HERE, THERE ... AND EVERYWHERE
Theorizing Legal Pluralism; Theorizing Jacques Vanderlinden

Séance VIII : Droit et théorie pluraliste

PAR

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This essay was completed in December 2004. Apart from minor updating of footnotes it has not been rewritten to reflect further development of my thinking about legal pluralism since then. I should like to thank my colleagues Jean-Guy Belley, Richard Janda, Nicholas Kasirer and Desmond Manderson for their critical readings of earlier versions of this text. I should also like to thank the participants at the colloquium *Étudier et enseigner le droit : hier, aujourd'hui et demain* for their incisive comments on the conference presentation of this paper. Jason MacLean (B.C.L.-LL.B. 2006, McGill University), Sean Rehaag, a J.S.D. candidate at the University of Toronto, Jonathan Widell, a D.C.L. student at McGill, and Andrea Brighenti, (Ph.D., sociology of law 2005, University of Milan) also offered sharp critiques of the essay in its penultimate form. Mr. MacLean and Mr. Brighenti, as well as assisting me in reformulating the text at several points during its drafting, also provided invaluable bibliographic support in the final stages of the project. Finally, I must also thank my children, Madeleine and Aidan, for their critical comments on an earlier version of my life. As good legal pluralists, all the above know that the focus of their critique and commentary is the same.

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Since I am using this paper to develop ideas previously evoked in various essays over the past several years, and attempting to show their interconnections with the *corpus* of Jacques Vanderlinden's writings I feel it important to list in one place the studies that have shaped (and reflected) my views of legal pluralism.

The principal contributions to the theory of legal pluralism are: "What is a *Critical* Legal Pluralism?" (1997) 12:2 Canadian Journal of Law and Society 25 (with Martha-Marie Kleinhans); "Critical Legal Pluralism as a Construction of Normativity and the Emergence of Law" in Andrée Lajoie, *et al.*, eds., *Théories et émergence du droit: pluralisme, surdétermination, effectivité* (Montreal: Éditions Thémis, 1998) 12. For subsequent development of these themes see "Against Nomopolies" (forthcoming 2006 Northern Ireland Legal Quarterly – with David Sandomierski).

For applications of this critical (or radical) legal pluralist perspective to particular situations see:

(1) in respect of everyday life: *Lessons of Everyday Law* (Montreal: McGill-Queen's Press for the School of Policy Studies, Queen's University and the Law Commission of Canada, 2002)

(2) in relation to issues of governance: "Call Centre Governance: For the Rule of Law, Press #" (2005) 55 University of Toronto Law Journal 449; "Kaleidoscopic Federalism" in Jean-François Gaudreault-DesBiens and Fabien Gélinas, eds., *Moods of Federalism: Governance, Identity and Methodology* (Montreal: Yvon Blais/Brussels: Bruylant, 2005); "The Swiss Army Knife of Governance" in Pearl Eliadis, Margaret Hill and Michael Howlett, eds., *From Instrument Choice to Governance: Future Directions for the Choice of Governing Instrument* (Montreal: McGill-Queens University Press, 2005); "Triangulating Social Law Reform" in Ysolde Gendreau, ed., *Mapping Society Through Law* (Montreal: Edition Themis, 2004) 117; *The Governance of Human Agency*, Senate Committee on Illegal Drugs (2002); "The Fridge-Door Statute" (2002) 47 McGill Law Journal 13; "Legislation and Governance" in Willem Witteveen and Wibren van der Burg, eds., *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam: Amsterdam University Press, 1999) 279; "Les Vieilles Gardes. Hypothèses sur l'émergence des normes, l'internormativité et le désordre à travers une typologie des institutions normatives" in Jean-Guy Belley, ed., *Le droit soluble: Contributions québécoises à l'étude de l'internormativité* (Paris: Librairie Générale de Droit et de Jurisprudence, 1996) 233; "Should Judges Be Legal Pluralists" in *Aspects of Equality: Rendering Justice* (Ottawa: Canadian Judicial Council, 1996) 229; "The Design of Constitutions to Accommodate Linguistic, Cultural and Ethnic Diversity" in Kàlmàn Kulsàr and Denis Szabo, eds., *Dual Images: Multiculturalism on Two Sides of the Atlantic* (Budapest: Royal Society of Canada – Hungarian Academy of the Sciences, 1996) 52.

(3) in relation to identity and multiculturalism: "Legal Republicanism and Legal Pluralism: Two Takes on Identity and Diversity" in Michele Graziadei and Mauro Bussani, eds., *Human Diversity and the Law* (Paris: Harmattan, 2005); "The Legal Mediation of Social Diversity" in Alain Gagnon *et al.*, eds., *The Conditions of Diversity in Multinational Democracies* (Montreal: Institute for Research on Public Policy, 2003) 85; "L'hypothèse du pluralisme dans les sociétés démocratiques avancées" (2002) 33 Revue de droit de l'Université de Sherbrooke 133; "Normativité, pluralisme et sociétés démocratiques avancées: l'hypothèse du pluralisme pour penser le droit" in Carole Younes and Étienne LeRoy, eds., *Médiation et diversité culturelle: Pour quelle société?* (Paris: Éditions Karthala, 2002) 21; "Regards sur les rapports juridiques informels entre langues et droit" (2000) 3 Revue de la common law en français 137; "Implicit Civil Codes: Concepts of Law and Legal Education in Early 20th Century Quebec" in DeLloyd Guth, ed., *Essays on Canadian Legal History* (unpublished manuscript collection), (Legal Research Institute, Winnipeg, Manitoba, 1998); "Recognizing and Legitimating 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.

(4) in relation to international trading regimes: "Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism" (1998) 15 Arizona Journal of International and Comparative Law 69; "Pluralism in Law and Regime Theory" in Robert Wolfe, ed., *Transatlantic Identity: Proceedings of the 1996 Canada-U.K. Colloquium* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1997) 37.

INTRODUCTION

1. This paper is at once a tribute to Jacques Vanderlinden and a statement of belief – an image of a man, nested in a manner of imagining law. With the image and the imagination comes both a way of conceiving a purpose and methodology for legal research and an ambition and practice for law teaching. With the image and the imagination also comes a way of conceiving oneself as scholar and teacher: in short, a way of being alive. These are, I acknowledge, large claims for the legal imagination – especially the last. But I state them unabashedly, and seek to sustain them against those who would disparage the life of the mind. So there can be no mistake about my intentions and my project in this essay, let me locate these affirmations by commencing with a cautionary note and a biographical allegory.

2. The cautionary note is this. What I say here has no necessary connection with any observable phenomenon in the world: it is merely true. I do not assert that there is some external reality of law – a thing, or an object having an essence – that I have successfully distilled and moulded into a theory of legal pluralism. My object is different. It is to present a number of hypotheses about what the idea of legal pluralism has come to mean for me, and to argue that the human project we call law can be better apprehended intellectually, deployed rhetorically and conceptualized as an emancipatory practice if conceived in this manner. On this view, law and ideas of law are constantly being remade by those who would wield the terms to frame their interactions with others.

Legal pluralism, like all conceptions of law, is first and foremost about ideology – about belief before behaviour, about aspiration ahead of accomplishment. This simple affirmation poses major challenges for those who claim to be legal pluralists. To be true to themselves, yet to persuade the sceptical, and in particular to persuade those who consider themselves to be hard-headed pragmatists merely describing the world as it is, legal pluralists cannot simply hide behind the unsubstantiated second-order assertions about "facts" or "reality" so common to institutional (legal) and sociological positivism. Rather, they must be candid about the well-springs of their ideas: the notions of identity (personhood, legal subjectivity, agency), the visions of the social (affect, love, hate, interaction), and the privileged knowledge (precepts about nature, history, politics, culture, liberty, equality, and so on) that shape their legal imaginations.[1]

3. My allegory is only slightly less cosmic. For it consists of the biography of Jacques Vanderlinden as jurist, or more accurately, my own symbolisation of that biography.[2] If for Jacques himself, the story dates from the 1950s, in my case the encounter begins in the fall of 1975 when as a first-year law teacher, I came upon and marvelled about his co-authored text: "*Ibi renascit ius commune*".[3] Over the next three decades I would become familiar with the broad *corpus* of his work across a vast range of topics and terrains. As my own research in law moved outward from doctrinal analyses of administrative law and secured transactions regimes, I came to discover how much the changing *foci* of Jacques' career had anticipated my own intellectual journey.

Since we all are constantly rewriting our pasts so as to claim an inexorable, perhaps even predestined, progression to our present understandings, it should be no surprise that I am able to do the same for our honouree – that is, to describe Jacques's scholarly and teaching career entirely in the language of legal pluralism.[4] Still, there

1. In these opening paragraphs I draw on ideas and formulations first presented in Martha-Marie Kleinhans and Roderick A. Macdonald, "What is a *Critical* Legal Pluralism?" (1997) 12:2 C.J.L.S. 25 [Kleinhans and Macdonald, "*Critical* Legal Pluralism"]. As the present essay was being drafted, I came across a recent study that picks up on several themes adverted to in the 1997 article, and that frames them in a similar manner. See Emmanuel Melissaris, "The More the Merrier? A New Take on Legal Pluralism" (2004) 13 Social and Legal Studies 57 [Melissaris, "A New Take on Legal Pluralism"]. Needless to say, I have found comfort in Melissaris' text.
2. For his most recent *auto*biographical narrative, see Jacques Vanderlinden, "Trente ans de longue marche sur la voie du pluralisme juridique" [2003] Cahiers d'anthropologie du droit 21 [Vanderlinden, "Trente ans de longue marche"]. Earlier iterations may be found in Jacques Vanderlinden, "Return to Legal Pluralism – Twenty Years Later" (1991) 28 Journal of Legal Pluralism and Unofficial Law 149; "Vers une nouvelle conception du pluralisme juridique" (1993) R.R.J. 573; *Anthropologie juridique* (Paris: Dalloz, 1996); and "Réseaux, pyramide et pluralisme ou regards sur la rencontre de deux aspirants-paradigmes de la science juridique" (2003) 49 Revue interdisciplinaire d'études juridiques 11, all of which are critical reassessments of his first theoretical venture into legal pluralism: "Le pluralisme juridique, Essai de synthèse" in *Études sur le pluralisme juridique* (Bruxelles: Éditions de l'Institut de Sociologie, 1972) 19.
3. "*Ibi renascit ius commune*" (1970) 33 Mod. L. Rev. 170 (with M.R. Topping).
4. There is an important theme in this sentence for those who would claim to be legal pluralists. Many social theorists (for example, in economics and sociology) today are enamoured of the idea of path dependence (as if human beings could really have only one unconstrained life choice – their first one). By contrast, legal pluralists would see the more telling choices as those people make in explaining to themselves how they have become who they wish to believe they are. See, for brief discussions of

is an even more profound lesson to be extrapolated from the Vanderlinden biography conjured here. The story I recount as one of legal pluralism could also be told several times over in several dimensions, both intellectual and personal. Let me speak only of the intellectual, and then only of those intellectual orientations expressly reflected in the themes of this colloquium.

If we were to look through lenses other than legal pluralism, how might we conceive and arrange the half-century career of Jacques Vanderlinden as jurist? Would we be wrong to say the optic of "*droit et altérité*" captures the golden thread? Or ought we rather to privilege his reflections on interactions between "common law and civil law"? What then of comparative law? Or the legal theory of colonialism and decolonialisation? Should we perhaps pigeon-hole Jacques as legal historian, or as a legal educator concerned with the construction and reconstruction of legal knowledge? Would those who derive inspiration from his concern with "*droit et langue*" feel slighted were his career not to be cast in such terms?[5]

However rich and varied this inventory of scholarly preoccupations, it signals only one of many ways of conceiving a research and teaching biography. For all human activity has a material as well as an intellectual frame – both a temporal field (an object and a physical location) as well as a theoretical orientation. Do we celebrate Jacques

path dependence and its pathologies in economics: contrast Paul A. David, "Path dependence, its critics and the quest for historical economics" in Pierre Garrouste and Stavros Ionnides, eds., *Evolution and Path Dependence in Economic Ideas: Past and Present* (Cheltenham: Edward Elgar Publishing, 2001) who takes a positive view of the idea, with Stan J. Liebowitz and Stephen E. Margolis, "Path dependence" in *The New Palgrave's Dictionary of Economics and the Law* (Houndmills: MacMillan, 1998) who is sceptical of the power of the idea.

5. Of course, the very exercise of imagining Jacques' career in these different frames of reference is a revealing endeavour. For it reminds us that structures of knowledge are contingent, and that there is no Archimedean point from which to judge which narrative is most compelling. More than this, there is no Archimedean point from which to decide whether we should apprehend the world as differentiated categories, or as undifferentiated "pre-Fall" Eden. On the implications of these choices, compare Nicholas Kasirer, "Pothier from A to Z" in *Mélanges Jean Pineau* (Montreal: Éditions Thémis, 2003) 387, with Nicholas Kasirer, "Legal Education as Métissage" (2003) 78 Tul. L. Rev. 481. See also Roderick A. Macdonald, "Transdisciplinarity and Trust" in Margaret Somerville and David Rapport, eds., *Transdisciplinarity: reCreating Integrated Knowledge* (Oxford: EOLSS, 2000) 65 [Somerville and Rapport, *Transdisciplinarity*]. Of course, the absence of an Archimedean point does not mean that "all is relative". Rather it means that the choice of frame of reference must be justified – not just asserted: contingency is the beginning, not the end, of inquiry.

as an Africanist? as European? as Acadian? as citizen of the world? The more one engages this extraordinary life in the law, the more one discovers the power of the biographical allegory: Jacques Vanderlinden patently *instantiates* the critical (or radical) legal pluralism by which we, his admirers, today apprehend his scholarship, his teaching, and his person. The modes of inquiry are multiple; the sites of engagement are several.

4. Tracing the connections between my opening cautionary note and the allegorical Vanderlinden is a central plot-line of this paper. As I scan the list of participants at this conference, I am struck by how many have been heretofore unknown to me. All of us present are deeply committed to one or another of the themes pursued by Jacques, and through these themes, to Jacques. But we have typically lived these commitments only in our own scholarly backyards – in our own research sites. Each of us has built up a normative community involving Jacques that does not necessarily interact with any of the other normative communities in which, and by reference to which, he would himself express and situate his research.

Like young children sharing a large sandbox, we have been engaged in "parallel play". We have inhabited a world not immediately penetrated by each other. In the public sandbox of the neighbourhood park, it is only where boundary disputes arise – disputes about territory, possessions, noise, attention, or whatever – that we become aware of the fact that the children we observe are not playing together. For only in these boundary disputes does the mutual constitution of each of the children – as those who act and those who suffer the actions of others – explicitly reveal itself. Until the interaction, each child's momentary sense of self is largely projected outwards; thereafter, the momentary self becomes as much the projection of others as the self-projection.

As jurists celebrating the several dimensions of Jacques Vanderlinden's career we have long relished our parallel play. While we do not, in principle, engage only in academic boundary disputes we do, in our own ways and often with pretence of exclusivity, claim Jacques for our own. Yet, as in the playground or sandbox, there is no pre-ordained order, no integrated social system, that commands the *ago* or the *patior* of our interactions with each other – apart from Jacques himself. Jacques (the scholar, the colleague, the friend) is the irreducible site of these manifold normative engagements.

5. The construction of meaning and the claiming of one or the other of Jacques' teachings or texts by legal pluralists, by decolonialists, by legal bilingualists and by legal historians compels us to acknowledge the limits of our engagement: that is, an epistemological point of view about the possibilities of intersubjective communication among humans and an ontological point of view about what counts as legally necessary, precede any empirical investigation of how law infuses various social settings. Nevertheless, mainstream legal theory, even mainstream legal pluralism theory, in various guises and by various myths, presents "law" and "society" as separate "realities" – hiding the assumptions that make this distinction possible.[6]

Such a bifurcated perspective is rejected here. Neither legal doctrine nor social scientific methodology is sufficient unto itself as an explanation of why one ideology of law or of society is preferable to another. Doctrinal scholars have to admit that neither law nor fact is self-evident. Nor can social scientists escape the self-referentiality of norms and social practices. Beliefs and actions only exist because there are believers and actors. As friends and colleagues of Jacques, we are his co-conspirators in conceiving the multiple dimensions of the project we call law. I organize my own reflections on this conspiratorial conceit by theorizing Jacques' legal pluralism (if only for heuristic purposes) in two vectors – outside in, and inside out.[7]

Why bother to contrast outside-in and inside-out as analytical perspectives even as a heuristic? Is this not just to replicate (at the level of epistemology) the rejected (ontological) law-society dichotomy? I think not. As a strategy for approaching critique, one sometimes tries to place oneself in the analytical framework of the non-believing critic (the so-called exogenous perspective); sometimes, by contrast, one tries to place oneself within one's frame to critique the critique (the so-called endogenous perspective). Even if one seeks to overcome this conventional distinction, since the critique that one has to meet typically presupposes the false dichotomy, one must initially attend to it. As I hope to illustrate in pursuing these two lines of inquiry, however, for a legal pluralist who rejects essentialist conceptions of the legal endeavour, outside-in and inside-out are not meaningful categories of analysis.

6. In this claim I follow Ian Hacking, *The Social Construction of What?* (Cambridge: Harvard University Press, 1999). Of course, the idea that we cannot talk about brute reality but we need a conceptual apparatus to give form to this brute reality was defended by the rationalist philosophers in the XVII-XVIII centuries, and eventually by Kant. Hacking's critique is focused on the fact that the term "social construction" as bandied about today in an umbrella one, which covers different intellectual processes. He makes a strong distinction between claims about the social construction of conceptual schemes and claims about the construction of things. While he accepts the first one, he is sceptical of the second. In brief, there is a way of acknowledging the importance of history and cultural context to concepts we deploy without having to conclude that everything is merely contingent and arbitrary.

7. I borrow this figure from a recent article by Nicholas Kasirer, "English Private Law, *Outside In*" (2003) 3 O.U.C.L.J. 249 to signal not only the obvious point that legal pluralism is a way of looking at law (imagining an object), but also a way of looking from law (imagining a subject). Indeed, the point is reflexive: how much of this essay is an account of me gazing at Jacques as legal pluralist, and how much is my sense of Jacques gazing at me as legal pluralist writing an essay about Jacques as a legal pluralist, and so on, *ad infinitum*?

I. LEGAL PLURALISM *OUTSIDE IN*

6. Let me begin my exploration of Jacques Vanderlinden's legal pluralism by looking from the outside in. Of course, as I have just suggested, such a perspective is, in its very framing, problematic. What, for a legal pluralist, is outside? How can the idea even be postulated as a manner of separating fields of social life? Consider the following account of everyday human interaction.

It is a commonplace of apology to excuse one's bad behaviour after the fact by distancing oneself from one's words or conduct. Such a strategy of distancing is often trotted out to explain a failure of performance, a lack of commitment or even positive disengagement. How often do we say (or have we heard): "I'm really sorry, I was just not myself yesterday." As if we could ever be anything other than ourselves.

But there is, notwithstanding, much insight in the excuse. For we are juxtaposing two concepts of the self: the total self – the imagined psychic inhabitant of our physical body that reflects our accumulated being (more often than not an idealized version of who we wish we were, or who we think we are when our "true" nature is revealed to others); and the partial self – the manifest beliefs and behaviours of a biological entity that reflect our conjunctural responses to particular circumstances (more often than not reactive to sensory stimuli in the immediacy of personal contact).

As a manner of explaining insight into who we believe we are, however, this juxtaposition of the total and the partial selves is, however, not an unmitigated good. For it has the unfortunate consequence of suggesting polarity. Rather than opening to the possibility

of us each having several partial selves but no separate total self, the very idea of the self is rendered binary. The multiplicity that partiality suggests is transformed into the psychic archetypes of Apollo and Dionysius – the rational, the whole, and the reflective (the *construit*, the *logique* – the law, the State) as against the irrational, the partial, and the reflexive (the *donné*, the *vécu* – fact, society).

7. Many scholars have embarked upon the legal pluralist endeavour in order to explore the dichotomy of "law" and "society" in the same binary logic that some deploy in discussing total and partial selves: that is, in some neo-Hegelian manner, they proceed as if there could exist both a total normative order (law) and a single partial normative order (society). The sites of reflection initially were exotic. Early legal pluralists sought to contest orthodox legal theory in European and European fragment societies such as, for example, the land-masses of the Americas, Australia and New Zealand. Their claim was typically oppositional. These pioneering legal pluralists could typically recite, then deny, the operative precepts of orthodox legal theory.[8]

From the social-scientific legal pluralist perspective, the rejected precepts are, in principle, four. Law is about externally-imposed rules and analogous normative statements (prescriptivism). Law is formal and institutionalized such that a single legal order has a normative monopoly over a given geographic territory (monism). Law is exclusively the product of the political state (centralism). There can be an *ex ante* hard criterion for distinguishing that which is law, from that which is not law (positivism).

Of course, not all legal pluralists reject all four claims of legal-doctrinal orthodoxy. Most look askance at only two – the hypotheses of monism and centralism. A contemporary exposition of legal pluralism, which adopts the prevalent pluralist perspective, runs as follows:

> Legal pluralism is the coexisting structure of different legal systems under the identity postulate of legal culture in which three combinations of official and unofficial law, indigenous and transplanted law, and legal rules and legal postulates are conglomerated into a whole by the choice of a socio-legal entity.[9]

8. For a masterful summary of the genre see S.E. Merry, "Legal Pluralism" (1988) 22 Law & Soc'y Rev. 869 [Merry, "Legal Pluralism"].
9. Masaji Chiba, "Other Phases of Legal Pluralism in the Contemporary World" (1998) 11 Ratio Juris 228 at 242.

For most legal pluralists, then, the aim is to uncover and to trace the institutional, procedural and normative features of self-regulating social groups, describing how the formal law of the State is not, and cannot be, responsive to these multiple legal orders.[10] Both sociological and anthropological legal pluralism are invariably of this type. Not surprisingly, perhaps inevitably, discussions about theoretical approaches to law – whether pluralist or orthodox – are then collapsed into claims about the definition of law and its "other": what is law? what is society?[11]

8. I eschew that exercise here. Neither a conceptual definition grounded in an "essence", nor a "structural" nor a "functional" definition of law is my ambition. I acknowledge that all communication (whether through a "natural" language or through other symbolic vehicles such as music, art, dance, gesture, food and architecture) presupposes differentiation, and that differentiation is often expressed by means of definitions. But this need not be the case. Differentiation can be framed around a set of inquiries, of problems to be explored.

Let me put the matter this way. To deploy the words "law" or "legal" or "pluralism" as communicative symbols is also to have some sense of that which is not "law" or "legal" or "plural". Necessarily then, the exercise of understanding legal pluralism implies criteria of differentiation. But in trying to specify what I intend, I will avoid *ex ante* definitions in the traditional mode. Rather I want to focus the outside-in inquiry by beginning with a perspective that begins with a "common sense" or "everyday" understandings. In other words, when we deploy the word law, what are the range of considerations that we mean to evoke, and what are the range of beliefs and behaviours we imagine?

9. Before continuing in this vein, I should note that there are a number of popular uses of the word law that I exclude from consideration at this point. Here are some. First, law as a generalized descrip-

10. See, for an historical overview and perspective, Merry, "Legal Pluralism", *supra* note 8, and Kleinhans and Macdonald, "*Critical* Legal Pluralism", *supra* note 1 at 37-49.
11. See Brian Z. Tamanaha, "The Folly of the Social-Scientific Version of Legal Pluralism" (1993) 20 J.L. & Soc'y 192; "A Non-Essentialist Version of Legal Pluralism" (2000) 27 J.L. & Soc'y 296; *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2001) at 171 *et seq.* [Tamanaha, *General Jurisprudence*].

tion of regularities of physical motion or other non-human events intended to have predictive power: Newton's Law, Kepler's Law, the law of conservation of mass and energy, and so on. Second, law as a descriptive summary of complex social practices hypothesized as having some systematic interconnection: law of the jungle, law of the market, law of nature. Third, law as a short-hand (typically metonymic) description of an institutional actor: here comes the law (as referring to the police). Fourth, the use of the term to convey a sense of "self-bindingness" (usually for rhetorical purposes) as in the advertising slogan: "Zellers – where the lowest price is the law!" I do not claim that there is no insight to be gained from investigating all these usages. My point is simply that for the purposes of the current endeavour it is not necessary to do so. In brief, to continue this investigation one need take no more sophisticated an approach than that implied in the everyday phrase: "you shouldn't do that because it is against the law".

10. When we approach the idea of law by examining the more limited usages that I have just suggested, we can conjure up several presuppositions. To begin, we are typically in the realm of human action (although it may well be that in the future we will be able to determine and discern the agency of other sentient beings and therefore accept a more inclusive referent).[12] Moreover, we are typically in the realm of the social (although it may well be that we can imagine the possibility of a hermit, or a Robinson Crusoe conceiving of objects as capable of agency – assuming, of course, that the hermit and Crusoe had at some earlier point in their lives been socialized in a normative community).[13] Again, we are typically in the realm of normativity, or the assessment of conduct on the basis of rules (although there are occasions where a norm is only emergent and may be little more than an expression of will or deference). And finally, we are typically in the realm of the offering of reasons for action or justification (although we could also imagine situations where explicit justification is the exception rather than the practice).

To these primary intuitions I would add four other presuppositional constraints. We are normally in the realm of institutions (although it may be that these institutions are so attenuated, so diffuse and perhaps so implicit, that we do not perceive their impact).[14] We are normally in the realm of reasonably stabilized procedures and processes of interaction such as custom, contract, third-party decision making, voting, casting lots, or whatever (although sometimes we are simply at the point of discovering procedures and processes). We are normally in the realm of appeals to purposes or intentions (although sometimes we forget, block out or dissimulate these purposes). And we are normally in the realm of moral philosophy or ethics (or appeals to justice, however we define the objects and content of that justice).

12. For one attempt to expand the referent, see Christopher D. Stone, *Earth and Other Ethics* (New York: Harper and Row, 1989).
13. Once again, for an attempt to expand the realm of the social in this direction, see Nicholas Kasirer, "Le droit robinsonien" in Nicholas Kasirer, ed., *La solitude en droit privé* (Montreal: Thémis, 2002) 1.

11. Together these ideas suggest a non-definitional way of framing inquiry about law – namely, attending to a particular manner of imagining how human beings negotiate their relationships with others. In the legal pluralist hypothesis, people are engaged in reflection about law whenever they direct their attention to ***"the endeavour of symbolizing human conduct and interaction as governed by rules"***.[15]

Let me summarily trace out the implications of this hypothesis by focusing on its nouns and verbs:

"Endeavour" implies purposive activity that is projected through time. The pluralist hypothesis is an argument that law is not a *datum* of experience but an intention – even if we claim that law "just is". Law is an idea that can be understood only if it requires more of us than simple cognition – it demands that we commit ourselves towards its achievement.

"Symbolizing" implies the understanding and intellectual reconstruction of that which is symbolized. The pluralist hypothesis

14. "Les Vieilles Gardes. Hypothèses sur l'émergence des normes, l'internormativité et le désordre à travers une typologie des institutions normatives" in Jean-Guy Belley, ed., *Le droit soluble: Contributions québécoises à l'étude de l'internormativité* (Paris: Librairie Générale de Droit et de Jurisprudence, 1996) 233 [Macdonald, "Les Vieilles Gardes"].
15. This tentative hypothesis of the legal pluralistic imagination is drawn, in the first instance, from Lon Fuller, *The Morality of Law*, 2d ed. (New Haven: Yale University Press, 1969) at 106, as developed in Roderick A. Macdonald, *Lessons of Everyday Law* (Montreal: McGill-Queens University Press, 2003) at 3-12. Of course, it is not necessary to adopt the pluralist hypothesis in order to claim a non-essentialist conception of law. For another recent attempt to discern a non-essential conception by someone who is avowed not a legal pluralist, see Tamanaha, *General Jurisprudence*, *supra* note 11 at 171 *et seq*.

is an argument that law results from the mental activity of perception and reflection – even in those cases where we want to claim that the urge to law and obedience is simply "conditioned" or "reflexive".

"Human" implies the terrain of the species of human beings. The pluralist hypothesis is an argument that, subject to limits on our capacity to see and attribute agency to species other than human beings, law embraces all human beings. This is not less true even in those cases where we purportedly deploy law to deny the humanity of others.

"Conduct" implies a minimum of behaviour or performance, rather than just thought. The pluralist hypothesis is an argument that (at least until we master mental telepathy) law imagines action – even in cases where that action consists in speech rather than movement.

"Interaction" implies relationships with other human symbolizers who themselves are both agents and patients of the agency of others. The pluralist hypothesis is an argument that law is bi- and multi-lateral, lying in the relationship more than the field within which the relationship is built.

"Governance" implies the idea of orienting oneself and one's intentions and behaviours by reference to a point of reference external to the act or the intention – even in those cases where the reference point is largely of our own making.

And "rules" imply norms or generalized prescriptions that pre-exist the human behaviour that is being symbolized. Whether these norms take the form of "in such as such a circumstance, one ought to do such and such", or whether they are largely facilitative and enabling rules the assumption is that they are both generalized and held to pre-date action.

12. This manner of engaging the legal suggests two avenues for pursuing the differentiation of law that meaningful intersubjective communication requires: *first*, "what types of symbolization does this conception not embrace?" and *second*, "what types of human conduct and interaction does it not embrace?" Let me begin with the first question.

The pluralist hypothesis is that law is a particular way of symbolizing human conduct and interaction – namely, as governed by rules. If this hypothesis is plausible, it must also be possible to imagine a range of other symbolizations of human interaction. In considering this possibility, I shall take three other symbolizations (perspectives) within the general canon of disciplinary (or transdisciplinary) knowledge promoted by the contemporary university.

Let us begin with economics, and in particular welfare economics as developed by the "Chicago School". Here one often finds the endeavour of economics cast in the manner of symbolizing human conduct as motivated by "rational self-interest in conditions that conduce to efficient market transactions". This is not a claim about what economics is, or what it does, but rather is a claim about the intellectual questions that those who claim to be economists pose (or ought to pose), and the consequences the posing those questions may have for understanding human interaction.

Take next anthropology. Today, most anthropologists reject positivist explanations of their activity (the investigation of culture) but rather conceive the endeavour of anthropology as a manner of symbolizing human conduct in cultural context. Again, this is not a claim about what anthropology is, what are its elements, or what it does, but rather a claim about the intellectual questions that those who are anthropologists pose, and the consequences the posing those questions may have for understanding human interaction.

My third illustration is not normally considered as much a discipline as a critical perspective – namely, feminist studies. Again, one finds the endeavour of feminist analysis typically understood as the manner of symbolizing human conduct apprehended, clarified and critiqued through the particular consciousnesses and experiences of women. This is not a claim about what feminism is, or what it does, but rather a claim about the intellectual questions that those who are feminists pose, and the consequences that the posing those questions may have for understanding human interaction.

13. In each of these three endeavours, one sees that perspective rather than object centres the inquiry – disciples of different branches of knowledge build their world views upon different bases.[16] It is

16. Let me enter a caveat. I do not assert that definitional essentialism is absent from economics, anthropology and feminist studies. The claim is rather that most econ-

the same with law. As a consequence, to ask "what is the field of law?" or "what is the frame of human conduct to which law claims pride of place (if not exclusive writ)?", is to ask a meaningless question. I argue for this position by induction from examples drawn from different sites of interaction, before developing a theoretical framework for exploring the point.

Take the university as an institution within which human beings pursue their purposes in concert with others. Might it be possible to explore the university itself – its ambitions, its processes, its structures, its personnel – through the disciplinary inquiries of market economics, anthropology and feminist analysis? Might there be insights to be gained from doing so? Consider next, an organized religion such as the Roman Catholic Church. Could one do the same? And again, the family. Or still again, the work-place? Or the international trading community as organised through the WTO process?[17]

Of course, the examples just given all can be situated by reference either to geography or to institutional form. For this reason it is relatively easy to see them as "objects" of investigation that can be hypothesized to exist prior to, and independently of, the disciplinary inquiry by which they are "apprehended". To fully test the legal pluralist claim, it is necessary to move to a terrain that is less explicit and less formalized, to human endeavours that are at once implicit and inferential[18] – dare I say virtual.[19]

Consider first if it might be possible to explore the "sentiment of feeling Scottish" through the disciplinary inquiries of market economics, anthropology and feminist analysis? What about "being a fan

omists, anthropologists or critical feminists who attempt to theorize their knowledge do not adopt essentialist approaches. For a collection of studies that explore the meaning of disciplines through an investigation of transdisciplinarity, see Somerville and Rapport, *Transdisciplinarity*, *supra* note 5.

17. The sites are not chosen at random. I derive them from Boaventura de Sousa Santos, *Toward a New Common Sense; Law in Paradigmatic Transition* (New York: Routledge, 1995) who imagines (at 420-441) six sites: householdplace, workplace, marketplace, communityplace, citizenplace and worldplace. While I do not adopt Santos' structuralism, I acknowledge that to the extent his interest is with interlegality and the relationships between dispersed legalities, his legal pluralism is consonant with the thesis argued here. See, for discussion, Macdonald, "Les Vieilles Gardes", *supra* note 14 at 233.
18. I have attempted to work through the implications of normative heterodoxy in Roderick A. Macdonald, "Vers la reconnaissance d'une normativité implicite et inférentielle" (1986) 18 Sociologie et Sociétés 37.
19. The image I have in mind has been explored by Richard Janda and Daniel Downes in their essay "Virtual Citizenship" (1998) 13:2 C.J.L.S. 17.

of the Beatles"? Or conceiving oneself as a "Baker Street Irregular"? Perhaps more to the present point, what about applying these disciplinary inquiries to a commitment to "intellectual exploration driven by ideas associated with legal pluralism"? Now consider a second – recursive – facet of the question. Might it be possible to apply the disciplinary inquiries of market economics, anthropology and feminist analysis to market economics, anthropology and feminist analysis themselves? More radically, might it be possible to apply the disciplinary inquiries of a commitment to intellectual exploration through legal pluralism to market economics, anthropology and feminist analysis. And finally, might it not be possible to apply the disciplinary inquiries of a commitment to intellectual exploration through legal pluralism to the disciplinary inquiries of a commitment to intellectual exploration through legal pluralism?

14. The second line of inquiry signalled earlier has another dimension. When we move from considering what is distinctive about the symbolisation of human interaction attending to the word law, to considering of the range of human situations to which this symbolisation might reasonably be applied, do we encounter human situations (as opposed to institutional contexts) where the symbolic construction of law as imagined here must *a priori* be excluded? Are there circumstances where it is simply impossible to apply meaningfully the symbolization of human interaction as governed by rules?

Here are five liminal cases. Can we find law in a social situation of ecstatic love? or in the scramble for survival on the open battlefield when one is under direct assault? or in panicked mob of those fleeing an anthrax attack? or in the multitude under conditions of hypnosis or a drug-induced somatic state? or even in deep sleep? The point of these examples is to test the outer limits of agency and normativity. It may be that the enterprise of law presupposes certain social situations (in general, even if not in a particular situation) involving a minimum possibility for rational reflection. I am not concerned to offer a full defence of the answer I would give to this question here. Nor need I do so, because the same inquiry would apply to any other symbolic construction of human action such as economics, anthropology or feminism. In other words, under the pluralist hypothesis, where law ends (that is, wherever we may choose to imagine that law ends), so too do economics, anthropology and feminist analysis.

Let me expand briefly on this last point. I do not deny that, just as there are some who hold to essentialist definitions of economics,

anthropology and feminist analysis, there are some who believe that economics, anthropology and feminist analysis can be isolated as methodologies of external analysis – that they can be hypothesized as "objective descriptions" of social behaviour.[20] The claim I make is that at bottom, the economist, anthropologist or feminist scholar must be committed to the practices that appear to be mere objects of inquiry. Neither of these three perspectives, nor law for example, can be fully captured by what one sees as an external observer; all directly engage what one does as an agent.

15. This is why my intuition is to address the question concerning possible limitations on the sites of law (the physical spaces where law may be hypothesized) without any preconceptions as to the need for boundaries. Any limitations on the human capacity to symbolize come from choices human beings make – not from conditions in the world they inhabit. So, for example, as a matter of exogenous (*sic*) observation, one might well examine some particular activity and conclude that the types of analysis and understanding brought to bear by economics do not shed much light on the activity in question: perhaps one might say that there is an absence of a market, or that the market is so attenuated as to be not very useful as an analytic, or whatever. Similarly, one might say that symbolizing law does not shed much light on the activity in question: perhaps there is an absence of purposiveness, governance or norm, or that they are so attenuated as to render legal analysis not particularly helpful.[21] But however meaningful the idea of usefulness on some cost-benefit analysis may be for enabling people to allocate intellectual effort in living from day-to-day, it is hardly an adequate criterion for discerning possibility.

16. These reflections now permit answers to be given to the two questions posed earlier. To the question "What types of human affiliation and self-construction does the legal symbolization of human conduct not embrace?" one may respond: in principle, none. Every human activity and commitment can be symbolized and perceived through the lens of law.

20. I am not critiquing naïve empiricism here. Few today hold to a position of "complete objectivity" in social research such as was critiqued in Gunnar Myrdal's *Objectivity in Social Research* (New York: Pantheon, 1969).
21. For a discussion of some of the social-psychological preconditions necessary for the idea of law in its Western sense to take hold, see Lon Fuller, "The Law's Precarious Hold on Life" (1969) 3 Ga. L. Rev. 630.

And to the question "What types of human endeavour does it not embrace?" one may also respond: in principle, none. Every situation in which human beings may physically find themselves – from war, to ecstatic love, to mass hysteria, to psychic escape, to sleep – may be symbolized, in however attenuated a form, as law.

Of course, and this is a key theme of the previous paragraphs, simply because all manner of human association (all modes of interaction) and all manner of human physical space (all sites of interaction) can be symbolized in the framework of law does not mean we ought to make a project of doing so. In opening this line of inquiry I mean to raise, and counter, two types of arguments that are sometime mistakenly advanced against the view of law taken here.

17. First, those who hold to an essentialist understanding of the legal enterprise, and who seek to define law as a thing, rather than a symbolization, are wont to see in the pluralist hypothesis evidence of intellectual imperialism, or "panjuridism". The critique is that the recognition of more law, of multiple sites of law, will devalue both putatively "real" law and will hollow out the concept itself. If *everything* is law, then *nothing* is law. Yet this is a misdirected criticism since legal pluralists do not seek to label everything as law. The goal is neither taxonomic nor definitional. Rather, it is to consider why certain human endeavours are usually characterized as legal and others are not: who does the characterisation? in what circumstances? and to what ends? In other words, as usually formulated the *panjuridist* critique rests on a false premise. That premise is that if some human endeavour is claimed to be "X", then it cannot be "Y". So, for example, the idea that "the interpersonal relationships within the family can be understood in the frame of law" is translated to mean that "the family is a legal system", with the consequence that this is to juridicize the family, and thereby to destroy exactly that which makes a family a family – namely the bonds of high affect, and mutual love. In the end, this is a curious critique, because it suggests that a particular way of knowing necessarily claims exclusivity as to a way of being – as if, for example, experiences in life must have one and only one "correct" categorization.[22]

22. For a critique – to my mind irrefutable – of this misconception of legal pluralism, see Daniel Jutras, "The Legal Dimensions of Everyday Life" (2001) 16 C.J.L.S. 45. Of course, in the standard view of human activity that we have inherited in the west, the expression "render unto Caesar" carries much weight. There are places in the world that are those of the state, and those for God. There are places in the world that are those for the employer, and those for the family. There are places in

There is, however, a more subtle *panjuridist* critique. Many jurists, even those who are neither monists, nor statists, nor positivists, fear loosing legal analysis upon the world for prudential reasons. They see that law has come to occupy a privileged position in Western societies. Simply as a matter of practice, once "law-talk" or "rights-discourse" invades a social field, it destroys other symbolizations. So in order to keep law (legal symbolization) under control, it is important to limit *ex ante* its terrain.

There are two responses to this second fear. To begin, it is not law itself that is dangerous, but rather the instrumental use of law. That is, the fear arises because of the association of law with the "command and control" activity of the political state in using one particular form of law – legislation – to advance particular policy goals. So the fear of legal imperialism is not a fear of law *per se*, but a fear of the instrumental use of law. Paradoxically, this is exactly the use of law associated with the conflation of law and state that pluralist analysis seeks to contest.

The other response is that law only metastasises because of the arrogance of lawyers and the poverty of legal education. Because law is typically presented by lawyers as a specialized activity requiring highly specialized training, when law expands its domains this usually means that competing, non-specialist, understandings of law are further marginalized. Professionalization breeds contempt. Were those trained in law to acknowledge the limits of their professional commitments, they would focus on the special contribution they could make to human society – a contribution I signal in Part II of this essay – rather than a fighting jurisdictional turf-wars for control of the word *law* with those who also claim legal knowledge.

18. These reflections lead to the second main critique of the pluralist hypothesis that is being argued here. That critique is as follows. The reason we have essentialist definitions and carve up realms of human activity into discrete compartments is simply because social resources and reflection are scarce, and we each have to make choices about where to devote our energies so as to gain most purchase. It is not hard to see why this critique is misplaced. Just ask the same question of economics. If an economist were to say that the family (and the relationships constituting the family) could be understood as a market, and that rational self-interest could be brought to bear as an analytic for understanding the family, few other economists would say either that this was an attempt to apply economic analysis where it has no place, or more to the present point, that it was a waste of time to do so.

the world that are those for rationality, and those for passion. Yet to accept this physical carving up of the previously undifferentiated world of Eden, does not imply that knowledge itself must be parceled out into these discrete categories of experience and understanding.

Indeed, economists would claim that it is possible to symbolize family relationships that way and that insight could be derived from doing so. They would make this claim even as they acknowledge at the same time that the exercise might possibly miscast or perhaps even mistake motivations within the family by describing altruism or love as simply the rational calculations of a parent given the preferences they have selected as governing decision-making. The economist's claim would be that as long as one acknowledged one's simplifying assumptions and the normative directions they implicitly give, economic analysis of the family can make a worthwhile contribution to human understanding. In short, economic analysis can provide insight into the character of behaviours within the family, and might even provide a site from which to assess whether different behaviours would be taking place if people were actually aware of the economic consequences of their actions. The character of the explanation is, obviously, no different where the symbolisation is legal, rather than an economic.

Let me restate this idea. One can certainly advance an institutional critique of the division of knowledge into distinct disciplines: disciplinary distinctions do not necessarily produce a more efficient or effective allocation of intellectual energy. But I am actually arguing a different point. I am asking about the criteria by which disciplines claim their distinctiveness: is it their object (human beings, rather than rocks, stars, or oceans)? is it their method (experiments, descriptions, pure theory, an internal logic)? is it their concepts (markets, anomie, interaction, power, adjudication)? their aim or finality (curing illness, predicting earthquakes, securing distributional justice)? and so on. Once one abandons objects and the search for exclusive fields of inquiry, one sees the incoherence of the idea that some *ex ante* criterion of efficiency in the pursuit of knowledge or understanding should define disciplinary terrains.

19. To understand the full impact of answering the two questions – "what types of symbolization does the pluralist conception of law not

embrace?" and "what types of human conduct and interaction does the pluralist conception of law not embrace?" – it is necessary to change the heuristic framework from pluralism "outside in", to pluralism "inside out". By accepting the possibility of perceiving and symbolising all human interaction through the lens of law, we can begin to excavate some of the foundational premises of the *radical* legal pluralism latterly espoused by Jacques Vanderlinden.

II. LEGAL PLURALISM *INSIDE OUT*

20. Thinking legal pluralism from the inside out is the endeavour of those who, latterly, have appropriated the expression *radical* legal pluralism.[23] Since all who claim to be radical position themselves against orthodoxy (or the mainstream), situating the *radical* legal pluralist perspective requires us first to unpack the various features of mainstream legal pluralist theory. Of course, those whose intellectual programme is in counter-current typically find themselves obliged to argue for their world-view against multiple opponents. So it has been for *radical* legal pluralists: not only are they contesting orthodox legal theory as taught in Occidental faculties of law, they are also contesting traditional versions of social-scientific legal pluralism.

As noted earlier, the orthodox conception of the legal endeavour rests on four postulates: prescriptivism, monism, centralism and positivism.[24] What makes *radical* legal pluralism ***radical*** is its apparent rejection of all these postulates.[25] Traditional doctrinal and social scientific legal pluralism, by contrast, need only reject monism. Prescriptivism, centralism and positivism are each consistent with first-order pluralism. So to assess the character of a *radical* legal pluralism a useful starting point would be to elaborate upon the various permutations and combinations of these four terms: what would

23. To forestall misunderstanding let me emphasize that while the use of the word *radical* is meant to signal the idea of root or fundamental, I do not at the same time mean to evoke the notion of essential or inherent. The adjective *radical* attends to the character of the inquiry, not to its object.
24. See *supra*, text at notes 6-8.
25. See, for various contemporary reflections and critiques of post-modern legal pluralism, Kleinhans and Macdonald, "*Critical* Legal Pluralism?", *supra* note 1; André-Jean Arnaud, "From Limited Realism to Plural Law: Normative Approach vs. Cultural Perspective" (1998) 11 Ratio Juris 246; Franz von Benda Beckman, "Who's Afraid of Legal Pluralism?" (2002) 47 Journal of Legal Pluralism and Unofficial Law 37; Melissaris, "A New Take on Legal Pluralism", *supra* note 1; and Vanderlinden, "Trente ans de longue marche", *supra* note 2.

different theoretical approaches look like under each of these different combinations? Thereafter the inside out inquiry can be phrased as follows: how many non-mainstream positions are needed to comprise the core of a *radical* legal pluralist perspective?

Given the extensive critiques of monism in the pluralist literature, I shall leave aside each of the monist variations, and concentrate on the possible varieties of legal pluralism.[26] In addition, I shall not consider a non-prescriptivist perspective until the variations on centralism and positivism have been reviewed. Such a categorical simplification leaves the following cells: pluralist – centralist – positivist; pluralist – polycentrist – positivist; pluralist – centralist – subjectivist; pluralist – polycentrist – subjectivist. These are considered in turn.

21. Take first the question whether it is possible to hold a pluralistic perspective and still be committed to a statist conception of law (centralism). This is a real possibility. In fact, this conception is usually referred to as weak legal pluralism, and is reflected in many studies of administrative law.[27] Theories of jurisdiction and agency competence both carve out the plurality of administrative normativities, and through judicial review keeps the universe of legal diversities in order.[28]

Of course, legal pluralists of this stripe do acknowledge that the legalities of the various subordinated state legal orders – of labour boards, welfare tribunals, environmental protection agencies, workers compensation commissions, and so on – rest on different interpretative and normative premises from the dominant judicial system.[29] This accounts for conflicting rationalities in judicial review applications, and premises the difference between the subordination that attends judicial review, and the polycentrism that attends judicial decisions in matters such as the recognition of foreign judgements in the conflicts of law.

26. Vanderlinden has recently provided such an overview in "Réseaux, pyramide", *supra* note 2; see also, Roderick A. Macdonald, "Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism" (1998) 15 Ariz. J. Int'l & Comp. L. 69.
27. See John Griffiths, "What is legal pluralism?" (1985) 24 J. Legal Pluralism 2 for the classical distinction between strong and weak legal pluralism.
28. This perspective is best exemplified in Harry W. Arthurs, *Without the Law* (Toronto: University of Toronto Press, 1985) [Arthurs].
29. For a version of the administrative law pluralism evoked in Arthurs, *ibid.*, that argues for implicit normativities beyond the contested interpretation of a canonical text, see Roderick A. Macdonald, "On the administration of statutes" (1988) 12 Queens L.J. 456.

22. Consider next whether it is possible to hold to a pluralistic perspective and accept a positivist conception of law? Again, the answer is yes. This, in fact, is the classical conception of sociological and anthropological positivism that underpins older forms of legal pluralism.[30] Like older forms of monistic state positivism, such a legal pluralism actually seeks to identify real entities, real sites of law, be these in semi-autonomous social fields, in barrios, in ethnic identity, in religious affiliation, in virtual communities, and so forth. Sociological positivism replaces normative (or pedigree positivism) with geography, religion, ethnicity, occupation, gender, race, class, caste and culture as normative identifiers.[31]

Many versions of social-scientific legal pluralism formally acknowledge the possibility and dominant power of state law – in order to transcend it or to resist it. The state and its apparatus is the centre against which the periphery is modelled. These forms of legal pluralism actually require monism within a given social field – it is just that they acknowledge many fields. Even strong legal pluralism requires each legal order both to define its field and to claim supremacy. In other words, empirical-positivist pluralism attempts to deploy structural or functional criteria to define law, and in so doing, inadvertently reproduces within a legal pluralist analysis the core elements of everyday dominant legality.[32] Nonetheless, it is important to give these traditional forms of social scientific legal pluralism their due. For they had the liberating effect of overcoming the view that poor communities and city slums were simply "lawless zones" having no social structure or organized interaction. As sociologists and ethnographers began to reveal ordered patterns, normative assumptions and dispute resolution mechanisms in these social spaces, more subtle understandings of law began to inform orthodox legal theory. New problems – the gap theory of social change, law and resistance – were opened for investigation.[33]

30. See, for example, Sally Falk Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study" (1973) 7 Law & Soc'y Rev. 719; Marc Galanter, "Justice in Many Rooms: Courts, Private Ordering and Indigenous Law" (1981) 19 J. Legal Pluralism 30; Peter Fitzpatrick, "Law and Societies" (1984) 22 Osgoode Hall L.J. 115.
31. See, for example, the recent studies of indigenous law in Hawaii by Sally E. Merry, *Colonizing Hawaii: the cultural power of law* (Princeton: Princeton University Press, 2000).
32. The point is very nicely argued in Melissaris, "A New Take on Legal Pluralism", *supra* note 1.
33. See, for example, Robert Cliche and Madeleine Ferron, *Quand le peuple fait la loi: la loi populaire à St-Joseph de Beauce* (Montreal: Hurtubise HMH, 1972); Mary Pat Baumgartner, *The Moral Order of a Suburb* (New York: Oxford, 1988).

Of course, more contemporary sociological approaches distance themselves from the positivism of traditional social scientific empirical studies. Neither Taussig nor Wacquant, for example, accept that social fields are observable phenomena existing apart from the representation that they have for social actors.[34] But as yet these contemporary approaches have not found themselves directly incorporated into the literature of legal pluralism.[35] The dominant epistemology of social-scientific legal pluralism both remains positivistic and acknowledges the state as the paradigmatic legal order.[36]

23. In common with many contemporary non-positivist sociological and anthropological theorists, a *radical* legal pluralist does not seek to reify legal-normative orders in order to find plurality: there is no need to posit a separation, and then an eventual reconciliation, of multiple legal orders. Normative heterogeneity is pervasive, and multiplicity is simply one account of heterogeneity: an account that sees heterogeneity as existing both between various hypothesized normative regimes that inhabit the same social-intellectual space, and within the hypothesized regimes themselves. The flux of power within and between these hypothesized regimes will determine their reconstruction in any given time-space. Since the condition of living these hypothesized regimes is at the same time the condition by which they are imagined and hypothesized, the effort to separately identify, to unify or to order them will always be contingent and fluid.

34. Consider Loïc Wacquant, *Body & Soul: Notebooks of an Apprentice Boxer* (New York: Oxford University Press, 2000); Michael T. Taussig, *Mimesis and alterity: a particular history of the senses* (New York: Routledge, 1993); and Michael T. Taussig, *Law in a lawless land: diary of a limpieza in Colombia* (New York: New Press, 2003). Of course, one of the first scholars to assert this position was Pierre Bourdieu, *The Logic of Practice* (Le sens pratique, 1980), (Cambridge: Polity Press, 1990).
Even leading pluralist scholars such as Boaventura de Sousa Santos continue to work in this positivistic vein. There has been, however, some evolution in his thinking over the past few years. Compare *Toward a new common sense: law, science and politics in the paradigmatic transition* (New York: Routledge, 1995) with *Toward a new legal common sense: law, globalization and emancipation* (London: Butterworths, Lexis-Nexus, 2002). Moreover, other anti-positivist legal pluralists such as Peter Fitzpatrick have abandoned legal pluralism in their recent scholarship.
35. See, for example, *Modernism and the grounds of law* (New York: Cambridge University Press, 2001).
36. In this sense, the critique of social-scientific legal pluralism formulated by Tamanaha, *General Jurisprudence*, *supra* note 11 remains pertinent. See also Simon Roberts, "Against Legal Pluralism: Some Reflections on the Contemporary Enlargement of the Legal Domain" (1998) 42 Journal of Legal Pluralism and Unofficial Law 95.

That is, a *radical* legal pluralism cannot even be polycentrist since it rejects the very idea of there being a centre to a legal regime.

But there is a further point, and this is what truly distinguishes a *radical* legal pluralism from all other conceptions of legal pluralism. A *radical* legal pluralism is also subjectivist and non-prescriptivist. That is, it rejects the supposition that law is a social fact existing outside and apart from legal subjects.[37] From this rejection comes the surprising proposition that there can be no *a priori* criteria by which one can determine whether or not any particular structure of social regulation should be understood as law. One might hypothesize that law is what subjects decide to consider as law – not in any naïve or instrumental way, but as a way of expressing their agency of human beings. Legal subjects themselves create the law by which their subjectivity is constituted, and they do so both in a continual way and in multiple dimensions. A *radical* legal pluralism presumes that knowledge is a process of creating and maintaining realities. Legal knowledge is the knowledge that is created and maintained by legal subjects. So at one and the same time, the subjects of knowledge (the believers and behavers of a *radical* legal pluralism) are also its objects. In a *radical* legal pluralist perspective legal subjects claim responsibility for hypothesizing the law by and through which they constitute themselves as legal subjects.

24. The constructing and constructed self in a *radical* legal pluralism is a concatenation of selves situated (at least on our current understanding of human agency) within anthropomorphic individuals.[38] The life of the self is a continuing narrative of meaning. We each seek to explore a variety of possible worlds and possible selves. In our relations with others and in our narrations of ourselves we appeal to

37. I have recently attempted to develop this thesis, first announced in the co-authored text of 1997 [Kleinhans and Macdonald, "*Critical* Legal Pluralism"], through the notion of a psychological conception of federalism. See Roderick A. Macdonald, "Kaleidoscopic Federalism" in Jean-François Gaudreault-DesBiens and Fabien Gélinas, eds., *Moods of Federalism: Governance, Identity and Methodology* (Cowansville: Yvon Blais, Bruxelles: Bruylant, 2005).

38. There are two points here. The first is that the anthropomorphic individual is the embodiment of the self, but that embodied self is not a free-standing individual of the type presupposed in libertarian political theory. Second, the self is recursive: in the narration of itself the self necessarily changes the self that is being narrated. For a further development of this conception of the *radical* legal pluralist self, see Kleinhans and Macdonald, "*Critical* legal pluralism?", *supra* note 1; and more recently, Roderick A. Macdonald, "The Fridge-Door Statute" (2002) 47 McGill L.J. 13, and "European Private Law and the Challenge of Plural Legal Subjectivities" (2004) 9:1 The European Legacy 55.

criteria that permit us to decide how we want to live in the worlds open to us. Hence relations among the subject's multiple selves will always be relations of judgement and evaluation. Whatever else subjects may be, they are the locus of normative heterogeneity. If they were to describe themselves in terms of their relations with other subjects, they might say they were, for example, consumers, family members, employees, citizens; if they were to describe themselves through an account of their motivations, they might say they were, for example, sentient, self-interested, curious, reflective, jealous, affiliative; if they were to describe themselves by the identities they claim, they might say they were, for example, tall, male, heterosexual, able-bodied, and so on. But however much the subject is multiply identifying in a series of narratives, being located in the world, the multiply identifying subject is in like measure constituted by the multiple identification of their subjectivity by other subjects.

The subject also narrates and is narrated by state, society and community. Structural-functional representations of almost wholly determined subjects, treated as "the other" to whom duties are to be owed, are impossible in a *radical* legal pluralist perspective. State, society and community are institutional hypotheses within which subjects are shaped by the knowledge they inherit, create and share with others. At the same time, the institutionalized subject reciprocates by shaping and reformulating the knowledge of the hypotheses of state, society and community that are inhabited.

25. The enterprise of law in a *radical* legal pluralist perspective must, then, be *radically* non-prescriptivist – that is, must not be conceived as comprising externally-imposed rules and analogous normative standards. Prescriptivist legal theories offer an account of law from the perspective of institutions – rules, officials, sanctions. Emphasis is on how these institutions shape subjects, not on how subjects shape institutions through their interpretations and re-narrations of institutionally imparted knowledge. Such accounts of law offend because subjects come to believe that their relationship with, and responsibility toward, law lies outside their imaginations and their practices. For law to be legitimate it must be the product of a reciprocal construction within subjects and among subjects acting through the momentary configuration and momentary narration of imposed, inherited and chosen institutions.

This point may be made, I believe, most cogently by asking whether a *radical* legal pluralist conception could tolerate that one of the narrated stories of law is another form of legal pluralism – say

traditional weak legal pluralism or traditional social scientific legal pluralism. The answer must surely be yes, and indeed the *radical* legal pluralist perspective even accommodates the possibility that one of the narratives could be a narrative of monist, centralist, positivist, prescriptivist state law. The *radical* legal pluralist perspective is both a first-order narrative of competing legalities and a second-order narrative of competing understandings of legalities in competition.

26. This last suggestion points directly to another critique of the conception of legal pluralism presented here. Does a *radical* legal pluralism abstract from, and fail to account for, the ugly world of power and politics? Does it naively accord too much weight to the simple *potential* of subjective agency? Is it a bourgeois legal theory that is only operable by those with the psychic and material capacity to recognize and resist? These are important questions, but they also fundamentally misconstrue the legal project as seen from a pluralist perspective.[39]

To claim that law is the consequence of personal narration and interaction, is not in any way to say that every person has an equal capacity and equal resources. Some subjects may exercise their agency to deny that they are ever anything more than subjects. In this sense, a *radical* legal pluralism is a pluralism of potential – or possibility. There is more. Not only inter-subjective, but intra-subjective life is neither democratic nor egalitarian. As object, I know that the dominant will, in the end – either directly through the imposition of brute force dressed up as state officials, or indirectly through the ideology of legitimated state power – impose their story, or at least a version of their story that they above all others, can recognize and re-narrate. But not all institutional narratives are equally persuasive. Likewise, as subject, I know that not all my narrations are equally persuasive. Consequently, I know that not all my selves are equally powerful. But the narrative of the self can never be told authentically by anyone other than the self, and in its constant re-narration, it serves to engage the narrative imagination of other selves.

39. Once again the point was announced in Kleinhans and Macdonald, "*Critical* legal pluralism?", *supra* note 1 at 42-44 and is further developed in Melissaris, "A New Take on Legal Pluralism", *supra* note 1, and in Roderick A. Macdonald, "Legal Republicanism and Legal Pluralism: Two Takes on Identity and Diversity" in Michele Graziadei and Mauro Bussani, eds., *Human Diversity and the Law* (Paris: Harmattan, 2005).

This observation recalls that the problem is not just one of *persuasivity* but also *pervasity* of various narratives. Because not all my selves are mine to the same degree, as I migrate from one identity to another I may find that to give persuasiveness to a previously marginal identity, I may need to rely on other models of the self that I see around me. In this sense, every narration implies change, but at each stage of change we can never separate ourselves from our previous narrations and from the available ambient narratives inspired by others.

27. The powerful instrumental preoccupations of the modern state have so dominated conceptions of law that its institutional and procedural artefacts are often held to be characteristic, even definitive, of contemporary legal activity. Yet to take a *radical* legal pluralist perspective is to claim that these conventional institutions, procedures, concepts and categories have no permanent or fixed content. For example, neither the distinction between the public, official, state sphere and the private, unofficial, civil society sphere, nor the distinction between "imposed" order by law and "spontaneous" order arising from relations of reciprocity and the pursuit of common purposes can be drawn sharply. Just as there can be no normative order that is totally imposed, so too there can be no normative order that is entirely spontaneous and autonomous. Norms, institutions and normative regimes are constantly mutating under the impulsion of one or the other – that is, the narrative they seek to impose on each other. They are also constantly mutating under the impulsion of their subjects – that is, the narrative that is imposed upon them by their subjects.

28. This response does not, however, fully meet the critique of power. For the issue of power is not just about changes (or the absence of changes) to the fields of the legal, but to the *directions* that change takes. No doubt the legal subject recognizes, acknowledges and resists brute power parading as the state and actively narrates alternative accounts of law. So too the legal subject recognizes, acknowledges, challenges and resists claims of legitimated power, by the state or other dominant forces. But this resistance could be seen simply as a claim that depends on a prior assumption that the hegemonic order is complete – whether the hegemon be conceived as the state, international capitalism, the WTO, or whatever. That is, this account of resistance presumes that power manifests itself only by refusing space to those who resist.

But there is another account of hegemonic power. Hegemonic power succeeds precisely because it is incomplete, always inviting the participation and cooperation of the subject.[40] Hegemonic power creates participatory spaces not just for participation and engagement within its structures, but also for active resistance. By co-opting and normalizing such engagement, the hegemonic order pre-empts external, system-wide critique and resistance. Does a *radical* legal pluralism simply make the power of the hegemonic order more complete because its constructivist claim is the ultimate co-optation?

On the very terms of the *radical* legal pluralist hypothesis this question is unanswerable. There can be no definitive, complete, unique hegemonic legal order for a *radical* legal pluralist. Here is why. On the one hand, the pluralist hypothesis claims that all legal actors – citizens, legal theorists, officials ... indeed anyone involved in the construction of law (whether of the state as hegemonic legal order, or the multiple regimes of everyday law, or any other legal order, for that matter) – both contest and legitimate all possible legal normativities. The emancipatory claims seem to acknowledge the hegemonic order (*e.g.* claims such as: do not consider that your role as legal subject is exclusively determined by the hegemonic order (*ex hypothesi* the state); assert manifold competing legal subjectivities that affirm your narrative of yourself). And in doing so, the *radical* legal pluralist perspective seems to invite its own co-optation.

One might conclude, therefore, that a *radical* legal pluralism can only avoid legitimating the hegemon by denying that the hegemonic order is a legal order. This would be wrong. The emancipatory potential of *radical* legal pluralism is achieved by way of its recognition that the state does not have a monopoly over the law, neither institutionally nor symbolically. A *radical* legal pluralism can only

40. The point is derived from Antonio Gramsci, *Prison Notebooks* (New York: International Publishers, 1971). A similar perspective may also be found in the poetry of Pier Paolo Pasolini. See, for example, *Poems*, selected and translated by Norman MacAfee with Luciano Martinengo, foreword by Enzo Siciliano (New York: Random House, 1982), and Pier Paolo Pasolini, *Tutte le poesie* (Milan: Arnoldo Mondadori, 2003) especially in "La poesia della tradizione" ("The poem of tradition") in the collection Transumanar e Organizzar (Transhumanating and organizing) at the verse: "Oh, unlucky generation, and you obeyed by disobeying!" See further Don DeLillo's novel, *Cosmopolis* (New York & London: Scribner, 2003): "There was a shadow of transaction between the demonstrators and the state. The protest was a form of systemic hygiene, purging and lubricating. It attested again, for the ten thousandth time, to the market culture's innovative brilliance, its ability to shape itself to its own flexible ends, absorbing everything around it."

claim counter-hegemonic power by denying sole possession of the *sobriquet* law to the state: law can only exist parallel to power. Paradoxically, the emancipatory power of the radical legal pluralist project lies in the recognition that another law is possible, even within the state. The co-optation pitfall is avoided by asking both how the legal orders of the state (today's hegemon) view non-state legal orders, but by asking how none-state legal orders view the plural state legal orders.

29. One of the evident consequences of a *radical* legal pluralist perspective is that systemic coherence and the logical integration of diverse regimes into a unified whole is shown to be as problematic as the postulate of legal monism itself. After all, it is these postulates of a necessary order (system, integrity, coherence) that make orthodox legal theories conceding pride of place to the state possible. There may, of course, be observable affinities between modes of production of law in different institutional sites and in diverse subjective narrations, but these affinities are not ontologically necessary. All normative regimes are radically heterogeneous in every one of their dimensions. Given the complexity of modern western societies, the political attempt to eliminate (and the intellectual attempt to reconcile) normative dissonance – be it within any normative order, or across normative orders – would be futile. To model consonance as identity is an instrumental goal requiring conscious effort that already implies a privileging of a particular archetype of legal normativity and a particular conception of a normative regime.[41]

CONCLUSION

30. The theorisation of legal pluralism presented above contains a number of critiques of the institutions, processes, prescriptions and assumptions traditionally associated with law in Western societies. Implicit in these observations is a critique of normative science of law as traditionally developed by mainstream jurists: system, jurisdiction and order cannot be the foundational postulates of law. Implicit in these observations is a critique of empirical science of law as traditionally developed by mainstream social theorists who explore law: normative regimes cannot be individuated as entities according to either structuralist or functionalist criteria.

41. For another expression of this idea, see Jacques Vanderlinden, "À propos de la vocation de notre temps à la révision de la théorie des sources de droit et des instruments de justice" in Nicholas Kasirer and Pierre Noreau, eds., *Sources et instruments de justice en droit privé* (Montreal: Thémis, 2002) 585.

As noted, a *radical* legal pluralism twists traditional analyses of law and society inside out. Rather than beginning with the premise that legal subjects are real entities that law can apprehend, constitute, remake or deny, it investigates how narrating subjects apprehend, constitute, remake and deny law. By highlighting dynamics of reciprocal construction, a *radical* legal pluralism legitimates interpretations of law apart from those endorsed by officials of institutional systems, or by either other-attributed or self-constituted community spokespersons in sociological systems. The hypothesis of law indwells: it is not *there* for the taking, but is *here* for the constant (re)making.

31. The conception of a *radical* legal pluralism presented here is not concerned with saving the appearances. By asking not only "how are subjects seen?", but also asking "what do subjects see?" a *radical* legal pluralist conceives law as emancipatory practice. This practice is unbounded and entropic. So, to imagine subjects as only the physical presentation of a series of selves constructed by, for example, gender, race and class is twice to err. First, there is no presumptive priority to any social category, whether apparently based on observation or attribution: class, gender, race, tortfeasor, tenant and citizen are all partial understandings of subjects. There is no sense in which these constituent selves are foreordained, necessary or exhaustive. The legal subject is not simply the aggregate of partial selves. Moreover, agency cannot be reduced to aggregated subjectivity. Every momentary sum of our partial selves will be contingent, indeterminate and in flux. Second, there is no presumptive priority to the critical scrutiny of the other over and above our own critical scrutiny. The acknowledgement of partial selves is dialogic, and there can be no identity in the boundary conditions for partiality as constituted by each legal subject.

In a *radical* legal pluralist framework, legal artefact, social milieu and particular identity are seen as mutually constituting and constituted, as an unsystematic *mêlée*.[42] A *radical* legal pluralism presumes that we hold each of our multiple narrating selves up to the critical scrutiny of each of our other narrating selves, and up to the critical scrutiny of all the other narrated selves projected upon us by others. In doing so, we acknowledge that our multiple selves are

42. I take this figure of *mêlée* from Charles Sampford, *The Disorder of Law* (Oxford: Blackwell, 1991), who nonetheless misses the power of his insight by restricting analysis to the state as dominant legality.

constituted by these multiple reciprocal gazes, and that because they have the potential to multiply themselves through each reciprocal gaze, the number of possible selves is limitless: it grows exponentially at, and with, each gaze. In brief, particular legal subjects are constituted, shaped, remade, denied and destroyed through the knowledge and identities they inherit, create and share with other legal subjects. By imagining law as a mode of giving particular sense to particular ideas in particular places, a *radical* legal pluralism shifts inquiry towards thinking of law as meaning, not machinery; of aspiration, not structure; as narrative, not norm; as agency not subjectivity.

32. I have found no better invitation to a *radical* legal pluralism, a legal pluralism that for me is inextricably connected with Jacques Vanderlinden, than reflection upon Jacques' own pluralistic career. Jacques (the scholar, the colleague, the friend) is the irreducible site of manifold normative engagements. As friends and colleagues of Jacques, we are his co-conspirators in conceiving the multiple dimensions of the project we call law.