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Abstract

Much legal-pluralist scholarship tends to naturalize "the law of the context," treating that law as though it were inherent in social interaction, emerging spontaneously, without conscious human decision. This view overstates the role of agreement in human societies and mischaracterizes the nature of law, including non-state law. All law is concerned with establishing a collective set of norms against a backdrop of normative disagreement, not agreement. It necessarily contains mechanisms for bringing contention to a provisional close, imposing a collective solution. This article presents a theory of legal pluralism that takes human disagreement seriously. The theory retains four themes crucial to legal pluralism: the hermeneutic theme, the plural theme, the adaptive theme, and the decentring theme. It also helps us to identify two modes common in legal analysis-the descriptive and the hortatory mode-which are quite different, though often confused. In doing so it provides a compelling, pluralist conception of law, one that takes human disagreement seriously.

LEGAL PLURALISM AND HUMAN AGENCY©

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Much legal-pluralist scholarship tends to naturalize "the law of the context," treating that law as though it were inherent in social interaction, emerging spontaneously, without conscious human decision. This view overstates the role of agreement in human societies and mischaracterizes the nature of law, including non-state law. All law is concerned with establishing a collective set of norms against a backdrop of normative disagreement, not agreement. It necessarily contains mechanisms for bringing contention to a provisional close, imposing a collective solution.

This article presents a theory of legal pluralism that takes human disagreement seriously. The theory retains four themes crucial to legal pluralism: the *hermeneutic theme*, the *plural theme*, the *adaptive theme*, and the *decentring theme*. It also helps us to identify two modes common in legal analysis—the descriptive and the hortatory mode—which are quite different, though often confused. In doing so it provides a compelling, pluralist conception of law, one that takes human disagreement seriously.

Une grande partie du monde juridique pluraliste universitaire tend à naturaliser le « droit du contexte », traitant ce dernier comme s'il était inhérent à l'interaction sociale, émergeant spontanément, sans décision humaine consciente. Cette perception exagère le rôle de l'accord dans les sociétés humaines et caractérise mal la nature du droit, y compris le droit non étatique. Le droit, quel qu'il soit, s'intéresse à établir un ensemble collectif de normes sur un fond de désaccord normatif, et non d'accord. Il contient nécessairement des mécanismes permettant d'amener la contestation à une clôture provisionnelle, imposant une solution collective.

Cet article présente une théorie du pluralisme juridique qui prend au sérieux le désaccord humain. Cette théorie retient quatre thèmes au cœur du pluralisme juridique: le *thème herméneutique*, le *thème pluriel*, le *thème adaptatif*, et le *thème du décentrement*. Elle nous aide également à identifier deux modes communs à l'analyse juridique—le mode descriptif et le mode exhortatif—tout à fait différents, même s'ils sont souvent confondus. Ce faisant, elle fournit une conception pluraliste du droit qui prend au sérieux le désaccord humain.

I.   INTRODUCTION

One of the great themes in Harry Arthurs' scholarship has been the theory and practice of legal pluralism. Arthurs wrote passionately about the way in which labour law emerges from interactions in the workplace; his 1985 book, *Without the Law*, deals with the development of responsive regulation in nineteenth century English administrative law; and much of his current work discusses how globalization is reshaping law, again in pluralist vein.[1]

I have learned much from that scholarship. My first, immensely stimulating, introduction to legal pluralism was as Arthurs' graduate student in the mid 1980s. I benefited greatly from the critical decentring of law that legal pluralism demanded—legal pluralism's insistence that law is not simply what the state decrees, but is subject to, indeed is often constituted by, normative claims that take shape within specific contexts of social interaction. I have also benefited from Arthurs' practice. At the time that I was his student Arthurs was president of York University. I saw first-hand how he performed that demanding role. But even more importantly, in working on labour law I repeatedly encountered Arthurs' path-breaking contributions as arbitrator, policy advisor, and policy-maker. In everything he has done, Arthurs has worked hard to fashion

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[1] See *e.g.* H.W. Arthurs, "Understanding Labour Law: The Debate over 'Industrial Pluralism'" (1985) 38 Curr. Legal Probs. 83; H.W. Arthurs, *"Without the Law"*: *Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985); H.W. Arthurs, "'Mechanical Arts and Merchandise': Canadian Public Administration in the New Economy" (1997) 42 McGill L.J. 29; Harry Arthurs, "Reinventing Labor Law for the Global Economy: The Benjamin Aaron Lecture" (2001) 22 Berkeley J. Empl. & Lab. L. 271; and Harry Arthurs, "Governance After the Washington Consensus: the Public Domain, the State and the Microphysics of Power in Contrasting Economies" (2002) 29 Man & Dev. 85.

regulatory methods that are responsive to the particular contexts in which they are to operate. He has been a vigorous, imaginative, and effective administrator, identifying what was most important about a given institution, then relying upon and reinforcing that vision through his decisions.

His practice has therefore involved both deference to context (at the very least the careful reading of context) and vigorous action upon that context. It has had both a deferential and an active dimension. It is the relationship between those two dimensions that is the subject of this article. The theory of legal pluralism tends to be very good at capturing the first. It emphasizes that legal norms are grounded in the lived reality of social interaction—in specific "forms of life" in Wittgenstein's terminology. But it is much less adept at dealing with the second: the way in which norms are the product of conscious and deliberate action, zeroing in on one outcome from among a range of possibilities.

Legal pluralist writings tend to speak in descriptive mode, purporting to state in the singular what the law of a particular context is. But when one actually probes that context, when one considers the diversity of claims present within that or any human society, "the law" often appears to be much more contestable. Indeed, in legal pluralist literature it can often seem that the law of the context is being formulated before our eyes, in the very act of its pronouncement.[2]

The failure to capture that active dimension significantly impairs many legal pluralist theories. It prompts them to treat as matters of fact normative claims that are contested within the very circumstances in which they are presumed to operate. It tends to blur description with advocacy. Taken to its limit, it can obscure the very heart of law: the need to establish, at least provisionally, a single normative position to govern relations within a given social milieu, despite the continuing existence of normative disagreement.

I begin by discussing two problems commonly encountered in legal pluralist scholarship. These are useful in suggesting a more adequate conception. I then sketch that conception, describing how a

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[2] This tendency is not universal. Some writings that have been shaped by legal pluralism or influential in its development have been acutely aware of normative conflict and its resolution. Good examples include Karl Llewellyn & E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman: University of Oklahoma Press, 1941); Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, 2d ed. (London: Butterworths LexisNexis, 2002).

concern with the mechanisms by which disagreement is considered and provisionally settled can improve our understanding of legal pluralism. That improvement carries several important benefits.

It makes clear what we should seek to protect when we set out to respect another legal order (for example, an indigenous legal tradition, or the regulatory autonomy of a particular profession or industry). We should not aim to protect a predetermined body of norms, for legal orders are always richer, more complex, and more dynamic than a focus on norms alone would suggest. We should respect that order's practices of normative deliberation and decision making—the processes by which normative claims are discussed, disagreement adjudicated (in the largest sense of "adjudicate," including all means of settling disputed norms), and the resultant norms interpreted and elaborated. A similar caution applies when deciding whether another normative order is *worthy* of respect. There too we should concentrate on processes, not just on the norms that issue from those processes.

It will assist us to understand the potential for and character of normative dialogue across legal orders, precisely because it will explore how every legal order approaches the continual assessment and determination—to some extent peremptory—of the content of norms. Interaction across legal orders involves the encounter of two or more traditions of normative decision making, each of which contains its own methods, protocols, modes of argument, and processes of judgment. Understanding another legal tradition requires not just the observation of the outputs of those processes. It requires that one understand how that order marshals and resolves arguments.

It will keep our focus squarely on the fundamental problem of law: how, despite our diversity, we can come to provisional working solutions, provisional norms, that allow us to live together despite our continuing disagreements. Those solutions may involve the imposition of a single outcome. They may involve the recognition of spheres of autonomy. They may produce a mere modus vivendi rather than a comprehensive body of principle. But they always aim to produce at least some settled order among the contending positions, allowing us to escape the brute interaction of those who are always "forçans ou forcés."[3]

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[3] "Coercing or coerced." The phrase is that of Jean-Etienne-Marie Portalis, conseiller d'État and orateur du gouvernement, referring to life outside society, on presenting the provisions

Finally, it will help us to distinguish between two ways of talking about law—what might be called the descriptive and the hortatory modes—that are often blurred in legal pluralist, indeed in all legal scholarship. Both modes have integrity, but they are different in their aims and consequences. Clarity demands that we distinguish between them.

Those are the purposes of this article. I begin with two shortcomings often present in the legal pluralist literature.

II.   OBLIGATION AND DISAGREEMENT

The literature on legal pluralism tends to speak the language of social science, as befits its origin in anthropology and sociology.[4] It takes an external point of view, concerned with describing the way in which norms develop, take hold, and are applied in social contexts. It is concerned with identifying the existence and operation of those norms. Ascertaining the law is conceived as a matter of acquiring knowledge, of discerning the norms operative within a social field. The norms are presumed to exist. The scholar's role is to perceive and describe them.

Legal pluralists do not, however, treat law in the simplistic fashion sometimes attributed to the legal realists: they do not consider law simply to be whatever judges and lawyers happen to do, as the mere practices that are performed by legal personnel, shorn of all sense of obligation.[5] Their idea of law still incorporates a strong element of normative judgment, which separates it from mere practice. Law is what the participants in social fields consider to be obligatory, the rules that they believe govern their conduct. Legal pluralism necessarily involves, then, a measure of deference to the internal perspective of the participants. Law is what carries a sense of obligation within the

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of the French Civil Code dealing with the right of ownership to the Corps Législatif on 17 January 1804, quoted in J.G. Locré, *La législation civile, commerciale et criminelle de la France*, vol. 8, (Paris: Treuttel et Würtz, 1827) 151.

[4] For a useful survey, see Sally Engle Merry, "Legal Pluralism" (1988) 22 Law & Soc'y Rev. 869.

[5] The one clear exception is Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2001) at 133-205. Tamanaha adopts a position that is very close to that of the legal realists, simply considering to be law whatever actors who are conventionally considered to be "legal" actors treat as such. But this avoids the problem of obligation only by eschewing (at least ostensibly) any serious engagement with normative argument. One might question whether this gives us any better understanding of the nature of law.

particular social setting—what operates as a standard for evaluating and controlling the conduct of participants in a social field.

Different pluralists account for the obligatory force of norms differently. Some, like Sally Falk Moore, emphasize functionalist explanations: norms enable predictability and therefore coordination in human interaction; they emerge and are sustained by the need to facilitate social intercourse.[6] Moore's legal pluralism has a distinctly disenchanted character, paying scant attention to claims of cultural authenticity or arguments about justice. In fact, she is generally unconcerned with the origins of norms. In Moore's work, the norms tend to be given—as much a matter of historical accident as of anything else. Individuals then shape their conduct around them, reinforce them, and deploy them instrumentally in the service of their own ends. The norms persist and evolve as a function of the self-interested manoeuvring of different social actors. Other pluralists, such as Clifford Geertz,[7] are much more cultural in their explanations. Norms are derived from broader visions of society: comprehensive, integrated conceptions of how the world works. Law is comprehensible only within these broader world views. It is sustained and its meaning determined by these complexes of beliefs and institutions.

However, my favourite pluralist theorist (and I suspect Arthurs' as well) is Lon Fuller. His approach also has strong functionalist elements: law performs a coordinating—Fuller sometimes says a "communicative"—role. But he sees that functionalism as generating distinct bodies of norms that are especially appropriate to particular modes of activity.[8] His vision is fundamentally Wittgensteinian: norms inhere in practices, in forms of life. But they are not reducible to the mere fact that something happens, even repeatedly. Law involves reasoned obligation, and this distinguishes law from mere habit. Fuller's theory also has room for culture, as cultural forms are adapted to meet

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[6] Sally Falk Moore, *Law as Process: An Anthropological Approach* (London: Routledge & Kegan Paul, 1978).

[7] Clifford Geertz, "Local Knowledge: Fact and Law in Comparative Perspective" in *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983) 167.

[8] See especially Lon L. Fuller, "Human Interaction and the Law" (1969) 14 Am. J. Juris. 1.

the challenges of coordination. Norms of coordination are formulated and justified within different cultural and practical vernaculars.[9]

In each of these theories, the local law is distinguished from local practices by its obligatory character. Each provides a theory for how obligation works in the contexts with which it is concerned: why certain norms are held to be obligatory, how they come to be adopted, and how they come to change. This account of obligation is often an essential means of distinguishing, in any given society, what ought to be done from what simply is done, for in the informal mechanisms of ordering with which pluralists typically are concerned, the line between mere practices and obligations is often indistinct.

But here arises a problem: this incorporation of a theory of obligation undermines the extent to which legal pluralists stand outside the phenomenon they are studying, simply taking the law as given. The theorists develop tools for judging what should be considered obligatory in the specific context. Indeed, in the absence of direct data as to what the society's members consider to be obligatory, the theorists' accounts often reconstruct the living law. This reconstruction is derived as much from the theorists' own judgment as to what is fundamentally required as it is from any observation of the rules actually applied. The theorists' descriptive role shifts perilously close to one of normative judgment, even in the course of describing the local law.[10]

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[9] Compare Stout's comments on the differences between Kant and Hegel, the former seeing norms as a product of self-legislation through agreement, the latter seeing norms as emerging out of mutually recognitive activities—out of "a form of ethical life"—therefore reflecting the rich cultural character of that life. See Jeffrey Stout, *Democracy and Tradition* (Princeton: Princeton University Press, 2004) at 272-73.

[10] This is an endemic problem in attempts simply to describe "the law." Two contrasting examples, one from legal theory, the other from practical adjudication, will suggest its significance. First, Stephen Perry has argued forcefully against "methodological legal positivism" on grounds very similar to those here. (By methodological legal positivism, Perry means theoretical approaches that seek simply to describe the law in a manner entirely apart from normative prescription.) Perry notes that there are contending claims as to the function of the judge and the role of morality in law. Any "descriptive" approach cannot help but take a position on these issues, and that undermines its claim to be merely descriptive. See Stephen R. Perry, "The Varieties of Legal Positivism" (1996) 9 Can. J.L. & Jur. 361 at 369ff. Second, in some theories, Aboriginal rights are grounded in the continuation of Aboriginal legal interests after the assertion of sovereignty by the colonial power. See *e.g. Mabo v. Queensland* (1992), 107 A.L.R. 1 at 42 (H.C.A.), Brennan J. But given the very different manner in which law operates within indigenous societies, and given the different context in which the rights are now being asserted, courts inevitably find themselves faced with difficult issues of translation, attempting to decide what practices should be considered matters of "right" and what should be considered mere practices. See Jeremy Webber, "Beyond Regret:

We will return to this blurring of normative and descriptive roles below, in Part V. But at this point, I want to draw attention to another related, more serious challenge to the legal pluralist project, at least as it is commonly conducted.

Legal pluralists purport to describe what the participants in a social context take to be obligatory. But of course, within any society, there· is often deep disagreement over matters of obligation. This is nowhere more true than in the workplace. There, workers often have a profoundly different sense of what is required than do employers. Workers, for example, tend to insist on the customs of the workplace, where employers see those as mere practices, always subject to managerial revision. Workers put enormous stock by the maintenance of the work relationship: no layoffs except in dire necessity; no dismissal without just cause; no contracting out. In the view of many employers, · workers are outsiders whom employers hire to perform certain tasks; employers should therefore be free to expand or contract the labour force as they see fit.[11]

What is the warrant for treating one of these positions as that of the "social field"? In what sense is one position or the other the indigenous law of the workplace when each is subject to fierce contestation? If there were formal institutions for settling such disagreements, and the authority of those institutions were broadly accepted within the workplace, those institutions' decisions could be taken to be authoritative. A legislature, for example, could set the fundamental rights and obligations of the workplace. But few legal pluralists want to rely on formal structures to determine norms. They want to focus on informal normativity, showing how norms emerge from

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Mabo's Implications For Australian Constitutionalism" in Duncan Ivison, Paul Patton & Will Sanders, eds., *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000) 60 at 63-69.

[11] See *e.g.* the contrasting understandings of the labour relationship expressed in *Services ménagers Roy Ltée c. Syndicat national des employés de la commission scolaire régionale de l'Outaouais*, [1982] T.T. 115; *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. Union des employés de service, Local 298*, [1988] 2 S.C.R. 1048.

Labour historians have dealt extensively with contestation over the customs of the workplace. For two prominent examples (one English, one Canadian) in what is an extensive literature, see E.P. Thompson, "Time, Work-Discipline and Industrial Capitalism" in *Customs in Common: Studies in Traditional Popular Culture* (New York: The New Press, 1993) 352 [*Customs in Common*]; Gregory S. Kealey, *Toronto Workers Respond to Industrial Capitalism, 1867-1892* (Toronto: University of Toronto Press, 1980).

social life. They want to identify norms before they become subject to determination by purposive human action. Indeed, they often want to use the insights of pluralism to criticize or guide that action.

When they declare the law of the workplace, then, legal pluralists often appear to be placing their stamp of approval on structures that are not unambiguously recognized as law by the practice's participants. They are imposing an artificial commonality, one which the parties themselves do not recognize. Their arguments may therefore appear to partake of sleight of hand, claiming the authority of law for a position that is eminently contestable, obscuring and minimizing the presence of dissent. And indeed many on the left have criticized legal pluralist labour-law scholarship on just such grounds. But the problem is more general. In any society, of any complexity, there are substantial disagreements even over matters of fundamental importance. How can one say in any contested situation what the norms are, unless there is some authoritative body for settling them and that body has spoken?[12]

In fact, this challenge is reminiscent of the argument over the old claim that judges merely discover, but do not make, the common law. That claim is now routinely ridiculed as serving merely to obscure judges' role in fashioning the law. But it too poses the problem of how norms can be found to be inherent in social practice when that very practice is contested. It too involves a claim that norms emerge out of social interaction, with only limited agency on the part of the decision maker. And although the discovery theory of the common law has come under fearsome assault—so fearsome that many consider it to be utterly dead—there is a sense in which many judges still consider it to be true. Few judges believe that in making a decision, they are licensed simply to make their personal opinions law. Virtually all think that they have an obligation to draw from the body of the law as a whole and from their reflection on the demands of the particular case, in order to fashion an outcome that constitutes a fair interpretation of society's norms on the question. And I suspect that their instinct is widely shared, even though we have great difficulty seeing how the norms that they come up with are, in any real sense, society's norms.

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[12] See the exploration of the implications of disagreement for jurisprudence generally in Jeremy Waldron, *Law and Disagreement* (New York: Oxford University Press, 1999).

To put the same point in another way, few of us accept the simplistic positivist's view (or for that matter, the simplistic legal realist's view) that the authority of a court's judgment lies simply in the fact that a court has made it; that when previous decisions or statutes are unclear, there is no law until a court has pronounced; and that in making such a judgment, the court is engaging in an act of pure discretion. We accept that there is some sense in which the law precedes the pronouncement—or at least, that the fashioning of law, in any contested case, still occurs through a process that is recognizably legal argument, not just an appeal to the personal predilections of the judge.[13]

Both the legal pluralists' dilemma and the common-law court's dilemma, then, raise the problem of how we should understand the existence of society's law in the face of disagreement over the normative standards in issue. Both prompt us to ask about the role of agency: how should one understand the role of the scholar, the role of the judge, and the role of the administrative decision maker in describing or fashioning society's law. It is to those questions that I now turn.

III.   LEGAL PLURALISM AND HUMAN AGENCY

Part of the problem lies in thinking about law as though it were a matter of knowledge[14]—as though law simply existed in the world as a straightforward and unambiguous product of human interaction. Law may well be natural in the sense that it is an essential attribute of human lives in society, but it does not emerge in a manner exempt from human

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[13] For a wonderful reconstruction of the classical common lawyer's conception of law, see Gerald J. Postema, "Classical Common Law Jurisprudence (Part I)" (2002) 2 Oxford U. Commonwealth L.J. 155; Gerald J. Postema, "Classical Common Law Jurisprudence (Part II)" (2003) 3 Oxford U. Commonwealth L.J. 1. As will become clear, Postema's conception of the common law is very close to the conception of law defended in this article.

[14] David Nelken has criticized the view that law is essentially a matter of empirical knowledge, fully comparable to sociological insight. See David Nelken, "Blind Insights? The Limits of a Reflexive Sociology of Law" (1998) 25 J.L. & Soc'y 407 at 417ff. He emphasizes the fact that law relies on a limited range of empirical inputs and works with those inputs in distinctive ways. My focus is related but somewhat different: law is not merely concerned with securing empirical information, but crucially with establishing a collective norm in the face of continuing disagreement. It does not merely reflect the range of attitudes that exist within society; it also seeks to "adjudicate" them, to establish (at least for some purposes) a single norm to govern a particular social context, and then to sustain the resulting societal norms through time. That distinctive aim goes a long way towards explaining why law purposefully narrows the information on which it relies. Nelken recognizes the importance of "legal closure" at 422 and 424. That is, in my view, crucial to any understanding of law's distinctive role.

agency. Law is consciously created. This is as true for informal law or "living law" as it is for enacted law.[15]

Stated in this way, the point is unremarkable. No one would now contest that law is made. Any legal pluralist worth their salt would situate law within concrete social processes, where actual people collaborate in specific ways and recognize determinate norms. But I mean to claim something different and stronger. I claim that much of what we take to be law is not a matter of settled agreement within society. Simple interaction does not produce anything like a set of agreed norms. There may be convergence around certain abstract and fundamental principles: one should not kill, for example, or one should generally follow through on one's contractual obligations. But as soon as one starts to introduce complexity—as soon as one adds to one's reflection on the law of contract the possibility of nondisclosure, dramatic mistakes of value, the desire to go back on an impulsive purchase, the misuse of family assets in making a purchase, or any one of a host of other situations—the social consensus evaporates. Law is not based on the natural existence of a normative order, which all members of society implicitly accept. It is based on the desire to make a normative order, to have some order established, even in the face of continued normative diversity within society at large.

There is good reason for people to acquiesce in such an order, indeed to support it actively, even if it does not comply with their own personal views. The existence of any normative order depends upon some matters being governed by a collective position. When people disagree (as we do over just about anything) that collective position has to depart from what some of us would prefer if left to our own devices. We nevertheless have reason to acquiesce in those positions precisely so that we can obtain the benefits of living in an ordered society governed by a sense of justice, not just by the will of the strong.[16] Conviviality—the desire to live together peaceably in society—is therefore a forceful inducement towards accepting the collective position. And although it

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[15] The phrase, "living law," is derived from the work of Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (New York: Arno Press, 1975). For Ehrlich, the resolution of normative conflicts by decision makers was integral to law. See K. Alex Ziegert, "A Note on Eugen Ehrlich and the Production of Legal Knowledge" (1998) 20 Sydney L. Rev. 108 at 118ff.

[16] See Jeremy Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples" (1995) 33 Osgoode Hall L.J. 623.

may be irritating, it is not deeply problematic that society's justice departs from our own. That is the inevitable result of living in a diverse society where we find ourselves in community with people with whom we disagree. It is a product of society's richness, not an imperfection to be lamented.

This predicament may be illuminated by an example the pragmatist philosopher Jeffrey Stout employs when arguing for the objectivity of moral reasoning.[17] He invokes an informal soccer game, one in which there is no referee. He notes that each player can assess his or her own and others' conduct, and that those assessments are in some sense objective: they are not simply projections of each player's subjective preferences but take place against the backdrop of the players' physical conduct and the purposes of the game (what is necessary to maintain the game and secure its benefits). Moreover, the rules of the game themselves are justified and refined by similar arguments. Stout notes, for example, that players of early forms of soccer recognized implicitly that hacking was improper, that impropriety was eventually rendered explicit in a rule against fouls, and that rule was in turn subject to further development, resulting in (for instance) the recent prohibition on tackles from behind.

Stout's account sounds much like standard legal pluralist discussions of the emergence of norms: a particular social context produces implicit standards of conduct; norms are generated and then shaped by the nature of the interaction. But note that this way of expressing the situation obscures an important and contested judgment inherent in the very emergence of the norm. This is most clear in the case of tackles from behind. Some soccer aficionados may well want to preserve those tackles: tackles from behind may be difficult to perform, they may be dangerous, but they may nevertheless be (in the aficionados' view) a challenging and valuable manoeuvre—perhaps especially valued because they are difficult and dangerous. The same is true even of the basic offence of hacking: some players may well like their soccer rough, welcoming the contact and toughness thereby required. When I was a kid, playing pickup soccer in a rural schoolyard, other kids were very proud of an effective shin-hack.

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[17] Stout, *supra* note 9 at 272-74.

In any rule-governed social context, there has to be some method for settling such disagreements or there is no norm. In pickup soccer the initial method may be an argument among all players: "Hey, that was a bit rough. This is a fun game." Or: "What's the matter? Can't you take it?" This may produce a working outcome (although dissenters may well harbour their heterodox views, and in this sense the underlying disagreement may well remain). If there is no such outcome, the final mechanism may be the decision of some players to leave, perhaps creating a separate game. Now, I do not dispute Stout's essential point: in their arguments, the players' claims have objective referents, grounded in the nature of the practice. They are doing more than simply asserting personal preferences. The players argue over how the game will change if different rules are adopted; the relative value of those different games; the purposes of those games; their desire to continue playing together rather than playing apart; the risk of injury; and the players' reasons for avoiding—or risking—injury. But those factors will be weighed and interpreted differently by different players. Any normative order therefore has to include a further, crucial step, in which the group moves from disparate attitudes to a single outcome. That outcome is almost always peremptory in the sense that the parties continue to disagree, but they acquiesce because that is the only way that the game can be preserved. It is the act of defining a common position, in the face of continuing disagreement, that is the essence of law.

Now, legal pluralism often tends to soft-pedal this final step because it appears to disconnect society's norms from the ostensibly spontaneous, lived reality of the practices—and it does, though only in relative terms. The practices alone are not determinative. The norms do not establish themselves through the unforced play of human interaction. They are consciously made against a backdrop of disagreement. This makes them to some extent controversial, partial, and nonconsensual. One often gets the sense that it is precisely to deny these adjectives a foothold and to claim a strong, consensual, and perhaps even naturalistic objectivity that legal pluralists say that their norms are rooted in human interaction. But in doing so, they overstate their case and obscure a crucial step in the emergence of social normativity.

To put the argument another way: the order established through human interaction is never simply the result of spontaneous, undirected action and reaction. Human order is always a reasoned order, the

participants adjusting their conduct consciously in response to that of others with an eye towards the maintenance of their sense of the good and the pursuit of their objectives.[18] Because it is a reasoned order, the parties can disagree. Any social order, to be an order, must have ways of resolving those disagreements. This may be done through the kind of rough and ready argument sketched in the soccer example above, or it may be achieved by more formal mechanisms such as voting or appeal to a third party. It may sometimes occur through inarticulate means—by parties modelling the behaviour they wish to see as the norm, appealing implicitly to other parties to reciprocate—although I suspect that this is rare and that when it does occur, the interaction usually draws implicitly on solutions that have already been firmly established in other dimensions of social interaction (norms that support, for example, the practice of taking turns, the practice of queuing, the social equality of the participants, the illegitimacy of violence, and so on). The fundamental point is that norms always involve both an argument (perhaps implicit) as to what the norms should be and a mechanism by which that argument is brought to a provisional conclusion. They always involve conscious human agency in their creation. It is a serious mistake to presume that they emerge spontaneously, naturally, by projection from the practices themselves, without any form of decision or imposition.[19]

This forces us to attend more closely to the mechanisms by which disagreements are settled. It forces us to weigh the adequacy of those mechanisms. When we do this, I strongly suspect that we will gain a renewed appreciation for formal institutions, including the institutions of the state. Legal pluralists have tended to treat these institutions with disdain, perhaps because those institutions seem to be characterized by authoritative diktat rather than deference to context; perhaps because legal pluralists are interested in affirming subcultures and subaltern groups, and for these groups the state can appear to be homogenizing and hegemonic; or perhaps because some pluralists yearn for an unforced and natural unity that is manifestly not present in state institutions. But once one takes disagreement seriously, the formal structures for sifting and aggregating arguments represented by

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[18] See Fuller's explication of this phenomenon *supra* note 8 at 2ff.

[19] Santos, *supra* note 2 at 86, is especially clear on the importance of mechanisms for determining a single outcome to the nature of law.

democratic institutions carry distinct benefits. They provide concrete and knowable mechanisms for popular participation; they allow citizens to speak in their own voice; and they do so on a basis of rough equality—certainly more equality than is present in many informal mechanisms, especially mechanisms in which an individual or small group poses as the privileged interpreter of the "living law." Moreover, they deal with residual disagreement through elections and voting, in a manner that again observes a rough equality.[20] Careful attention to the fact of disagreement causes us to see the necessity of some institutions for producing a common outcome, if only for the purposes of peaceable social relations. In doing so, we begin to leave behind purely naturalistic conceptions of norms and see norms as always constructed, always to some extent artificial.

This realization deflates the stronger claims made by some legal pluralists, especially (I believe) the "critical legal pluralists." As I understand it, critical legal pluralists argue for the recognition of a host of normative orders, always intersecting in any social context. Every relationship of whatever kind generates norms, and so each individual stands at a point of intersection of many—in effect an unlimited number—of normative orders: those generated by relationships of intimacy, family, work, neighbourhood, professional identification, gender identity, language, cultural attachments, nationality, and so on. Critical legal pluralists tend to consider, then, each individual's act of manoeuvring around these orders as the crucial phenomenon, they tend to take as their implicit standard of evaluation each individual's consensual adherence to norms, and they tend to treat, almost in consequence, any kind of institution as inherently repressive, running roughshod over the freedom and multiplicity of individuals' normative lives.[21] But this, it seems to me, leaves out the hard truth that norms

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[20] Waldron, *supra* note 12; Jeremy Webber, "Democratic Decision-Making as the First Principle of Contemporary Constitutionalism," in Richard W. Bauman & Tsvi Kahana, eds., *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (New York: Cambridge University Press, 2006) [forthcoming in 2006].

[21] Desmond Manderson, "Beyond the Provincial: Space, Aesthetics, and Modernist Legal Theory" (1996) 20 Melbourne U.L. Rev. 1048; Martha-Marie Kleinhans & Roderick A. Macdonald, "What is a *Critical* Legal Pluralism?" (1997) 12 C.J.L.S. 25; Roderick A. Macdonald, "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) 9; Emmanuel Melissaris, "The More the Merrier? A New Take on Legal Pluralism" (2004) 13 Soc. & Legal Stud. 57; and Margaret Davies, "The Ethos of Pluralism" (2005)

always involve a kind of imposition, where parties submit (sometimes by conscious decision, usually by something more like acquiescence) to norms that would not be the ones they would choose if left to their own devices. And this truth, while blunt, is not inherently problematic: the compromises it involves are essential to any life in society, to any peaceable social collaboration.

It is only through such narrowing of the normative options that "norms" come into being. Prior to that stage one has normative assertions: proposed norms. Those assertions are grounded in the experience of social interaction in the various contexts that critical legal pluralists rightly draw to our attention. People cite that experience to justify their proposed norms. At times, that experience—especially when it has involved continual interaction in the past, resulting in the prior establishment of many other norms—may seem to point so clearly towards a particular outcome that we are tempted to say that that outcome is already latent within the practice. But law, the actual emergence of norms, only occurs when those assertions are settled by some emphatically social, non-individual process. The critical legal pluralists are right in drawing our attention to the fact that resolving disagreement through such a process forecloses alternatives. Their critical project is valuable in reminding us of other paths that might have been and might still be taken.[22] But then, it seems to me, our attention must turn toward how common positions are and should be hammered out (including the appropriate scope of application of the norms and the depth to which commonality is required, for parties may, for some purposes, agree to disagree). We cannot be concerned with norms and leave the disagreements as we find them. A distinctively legal pluralism requires, paradoxically, that we seek ways to overcome the radical pluralism of our normative assertions.

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27 Sydney L. Rev. 87. There are close parallels between this approach to legal orders and Seyla Benhabib's approach to cultural identification more generally. See Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton: Princeton University Press, 2002). In each case, individuals are seen as participating in multiple orders, and because the theorist brings no tools for distinguishing between the relative salience of different orders (other than individual option), or for the collective management of order (except conceived as a species of repression), the theoretical prescriptions end up being profoundly individualistic.

[22] This indeed seems to be the chief attraction of critical legal pluralism to Davies, *ibid.* at 100-03.

IV.   FOUR PLURALIST THEMES

What remains, then, of legal pluralism? Four essential themes are crucial—although, as will become clear, they end up being cast somewhat differently, with less emphasis on the simple fact of plurality and more on what sustains that plurality and the justifications for its protection.

First, there is legal pluralism's *hermeneutic theme*. Legal pluralists emphasize that normative arguments take shape within particular social contexts and are in an important sense both grounded in and marked by those contexts. Our normative arguments are not free-standing and abstract. They exist within histories of social encounter and social justification, their present content resulting from reflection upon past norms, past hypotheses, in relation to our various histories of social interaction.

There are different ways to conceive of this grounding of norms, coinciding with the different tendencies in legal pluralism noted earlier. Some pluralists, following in the pragmatist tradition, emphasize the grounding of norms in day-to-day practices and often tend, then, towards functionalist explanations.[23] Other pluralists emphasize their grounding in ideational structures—in culture, in tradition.[24] In my view, the best approach recognizes that both the functional and the ideational are operative. Our normative assertions do take shape within particular traditions of normative inquiry, within cultural traditions. These provide our starting presumptions; they provide the terms of our inquiry; they provide a set of tools, problems and competing solutions that shape, at least initially, our normative assertions; and they provide a range of cultural referents upon which we draw in all our attempts to make sense of our world, including our attempts to fashion the norms we seek to live by. But these traditions are not purely self-referential, entirely turned in upon themselves. Self-conscious reflection plays off the experience of interaction in specific milieux. Normative arguments incorporate judgments about the point of particular practices, about successes and failures, about past experiences of injury and well-being—and because they do, they can be criticized on the basis of the adequacy of their

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[23] See *e.g.* Ehrlich, *supra* note 15; Moore, *supra* note 6.

[24] See *e.g.* Geertz, *supra* note 7; Robert M. Cover, "The Supreme Court 1982 Term, Foreword: *Nomos* and Narrative" (1983) 97 Harv. L. Rev. 4.

judgments.[25] Normative commitments can be jettisoned as a result of experience. They can give way to more adequate, more refined judgments as individuals confront situations they had not previously encountered.[26] In that sense normative arguments have referents that display the objective character identified by Stout: referents that go beyond what we have previously succeeded in enunciating, referents that are not merely projections of our own subjectivity. This does not mean that we have a handy way of settling all our arguments, for the referents and their implications still have to be interpreted, and in that interpretation we may well differ (although the differences occur against a ground that allows for real argument, not merely solipsistic assertion).[27] We still need, then, mechanisms for bringing those arguments to a provisional close.

Our design of those mechanisms will be greatly aided by the pluralist insistence on experience as the ground for normative argument. We will be acutely aware of the dependency of good judgment on the breadth and depth of decision makers' personal experience and on their disposition to attend to and learn from the impact of past norms. This has obvious implications for whom one selects as a decision maker, but it also has implications for process. It militates strongly in favour of wide participation, accessing information about past practices and their effects, declining to rush to judgment when haste is unnecessary, valuing deliberation, and creating opportunities for reconsideration. There are clear lessons here for the design of democratic institutions. Indeed, one can see the foundation of an argument for the primacy of representative and deliberative institutions precisely in order to achieve the broadest

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[25] Michele M. Moody-Adams, *Fieldwork in Familiar Places: Morality, Culture and Philosophy* (Cambridge, MA: Harvard University Press, 1997) at 146-60; Jeremy Webber, "Culture, Legal Culture, and Legal Reasoning: A Comment on Nelken" (2004) 29 Austl. J. Legal Phil. 27 [Webber, "Culture"]; and Jeremy Webber, "A Judicial Ethic for a Pluralistic Age: Responding to Gender Bias, Class Bias, Cultural Bias in Adjudication," in Omid Payrow Shabani, ed., *Multiculturalism and the Law: A Critical Debate* (Cardiff: University of Wales Press, 2006) [forthcoming in 2006].

[26] Jeremy Webber, "The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*" (1995) 17 Sydney L. Rev. 5.

[27] See also Charles Taylor, "Interpretation and the Sciences of Man" in *Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge: Cambridge University Press, 1985) 15 at 26-27 [*Philosophical Papers 2*]; Charles Taylor, "Explanation and Practical Reason" in *Philosophical Arguments* (Cambridge, Mass.: Harvard University Press, 1995) 34; and Cheryl Misak, *Truth, Politics, Morality: Pragmatism and Deliberation* (London: Routledge, 2000) at 48ff., especially 78-83, 90-94.

range of input into normative decision making.[28] The factors also have important implications for adjudicative processes. They support, for example, the strong commitment to specialist administrative tribunals, well versed in their particular spheres of activity, that has been a hallmark of much of the legal pluralist literature, not least Arthurs'.[29]

The second is legal pluralism's *plural theme*. Because normative argument always occurs against the backdrop of particular traditions and practices, because it takes shape within a specific history of normative inquiry, it will necessarily vary from place to place. There are traditions and sub-traditions of normative argument, each of which is characterized by its own particular history of normative engagement through time. Note that these traditions are not defined by a rich set of substantive agreements. Their participants may well disagree, perhaps profoundly. Rather, they are bound together by a common language of normative inquiry—distinctive ways in which the questions are posed; a common set of past solutions; a shared history against which their arguments are framed; specific practices upon which the norms are intended to operate and in relation to which they are assessed.[30] These traditions may also include mechanisms for settling disagreements and establishing norms, if only provisionally.

The third theme is legal pluralism's *adaptive theme*. This suggests that because certain kinds of norms are developed in relation to particular contexts—because they have been proposed, evaluated, and found to be useful within long interaction in those contexts—they are especially well adapted to those contexts. For many legal pluralists, this provides an important reason for preferring the "living law" over more formalized law, especially the law of the state. Informal norms are seen to be more natural, more enmeshed in people's daily lives; state law is

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[28] Robert B. Talisse, *Democracy after Liberalism: Pragmatism and Deliberative Politics* (New York: Routledge, 2005).

[29] H.W. Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 Osgoode Hall L.J. 1.

[30] I develop this dialogic conception of culture in Jeremy Webber, *Reimagining Canada: Language, Culture, Community and the Canadian Constitution* (Montreal: McGill-Queen's University Press, 1994) at 183-228 [Webber, *Reimagining Canada*]; Jeremy Webber, "Individuality, Equality and Difference: Justifications for a Parallel System of Aboriginal Justice" in Canada, Royal Commission on Aboriginal Peoples, *Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues* (Ottawa: Royal Commission on Aboriginal Peoples, 1993) 133 [Webber, "Individuality"].

considered to be artificial, compromised, imposed.[31] This preference is often tacit, inscribed in the terms that are used to describe informal norms: "living law," "the indigenous law of the workplace," "social law." The tendency in much pluralist scholarship to naturalize that law—to treat non-state law as emerging spontaneously, in unified form, without disagreement or processes to resolve disagreement—serves both to underline the superiority of the "living law" and to evade explicit justification for the preference, presuming its truth in the very attribution of law to context. But it is also possible to embrace the adaptive theme in more modest fashion, recognizing the relativity of law to context, recognizing that that relationship provides presumptive reasons for respecting norms that have been developed in particular contexts, but insisting that in any particular case one must still inquire into *how* the law relates to context and about the significance of that context, so that one can judge to what degree any particular claim deserves our respect.

The reasons in favour of that modest presumption are grounded in the hermeneutic and plural themes. Norms are developed against the backdrop of particular practices; they are shaped by the attempt to comprehend and regulate those practices. There is good reason to believe, then, that norms that have been developed over time in relation to a particular field will take better account of its practices than norms developed in an entirely separate field with very different practices. To take a straightforward example, norms developed in a market economy are more likely to be appropriate to commercial affairs than those developed in a purely feudal society. The same will tend to be true at a micro level, in norms adapted to the internal ordering of a particular hospital, decision-making processes within a particular corporate organization, the regulation of rights upon common lands in pre-industrial England, or the regulation of hunting territories in the Cree lands of northern Quebec.[32] The insight might be framed in Burkean

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[31] See *e.g.* Cover, *supra* note 24 at 12ff.

[32] See *e.g.* Guy Rocher, "Les 'phénomènes d'internormativité': faits et obstacles," 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) 25; Mary Douglas, *How Institutions Think* (Syracuse, NY: Syracuse University Press, 1986); E.P. Thompson, "Custom, Law and Common Right" in *Customs in Common, supra* note 11, 97; and Adrian Tanner, *Bringing Home Animals: Religious Ideology and Mode of Production of the Mistassini Cree Hunters* (New York: St. Martin Press, 1979).

terms: normative traditions are repositories of knowledge and reflective judgments on the challenges of living in society—in actual, historically determined social milieux. One loses something when one treats those traditions with disregard.

What is more, those traditions often have great significance for their members' sense of moral responsibility and personal identity. Members have used the distinctive terms of those traditions to frame their commitments. They have mastered those terms, used them to guide their actions, and employed them to pose their deepest questions. It can be profoundly disabling to lose that framework.[33]

But these very reasons also suggest that deference to the contextual law should be neither automatic nor absolute. The presumption that, all things being equal, norms are adapted to the context in which they are formed applies to all kinds of situations: to norms developed by indigenous peoples, by state institutions themselves, by religious communities, by groups defined by language, by professional associations, by those engaged in industrial relations within a particular plant, within a given industry, or across an entire community—indeed, by just about any persistent human association. Some of these will have real significance for the members' sense of moral agency. Others will not, providing at most a measure of familiarity. The strength of the reasons for respecting the law of the context will depend, then, upon the extent to which that law constitutes a comprehensive, substantially autonomous tradition of normative ordering, which has in fact served to shape the moral understanding of its members. The claim that one should defer to the norms of a particular workplace, for example, is manifestly much weaker than the claim that members of an indigenous people should be entitled to live by their traditions.

Moreover, even with respect to the first, pragmatic reason for respecting the law of the context (the adaptation of norms to the particular practices they seek to regulate), the reasons for deference will depend upon how the norms have been developed and the value of the practices to which they relate. Norms are never simply the mechanical projection of practices. They are always the product of human interpretation, disagreement, and mechanisms for establishing a

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[33] Webber, "Individuality," *supra* note 30.

collective outcome in the face of disagreement. If those mechanisms are
objectionable—if, for example, the internal ordering of a hospital is
determined by the self-protective instincts of a privileged caste of health
professionals—there may be little reason for deference. One might first
insist that the internal decision-making structures be reformed, so that
even though norms are developed in relation to a concrete set of
practices, this development occurs in a manner that allows for greater
equality of participation. When we defer to other contexts'
establishment of norms, we are deferring not simply to the unanimous
opinions of its members but rather to structures of authority—to
"multicultural jurisdictions" in Ayelet Shachar's useful phrase.[34] We
inevitably confront judgments about representativeness and
justification—although of course we should never forget that when we
refuse to defer, we similarly prefer a structure of authority: our own.
Decisions to defer or not to defer are always, at least implicitly,
comparative. And there will be circumstances in which the essential
nature of the practices themselves is contested. In those situations, the
very assumption that norms should be adapted to these practices will be
challenged, as parties draw on insights from other contexts in order to
change fundamentally the way things are done.

Finally, even when there are strong reasons for respecting the
distinctive normative traditions of a particular context, there remains
potential for communication across the traditions' boundaries, the
members' drawing upon the history of interaction between the traditions
(itself a body of practice from which the parties can draw normative
consequences), and upon a deep engagement with the other in order to
search for useful analogies or to understand, in something like the
other's terms, the relationship between its distinctive experience and its
normative debate. A kind of translation is possible across boundaries,
using the relationship between normative principle and human practices
as the ground. There is reason to participate in such discussions. We
learn a great deal from engagement with a richer array of experience.

In short, there are good reasons to take seriously the adaptation
of norms to context. But these constitute presumptive reasons, the

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[34] Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights*
(Cambridge: Cambridge University Press, 2001). For the ubiquitous role of authority, see also
Brian Slattery, "The Paradoxes of National Self-Determination" (1994) 32 Osgoode Hall L.J. 703.

specific force of which depends upon a more complex and extended normative inquiry.

Lastly, there is legal pluralism's *decentring theme*, which attempts to displace the assumption that the state is the sole or even the privileged source of law and emphasizes instead the coexistence of multiple contending orders, each with its own autonomous source of legitimacy. In this theme, state law is treated as simply one normative order among many, each of which is of presumptively equal status. Sometimes this equality is conceived in empirical terms: as a matter of fact, the state is considered to be less hegemonic and less a source of obligation for its members than is often assumed. But generally it incorporates a normative judgment: it denies that state institutions have any inherent right to judge the legitimacy and determine the bounds of other normative orders (or at least it rejects any automatic presumption along those lines); instead, non-state orders are just as entitled to judge the state. The state is displaced from the centre of the analysis, a displacement that marks the transition from John Griffiths' "weak" to "strong" legal pluralism.[35] Critical legal pluralism takes this decentring move even further—too far in my view, for reasons I have already indicated—treating every one of individuals' manifold normative relationships as presumptively equal, thereby definitively shifting the focus from the relationships to the individual's decision among them as the determinant of normative obligation.

A more modest version of the decentring theme is, however, inherent in the conception of legal pluralism I have developed here. The grounding of normativity in particular practices and traditions, which may or may not be identified with the state, allows for the coexistence of multiple normative orders, each grounded in its own distinctive complex of practices and traditions, each with its own claims of legitimacy. These orders may well interact in a manner that is not simply hierarchal, one order necessarily granted precedence over all the others. They may contend in a manner more akin to a negotiation. "Encounter," "mutual adjustment," "push and push back" may be better terms to capture the potential openness of the interaction. To understand the relationship adequately, then, one may well have to approach it from each order's perspective, not merely assume the dominance of the state's. Canada's

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[35] John Griffiths, "What is Legal Pluralism" (1986) 24 J. Legal Pluralism & Unofficial L. 1 at 5.

encounter with indigenous peoples, for example, is poorly understood if one begins with Canadian constitutional provisions and simply explores their ability to accommodate indigenous autonomy, or if one takes Canada's fundamental institutions as given and asks whether those premises justify indigenous self-government. One must also ask how Canada looks from the points of view of indigenous peoples: what matters (if any), from those peoples' perspectives, Canada might be entitled to govern; what type of relationship, from those peoples' perspectives, would be legitimate.[36] I do not mean to simplify either side of this interaction. I am not arguing for self-abnegation of the non-indigenous state: reflection on non-indigenous perspectives, non-indigenous arguments of justification, will be a crucial part of any productive encounter. And on the indigenous side, there will of course be a range of interpretations of the relationship. An extended conversation is therefore required, in which all parties consider their traditions, reflect upon their histories, and seek acceptable ways forward. But the Canadian state cannot simply set the frame.

The decentring theme relativizes the claims of the state, then, placing it presumptively on a plane of equality with non-state orders. That presumption can be rebutted. Given the vast range of normative orders (from workplaces to marketplaces to cultural communities to nations); given that all such orders contain disagreement and that all have ways for imposing a provisional outcome; given that there is a range of such mechanisms, some of which are compatible with the dignity of their members and some not—there may be good reason to subject some normative orders to the will of the state, especially given the inclusiveness, rough equality, transparency, predictability, and opportunity for members' input characteristic of a democracy. Indeed, I suspect that once one takes the need for mechanisms seriously, one will often work back towards a re-justification of the state, perhaps significantly reorganized on more plural foundations.[37] But that justification must be undertaken, not merely assumed. Sometimes, the attempt will be unsuccessful and secession will be justified. More often, it will prompt us to alter how the state relates to other normative orders:

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[36] In this regard I have learned much from Dawnis Kennedy, "Reconciliation Without Respect?: Section 35 and Indigenous Legal Orders" (Paper presented to Law's Empire: the Annual Conference of the Canadian Law and Society Association, June 2005) [unpublished].

[37] See Santos, *supra* note 2 at 90-91, 94.

even if the state should have power to adjudicate between different visions (in the context of the workplace or the family, for example), there may well be reasons for it to exercise this power in a manner that allows contending orders to persist and flourish.

   Once again, it becomes important to distinguish the differential claims to autonomy of different normative orders. It is no accident that I have often chosen indigenous peoples as the example of where substantial respect for independent normative authority is warranted. Indigenous societies have maintained rich traditions of normative inquiry that support unique forms of social regulation. Their members have held tenaciously to those traditions under heavy pressure. If those traditions were subjected purely and simply to the will of the majority . within a state like Canada—if, for example, the sole political community for determining forms of property, making land use decisions, determining educational content, making decisions on language use, or stipulating processes of public decision making, is the community that consists of all Canadian citizens—indigenous normative orders would be overwhelmed, washed out by a largely ignorant, certainly uncomprehending, non-indigenous majority.[38] The decentring of the state helps us to see that the state too draws upon particular traditions and practices in its decision making, it too has blind spots, its jurisdiction too requires justification. Achieving a just relationship among normative orders requires judgments—about the significance of the orders to their members, about their scope, about the capacity that each possesses for respectful dialogue, and about the integrity of the structures by which norms are defined within both societies. The decentring theme prompts us to acknowledge that those judgments are best made by approaching the issues in the perspectival manner described by Jim Tully in *Strange Multiplicity*: realizing that one comes at the questions from a particular direction—from a history of engagement with a specific tradition and set of practices; a history that is frequently marked by domination and imposition—and attempting to achieve, through a predominantly dialogic process, a just accommodation among those perspectives.[39]

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[38] Webber, *Reimagining Canada, supra* note 30 at 219-22.

[39] James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995) at 110.

V.   DESCRIPTION AND EXHORTATION

To this point I have emphasized how one should conceive of legal pluralism in predominantly descriptive terms, drawing normative consequences from that conception. I have stressed the need to take full account of the presence of disagreement in human societies and have argued for the centrality, in law, of mechanisms for overcoming that disagreement, at least provisionally.

One consequence is that it is always misleading, when engaging in description, to talk about "the law" of a particular context as though the law's content was predetermined and singular, at least until the mechanisms operative in that context have adjudicated the disagreement (again using "adjudicate" in the broadest possible sense). Even then, the decision only settles the matter for the particular dispute. In any future controversy, the normative tradition, including that decision, will need to be interpreted and applied to the new situation, opening the door to further disagreement. The hermeneutic character of normative argument means that law always has a measure of openness. The job of decision makers is to impose a collective resolution, but that resolution has to be made and remade.

Any attempt to truly describe the law of a particular context should reflect this openness. It should not state the law as though it were singular. Instead, it should aim to capture a *legal culture*, portraying the range of contending arguments; the normative resources on which those arguments can build; the relationship between those arguments on the one hand, and practices, interests, patterns of historical experience and individuals' identifications on the other; the extant mechanisms for resolving social disagreement; and, from an assessment of all of these factors, the relative chances of success of various normative assertions. The grounding of arguments in particular traditions and practices, and the pursuit of normative argument within social arrangements that favour certain outcomes and discourage others, means that the normative universe is not wide open. One can describe its contours, weigh the likelihood of some outcomes as opposed to others, and venture judgments as to the ultimate result. But in doing this, one will

be describing a complex of arguments and processes, not simply stating "the law."[40]

That is how genuine attempts at description must be pursued. But this is not the only way to talk about law. There is another way, one that uses language that might be mistaken for description but is really meant as exhortation. These assertions often take the form of a statement of fact: "This is the law of the workplace." But they are meant as an implicit appeal for acceptance: "This is the best conception of the law of the workplace. I urge it upon you." They propose a particular collective outcome, a particular norm to resolve the context's normative disagreements, but they do so in descriptive terms.

This use of descriptive language to express what is really an implicit argument may appear disingenuous, and in some cases it is. But generally this is not so. There are good reasons why we feel compelled to advance a single reading of a society's law and why we couch that reading in descriptive language.

As we have seen, law is about striving towards just such readings—about the attempt to establish a collective norm on at least some questions in the face of continued disagreement. Proposing and arguing for a specific outcome is therefore a core feature of normative deliberation. In doing so, we draw upon the tradition of normative inquiry in our society, suggesting how particular principles best explain, best order, our practices. We appeal to the kinds of objective referents to which Stout refers in his soccer example. We try, to the best of our ability, to anchor our normative arguments in the life of our society. We claim that the outcomes we advocate are already inherent in the social order. We say: "Our game is a fun game. We don't want people to get hurt." Or: "Face it. Soccer involves contact. It involves footwork. You have to be able to take it." These expressions employ descriptive language; they attempt to ground their arguments in the way things are (with more or less success); but they also propose readings that are by no means incontestable. They are, fundamentally, normative assertions, not mere descriptions of norms.

The use of descriptive language is understandable, then. The problem lies in our failure to recognize that we use it in two modes. In the hortatory mode, we are active participants in the process of

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[40] Webber, "Culture," *supra* note 25.

normative argument, labouring to move our audience towards our preferred, singular, reading of society's norms. We engage in studied hyperbole, asserting that something exists so that something inchoate, something possible, may be brought into actuality. In the descriptive mode, on the other hand, we don't see ourselves as partisans in normative debate. We stand in the role of observers, trying to describe, as informatively as we can, the normative landscape that confronts us. In the former, we naturally speak of law in the singular, for we are appealing to our audience to adopt a particular way of resolving disagreements. In the latter, we do better if we employ the language of legal culture, so that we do justice to the openness and potential for disagreement that characterize any order.

There are close connections between the two modes. Because normative argument proceeds by interpreting traditions and practices that have gone before, any attempt to describe a legal culture will have to consider those traditions and practices, assess what arguments might be made, and judge their relative strength. This involves forms of reasoning similar to those of actors who are arguing, in hortatory mode, for particular outcomes within a normative order. The difference is that in hortatory mode, one places oneself in the shoes of the decision maker and argues through to a specific outcome. One models a line of argument, urging the decision maker to adopt it. In descriptive mode, one remains aware that one is emphatically not a decision maker, indeed not even a participant in the normative order, and one simply attempts to recreate the range of possibilities and their likelihood of success.

Now, lawyers are especially prone to confuse the two modes, perhaps because we are so used to making order out of others' disorder. Indeed, most legal literature adopts the hortatory mode, stating what the law "is" as a way of encouraging people to adopt the interpretation we advance. That is entirely legitimate, even essential. But a similar approach often appears in the legal pluralist literature, despite that literature's claims to be descriptive. When this occurs, there is dissonance between the literature's descriptive claim and its hortatory content. It is this situation that gives one the sense that the law of the context is being formulated in the very act of its description, or that contentious normative judgments are being read into the context. This kind of legal pluralist literature is best read as exhortation—useful as a way of modelling how the law of the context *should* be interpreted, but not to be confused with description.

VI.   CONCLUSION

I began this article by noting the contrast between the way in which the "living law" is described in much of the legal pluralist literature—where it is often portrayed as being wholly implicit, emerging in an unforced manner out of human interaction—and the vigorous, activist, and often passionate assertion typical of effectual actors in institutional and informal settings alike, including actors who, like Arthurs, embrace a pluralist analysis. I have argued that such agency is an essential part of all law and must be incorporated into legal pluralism. Law is never simply given. It is always made against a background of disagreement. For a legal order to exist, disagreement has to be brought to a close, at least provisionally, and a common normative outcome established. The process of zeroing in on a particular norm is the very essence of law.

This approach departs from that followed by many legal pluralist analyses. It rejects the common tendency to naturalize the law of the context, treating that law as existing before all attempts to settle and apply it. It rejects the tendency to treat the "living law" as more fitting, necessarily more consensual, than norms that emerge through formal processes. Mechanisms for decision exist in all legal orders. We need to inquire, in each case, into the processes by which normative debate is brought to a close. And these mechanisms rarely result in full substantive agreement; usually a collective outcome is achieved by some more peremptory mechanism.

This emphasis on disagreement challenges important aspects of many legal pluralist studies, but the challenge is meant to deepen pluralist analysis, not reject it. This approach retains the four key pluralist themes described in this article: (1) the hermeneutic theme, in which normative argument is grounded in reflection on a specific set of traditions and practices; (2) the plural theme, in which normative argument takes different forms as it is developed in different contexts, marked by different traditions and practices; (3) the adaptive theme, in which norms that are developed in relation to particular traditions and practices can generally be presumed to be better adapted to those contexts than norms identified elsewhere (although the presumption is rebuttable); and (4) the decentring theme, in which each normative order is seen to have its own source of legitimacy, its own basis for judgment, which may well challenge those of the state. But it treats these orders as genuine arenas for normative reasoning, debate, and

determination, not merely as bundles of rules ingrained in social interaction. Legal orders are reasoned orders, their members engaged in reflection, argument, and reinterpretation. To respect the orders, one must respect their processes of reasoning, their resources for normative argument, and perhaps also their mechanisms for decision making.

The value of all normative orders (ours and others) lies precisely in the depth and quality of their engagement with a specific set of practices and distinctive normative conversation—a value that is particularly important to those raised within the order, for whom the order has generally provided the very terms in which they have come to understand their own moral agency. The orders embody a rich history of reflection on the challenges of living in society. Depending on the scope and ambition of the order, they may provide a unique language of normative reflection, with distinctive capacities for expression and analysis from which we may have much to learn. Those unique attributes are what demand our respect, underlying our recognition of other orders' integrity and autonomy. Some read the demand for recognition as a peremptory demand, in which every culture is entitled to full respect and autonomy. This argument suggests a more reasoned respect, a more conditional recognition, based on the quality and distinctiveness of insight present within the other order.[41] It provides grounds both for presumptive respect (because all orders have evolved in relation to a distinctive set of practices and therefore can be presumed to carry distinctive lessons) and for evaluation of whether recognition is justified (and to what extent) as one comes to understand the normative resources of the other culture. This judging should always occur cautiously, with humility, given the limitations of our own understanding, the extent to which we are marked by our distinctive histories, and the unique importance of the other tradition to its members. But it is inherent in any recognition that isn't purely formalistic, but instead genuinely values the other.

And indeed, one important consequence of taking normative orders as reasoned is that it opens up the possibility for normative

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[41] Taylor is often misread as arguing for an automatic, almost mechanistic right to recognition. He is much closer to the position stated in. the text, in which recognition requires⋅ substantive respect (and therefore judgment). See Charles Taylor, *Multiculturalism and "The Politics of Recognition,"* ed. by Amy Gutmann (Princeton: Princeton University Press, 1992) at 25-44.

dialogue, for learning, across traditions' boundaries. The naturalistic approach to legal pluralism tends to treat each order as self-contained, each with its own law.[42] The approach sketched in this article draws attention to the centrality of hermeneutic reflection to all normative orders, notes the diversity of insight and disagreement that characterize those orders, and allows us to see how we might understand each other by listening, learning each other's normative language, reflecting upon the practices that have shaped those languages, looking for points of analogy in our practices and traditions, and attempting to translate each other's insights into terms intelligible in our own—into a "language of perspicuous contrast" in Charles Taylor's felicitous expression.[43] Indeed it is just such a potential for dialogue that supports the attribution of value to another's tradition and that in turn underpins the moral demand for recognition.

The emphasis on disagreement and its resolution within any legal order also foregrounds another judgment inherent in deference to another's order: when we defer, we are not merely recognizing another's norms; we are also deferring to the structure of authority by which conflict is settled in that order. Indeed on occasion we may be picking out one mechanism for settling conflict and preferring it to other competing mechanisms within that same order.[44] The approach set out in this article invites us to make those decisions carefully, attending to the diversity of voices that exist within any normative community and exercising some judgment in determining the mechanisms we take to be authoritative. In making those judgments, we clearly run the risk of falling into ethnocentrism and imposition. We should therefore make them in a manner that takes seriously the decentring theme in legal pluralism, realizing that we too live within structures of authority that impose peremptory normative closures, and that we too have had our normative judgments shaped by distinctive practices and traditions, ones that may lack—indeed may even fail to perceive—normative resources

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[42] This is also the case with those versions of legal pluralism heavily influenced by systems theory, only in these works the self-containment is attributed to what is presumed to be the relentlessly self-referential quality of legal reasoning. See *e.g.* Gunther Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism" (1992) 13 Cardozo L. Rev. 1443.

[43] Charles Taylor, "Understanding and Ethnocentricity" in *Philosophical Papers 2, supra* note 27, 116 at 126.

[44] See Slattery, *supra* note 34.

that are present in the other order. But we cannot escape such judgments. Every recognition of a normative order necessarily recognizes a specific structure of authority.

This brings us to the state. The legal pluralist literature has often had an inbuilt bias against the state. State law is portrayed as an artificial imposition; the living law as...well, the living law. However, once one recognizes that all law involves the determination of collective norms and that those norms are not simply the product of consensus, the difference between state and non-state orders is narrowed. Both are grounded in particular sets of practices and traditions. Both involve interpretation. Both have ways of bringing the interpretive argument to a close. The decentring theme in legal pluralism takes the state down from its pedestal, but it doesn't push non-state orders up into its place. Societies' norms are never the result of complete agreement; they are always established by concrete social mechanisms in the face of disagreement. A naturalistic approach to legal orders is therefore an illusion. When reflecting upon the relations between legal orders, we have no alternative but to weigh the specific justifications for mutual autonomy, to consider the most appropriate scope for that autonomy, and to assess the structures by which disagreement is resolved—always realizing that we speak from within our own traditions and our own institutions (which we must try to expose to the same searching questioning) and also within institutions that, because of colonialism or other causes, have differential ability to shape the overall relationship.[45] The great merit of legal pluralism is that it demands that we surrender the privileged epistemic perspective of our own law, and use the insights provided by others' to consider our own afresh.

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[45] This indeed was one of the principal warnings in Cover, *supra* note 24 at 42.