the necessary conjunction and bi-directionality of explicit-canonical law and implicit-inferential law.⁶⁹

Before I proceed to developing the connections between custom and legal pluralism, however, it is worth noting how much of our everyday legal apparatus testifies to these interplays. In general, social systems, including legal systems, must always negotiate between what may be called *states of fact* and *states of law*. The law of adverse possession is a classic instantiation; but it is only one. In matters of domestic relations, state courts and legislatures have constantly negotiated a moving frontier between formal marriage and informal marriage, between formal divorce and common-law divorce, between formal and informal filiation. In interpersonal relationships of exchange, the law balances formal contract and reliance as a source of obligation, or actual authority and ostensible authority in relation to third-party effects. And, finally, notions of agency estoppel are common to control decision making in public-law contexts. In everyday human interaction, exactly these same types of arguments ground claims for entitlement or forbearance, although they are often hidden in the rhetoric of justice, fairness, or due process. However formal or informal a legal order, however formal or informal a norm, human action will mould the institutional practices and the prescriptions into a complex normative environment.⁷⁰

5. In the Beginning was the Word . . . Not

The first book of the first chapter of the Gospel according to John commences, in the King James Version, “In the beginning was the Word, and the Word was with God, and the Word was God.”⁷¹ In the most common French version, the verse and chapter begin, “Au commencement était la Parole, et la Parole était avec Dieu, et la Parole était Dieu.”⁷² Believing that “in the beginning was the word” accords a greater primacy to language—indeed, the particular language we use (i.e., text)—than if in the beginning

⁶⁷ For more detailed elaboration see R.A. Macdonald, “Call-Centre Governance: For the Rule of Law, Press #,” *University of Toronto Law Journal* 55 (2005), 449.

⁶⁸ See OED, s.v. “custom” #1.

⁶⁹ Here, of course, we see the point of the film *Trobriand Island Cricket*. Lon Fuller discusses the interaction of made and implicit elements of law in Part 2 of his *Anatomy of the Law* (New York: Praeger, 1968).

⁷⁰ See J.-G. Belley, *Le contrat entre droit, économie et société* (Cowansville: Yvon Blais, 1998); M. Reisman, *Law in Brief Encounters* (New Haven, CT: Yale University Press, 1999); and R.A. Macdonald, *Lessons of Everyday Law* (Montreal: McGill–Queen’s University Press, 2003). Daniel Jutras provides an excellent discussion of these three examples in “Law in Small Spaces,” *Canadian Journal of Law and Society* 16 (2002), 45.

⁷¹ 1 John 1:1 (KJV).

⁷² Évangile selon Jean I, 1 (Colombe version).

were “flesh” (i.e., practice) or “spirit” (i.e., human purpose). For the author of the Gospel of John, the statement “in the beginning was the word,” is true because that is how the narrative begins. For the law, however, it is not necessary that a particular narrative begins with the word. Law involves more than just redacting a text; indeed, even speaking law may be done with sign language, gesture, and just plain action.⁷³

Some have used the metaphor of natural languages to explore customary law, characterizing law as “a language of interaction” or seeking to explicate “the grammar of customary law.” There are, however, several difficulties with using this metaphor. One, obviously, is that reflection on language as such almost immediately turns from orality to written, canonical forms.⁷⁴ Moreover, the fluidity of the oral is lost in text, and, even where no text is generated in specific cases, the protocols of textual interpretation induce the crystallization of orality into memorizable formulae and mantras. A third difficulty is that the metaphor of natural languages promotes the conception that practice, or any other human symbol for communication, is merely a prelude to understanding. Practice, music, art, and dance are proto-normative; they can be understood and explicated only by words—not by more practice, more music, more art, or more dance. In Western culture there are very few instantiations of the dyadic relationship engaged exclusively through non-linguistic communication: the film *Deliverance* is a rare example. Finally, the metaphor invariably invites us to reflect on language as instrumental: it is the discursive properties of language—grammar, syntax, dictionary definitions—that are invoked metaphorically for their explanatory power. Yet the paradox is that language is used metaphorically, without acknowledgement that meaning in language is fundamentally metaphorical and not discursive.⁷⁵

The basic claim is that the central feature of customary law is not that it is implicit, nor even that it is unwritten. The claim here is that customary law is inferential (non-discursive, ideational, non-chirographic). Let me develop this point. Customary law is instantiated in practices and actions through which human beings use available communicative symbolisms to hypothesize these practices and actions as normative (rule-governed). While most often these symbolisms involve visual, aural, olfactory, gustatory, and tactile stimuli and response, written words (hieroglyphs, epigrams, and pictograms) can also occasion ideational customary law. Customary law may involve writing, even referencing the words of a natural language. But the words are apprehended inferentially. Customary law is non-chirographic and ideational in each of its normative dimensions: rules, institutions, processes, concepts, and systems.⁷⁶

⁷³ See text at notes 30–37 above.

⁷⁴ W.J. Ong, *Orality and Literacy: Technologizing the World* (New York: Routledge, 2002).

⁷⁵ I derive this thought from S.K. Langer, *Philosophy in a New Key*, 3rd ed. (Cambridge, MA: Harvard University Press, 1957).

⁷⁶ I acknowledge the inherent paradox of this essay. I am using discursive prose (the chirographic form) to make an argument that normative human interaction exists

Such a non-chirographic conception of law points to several of the foundational themes in *critical* legal pluralist thinking. One is that with the formalization of entitlements, legal claims have come to rest on formal concepts such as jurisdiction, power, and fiat. The richness of normative discourse that flows from recognition that agents are continuously negotiating their agency with one another and with those who would seek to control it is lost when the text that confers a power is read as simply commanding obedience. No longer is it possible for the text to be the occasion for reflection about matters to which it indirectly points.⁷⁷ In favouring textual law, fundamentalist evangelicalism also privileges linguistic signifiers over the signified.⁷⁸

A second theme is this. The critical legal pluralist ethos favours social conditions in which compliance occurs through personal commitments arrived at without coercion or inducement.⁷⁹ People are always—though to varying degrees and in shifting contexts—actively engaging in law-making endeavours as legal *agents*. Often, it is the norm-generating communities to which people belong that influence beliefs and actions in ways that are more profound and immediate than any “official” state-based rules. Legal pluralists look to how social actors negotiate and create their own normative commitment through *interactions*.⁸⁰ For instance, we might consider the rules that define acceptable behaviour and which emerge from interactions between “norm entrepreneurs” (individuals, affiliations, states, etc.) who engage in persuasion and other practices to influence and ultimately shift our individual expectations.⁸¹ From this perspective, dissenting or non-conforming behaviour

independently of its possible expression in words. Yet much human communication is initiated through language, and many of our social resources are devoted to generating the capacity of citizens to express themselves through language. Still, had I been somewhat more certain of the audience for this essay, I would have been less reluctant to use film, art, and music to such effect. What fascinates is that musicians have a rich vocabulary of signs and symbols to express ideas that lawyers do not. How is it possible to deploy music normatively without words? And how much more is required of a listener to gauge the normativity of Beethoven's 32nd Piano Sonata than to gauge the normativity of the soundtrack of a popular movie, or of “muzak” in an elevator?

⁷⁷ This is a phenomenon which has affected all our social institutions as churches become exclusively concerned with religion—having abandoned education, poor relief, orphanages, and so on. The uses of pot-luck suppers, barn raisings, rummage sales, and similar social endeavours to achieve economic redistribution have been lost in the professionalization of religion. Likewise, playgrounds as sites of multigenerational interaction and community building have been transformed into sports facilities.

⁷⁸ See Part 2 above. The catch-phrase is from Jacques Derrida, *Of Grammatology*, trans. G.C. Spivak (Baltimore: Johns Hopkins University Press, 1998).

⁷⁹ R.A. Macdonald, *The Governance of Human Agency* (Background document prepared for the Senate Committee on Illegal Drugs, 2002), 19. On the way in which internalized processes are capable of generating effective international law without “teeth” or coercive sanctions see P.S. Berman, “Seeing Beyond the Limits of International Law,” *Texas Law Review* 84 (2006), 1265.

⁸⁰ Consider SE. Merry, *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans* (Chicago: University of Chicago Press, 1990), 5: the law “consists of a complex repertoire of meanings and categories understood differently by people depending on their experience with and knowledge of the law.”

⁸¹ P.S. Berman, “The New Legal Pluralism,” *Annual Review of Law and Social Sciences* 5 (2009), 225; R.A. Macdonald, “Three Metaphors of Norm Migration in International Context,” *Brooklyn Journal of International Law* 34 (2009), 603.

(whether through ignorance, carelessness, selfishness, context-specific acquiescence, or passive or active resistance) may be an attempt to articulate a different image of normativity. It is through the symbolic and tacit expression of law that people construct their own law, their own regimes of governance.⁸²

A third tenet of critical legal pluralism is that people define acceptable behaviour in ways that engage their fluid, competing, and multiple notions of self. These selves, in turn, shift and vary through our interactions, our morphing locations along axes of race, class, gender, age, ethnicity, sexuality, culture, and geography, and materialize in the nooks and crannies of everyday life.⁸³ Our normative commitments thus vary depending on our various configurations of self, which is shaped and informed by our personal motivations, bonds to others, institutional affiliations, and identity markers.⁸⁴ Each of these aspects of our selves, the plurality of identities we “live by,” is variably ascribed by ourselves and also prescribed by others to varying degrees. Individuals may feel bound to a web of multiple, sometimes conflicting legal regimes, whether by virtue of their affiliations with various social groups, by their own individual normative standards, through their interaction with institutions (families, clubs, churches, schools, self-regulating bodies, corporations, communities, etc.) that reflect, reinforce, and implement these standards. Law emerges, then, through these interactions and relationships and not through coercive means.

If the beginning does not lie with the Word, a critical legal pluralist must find an alternative conception of the relationship between formal and informal norms. If law begins with human action and interaction, the most important norms are informal, and formal rules of law are merely evidence of, but do not themselves function as, operative legal norms. Why then the preoccupation with transforming informal norms into formal legal rules (statutes, regulations, by-laws)? In many cases, the production of formal law is an indication of dissonance among different orders of informal norms that norm entrepreneurs seek to resolve through an appeal to text. That is, formal norms are promulgated because implicit norms *do* have normative weight; powerful groups resist these informal norms and seek, through formalization, to demonstrate that these informal norms no longer have real normative weight; once enactment occurs, however, disempowered groups reassert informal norms as an expression of normative “deviance.”

In such a perspective, a central question then becomes how to address the relative importance of symbolic and instrumental goals in the transformation of implicit into formal norms. The normal characterization of legal rules attributes to them two complementary functions: dispute avoidance through

⁸² Macdonald, “Unitary Law Re-form,” 1144.

⁸³ See the extended discussion in R.A. Macdonald, “The Legal Mediation of Social Diversity,” in *The Conditions of Diversity in Multinational Democracies*, ed. A. Gagnon et al. (Montreal: IRPP, 2003), 85.

⁸⁴ R.A. Macdonald, “L’hypothèse du pluralisme juridique dans les sociétés démocratiques avancées,” *Revue du droit Université de Sherbrooke* 33 (2003), 143.

planning, and dispute resolution. But this highly instrumentalist approach fails to account for the symbolic role of rules. The existence of a textual rule influences the way in which discussions about entitlements are structured. In limiting the way in which people are authorized to talk to each other about their conflicts, rules transform claims of justification into arguments about the meaning of words. Of course, non-interpretive arguments are not thereby expunged from legal discourse; they are reformulated into a language and form consistent with that given by the formal rule. The primary purpose of formalized rules is to *create* disputes—to turn inarticulate complaints, open-ended differences of opinion, or multidimensional conflicts into something sufficiently focused to be characterized as a dispute.

On what basis, then, can legal *agents* decide which normative systems should have pre-eminence over others? There is no “natural” hierarchical ranking of the multiple normative systems which compete for attention and loyalty in the same social space. Moreover, attempts to develop generalizable formulae are inevitably over-simple: “formal orders necessarily trump informal orders,” say, or “the more embracing and coercive the order the higher it stands in the hierarchy of norms.” Refusing to acknowledge a natural hierarchy among normative regimes does not obviate the need to develop some method of achieving comity, of promoting mutual recognition, which would be metaphorically similar to practices and principles which have led to non-hierarchical relations among nation states. Such practices and principles would allow each normative regime to operate more or less peaceably within its own domain, to defer to neighbouring regimes similarly engaged, and to defend itself against intrusions deemed illicit. But of course they would never succeed in confining all individual perceptions, all differences of circumstance and concern, all activity and experience, within a series of watertight normative compartments.

One might also note that normative consonance and dissonance may exist even within a single regime of rules. This is not new information for any astute observer of state law, or for anyone who has self-consciously experienced other normative regimes; all have blatant contradictions, and some legal cultures thrive on such internal controversy. But an important and non-obvious conclusion ensues. If norms can be heterogeneous, if institutions and processes can take many forms, if normative systems are incapable of obvious ranking or relationship within or among themselves, the notion that legal ordering necessarily results in normative coherence is unsustainable. For any person in interaction with others, the idea of law is best rendered as a normative *mêlée*.⁸⁵

⁸⁵ C. Sampford, *The Disorder of Law* (Oxford: Blackwell, 1989). Let me emphasize that I do not claim that the transformation of custom into text is never liberating or empowering. Often revolutions are driven by the desire to break implicit structures of domination by imposing a textual basis for authority. But in the same way that practice can customize rules, sometimes the recognition of normative plurality is a strategy of resistance to official written law and a mechanism for popular construction of law. For example, just as the printing press served to decentre the control of text and the authority of scribes and official interpreters, the Internet acts to decentre the control of information and

6. Conclusion—Living Legal Pluralism

Legal pluralism is way of portraying legal and social phenomena in relation to one another and in their full richness of detail; but it is not itself an analytical model. An internally coherent legal pluralism would itself be pluralistic; an internally coherent *critical* legal pluralism would engage manifold intellectual frames. To a certain degree, the structure of this essay has sought to reflect this multiplicity. Its five parts traverse religion, sports, film, customary practice, and language theory—in each case without attempting to reduce any of these to each other, or to law.

This is not an invitation to chaos. Legal pluralism, like all conceptions of law, presupposes that certain questions will be addressed. At some point there is a difference between law and economics, and between law and basket-weaving. But a *critical* legal pluralism is relatively catholic about the ideological foundations of normative systems, acknowledges the contingency of notions such as “efficacy,” and accepts that its descriptions will always be works of the imagination, no matter how much they are informed by empirical investigation.

A *critical* legal pluralism opens a range of inquiries about the nature of legal regulation. A *critical* legal pluralism must come to terms with the notion that it is not just norms, not just rules, which are infinitely various; so too are the institutional arrangements through which they are conceived, promulgated, and made operational. A non-chirographic *critical* legal pluralism invites scholars to ask what circumstances make for more formality or less in both state and non-state settings. More generally, a *critical* legal pluralism must help us to understand not only the relationship of normative systems to one another but also their internal architecture and dynamics.

If citizens, lawyers, and legal theorists believe that, and act as if, the expression *custom made* means only the increasing making over of customary practice by legislation, we shall end up with a very mean and monochromatic social existence. If, however, citizens, lawyers, and legal theorists believe that, and act as if, the expression also means the constant non-chirographic customizing of our explicit and formal normative creations, we can anticipate a richer and more rewarding life together in our various social interactions. While a non-chirographic *critical* legal pluralism invites us to abandon the illusion that law is no more than a canonical nomopoly, it does not at the same time invite the pretence that it is possible to live without formal and explicit norms and institutions. The impossibility of knowing in advance all normative forces operating on one another and their effects on the individuals ostensibly affected by them requires each of us to consider how we live meaningful social lives in shifting normative hierarchies where tragic choices are a necessary consequence of human agency.

commentary. The Internet has spawned a number of creations such as Wikipedia that, because they are being edited from multiple directions, dilute the canonical nature of the written form.

We undervalue and circumscribe human agency when we attempt to impose, through explicit discursive text, automatic answers to conundrums of human interaction. The irregularity and multiplicity of law permits *human agents* to discover and create for themselves the arrangements that best meet their own contingent understandings of justice. I can think of no better tribute to Jean-Guy Belley than to note that his own rich scholarly life—as teacher, author, and colleague—is an exemplar of the legal pluralism he has so thoughtfully theorized.

Abstract

Contemporary shifts in legal pluralism theory (from weak, intra-state pluralism to strong, extra-state pluralism and from socio-scientific to *critical* legal pluralism) have raised important new questions about law as a normative phenomenon. This article argues for the significance of implicit and inferential legal norms. It begins by considering a movement of thought—evangelicalism—that subordinates the implicit and informal to the explicit and authorized. The essay then outlines the principal features of a non-chirographic legal pluralism and explores how regimes of written rules are consistently made over by those whose conduct they are presumptively meant to govern.

Key words: critical legal pluralism, implicit and inferential norms, chirographism, custom, legal agency

Résumé

Les développements récents dans les théories du pluralisme juridique (le passage du pluralisme intra-étatique vers un pluralisme extra-étatique et le passage d'un pluralisme socio-scientifique vers un pluralisme juridique critique) posent de nouvelles questions concernant la nature du droit en tant que phénomène normatif. Cet essai prône l'importance de la normativité implicite et inférentielle. Il discute une tendance théorique moderne—évangélisme—selon laquelle l'implicite et l'informel doivent nécessairement être subordonnés à l'explicite et au formulé. L'essai se termine en élaborant une conception non-chirographaire du pluralisme juridique et démontre comment dont les normes écrites sont constamment modifiées par ceux et celles dont l'action est visée par ces normes.

Mots clés : pluralisme juridique critique, normativité implicite et inférentielle, chirographisme, coutume, libre arbitre juridique

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