

## Louisiana Law Review

---

Volume 67 | Number 4

*Symposium: Law Making in a Global World*

Summer 2007

---

# Unitary Law Re-form, Pluralistic Law Re-Substance: Illuminating Legal Change

Roderick A. Macdonald

---

### Repository Citation

Roderick A. Macdonald, *Unitary Law Re-form, Pluralistic Law Re-Substance: Illuminating Legal Change*, 67 La. L. Rev. (2007)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol67/iss4/7>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact [kreed25@lsu.edu](mailto:kreed25@lsu.edu).

# Unitary Law Re-form, Pluralistic Law Re-Substance: Illuminating Legal Change

*Roderick A. Macdonald\**

## TABLE OF CONTENTS

Prologue...	1114
Introduction: Before the Prism.....	1116
I. The Form of Legal Change: Additive Primaries—	
Seeing Same-Sex Marriage.....	1122
A. Legislation—Statute, Enactment: Green .....	1126
B. Custom—Practice, Interaction: Blue .....	1130
C. The Common Law—Precedent, Adjudication: Red ....	1133
D. Tradition—Supereminent Principles, Phronesis: White .....	1138
II. The Substance of Legal Change: Subtractive Primaries—	
Doing Commercial Law Reform.....	1141
A. Monism—Effacing Social Facts: Yellow .....	1145
B. Centralism—Relativising the State: Magenta.....	1149
C. Positivism—Interpretation: Cyan .....	1151
D. Prescriptivism—Beyond Legal Subjectivity: Black ....	1154
Conclusion: After the Rainbow .....	1157
Epilogue... ..	1159

---

Copyright 2007, by LOUISIANA LAW REVIEW.

\* F.R. Scott Professor of Constitutional and Public Law, McGill University; Fellow, Pierre Elliott Trudeau Foundation.

I am grateful to Hoi Kong of Queen's University and David Sandomierski (B.C.L./LL.B. 2007) for their critical read of the initial version of this article. I am also pleased to acknowledge the helpful comments of participants at the Law Making in a Global World Symposium at which this initial version was delivered.

## PROLOGUE

The theme of this symposium, Law Making in a Global World, can be iterated in two ways, depending on how one understands the term “law making.” We might imagine how “globalization” affects the manner in which *domestic* law is conceived, instantiated, brought into force, interpreted, and applied. Or we might imagine how “global law” as *transnational* law is itself conceived, instantiated, brought into force, interpreted, and applied. The very possibility of these two readings, which signals the internal and external dimensions of legal change, evokes the central ideas I seek to develop in the two main Parts of this article.

The headlong rush of many States, notably in Central Europe, the “-stans,”<sup>1</sup> Africa, and South America, to adopt the latest commercial laws of the Western market economies is a clear reflection of the former reading.<sup>2</sup> But it is only half the story. The refusal of States in Western Europe, North America, and Australasia to both acknowledge the reciprocity of legal transplantation<sup>3</sup> and to attend to the local variations of their own official law, especially in fields like family law, is the other half of the story.<sup>4</sup>

The zeal of States to invest in international legal institutions of all kinds, from the ICC through to the WTO, and in international instruments of all kinds, from the Conventions of UNIDROIT and

---

1. For example: Tajikistan, Kazakhstan, Kyrgyzstan, Uzbekistan, and Turkmenistan.

2. For a good conspectus of challenges and developments of commercial law reform in the North Atlantic trading block, see SECURITY RIGHTS IN MOVABLE PROPERTY IN EUROPEAN PRIVATE LAW (Eva-Maria Kieninger ed., 2004).

3. See generally ADAPTING LEGAL CULTURES (David Nelken & Johannes Feest eds., 2001) (on problems of cross-tradition law reform). The essays in DROIT QUEBECOIS ET DROIT FRANÇAIS: COMMUNAUTE, AUTONOMIE, CONCORDANCE (H. Patrick Glenn ed., 1993) [hereinafter DROIT QUEBECOIS ET DROIT FRANÇAIS], and in LA CIRCULATION DU MODÈLE JURIDIQUE FRANÇAIS: JOURNÉES FRANCO-ITALIENNES DE L'ASSOCIATION HENRI CAPITANT POUR LES AMIS DE LA CULTURE JURIDIQUE FRANÇAISE (1994) [hereinafter LA CIRCULATION DU MODÈLE JURIDIQUE FRANÇAIS] explore the point from the perspective of the French civil law tradition.

4. This is true both in unitary States, where local variation of national law tends to be informal, and in federal States, where it flows from the necessary institutional arrangements of federalism. In the latter cases, the reciprocal constitutive influence of federal and state law is rarely acknowledged. But see the essays collected by the Canadian Department of Justice, and in particular, Roderick A. Macdonald, *Harmonizing the Concepts and Vocabulary of Federal and Provincial Law: The Unique Situation of Quebec Civil Law*, in THE HARMONIZATION OF FEDERAL LEGISLATION WITH QUEBEC CIVIL LAW AND CANADIAN BIJURALISM 29 (1997) [hereinafter THE HARMONIZATION], and *Encoding Canadian Civil Law*, THE HARMONIZATION, *supra*, at 135.

UNCITRAL, to regional trade treaties like NAFTA and MERCUSOR, is an example of the second reading.<sup>5</sup> For many international norm entrepreneurs, generating a world legal order with its own indigenous transnational law appears to hold out the best hope for peace and economic prosperity.<sup>6</sup>

It is, obviously, much easier to conceive of law and legal change as exclusively a matter of those artifacts with which one is familiar, over which one has control, through which multi-lingual versions may be easily produced, and by which one can avoid the messiness of social and political diversity.<sup>7</sup> Yet preoccupation with these formal artifacts of law and their subjacent ideology of universalizing

---

5. The literature on these various international instruments is immense. For the latest developments in the field of secured transactions, which will be discussed in detail in Part II of this article, see the following websites: Asian Development Bank, *Law and Policy Reform at the Asian Development Bank* (Apr. 2000), available at [http://www.adb.org/Documents/Others/Law\\_ADB/lpr\\_2000\\_1.pdf](http://www.adb.org/Documents/Others/Law_ADB/lpr_2000_1.pdf); European Bank for Reconstruction and Development, *Model Law on Secured Transactions* (1994), available at <http://www.ebrd.com/pubs/legal/secured.pdf>; Organization of American States, Sixth Inter-American Specialized Conference on Private International Law ("CIDIP-VI"), 2002, *Model Inter-American Law on Secured Transactions*, available at [http://www.oas.org/dil/CIDIP-VI-securedtransactions\\_Eng.htm](http://www.oas.org/dil/CIDIP-VI-securedtransactions_Eng.htm); United Nations Commission on International Trade Law ("UNCITRAL"), Working Group on Security Interests, *Draft Legislative Guide on Secured Transactions*, U.N. DOC. A/CN.9/WG.VI/WP.31/Add.1 (Nov. 22, 2006), available at [http://www.uncitral.org/uncitral/en/commission/working\\_groups/6Security\\_Interests.html](http://www.uncitral.org/uncitral/en/commission/working_groups/6Security_Interests.html) (follow "A/CN.9/WG.VI/WP.31/Add.1—Draft legislative guide on secured transactions" hyperlink); The World Bank, *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems* (Apr. 2001), available at [http://www.worldbank.org/ifa/ipg\\_eng.pdf](http://www.worldbank.org/ifa/ipg_eng.pdf) [hereinafter World Bank, *Principles and Guidelines*].

6. Not all commentators or international law reformers agree. Today, the argument for vernacular law is often framed in opposition to coordination movements in Europe. See, most notably, Pierre Legrand, *Against a European Civil Code*, 60 MOD. L. REV. 44 (1997); Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT'L & COMP. L.Q. 52 (1996); Pierre Legrand, *On the Unbearable Localness of the Law: Academic Fallacies and Unseasonable Observations*, 10 EUR. REV. PRIV. LAW 1, 61 (2002). See also Nicholas Kasirer, *The Common Core of European Private Law in Boxes and Bundles*, 10 EUR. REV. PRIV. LAW 3, 417 (2002) (setting out a more balanced perspective). On the limits of legal transplants as instruments of economic development, see generally LEGAL CULTURE (David Nelken ed., 1996); Jonathan Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839 (2003); Brian Tamanaha, *The Lessons of Law-and-Development Studies*, 89 AM. J. INT'L L. 470 (1995).

7. See Roderick A. Macdonald, *Triangulating Social Law Reform, in MAPPING SOCIETY THROUGH LAW 119* (Ysolde Gendreau ed., 2004).

formal rationality occludes the informal localization and particularity that inevitably accompanies over-reaching generality.<sup>8</sup>

This article takes a legal pluralistic perspective to explore several dimensions of law making in a global world. It does so through an extended metaphor of light and color.<sup>9</sup> The metaphor is meant not just to illuminate, but to illustrate two foundational ideas. It aims, that is, at achieving a performative effect<sup>10</sup> by first focusing attention on the complexity of determining how the various forms of legal normativity combine within any particular legal regime, or the plurality of *modes* of law (Part I), before noting that legal change occurs within and between political States, often without any reference to the law of the State, the plurality of *sites* of law (Part II). Substantively, this article uses domestic debate about the recognition of same-sex marriage to ground Part I and international debate about secured transactions reform to ground Part II.<sup>11</sup>

#### INTRODUCTION: BEFORE THE PRISM

The light we perceive in the visible spectrum presents itself in a singular, undifferentiated fashion. Our most common, though typically unconscious, experience of the phenomenon is, of course, sunlight. We understand perfectly well what is meant when someone says to us, "It's light outside," or, "It's nighttime." What is more, in the normal course of life's events we do not typically attend to the quality of light we perceive. We may, to be sure, worry about its intensity: for example, we notice the difference between a dull day and a cloudless day, and we turn on a bright light to read. Still, unless we have some special reason for doing

---

8. The *locus classicus* is Boaventura de Sousa Santos, TOWARDS A NEW COMMON SENSE (1995).

9. On the justification for and use of metaphor in law, see Richard Janda & Daniel Downes, *Virtual Citizenship*, 13 CAN. J.L. & SOC. 27, 30-37 (1998). In particular, I use the metaphor of light to:

[P]roject a set of implications upon a primary subject . . . .  
Metaphorical image schemata not only create a propositional connection between two highly delineated domains of experience but also give rise to a structure according to which experiential relations and connections are established . . . . [T]he acquisition of new knowledge is always based on the forward reach of metaphor . . . .

*Id.* at 31-32 (referencing George Lakoff & Mark Johnson, METAPHORS WE LIVE BY (1980)).

10. Here I draw on the pioneering work John Searle, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE (1969).

11. Because I am writing for an audience that is unfamiliar both for me and with me, I will frequently reference previous texts that develop more fulsomely, and with exhaustive bibliographic references, the points raised summarily here.

so, we generally neither distinguish bright desert sunshine from sunlight filtered through urban smog, nor do we attend whether the bulb emitting the light is incandescent, halogen, fluorescent, or even a low energy compact coil.

This said, when questioned, or when it matters to know, we acknowledge that most of our everyday intuitions about light are merely convenient operational hypotheses. So, for example, we know that light comes from manifold sources other than the sun. We are also aware that what we perceive as light frequently results from a combination of sources, occasionally not involving sunlight at all. In addition, we recognize that boundaries between light and dark are often difficult to trace (say at dawn or dusk, or when artificial lighting is low). Still again, the quality of light often does matter, such as when we notice the difference between direct sunlight and the sun's reflection in moonlight, when we distinguish between "black light" and the warm glow of an incandescent bulb, or when we perceive shades of color. Light, for us, is what we perceive. The more we pay attention to what we perceive, the more its complexity is revealed.

Law, admittedly, is not of the same epistemic order as light. Yet its paradigmatic expression in contemporary States, who derive their official legal systems directly or indirectly from Roman law, rests on several operational hypotheses quite similar to those that sustain our quotidian conception of light. Paradoxically, however, we are much more willing to accept our untutored understanding of light as a series of working hypotheses (as opposed to statements of scientific truth) than we are to acknowledge our "common sense" paradigm of law as equally hypothetical. Indeed, even though most of us now believe that law is neither divinely ordained nor a natural necessity, we blithely assert our simplifying hypotheses as being true by definition.

The key definitional truths in conventional understandings of Western law may be summarized as follows:

- (1) Monism: Law is formal and institutionalized such that a single legal order has a normative monopoly over a given geographic territory. *There is only one source of light in any given location.*
- (2) Centralism: Law is exclusively the product of the political state. *The exclusive source of light is the sun.*
- (3) Positivism: There can be an *ex ante* hard criterion for distinguishing that which is law from that which is not law. *There is a sharp distinction between light and dark.*

(4) Prescriptivism: Law is about externally-imposed rules and analogous normative statements. *All visible light has the same quality.*<sup>12</sup>

Together, these four parameters induce a conception of legal change that can be captured by the expression “law reform.” Changing the form changes the norm. Hence, when a legislature enacts, amends, or repeals a statute, its action of modifying a legal text necessarily modifies a substantive legal rule, or so the story goes.<sup>13</sup> But does it really?

Consider once again how we apprehend visible light. Our first intuitions are to immediately translate the perception into a singular, undifferentiated sensation. For example, we think about sunlight as being quintessentially white. White is what our brain processes when our eyes are reacting to the entire span of the visible spectrum. This unifying neurological processing is a key part of how we adjust to our physical environment. But the human intellect also strives to disaggregate holistic sensations. Perceiving, naming, categorizing, and understanding in broader synthesis are the procedural steps through which we find comfort when we encounter the “big blooming buzzing confusion” of our physical location.<sup>14</sup> Of course, these are the very same steps by

---

12. For detailed elaboration of these conventional understandings as seen from a legal pluralist perspective, see Roderick A. Macdonald, *Here, Here, There . . . and Everywhere: Theorizing Legal Pluralism; Theorizing Jacques Vanderlinden*, in *ÉTUDIER ET ENSEIGNER LE DROIT: HIER, AUJOURD’HUI ET DEMAIN—ÉTUDES OFFERTES À JACQUES VANDERLINDEN* 381 (N. Kasirer ed., 2007) [hereinafter Macdonald, *Here, There and Everywhere*]; Roderick A. Macdonald, *Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism*, 15 *ARIZ. J. INT’L & COMP. L.* 69 (1998); Roderick A. Macdonald & Martha-Marie Kleinhans, *What is a Critical Legal Pluralism?*, 12 *CAN. J.L. & SOC.* 25 (1997); and Roderick A. Macdonald & David Sandomierski, *Against Nomopolies*, 57 *N. IR. LEG. Q.* 610 (2006).

13. Only in the past quarter-century has this “taken for granted” proposition come under critical theoretical scrutiny. See David Nelken, *Towards a Sociology of Legal Adaptation*, in *ADAPTING LEGAL CULTURES*, *supra* note 3, at 7; see also *BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW* (Erik Jensen & Thomas Heller eds., 2003). Probably because of the influence of Marxism, the converse proposition—that there can be no change of the substance of law without a change in its form—has held much less sway over the legal imagination, even in codified civil law jurisdictions. See Karl Renner, *THE INSTITUTIONS OF PRIVATE LAW AND THEIR SOCIAL FUNCTION* (1949) for a comprehensive discussion originally dating from the early twentieth century.

14. William James, *SOME PROBLEMS OF PHILOSOPHY* 50 (Greenwood Press 1968) (1911).

which we also make manageable the “big blooming buzzing confusion” of our social lives. As children, one of our first learned skills is the ability to fractionate—to notice difference. But sometimes the price we pay for fractionation aimed at overcoming the confusion of undifferentiated experience is an equally troubling confusion of single instances—of particularism. So, having differentiated, i.e., having found plurality, we then, often desperately, seek to reconstruct singularity and the certainty we believe flows from it.

Locating the most meaningful frame of analysis is the challenge.<sup>15</sup> In the physical sciences, we take as given several such frames, such as the visual, the auditory, the olfactory, the tactile, and smell, and the physiological mechanisms they imply. So also in the social world we take certain frames as “given.” But, again paradoxically, while we readily admit to the contingency of the physical apprehension of our “situatedness,” we experience much more difficulty in acknowledging the contingency of our social “locatedness”—the way in which we organize categories of knowledge. For example, in any given time or place, law simply is. Because of this, we presume that there must be a single, ultimately knowable answer (however indeterminate or controversial its content might be when applied to particular situations) to the questions: “what is the law *in* Louisiana on same-sex marriage, or what is the law *in* Louisiana on the perfection of security interests in corporeal moveable property?”<sup>16</sup>

Nonetheless, there is a plurality not only of sites of law in modern States—*light can arise from multiple sources*; there is also a plurality of modes of law—*what appears to be white light is the combination of the multiple colors of the visible spectrum*. What

---

If my reader can succeed in abstracting from all conceptual interpretation and lapse back into his immediate sensible life at this very moment, he will find it to be what some one has called a big blooming buzzing confusion, as free from contradiction in its “much-at-onceness” as it is all alive and evidently there.

*Id.*

15. Here I am drawing on the insights of Erving Goffman, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* (1974).

16. I purposely use the preposition *in*, rather than the preposition *of*, in order to signal that I am talking about a particular place (geography), rather than a particular normative regime (the law of the political State). Whether there can even be a single, ultimately knowable answer to the question, “What is the law *of* Louisiana on same-sex marriage or on the perfection of security interests in corporeal moveable property?,” is a question that jurists adopting a post-modern approach would question. For purposes of this article, however, I need not address this further issue.



then are the legal colors into which the singular law of any particular regime can be refracted, or, inversely, what do we call the legal colors that are comprised within the singular law of any particular regime? These are questions asked in common law jurisdictions only by authors of textbooks on analytical jurisprudence, although they are posed by civil law scholars of all manner of sophistication through an inquiry into "sources of law."<sup>17</sup> The conventional fractal elements of Western legal traditions are:

(1) Enactments (*la loi*): Official institutions specify law in propositional form. Additive or "light" primary colors—red, green, blue—are particular wavelengths that can be mixed to produce all colors.

(2) Custom (*la coutume*): Members of a particular social or political community create norms believed to be obligatory through reciprocal interaction. Sociological primary colors—red, orange, yellow, green, blue, purple—are culturally determined as expressing what we see in a rainbow or other prismic refractions.

(3) The common law (*la jurisprudence*): Official institutions deciding disputes articulate propositions through which *res judicata* is reconceived as *stare decisis*. Subtractive or "colorant" primary colors—magenta, yellow, cyan—are particular substances that reflect the light of one of these wavelengths and absorb other wavelengths that can be mixed to produce all colors.

(4) General principles (*les principes généraux*): All members of a particular social or political community attend to unconscious norms that arise in tradition and aspiration. Psychological primary colors express what we see in a rainbow or other prismic refractions—red, orange, yellow, green, blue, purple—plus the achromatic pair, black and white.

Yet contemporary conceptions of law reform invariably rest on the assumption that legislation is the primary (if not exclusive) vehicle of legal change. Only law makers (*le législateur*) can remake law (*la législation*). Numerous doctrines (dare one say fictions) sustain this belief, including the doctrines that state that: courts do not make the common law (only discover it); custom is

---

17. On common law perspectives, see Carlton Kemp Allen, *LAW IN THE MAKING* (Clarendon Press 1964) (1957). For a leading contemporary civil law treatment of sources of law, see Jacques Ghestin & Gilles Goubeaux, *TRAITÉ DU DROIT CIVIL: INTRODUCTION GÉNÉRALE* (L.G.D.J. 2005) (1980).

not really law until recognized by a court or a legislature (at which point it is transformed into an institutionalized form of law and is no longer normative in its own right); and that general principles are immutable expressions of the logic of the political community and, short of revolution, do not of themselves evolve or change.<sup>18</sup> Are these doctrines sustainable?

\* \* \*

The burden of this article is to deploy the hypothesis of legal pluralism to provide an alternative account of legal change in contemporary official normative regimes, whether domestic or transnational. The argument proceeds in two steps.

First, I argue that the plurality of *modes* of law within any system requires us to adopt a theory of legal change that sees these *modes* of law not as pieces of a single legal order, but as each constituting a discrete normative regime. Crudely put, this means much law *reform* in modern States produces no substantive normative change; conversely, it means that that much *substantive* normative change occurs without any law reform. Legal pluralism invites us to notice that, especially in multi-jurisdictional and international settings of legal change, plural law re-substance may well result from unitary law reform.

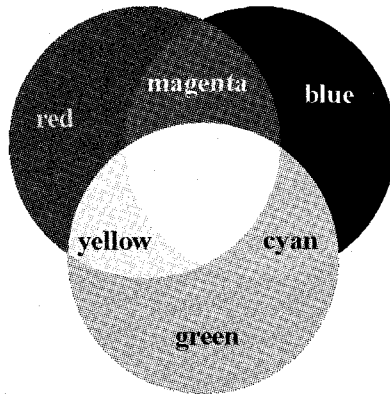
Second, I argue that the plurality of *sites* of law within any psycho-social-geographic space requires us to adopt a theory of legal change that does not see these *sites* of law as human artifacts that are separate from the world upon which law is meant to operate. Crudely put, this means that much law *reform* is based on the erroneous presumption that legal subjects are simply entities that law can apprehend, constitute, remake, or deny; conversely, it means that *substantive* legal change is based on the correct assumption that it is legal subjects who apprehend, constitute, remake, and deny law. Legal pluralism invites us to notice that, even in apparently uni-jurisdictional and national settings of legal change, it is possible to achieve unitary law re-substance through plural law reform.

---

18. See Roderick A. Macdonald, *ReCommissioning Law Reform*, 35 ALTA. L. REV. 831 (1997).

## I. THE FORM OF LEGAL CHANGE: ADDITIVE PRIMARIES—SEEING SAME-SEX MARRIAGE<sup>19</sup>

It is quite remarkable that we should even think ourselves capable of talking about law as a singular phenomenon at all. Very often we attend only to the particular form—a constitution, a statute, for example—in which discrete legal rules are expressed. But like visible light, the total normative realm that we experience is additive. It comprises several distinct but typically overlapping normative forms. In light, the response curves of the three different color receptors of the human eye optimize three additive primary colors, red, green, and blue, for the production of the largest range of discernible colors. For example, we all know that mixing green and red produces shades of orange and yellow; mixing green and blue produces shades of cyan; and mixing blue and red produces shades of magenta and purple.



These spectral colors are themselves not defined scientifically by any specific qualitative features. They are, rather, differentiated quantitatively by their wavelengths. Nonetheless, how we

---

19. The concepts of an additive color system and additive primaries presuppose that light is projected from a source onto a surface. Additive primaries are those colors that, when projected upon each other in different combinations and intensities, will produce all colors of the visible spectrum, and when equally projected at high intensity will produce white light. The additive primaries are green, blue, and red, and not the familiar red, blue, and yellow pigments associated with dyes and paints. I evoke the notion of “seeing” to suggest that the disaggregation of light enables us to attend to our differentiated ocular capacity, and to reconstruct the apparent unity of white light from its primary components. Likewise, disaggregating sources of law enables us to see how these different formal sources can be recombined into a pluralistic normative order.

apprehend and name these colors is conditioned in part by biology, notably the color receptors of the eye (the given—*donné*) and in part by the reconstructive activity of the brain, itself significantly shaped by culture and language (the constructed—*construit*). So, for example, while both Japanese and English speakers have similar ocular biology, it is nonetheless the case that the Japanese language has a single term that covers both blue and green. The reverse is true as well. The English language sometimes splits hues into distinct colors, e.g., red and pink, orange and brown, yet sometimes it does not, e.g., light blue and dark blue, light green and dark green. But other languages, Russian for example, actually give two different color names to what the English language differentiates simply with an adjective: light green and dark green.

So too the *donné* and the *construit* figure in how we see “sources of law.” We do apparently have shared given understandings of the primary sources of law in Western European derived legal systems.<sup>20</sup> At the same time, we also have cultural understandings of how primary those sources are and what phenomena may be grouped together as particular instantiations of each normative form. To illustrate the point, let me begin with a homely example.<sup>21</sup> A child seeking permission from his or her parents to stay out past a normal bed-time in order to “trick or treat” on Halloween night recites an array of normative claims. Most frequent are: “Everyone else is allowed to”; “Last year you let her (presumably an older sister) stay out later”; “You said that if I was good and did well at school I could have more privileges.” Then the bargaining gets more intense: “I’ll go to bed early tomorrow night”; “I’ll share my candy with you, and won’t ask for money to buy more.” Yet the pleas do not stop there. They move on to: “I bet you were allowed to stay out when you were young”; “I’ll be safe because I’ll stick with my friends”; “There is no law that puts a curfew on trick-or-treating”; “All the books on being a good parent say you should be flexible about bed-times and other limitations.” And, of course,

---

20. On the nature of a “legal tradition” and the shared commitments of Western European law, see generally H. Patrick Glenn, *LEGAL TRADITIONS OF THE WORLD* (Oxford Univ. Press 2004) (2000).

21. This example is drawn from Roderick A. Macdonald, *LESSONS OF EVERYDAY LAW* 83 (2002). For a similar canvassing of justificatory arguments, see Jeremy Paul, *A Bedtime Story*, 74 VA. L. REV. 915 (1988). The illustration given intimates the continuity of legal and everyday life, on which topic, see Daniel Jutras, *The Legal Dimensions of Everyday Life*, 16 CAN. J.L. & SOC. 45 (2001). This theme is explicitly taken up in Part II. For the moment, I wish to elaborate only upon the multiplicity of normative forms within official legal orders.

when all else fails, the claim is simply: "It's not fair! You're being unreasonable and mean!"

Most often people think of arguments justifying a particular course of action or outcome as constituting official legal rules. Legal rules are commands enacted by the State, telling them what to do. Lawyers, judges, and legal theorists, by contrast, conceive legal rules, in a manner similar to pleading children, as exclusionary reasons for action.<sup>22</sup> For them, the question of sources of law is one of determining why certain types of reasons are deemed to count as law, and others not.

Now imagine how to categorize and catalogue the arguments made by children on Halloween as different types of reasons for action. The "everyone else" argument is an appeal to community customs, practices, and usages. The "last year you let her" argument is nothing more than citing a precedent. The "you said that if I was good" argument rests on the idea of enforcing a prior promise, or an agreement. The "I'll go to bed early" argument is an invitation to negotiate. And the offer to "share my candy" is an economic argument that shows a willingness to arrive at a win-win agreement. The "you were allowed to stay out late when you were young" plea is an appeal to tradition. The "I'll be safe" argument demonstrates some long-range concern about consequences. To say "there is no municipal curfew" is like pointing to a statute, or its absence. To make reference to "all the books" evokes a reliance on expert knowledge. And complaining that "it's not fair" is a direct attempt to invoke a standard of justice, whatever that standard may be.

Depending on the proclivities of the theorist, between two (legislation and custom) and five (legislation, custom, precedent, doctrine, and supereminent principles) of these ten types of arguments are usually held to count as sources of law.<sup>23</sup> Yet in any attempt to convince a decision-maker that they are woven together with all the other kinds of arguments is a single effort at advocacy. There is no Archimedean point for deciding where rules stop and where arguments about how these rules should be interpreted and applied begin. This suggests why, in every situation, an easy case is one in which all (or most) of the relevant, culturally weighted,

---

22. Here I am adopting the language and thesis of Joseph Raz, *THE AUTHORITY OF LAW* (1977).

23. Compare Jean Carbonnier, *DROIT CIVIL: INTRODUCTION GÉNÉRALE* (L.G.D.J. 2000) (1955) (listing legislation and custom as primary sources and precedent and cases as secondary sources), with René David, *FRENCH LAW* (La. State Univ. Press 1975) (1972) (listing all five as sources). Compare also Patrick Fitzgerald, *SALMOND ON JURISPRUDENCE* (Sweet & Maxwell 1966) (1902) (listing four), with Thomas Holland, *JURISPRUDENCE* (1910) (listing but two).

normative arguments point in the same direction, and a hard case is one in which they do not.

Once we understand law not as an undifferentiated whole, but rather as the result of a subtle and varying interplay of forms of belief, behavior, and argument, we can easily imagine the shades within which the total normative picture is presented. That is, just as certain physical features of the eye enable us to discern primary hues and differentiate them from secondary hues, so too it may be that we have come to postulate certain classically identified forms of normativity as, in some measure, primary. To attend to law and to conceive of law reform as involving nothing but legislation and custom is, in other words, no different from (against all evidence) attending to light as involving nothing but green and blue.

Moreover, just as there are secondary hues, we can imagine secondary forms of normativity occupying similar intellectual space. Hence, we can locate contract as a form of law lying on the normative frontier of enactment and custom, just as yellow lies on the spectral frontier of green and red. Likewise, we can place an arbitration award in a final offer selection process on the boundary of legislation and common law, just as cyan lies between green and blue. And, we can conceive of appeals to unofficial authority, like doctrine, occupying the normative ground between custom and common law, just as mixing red and blue produces magenta.

Conventional opinion in most Western legal systems today holds that there are three primary additive normative forms, or the conceptual forms from which all others can be made: legislation, custom, and common law arising from judicial decisions. Legislation and custom have the property of being self-evidently normative. Legislation and common law have the property of arising in an institutional setting, and custom and the common law have the property of being non-canonical in expression. In combination (and in each of their normative hues), they point to the supereminent principles characteristic of any particular legal tradition.<sup>24</sup>

In the remainder of this Part, I shall assess the specific normative character of these primary forms, arguing that each is an independent source of normativity and that no one is necessarily subservient or superior to another. To the extent we conceive such subservience, we are simply unreflectively accepting the current cultural construction of law in Western legal systems, and, as a

---

24. For a slightly different elaboration of this taxonomy, see Roderick A. Macdonald, *Les Vieilles Gardes*, in *LE DROIT SOLUBLE* 233 (1996), and Roderick A. Macdonald, *Vers la Reconnaissance d'une Normativité Implicite et Inférentielle*, in *SOCIOLOGIE ET SOCIÉTÉS* 38 (1986).

consequence, blinding ourselves to the distinctive manner in which other legal systems may conceive their inter-relationship.

The main themes of this Part are developed by examining the manner in which Western States have sought to modify their official legal regimes to address the diversity of high-affect adult relationships.<sup>25</sup> First, I argue that it is important to disaggregate the different normative forms in order to better see what kinds of claims those promoting legal change are advancing. Second, I claim that each of these normative forms is not just a form of law, but is itself a legal regime. Third, I assert that the different normative forms do not exist in a pure state but are interpenetrated.

#### A. Legislation—Statute, Enactment: Green<sup>26</sup>

For the past two centuries, a particular form of normativity has captured the attention of both jurists and citizens in Western legal systems: the legislative enactment. By legislative enactment, I mean to signal a broad range of artifacts that comprise what we hold to be the central case of law, such as treaties, conventions, constitutions, codes, statutes, regulations, by-laws, binding directives, etc.<sup>27</sup> Enactments have two external (or formal) properties: (1) they are consciously made by an institutional process; and (2) they are typically written in canonical language. These properties give meaning to the expression law *reform*. But enactments also have one internal (or substantive) property: they are normative.<sup>28</sup> Much of the confusion about what the idea of an enactment implies lies in the failure to inquire into this second, substantive property. What does it mean to say that legislation is normative?

---

25. A systematic treatment of approaches in Canada is set out in Law Commission of Canada, *Beyond Conjugal* (2002).

26. Today the human eye has greatest sensitivity to hues that fall within the green range under normal lighting, notably wavelengths around 550 nanometers. Similarly, in Western legal systems today most people have greatest sensitivity to normative artifacts that present themselves in the form of legislation.

27. The specific institutional source of enactments is immaterial. Some are brought into force through the consent of an entire population, such as a constitution, for example. Most are the product of an act of will of a deliberative body, i.e., statutes, delegated legislation, regulations, by-laws, and so on. A few are the product of bilateral or multilateral negotiation, i.e., treaties and conventions. For a detailed elaboration, see Roderick A. Macdonald, *Legislation & Governance*, in REDISCOVERING FULLER: ESSAYS ON IMPLICIT LAW AND INSTITUTIONAL DESIGN 279 (1999).

28. It is important to be clear about the claim being made. To be a written, institutional product is a necessary, but not sufficient, condition for an enactment. A legislative instrument that is merely declaratory, say of the state flag, bird, or motto, is not an enactment. In other words, I exclude from this discussion every legislative product that is not normative.

Legislation may, like assembly instructions for a child's toy or a recipe for a soufflé, provide suggestions about a structure for apprehending a task and a method for pursuing a purpose. It may even, like a list of New Year's resolutions, the mass, or the *Seder*, offer us a ritual to reflect upon our duties to ourselves and others. But nothing about legislation, instructions, recipes, or ritual, in themselves, directly controls behavior. To the extent we decide to accept their counsel, words arranged as expressions of legal rules certainly influence human conduct—they may change the way we talk, the way we organize our modes of living, and the way we justify our actions.<sup>29</sup>

Consider the various ways in which legislatures may attempt to bring about substantive legal change by deploying an enactment to change the form in which a particular legal rule is expressed. In the most obvious instance, this involves an enactment that repeals, amends, or replaces the canonical words of some other enactment, such as, paradigmatically, a statute explicitly addressing some other statute as when the Parliament of Canada enacted the Modernization of Benefits Act<sup>30</sup> to permit same-sex couples to receive the same benefits as unmarried opposite-sex couples. But sometimes legislatures deploy enactments to repeal, amend, or replace legal rules that have never been given an explicit canonical formulation, paradigmatically, a statute explicitly addressing a customary rule as when the government of Canada amended the Marriage Act<sup>31</sup> to permit same-sex marriage. And even when enactments purport merely to restate a common law rule, the very act of rendering a precedent into a canonical formulation will modify it, as when, in the Modernization of Benefits Act, the Parliament of Canada provided that the statute did not affect the common law definition of marriage, which it then specified.<sup>32</sup>

---

29. The idea is nicely developed in Jean Carbonnier, *FLEXIBLE DROIT: POUR UNE SOCIOLOGIE DU DROIT DANS RIGUEUR* 152 (L.G.D.J. 1995) (1979).

30. Modernization of Benefits and Obligations Act, 2000, S.C., ch. 12 (Can.). This statute was enacted as a consequence of the decision of the Supreme Court of Canada in *M. v. H.*, [1999] 2 S.C.R. 3 (Can.). Given the import of the decision of the Supreme Court, however, provinces were also obliged to enact similar legislation. See, e.g., An Act to Amend Certain Statutes Because of the Supreme Court of Canada Decision in *M. v. H.*, 1999, S.O., ch. 6 (Ont.).

31. Civil Marriage Act, 2005, S.C., ch. 33 (Can.).

32. Section 1.1 of the statute explicitly provides that “[f]or greater certainty, the amendments made by this Act do not affect the meaning of the word ‘marriage,’ that is, the lawful union of one man and one woman to the exclusion of all others.” Modernization of Benefits and Obligations Act, 2000, S.C., ch. 12, § 1.1 (Can.). In so doing, the Parliament of Canada legislatively codified, for the first time, the common law rule that only opposite-sex couples could



These diverse legislative actions may be evaluated according to their objectives (substance), and according to the techniques (form) deployed to achieve these objectives. Of course, substance and form exist in a relationship of interdependence: the choices a legislature makes with respect to substantive goals being pursued will normally bear on the kinds of techniques it uses, and vice versa. The legislative *ukase* is never unmediated and its form and substance is necessarily shaped by the structural features of the instrument through which it is enunciated.<sup>33</sup>

The objective of many contemporary enactments is not just to reflect a new social reality. Rather, it is to create a new reality—to preemptively enact changes to a system in order to change behavior within that system.<sup>34</sup> Conversely, sometimes legislative amendments are primarily reactive. In such cases, legislatures enact amendments meant to reflect changes in society or in other legal artifacts.<sup>35</sup> Finally, although a surprising number of legislative amendments are simply technical, interpretive,

---

marry. Even in the 1866 Civil Code of Lower Canada, article 115 did not expressly provide that only a man and a woman could marry, although the point was implicit. Article 115 stated: “A man cannot contract marriage before the full age of fourteen years, nor a woman before the full age of twelve years.” CODE CIV. OF LOWER CAN. art. 115 (1866).

33. For an elaboration in contemporary context, see Hoi Kong, *Changing Codes and Changing Constitutions*, 46 LES CAHIERS DE DROIT 629 (2005). The observation is also true across time. The early English statute differed radically in form, content, and purpose from the archetypal nineteenth century statute. See Donald Manderson, *Statuta v. Acts: Interpretation, Music and Early English Legislation*, 7 YALE J.L. & HUMAN. 317 (1995). For a review of the evolution of the form of legislation from 1800 through 2000, see Roderick A. Macdonald, *The Fridge-Door Statute*, 47 MCGILL L.J. 11 (2001).

34. Examples abound. Sometimes legislatures alter several statutes in light of a single policy objective. Sometimes they will repeal a particular provision or statute to produce a change in practice. Sometimes they will amend a rule because the current law shapes an unsettled framework of social practices, typically with regard to family relationships, in a manner at odds with the legislature’s preferences. And, sometimes they modify or enact a legislative rule in order to regulate or to establish commercial practices.

35. Again, examples are abundant. Sometimes legislatures change a rule to reflect an already crystallized change in social beliefs and practices. Sometimes the modification recognizes a change in perception about which institutional structures are legitimate. Sometimes legislative action is meant as a response to a judicial decision that causes confusion. Occasionally, and most frequently in federal systems, a statute is amended in order to bring it into line with other statutory changes. And frequently, legislation is meant to respond to discrete problems in a particular regulatory field rather than reflecting a general shift in social mores.

aesthetic, or cosmetic, they are often loaded with symbolic freight.<sup>36</sup>

Of course, legislatures can also deploy enactments to change the forms of law implicitly. When the Parliament of Canada enacted the Modernization of Benefits Act, it did so to explicitly amend several hundred federal statutes. By contrast, when it amended the Marriage Act, it made no consequential amendment to the same several hundred statutes that deployed the word “marriage” in instances as diverse as income tax deductions, immigration entitlement, conflicts of interest, and the admissibility of evidence.<sup>37</sup> What is more, this statute implicitly amended relevant parts of the entire corpus of provincial law dealing with, *inter alia*, family courts, domestic contracts, pension and insurance beneficiaries, and adoption.

Most significantly, however, the symbolic effect of the manner in which the amendment to the Marriage Act was justified, to rectify the constitutionally impermissible unequal treatment of same-sex couples, immediately called into question other exclusions on the capacity to marry. If gender is no longer a relevant denominator, why should number continue to be? Might polygamy and polyandry also follow? What also of the incest prohibition? Why should mothers and daughters who have lived together in a relationship of interdependence not also profit from the new status? Or similarly situated siblings?

In the Canadian Parliament’s naïve belief that it could simply enact legislation to deal with the capacity of same-sex couples to marry without accounting for collateral consequences within its own legislative powers or within the legislative competence of provinces, it lost sight of the instrumental impact of enactments on other forms of law. And in the manner by which it justified its statutes, it demonstrated that it was neither attentive to, nor probably even aware of, the symbolic dimension of enactments—how they color the meaning of other norms that lie beyond the reach of express legislative intention and action. A deeply diverse substantive law is the price of the Canadian Parliament’s failure to recognize that enactments are not simply a compendium of express commands.<sup>38</sup>

---

36. Legislative action of this sort ranges from altering a title or a heading or changing terminology simply because it is symbolically charged to statutory amendment for purely stylistic reasons.

37. For discussion of these impacts, see Law Commission of Canada, *Discussion Paper: Close Personal Relationships Between Adults* (2000).

38. See Jean-Étienne-Marie Portalis, *Discours Préliminaire*, in PROJET DE CODE CIVIL 463 (P.A. Fenet ed., 1827), for the clearest statement of this idea of an enactment, penned in relation to a code. “It is the function of an enactment to

B. *Custom—Practice, Interaction: Blue*<sup>39</sup>

Non-institutional and non-canonical forms of law can be equally potent and equally problematic in effecting substantive legal change. In other words, just as an enactment may change the form of another enactment, a common law rule, or a customary rule, with or without changing its substance, so too a set of practices may change the form of a legal rule, with or without changing its substance. Even when the object of the legal change is a particular legislative text, the on-the-ground activity through which change is pursued can take diverse forms, deploy different techniques, and originate in diverse sites. The forms and agencies of legal change, even in relation to the *lex non scripta*, are irreducibly plural.

Practice may effect legal change in two complementary ways—directly and by ricochet. First, custom, usage, and practice are normative in their own right and will change over time. In this sense we can analogize the substantive change as one involving changing hues of blue. Of course, these changing hues are often the consequence of the influence of other primary colors. Blue becomes darker and shades into magenta under the influence of red, and becomes lighter shading into cyan under the influence of green. So too changes to practice may result from the implicit influence of other normative forms. Thus, even when an enactment does not expressly purport to modify, repeal, or restate a practice, it may nonetheless do so.<sup>40</sup> Likewise, even when a judicial decision does not purport to apply, recast, or overrule a practice, it can produce significant behavioral change. Finally, practices themselves can be mutually constructive even when not immediately intended to have generalized effect. Practices are situated with regimes of activity, such as in the family, the

---

establish, in large terms, the general maxims of the law, to frame principles rich in implications . . . it is for the judge and others learned in the law, imbued with its general spirit." *Id.*

39. I have associated custom with the color blue because I implicitly want to suggest the continuity of legal and social life, and blue is the primary color that moves closest to the audible range of wave motion, thereby suggesting the continuity of sensory experience. See THE VARIETIES OF SENSORY EXPERIENCE: A SOURCEBOOK IN THE ANTHROPOLOGY OF THE SENSES (David Howes ed., 1991).

40. Here is a recent example. When the City of Montreal passed a by-law to prohibit smoking even in bars and taverns, patterns of drinking changed. Women smokers, who were obliged to go outside to smoke, drank more quickly to avoid exposing their half-finished drink to tampering. Similarly, men no longer checked their coats because they concluded that it was too much trouble to retrieve a winter overcoat from a coat-check each time one wished to smoke.

neighborhood, the workplace, the marketplace, and so on. For this reason, these practices will spill over into other social settings where those engaged in the situated practice interact with others.<sup>41</sup>

Conversely, and secondly, customs, usages, and practices effect legal change through their influence on other forms of law. Just as blue changes hue under the influence of green and red, green and red will change hue under the influence of blue. The means by which institutional artifacts of law can be modified by practices without explicit amendment of their language is typically implicit. By implicit law I do not mean just the implicit law of the State legal order that sustains and nourishes the legislative and judicial processes. Nor do I only mean the unenacted general principles, custom, and usages that may be from time to time recognized by courts. Rather, I am referring to the normativity flowing from the reciprocal adjustment of expectations arising out of human interaction in the myriad social locations where this interaction occurs, quite independently of whether any official legal institution picks it up, and of whether any such institution even acknowledges its existence.<sup>42</sup>

Such a refocusing would have jurists inquire into how citizens actually construct the living law that the official legal order by definition effaces, especially where the official legal order is fundamentally reliant on legislation. The constructive endeavors I have in mind take place every day in numerous sites and through numerous practices. The living law attaches to the official legal order through constructive endeavors that take place every day in numerous sites and through numerous practices, some of which attach themselves as appendices to an existing text, some of which ultimately generate their own written deposits, and some of which remain tacit. The multiple normative outputs negotiated in these diverse locations are more than social practices. They are the reflection of discrete, yet interpenetrated, legal regimes. To

---

41. Illustrations of the point may be found, in particular, in the various studies of micro-legal systems undertaken by Michael Reisman. See, e.g., Michael Reisman, *Rapping and Talking to the Boss: The Microlegal System of Two People Talking*, in CONFLICT AND INTEGRATION: COMPARATIVE LAW IN THE WORLD TODAY 61 (1988); Michael Reisman, *Lining Up: The Microlegal System of Queues*, 54 U. CIN. L. REV. 417; Michael Reisman, *Looking, Staring and Glaring: Microlegal Systems and Public Order*, 12 DENV. J. INT'L L. & POL'Y 165 (1983).

42. In this I take my cue from Lon Fuller. See Lon L. Fuller, *Human Interaction and the Law*, 14 AM. J. JURIS. 3 (1969).

borrow a figure from the civil law, they can be conceived of as implicit civil codes.<sup>43</sup>

The rationale for characterizing these regimes of practice as implicit civil codes flows from the theory of a civil code itself. A civil code can be conceived as a social constitution that presents the directory principles of the officially recognized private law in an abstract and canonical form. It is a text purporting to document the compact between people by which the fundamental terms of civil society within a given political community are established.<sup>44</sup> This can also be said about the tacit, informal, unofficial regimes of legal order arising from diverse sites of human interaction. Whatever their relationship to an official text, they are at the normative foundations of both inexplicit customs and the more explicit practices, such as contracts, exchanges of letters, and wills, that structure and reflect the diverse and complex normative lives that we each live.<sup>45</sup>

To speculate on the number, scope, and import of these multiple implicit civil codes is, of course, to necessarily recognize the limited role that the explicit artifacts of the political order, like civil codes, play in shaping normativity. However much any legislative instrument or an entire official normative system comes to achieve an iconic status as a symbolic point of reference for these other implicit normative regimes, it never constrains human invention.<sup>46</sup> The inability of the Parliament of Canada to imagine that the justification for the legal recognition of a civil status such as marriage today has little to do with conjugality as such, and

---

43. I have developed these points at length in Roderick A. Macdonald, *Regards sur les Rapports Juridiques Informels entre Langues et Droit*, 3 REV. DE LA COMMON L. EN FRANÇAIS 137 (2000).

44. This idea is carefully elaborated in Jean Carbonnier, *Le Code Civil*, in LES LIEUX DE MEMOIRE, 2 LA NATION (Pierre Nora ed., 1986). See also John E.C. Brierley et al., QUEBEC CIVIL LAW 33–73 (1993).

45. The symbolic framework of official law permeates all the normative lives we live. This is true not only among the initiates, but among the population at large. *LaFontaine's Fables* speak to both society and law in France in the same manner that *Winnie the Pooh* offers cautionary tales of law and life in England. A civil code or other legislative text becomes part of a society's normative baggage even if its explicit rules are often trumped by the implicit normativity of other competing legal regimes. See Shauna Van Praagh, *Adolescence, Autonomy and Harry Potter: The Child as Decision-Maker*, 1 INT'L J.L. IN CONTEXT 335 (2005); see also Jutras, *supra* note 21.

46. Here again, Portalis captures the key point. "A Code, however complete it may appear, is no sooner finished than a thousand unanticipated questions arise for adjudication. Its rules, once drafted, remain as written. Human activity, on the other hand, never stops." Portalis, *supra* note 38, at xii.

even less to do with reproduction of the species,<sup>47</sup> constrains its capacity to imagine other relationships and other legal institutions for nurturing high-affect relationships between adults.<sup>48</sup>

Today in Canada, a high percentage of households comprising more than one person and involving a close personal relationship of dependence or interdependence do not involve a married opposite-sex couple.<sup>49</sup> Even fewer comprise such a couple living the religious ideal of an indissoluble first marriage. While a legislative framework enacted by the State can be a *lieu de rassemblement* that offers its users a lexicon through which, and a model of human interaction against which, to put their diverse implicit civil codes into practice, it can also be an instrument of exclusion and oppression that is neither normative nor liberating, even when reformed in response to felt necessity. The central issue for understanding legal change resulting from implicit legal forms within a polity where life circumstances and the vernacular legal order of citizens is increasingly diverse is to acknowledge that there can be as many implicit civil codes as people organizing their lives by reference to them.<sup>50</sup>

### C. *The Common Law—Precedent, Adjudication: Red*<sup>51</sup>

If the business of legal change involves (at least in part) a mediation between enactments and custom, in Western legal traditions at least, it also imagines a mediation between these two forms and a third—the common law.<sup>52</sup> By common law I mean

47. These two justifications underlay the institution in the mid-nineteenth century when the Judicature Acts in England assigned authority over matrimonial causes to the common law courts rather than ecclesiastical courts.

48. See Roderick A. Macdonald, *Perspectives on Personal Relationships* (Oct. 21, 1999) (unpublished manuscript prepared for the Conference on Domestic Partnerships sponsored by the Law Commission of Canada at Queen's University, on file with author).

49. See the statistics reported in Law Commission of Canada, *BEYOND CONJUGALITY 1–7* (2001) and footnotes to Statistics Canada census data cited therein.

50. Nicholas Kasirer has developed this point in a discussion of the trans-systemic program of legal education at McGill. See Nicholas Kasirer, *Bijuralism in Law's Empire and Law's Cosmos*, 52 J. LEGAL EDUC. 29 (2002); Nicholas Kasirer, *Legal Education as Métissage*, 78 TUL. L. REV. 481 (2003). See also Roderick A. Macdonald, *European Private Law and the Challenge of Plural Legal Subjectivities*, 9 EURO. LEGACY 55, 55–66 (2004).

51. I have associated the common law with the third additive primary, red, in order to signal that beyond the common law are other sensory experiences, including heat, by which we can reinterpret and re-orient behavior.

52. It is not necessary here to undertake an excursus into the various meanings of the common law. A comprehensive treatment of the concept of a

those rules of law that are generated by the application of human intellect to the invention or reconstruction of reasons for decision offered by authoritative decision-makers.<sup>53</sup> Most often, the expression is used in reference to rules so deduced that find no immediate grounding in a canonical text or practice. Trivially, one might say that a common law rule is a rule that is neither statutory nor customary. The color red has an independent grounding as a primary color regardless of whether it is projected onto a surface that may be green or blue.

In other words, the common law is not parasitic upon other forms of law, which serve as the material from which the decision-maker constructs the "reasons for decision" that are then reconstructed in the future as a precedent. Nonetheless, the difference between the idea of the common law as the self-contained customary practice of official decision-makers (most notably, courts) and the idea of judicial decision as a simple precedent is, at times, subtle.<sup>54</sup> When a court follows, extends, distinguishes, or overrules a prior decision in relation to the interpretation of a statute, that court is thereby engaged in an activity that will later be cited as a precedent. But the precedent is an interpretational precedent: the formal norm is still to be found in the enactment, whether a statute, regulation, or code. So also, when a court purports to act similarly in respect to a customary norm, it may do one of three things: (1) it may claim that it is doing no more than giving official expression and recognition to a legal rule that already exists as a custom; (2) having once already given such recognition, it may claim that its previous interpretation of the custom was correct or erroneous, as the case may be; or, finally, (3) it may acknowledge the correctness of a previous interpretation, yet find that the custom has changed, for much the same reasons that an enactment may change—either substantively or formally.

In neither the case of statutory interpretation nor the interpretation of a customary rule does the court claim that it is the author of the norm. Rather, it is an oracle. The green of the statute

---

common law and its importance for statutory law is provided by H. Patrick Glenn, *ON COMMON LAWS* (2005).

53. For development of this conception, see generally Lon L. Fuller, *ANATOMY OF THE LAW* (1968). See also Melvin Aron Eisenberg, *THE NATURE OF THE COMMON LAW* (1978).

54. See Jacques Ghestin & Gilles Goubeau, *TRAITÉ DE DROIT CIVIL: INTRODUCTION GÉNÉRALE* (1993) for an elaboration of how this conception of judicial interpretation can generate a judicial common law even in a codified civil law tradition.

remains green, although of a different hue, and the blue of custom remains blue, although again of a different hue. Of course, there are cases where a judicial interpretation of a statute or practice is significantly shaped by the common law of the court's own making. In these cases, there is an interpenetration of normative forms, such that the judicial interpretation of a statute or custom becomes a new source of law. For present purposes, we might say the former are instances of yellow and the latter instances of cyan.

Of course, in addition to the judiciary, there are other official and unofficial institutional decision-makers whose interpretive processes and practices contribute to substantive legal change. These include, for example, administrative agencies, the police and other public officials, individual lawyers, and citizens, whose interpretations inform the living law of an enactment or a customary practice.<sup>55</sup> But these types of legal change through interpretation are, generally speaking, so implicit that they are also subliminal; not only is the form of law unaltered, but often there is no official recognition of any substantive legal change. By contrast, sometimes these processes and practices do generate official interpretive change in courts. This most often occurs where the practice in question is explicitly normative. Here one might signal doctrinal writing by law professors, briefs and memoranda by professional associations, lobbying activities by private groups, and even professional practice through strategic litigation.<sup>56</sup>

In one sense, all interpretation can be understood as simply a case of the interpreter instantiating through application the intention of the legislature. However, a different image emerges if we consider judgments to be normative artifacts that do not simply derive their legitimacy from an implicit delegation by a legislature to develop a particular normative field that the legislature chooses not to regulate explicitly—that is, if we conceive of them as distinct sites of legal normativity. Interpreters are participants in a wide-ranging dialogue about the meaning of norms, and they

---

55. Scholars of administrative law precisely understand the point when they talk about “agency law” as a separate phenomenon from the law as announced by courts sitting in judicial review, even when the norm at the source of the “law” is identical. See Roderick A. Macdonald, *On the Administration of Statutes*, 12 QUEEN’S L.J. 488 (1987).

56. Consider the following observations of Portalis, *supra* note 38, at 469: “In the absence of a specific text on every point, a longstanding, constant and well-established usage, or an uninterrupted succession of decisions on a particular point, or a doctrinal opinion or established maxim stands stead of legislation.”



become active sites of legal change.<sup>57</sup> In this light, the distinction between legal change effected through interpretation of custom or legislation and legal change effected through the interpretation of a precedent is a matter of degree. The common law, that body of unenacted norms invented by courts under the cover of discovery, is the substantive law that underlies any particular formal explication of it in a judgment. In other words, the official common law is a particular site of custom and practice—the custom and practice of the primary law-applying organs of the official regime (courts). Concomitantly, any interpreter of any normative regime engages in a similar practice and is similarly influenced by other normative forms appropriate to that regime.

What then is the role of the common law as such in producing legal change? Not surprisingly, this role is both formal and substantive, and is both explicit and implicit. Perhaps the most striking example of the courts deploying the common law to effect legal change is where they hide what they are doing under the cover of constitutional review. Occasionally, they extend basic principles of the common law constitution, such as the rules of natural justice, to “supply the omission of Parliament” and modify the operation of statutes.<sup>58</sup> Sometimes they find justification in implicit constitutional principles.<sup>59</sup> And on rare occasions, they imagine not only that the common law declares legislation unconstitutional, whether on federalism grounds or as a result of the application of substantive bill of rights-type amendments, but also that the common law will actually erase the text.<sup>60</sup>

When the Supreme Court of Canada first confronted cases in which claims were made for the recognition of equal status of same-sex couples, it was constrained by the manner in which the arguments for legal change were framed. Initially, the cases were cast in terms of the discriminatory effect of legislation setting out the support obligations due between common law spouses at the

---

57. Gerald J. Postema, *On the Moral Presence of Our Past*, 36 MCGILL L.J. 1153 (1991).

58. I have considered this activity of judicial implication at length in Roderick A. Macdonald, *Procedural Due Process in Canadian Constitutional Law: Natural Justice and Fundamental Justice*, 39 U. FLA. L. REV. 217, 230–42 (1987).

59. See Ref. re Remuneration of Judges of Prov. Court of PEI; Ref. re Independence & Impartiality of Judges of Prov. Court of PEI; *Manitoba Prov. Judges Ass'n v. Manitoba (Min. of Justice)*, [1998] 1 S.C.R. 3 (Can.).

60. To take a dramatic example from Canada, in *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 (Can.), the Supreme Court not only pronounced on the validity of Manitoba's legislation since the late nineteenth century, but implicitly declared that, should such legislation not be retroactively validated, it would be deemed never to have been enacted.

termination of the relationship. In *M. v. H.*, it was argued that to permit such claims to be made by unmarried heterosexual couples while denying recourse to same-sex couples who were in an analogous domestic situation of unmarried conjugality was contrary to the equality guarantee of § 15 of the Canadian Charter of Rights and Freedoms.<sup>61</sup> After having decided the case on that basis, litigation commenced on the issue of whether the common law exclusion of same-sex couples from entitlement to marry was equally unconstitutional. Before the case could be decided, the government of the day referred a bill to the Court for an advisory opinion as to whether an enactment permitting same-sex marriage was unconstitutional.<sup>62</sup> In opining as to constitutionality, the Court never addressed whether the current Marriage Act was itself unconstitutional. Nor did it opine as to whether some legislative response short of legalizing same-sex marriage would pass constitutional muster.

In this saga, one sees how litigants and the Parliament of Canada instrumentalized the judiciary by assuming that the common law rule relating to same-sex marriage had exactly the same normative status as a legislative rule respecting entitlement to benefits and support obligations. To its discredit, the Supreme Court of Canada acquiesced in this instrumentalization of its own normative processes and the trivialization of its own normative product.

The gravamen of this section is that legal change through judicial activity can occur in multiple registers, multiple forms, and multiple processes. Because the forms of normativity in a regime of law extend beyond enactments and general social customs, usages, and practices, to also embrace the customs, usages, and practices of official and unofficial interpreters, legal change through changes to the expression of interpreter's customs are as various as the agents engaged in these interactional practices. Unless the courts protect their own practices, however, the expropriation of law by legislative enactment will only increase.

---

61. [1999] 2 S.C.R. 3 (Can.).

62. Ref. re Same-Sex Marriage, [2004] 3 S.C.R. 698 (Can.).

D. Tradition—Supereminent Principles, Phronesis: White<sup>63</sup>

The visible spectrum comprises a variety of wavelengths that at their margins fade into infrared and ultraviolet spectra. That is, colors as we apprehend them are only a part of the electromagnetic spectrum ranging from very short (gamma rays) to very long (radio waves). In addition, our sensory apparatus allows us to attend the non-visible wavelengths through our ears (sound, towards the shorter end) and tactile sense (heat, towards the longer end). That is, whatever we see at any given time is a function of what we are able to see.<sup>64</sup> The presence of green light implies either that certain wavelengths have been absorbed, or filtered out. All wavelengths are, in theory, always present. Likewise, all forms of law are, in theory, always present in any regime. Even if we attend to only one, the others are impliedly present. Even still, if we attend to all but one, the missing form is also impliedly present. All normative regimes, not excepting the official regimes of the political State, can be understood as comprising white light.

Most frequently, however, we focus on forms of law that have either an institutional (typically textual) or canonical expression. These primary forms have just been considered. But together they and the various secondary hues that arise from their particular combination are additive to produce white light or a complete normative regime. What is the intellectual framework within which these forms are added? It is the non-institutional and non-canonical expression of normativity that we ascribe to the foundational principles and understandings of any particular legal regime. That is, this implicit and inferential normativity is at once the understanding that arises from attending to the components of the visible spectrum, and the underlying intellectual construction

---

63. As the diagram intimates, at the conjuncture of the three primary additive colors, one discerns a hue approaching white—the result of the projection of the three primaries in fully saturated fashion. When they are projected at less intensity, the result is varying shades of grey. The association of white with tradition and supereminent principles is meant to suggest that a tradition is a complex amalgam of the entire normative typology. In this sense, a tradition can only be appreciated when all additive primaries are accounted for in equal intensity.

64. The point is important. While human beings can perceive a range of colors within the visible spectrum, how they do so is given by the fact that we have three different color receptors. Three color receptors generate three additive primary colors. Some species, such as birds, are often *tetrachromats* and have four color receptors, permitting them to discern a fourth primary color. By contrast, most mammals other than primates are *dichromats*, having only two types of color receptors and consequently discerning only two primary colors.

by which the visible spectrum is understood to be part of the larger electromagnetic spectrum.

These principles are, for the most part, latent in the practices by which legislatures enact rules, in the everyday practices by which multiple normative communities express structures of belief and behaviors, and in practices by which interpreters, such as courts, interpret rules, whether of the legislature, or a normativity community, or their own practices. Occasionally, they come to manifest expression and recognition. So, for example, a legislature may attempt to enact them through a formula that can be understood only metaphorically, such as the Rule of Law, good faith, public policy, reasonableness, due process, equal protection, the prohibition against cruel and unusual punishment, the best interests of the child, fiduciary obligations, or unjustified enrichment. In the same way, members of normative communities will typically seek to ground their practices in understandings that transcend both the here and now. Whether the referent be to tradition, justice, or revelation, the expression can never do more than point to a symbolic referent. Likewise, interpreters may explicitly add to the justificatory structure of a decision a reference to principles that are aspirational in ambition.

While many of these principles sound in constitutional law, because it is in that context that the need to refer to them censorily is most keenly felt, they appear through the law and serve as engines of legal change.<sup>65</sup> Many are implied by enactments or judicial decisions without being reduced to writing. In principle this is what occurs in every situation of judicial interpretation, as such usages and doctrines provide the normative link that enables judges to mediate between competing litigation narratives. When a court or any other interpreter discovers, announces, or applies such a principle, it is bringing consciousness to substantive law that has not previously been made explicit or is providing a continuing iteration of how a principle expressed symbolically may be instantiated in particular cases. In either case, the interpretive act is an act of legal change.

Here then is the true import of implicit and inferential normativity: it is the engine of tacit legal change. Assumptions about the socio-economic and political conditions may typically lie

---

65. On the potential problems raised by recourse to such principles, see Jean Leclair, *Canada's Unfathomable Unwritten Constitutional Principles*, 27 *QUEEN'S L.J.* 389 (2002). For a tentative affirmation of their use, on pluralist grounds, see J.F. Gaudreault-DesBiens, *The Canadian Federal Experiment, Or Legalism Without Federalism? Toward a Legal Theory of Federalism*, in *FEDERALISMO/FEDERALISM* 79 (M. Calvo-Garcia & W. Felstiner eds., 2004).

unvoiced in the background of formal law reform efforts, but they inevitably become heard as they interact with the explicitly expressed features of a given legal order and the everyday law of citizens. Tacit legal change entails attending to these principles and conditions and recognizing the ways in which reform measures may shape and be shaped by them. No one form of law, like no one primary color, ever really exists in its pure state.

*Unitary law reform* is the pretension that simply adding more pure green will accomplish a desired legal change. It aims only at one of the additive primaries, but no matter how bright the green is, it will provide an incomplete illumination. Only white light—the simultaneous projection of all additive primaries—allows us to see what is “on the ground” clearly. White light is not only the *apparent* white light that we need to disaggregate in order to understand the interplay of various sources (forms) of law, it is also the *goal* of the endeavor. Not surprisingly, this particular expression of pluralistic normativity is the only type of law reform that will produce substantive legal change.

\* \* \*

To understand the phenomenon of light as the additive result of the differing wavelengths discerned by physical features of the eye and brain is to conceive of law in any particular intellectual system not as an undifferentiated whole, but rather as the result of a subtle and varying interplay of forms of belief and behavior. Just as ocular biology predisposes human beings to attend to certain wavelengths that are primary, and just as our language and culture predispose us to group and to differentiate wavelengths into particular spectral colors, so too, our inherited occidental legal traditions predispose us to see certain forms of law as primary, and so too, our particular language and culture predispose us to group and differentiate all forms of normativity into particular categories. This is why an answer to one of the questions posed in the introduction, “What is the law of Louisiana on same-sex marriage?,” cannot be given without carefully disaggregating the forms by and through which that normativity is expressed.<sup>66</sup>

Put slightly differently, if one approaches *domestic* legal regimes on the assumption that the key point of analysis is to imagine law as white light, one will never attend to the way in

---

66. See Robert Leckey, *Family Law as Fundamental Private Law*, 85 CAN. B. REV. (forthcoming 2007) (discussing how legislation and constitutional statutes have relegated other forms of normativity in respect of questions touching the definition of marriage to the margins).

which diverse normative forms actually interact. The subtle relationship of enactment to custom, just like the subtle relationship between green to blue, will be washed out. Moreover, even if in theory the undifferentiated understanding we have of light should embrace the entire visible spectrum, one of the primaries will dominate, for reasons of biology and culture.

In this Part, I have sought to show that the theorization of the day-to-day activity of those who think they are engaged in promoting legal change reflects the dominant theory of law reform's paradigmatic practice, the haphazard application of legislative correctives meant to achieve an instrumental purpose. All of these discrete legislative interventions presuppose an internal exercise of legal change that takes the basic assumptions of law as a given—as a ground in which the reforming endeavor will be rooted. I have argued, conversely, that attending to the “form” of legal change enables us to see both the equal status and interpenetration (hues) of different forms (sources) of law. The first step to understanding law re-substance is to *see* the normative image of law re-form with clarity and precision.<sup>67</sup>

## II. THE SUBSTANCE OF LEGAL CHANGE: SUBTRACTIVE PRIMARIES—DOING COMMERCIAL LAW REFORM<sup>68</sup>

The internal pluralism of a legal order considered in Part I is fundamentally a pluralism of *modes* of law. In conventional legal theory this plurality of normative forms simply reflects the different ways in which a system's rules can be expressed in a manner that will be recognized by a regime's self-defined primary

---

67. On the power of attending to visibility, see Andrea Brighenti, *Visibility: A Category for the Social Sciences*, CURRENT SOCIOLOGY (forthcoming 2007).

68. The concepts of subtractive color systems and subtractive primaries refer to the pigments found in dyes and paints that absorb only some wavelengths. The color of a dye is that which is associated with the part of the visible spectrum that is not absorbed by the dye, i.e., the part of the visible spectrum that is reflected. For this reason, subtractive primaries are the opposite of additive primaries. We perceive green not because a light source emits green, but rather because there is an absence of magenta in the pigmentation of the object we see. The three subtractive primaries are magenta, cyan, and yellow, which together absorb the entire visible spectrum, producing black. I use the notion of “doing” to signal that the absorption of portions of the visible spectrum light typically is unnoticed because we attend rather to the colors that are reflected. In a like manner, when we attend focus on the legal order of the political State, we typically fail to notice all the other competing legal orders in competition for our loyalty and adherence. When we do not attend to any of these legal orders, of course, the result is the normative equivalent of black—the absence of anchorage for producing substantive legal change.

law-applying organs under a "hypothetical rule of recognition."<sup>69</sup> By contrast, a legal pluralist perspective conceives each of these forms as a separate normative regime. A legislature generates its own legal regime, as does a court, an administrative tribunal, or a social group. What we conventionally call any particular "legal regime," for example, the law of Louisiana, is a complex interweaving of interpenetrated normative forms, reconstructed as a single system.<sup>70</sup> The legal pluralism of contemporary law also has an external dimension. From the perspective of normative regimes that are not recognized by a given regime's primary law-applying organs, internal regime plurality is simply the mechanism by which legal systems selectively domesticate the exotic. To recur to the metaphor of color, we might say that plural normativity results not just from the multiple spectral wavelengths, the additive primaries, that together comprise visible light, but also from the several pigments that differentially absorb and reflect light from multiple sources, the subtractive primaries.

What is most significant in these understandings of subtractive primaries is that the secondary colors produced by their combination are the additive primaries previously noted, and vice versa. The relationship of internal and external legal pluralism is, in exactly the same way, constituted through symbiotic inversions. Just as a given legal regime may deconstruct its internal normative plurality,<sup>71</sup> so too a given normative regime claims primacy by locating itself over and against the plurality of other regimes in the total normative universe.<sup>72</sup> As with additive primaries, however, subtractive primaries rarely appear in pure form. For example, mixing yellow and cyan produces shades of green; mixing cyan with magenta produces shades of blue; and mixing magenta with yellow produce shades of red. The particular hue obtained by mixing subtractive primaries parallels the particular weight of internormative influence among different legal orders. In a fully saturated combination, the three subtractive primaries yield black, just as in a fully saturated normative universe all have equivalent prescriptive status.

---

69. See generally H.L.A. Hart, *THE CONCEPT OF LAW* 100-23 (Oxford Clarendon Press 1996) (1961).

70. It was precisely in reaction to this unitary reconstruction that Fuller came to characterize his legal theory of multiple processes of social ordering as pluralistic. See Lon L. Fuller, *The Law's Precarious Hold on Life*, 3 GA. L. REV. 530 (1969).

71. This being analogous to the single sensory experience of white being disaggregated by a prism into colors.

72. This being analogous to the particularity of absorptive pigments being held distinct to prevent the creation of a single sensory experience of black.

This Part develops four implications of thinking about normative plurality as akin to subtractive primaries. Fundamentally, an external pluralist approach rests on the observation that, however much substantive legal change seems correlated to the reform of artifacts of the official law of a political State, there is no necessary causal connection between the two. Whatever the form of law, i.e., enactment, the common law, or custom, a change to form need not precipitate substantive legal change; conversely, whatever the form of law, substantive legal change may occur even when that form remains unchanged.<sup>73</sup>

Together, these observations recall the intellectual moves by which internormative trajectories between unofficial and official legal orders are explained in conventional legal theory. In codified systems, the claim is that the need for ordinary law reform may be obviated by casting codal prescriptions at a sufficient level of generality that their meaning can evolve through time.<sup>74</sup> The nineteenth century civil code was to function not like an ordinary statute directed to reforming the law, but rather like the historical common law. Until the utilitarian politics of the late nineteenth century froze its development, that common law was constantly evolving without significant legislative intervention to “work itself pure.”<sup>75</sup>

The relative autonomy of form and substance is a central point for analyzing pluralistic legal change.<sup>76</sup> It can be elucidated by thinking through the several possible relationships that can arise between human action and official law. Consider first action in conformity with the formal prescriptions of State law. Sometimes we act in a particular way without awareness that a specific rule of law requires, counsels, permits, or even advantages the behavior in question. At other times, we are aware of a statutory rule but act as we do for our own reasons having little or nothing to do with that rule. Still yet, we act at times in the manner apparently required by

---

73. These ideas are explored, although in slightly different terms, by Alan Watson in his discussion of the “block effect of Roman Law.” See Alan Watson, *THE CIVIL LAW TRADITION* 14–23 (1985).

74. The most powerful argument of this kind was made 100 years ago by Marcel Planiol. See Marcel Planiol, *L’Inutilité d’une Révision Générale du Code Civil*, in 2 *LE CODE CIVIL, 1804–1904 LIVRE DU CENTENAIRE* 953 (1904).

75. The distinction Llewellyn draws between the “formal style” and the “grand style” in common law judgments remains one of the best expositions of this idea. See Karl Llewellyn, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960). For the source of this expression, see *Omychund v. Barker* 26 E.R. 15, 23 (L.R. Ch. 1744) (Eng.).

76. The ideas that follow are extracted from Roderick A. Macdonald & Hoi Kong, *Patchwork Law Reform: Your Idea is Good in Practice, But It Won’t Work in Theory*, 44 *OSGOODE HALL L.J.* 11 (2006).



the statutory rule out of convenience, because doing so is of no great consequence to us. Sometimes we consciously elect to act as a rule prescribes because we consider the rule to be just and appropriate in the circumstances. Finally, sometimes we choose to follow a rule that we genuinely believe unjust because of the larger claim that it is just to obey the rules of the State that aim at justice, even when they fail, in individual cases, to do so. Only in the last of these cases can it be said that there is a significant substantive weight attaching to the formal statutory rule.

Consider next human action not in conformity with the formal prescriptions of State law. Sometimes we act contrary to a rule of State law because we are ignorant of it. Sometimes, as in much regulatory law, we do so unreflectively and carelessly. At other times, contrary action is grounded simply in opportunistic and self-interested reasons. Still yet, we at times accept the justice of the rule as a general proposition but not of its application in the particular case we are confronting. Finally, sometimes our dissenting behavior is based on our belief that the rule is unjust in all cases.

This variety of hypotheses about the relationship of human action to formally announced legal rules reveals the fundamental truth of official law reform. When a legislature enacts a reforming statute, or when a court announces a new or modified "common law rule," the enactment or announcement operates principally in the symbolic, rather than the instrumental, register. While modifications that make the formal rule consistent with already accomplished social change appear to effect an instrumental, regulative purpose, they do not. Most law reform is about providing institutional structures through which people can more effectively coordinate existing behavior. While modifications that change a formal rule in directions not already taken in social action also appear to effect an instrumental, regulative purpose, once again, the proposition is doubtful. The formal law may indeed *propose*, but, in the end, human action *disposes*.<sup>77</sup>

Patterns of legal change in the transnational commercial law sphere can serve to illustrate the perils of mistaking law reform for substantive change. Throughout the developing world, legal change is often conceived as legislative law reform best brought about by a continuing series of exogenous legal transplants on a unitary, one-size-fits-all basis.<sup>78</sup> The main themes of this Part are

---

77. See Macdonald, *supra* note 7.

78. For the importance of contextual sensitivity, compare Daniel Berkowitz et al., *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003), with Daniel Berkowitz et al., *Economic Development, Legality, and the Transplant Effect*, 47 EUR. ECON. REV. 165 (2003). The expression "legal transplant" was coined by

developed by closely examining attempts of regimes of secured transactions law at modernization, particularly in the post-socialist economies of central Europe.<sup>79</sup> First, to anticipate the formal law of a State, or even of a transnational system elaborated by treaty, is only a part of the relevant normative order. Internal legal pluralism exists regardless of how the relevant legal order is defined. Second, the reasons for which people accept the authority of official rules are as varied as the reasons for which they accept the authority of unofficial rules. Third, the success of attempts to effect legal change (re-substancing law) is dependent on a plethora of factors, only some of which relate to legal form: considerations relating to legal structures; political decision-making and institutional infrastructure; economic structure and market segmentation; and social and professional practices. All, however, are directly linked to the four central tenets of the legal pluralist hypothesis: pluralism, not monism; polycentricity, not centralism; interactionalism, not positivism; and, agency, not prescriptivism.

*A. Monism—Effacing Social Facts: Yellow*<sup>80</sup>

Jurists trained in States with market economies are wont to proclaim that the reform of secured transactions regimes should be informed by a few, relatively uncontroversial, core legal principles. They typically also agree that these principles should apply whatever the basic character of the legal system already in place, whether it is the common law, civil law, socialist law, religious

---

Alan Watson. See Alan Watson, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (1974). For recent contributions to the debate, see Roger Cotterell, *Is There a Logic of Legal Transplants?*, in *ADAPTING LEGAL CULTURES*, *supra* note 3, at 70; Yves Dezalay & Bryant Garth, *The Import and Export of Law and Legal Institutions: International Strategies in National Palace Wars*, in *ADAPTING LEGAL CULTURES*, *supra* note 3, at 241; Pierre Legrand, *What Legal Transplants?*, in *ADAPTING LEGAL CULTURES*, *supra* note 3, at 55; Daniel Nelken, *Towards a Sociology of Legal Adaptation*, in *ADAPTING LEGAL CULTURES*, *supra* note 3, at 7.

79. For a more elaborate discussion of international secured transactions reform, see Roderick A. Macdonald, *Article Nine Norm Entrepreneurship*, 43 *CAN. BUS. L.J.* 240 (2006).

80. I have associated the notion of monism with yellow because it is the inverse of blue, already chosen to represent non-institutional and non-canonical forms of law, i.e., custom and practices. In this section, I suggest that the absorption of the multiple, informal normative regimes into a single system is the external parallel to the denial of the diversity of custom.

law, or customary law.<sup>81</sup> In this conclusion, however, law reform entrepreneurs make a fundamental error. They believe that because harmonization of secured transactions law is the substantive result to be achieved, there must be harmonization, if not identity, in the form of the law to be adopted. This monistic commitment also drives conventional views of law itself: the proposition that, because law is formal and institutionalized, a single legal order must have a normative monopoly over a given geographic territory.<sup>82</sup>

There are two dimensions in which this preoccupation shows its insufficiency. First, the diversity of political culture will shape the form of law and its processes. Second, the diversity of on-the-ground social facts will shape the substantive norms that govern the regime. In other words, the criteria and processes by which one selects the unit of legal analysis are not foreordained. Even leaving aside the question whether the construction of substantive normativity should be pragmatic and transactional, there are a range of registers in which regimes of normativity can be understood. Most obviously, law can be linked with the atomic political State, e.g., Louisiana, New York, France, England, Quebec, Ontario. In such a perspective, all other normative regimes would then be cast as external.

Alternatively, the law could be linked to the direct historical cognates, usually confirmed through some notion of reception, of the atomic political State they privilege. For example, New York and Ontario have direct historical cognates in the common law of England, while Louisiana and Quebec have a direct historical cognate in the civil law of the Île de France. They would then treat everything else as external.

Alternatively, some would prefer to link the law with the indirect cognates of the atomic political State they privilege. New York and Ontario, for example, have indirect cognates in the common law of Australia, New Zealand, and India, among others; Louisiana and Quebec, on the other hand, have indirect cognates in the civil law of Germany, Italy, and Latin America.

Finally, some would prefer to link the law with the historical cognates of the atomic political State they privilege. New York and Ontario, for example, have indirect historical cognates in medieval

---

81. See generally ADAPTING LEGAL CULTURES, *supra* note 3; DROIT QUEBECOIS ET DROIT FRANÇAIS, *supra* note 3; LA CIRCULATION DU MODÈLE JURIDIQUE FRANÇAIS, *supra* note 3; World Bank, *Principles and Guidelines*, *supra* note 5.

82. See Roderick A. Macdonald, *Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism*, 15 ARIZ. J. INT'L & COMP. L. 69 (1998) (discussing legal pluralism as a method to overcome monism).

English law and in twelfth century Roman and Canon law. Louisiana and Quebec, on the other hand, have indirect historical cognates in medieval Carolingian law and twelfth century Roman and Canon law.

Not one of these is *a priori* superior to any of the others as a means to organize a formal doctrinal assemblage that one would call a law reform statute. Superiority flows from decisions taken as to which aspects of the substantive normative regime one chooses to privilege, and how well one can accommodate the full panoply of substantive legal change objectives within a regime created on one or the other assumption. The aspiration and practice of legal change being sought in pluralizing form, content, and process is to reconstruct the social relations that are *constitutive* of all types of legal systems.

To illustrate this point, imagine the following secured transactions: (1) the financing of snowmobiles in Rimouski, Quebec; in Kapuskasing, Ontario; in Grenoble, France; in Portillo, Chile; in Aviemore, Scotland; and in Thredbo, Australia; and (2) the financing of automobiles in Montreal, Quebec; Toronto, Ontario; Paris, France; London, England; Santiago, Chile; and Sydney, Australia. In what conceptions of law would we say, for purposes of legal analysis, that the closest normative affinities are Montreal and Rimouski (and more remotely Paris, Grenoble, Santiago, and Portillo) on the one hand, and Toronto and Kapuskasing (and more remotely London, Aviemore, Sydney, and Thredbo) on the other? In what conceptions of law would we find the primary pairs to be Rimouski and Kapuskasing (and more remotely Grenoble, Aviemore, Portillo, and Thredbo) on the one hand, and Montreal and Toronto (and more remotely Paris, London, Santiago, and Sydney) on the other? In what conceptions of law would we conceive the primary groupings to be Rimouski and Portillo (and more remotely Montreal and Santiago) and Kapuskasing and Thredbo (and more remotely Toronto and Sydney) on the one hand, and Grenoble and Aviemore (and more remotely London and Paris) on the other?

Legal pluralism theory rejects the facile conclusion that the answer given to the first question is necessarily the best. Indeed, legal pluralism theory seeks to understand the conditions under which each one of these organizational frames might be most relevant to the solution of any particular problem, and at the same time to imagine what solutions might look like if alternative organizational frames were adopted.<sup>83</sup> For present purposes, three

---

83. For possible answers to these questions, see Roderick A. Macdonald, *In Praise of the Hypothecary Charge*, DERECHO COMERCIAL INTERNACIONAL

frameworks may be identified: political culture, economic context, and social practices.

The most important consideration in any international endeavor to effect legal change through legal transplants is that the proposals respect the political culture of the country in question. This means, obviously, attending to institutional structure and practices, but it also means, at a more mundane level, considering the impact of basic public policy choices. In North America, for example, the widespread use of *private* social insurance programs means that a secured transactions regime can be designed to favor lenders to the exclusion of the State (or its agencies). But in many countries, it is only by maintaining a priority entitlement in bankruptcy that these programs can avoid insolvency themselves. One cannot assume that all States will locate responsibility for providing basic social services on the same side of the public-private divide. Since the goal is to provide for the most efficient, low-cost regime of secured lending possible within the framework of the political choices made by individual States about the organization of their economies, the regime has to be designed to permit States to use non-consensual priorities to achieve social policies.

A secured transactions regime is not a free-standing field of legal regulation insulated from economic forces. It must be adapted to market practices of a jurisdiction. In some countries, for example, there is only a rudimentary trading economy because, whether in the agricultural, manufacturing, or light-industrial sector, the interpersonal confidence that makes the market for credit possible is absent. Therefore, simply importing legal regimes from one country to another without attending to underlying assumptions about credit granting is perilous. Again, legal regimes such as those found in North America, which presuppose open competition for credit need to be adjusted for countries where a small number of institutions (sometime the national bank owned by the State) have a *de facto* or *de jure* credit monopoly.

Finally, simply because a newly enacted secured transactions regime is generally coherent with the official legal regime into which it is being projected is no guarantee that it will be successful. One

---

TEMAS Y ACTUALIDADES (forthcoming 2007). In the first pairing, the conceptual aggregator is the abstract notion of a legal tradition, e.g., civil law, common law, etc. In the second, the conceptual aggregator is transaction-type and geography, e.g., financing snowmobiles in rural communities, financing automobiles in cities. In the third, it is socio-political culture, e.g., the socio-political economies of the "new world," the socio-political economies of "old Europe," etc. The point is, of course, that even as a matter of law, not one of these can be unconditionally determinative.

must be attentive to one's assumptions about how debtors and creditors actually respond to legal norms and assess whether like assumptions are operative in the receiving system. Here is an example. In some States there is little reluctance among merchants to invent proof and assertions of facts long after an event has occurred. In these jurisdictions accepting possession as mode of "publicity" for secured rights is likely to conduce to a proliferation of transactions tinged with fraud, the true character of which might be either long or hard to prove in court. Deciding which principles of publicity and enforcement can be made to work in a given jurisdiction presupposes a keen sense of how these principles are likely to play out in the everyday practices of debtors and creditors.

A legal pluralist conception of legal change opens for inquiry the question whether the official legal regime of secured transactions law is, in fact, the dominant normative order in a given political territory. Each of the above examples suggests the extent to which the official regime is at least partly parasitic on other normative regimes, even when it claims that it is managing them through its own normative structures.

### *B. Centralism—Relativising the State: Magenta*<sup>84</sup>

Secured transactions law reformers are commonly preoccupied with designing legislation that organizes commercial practice around the legal regime managed by the political State. This is paradoxical. Notwithstanding that secured transactions law works within discrete social categories, and notwithstanding that the underlying logic is one that is meant to marry economic activity with regulatory ambition, these jurists believe that the reality of the law is driven by the statutory or judicial form in which official legal rules are expressed. Here again, law reform entrepreneurs make a fundamental error. They believe that State regulation is a substantive result to be achieved, and this can only be achieved by explicit action of the State. This is the legal centralist preoccupation: the proposition that because the formal artifacts and institutions of law appear to be those of the political State, all substantive law is exclusively the product of the political State.<sup>85</sup>

---

84. I have associated the notion of centralism with magenta because it is the inverse of green, already chosen to represent the most visible and institutionalized form of law—legislation. In this section, I suggest that the absorption of all non-state normativity is the external parallel to the association of all internal normativity with legislation.

85. See Macdonald, *Here, There and Everywhere*, *supra* note 12, for a further discussion of this point.

Obviously, however, since the measure of substantive legal change is whether the proposed regime of law to be adopted actually takes root, it is necessary to attend to the on-the-ground contexts within which the formal regime under consideration is meant to operate. These contexts are plural and are infinitely variable as between States. States have quite distinct socio-economic-political systems. In addition, the types and actual role of credit institutions and the contractual practices attending to commercial law generally vary considerably from country to country. Even when an attempt at formal legal change does take root, typically through a legal transplant, it can produce consequences quite different from those anticipated by enacting legislatures.<sup>86</sup> This is because the form of law itself is symbolically linked to understandings of central structural issues in a legal order. If law re-substance requires attention to the substance of law, law reform must attend to the form of law. The key question for a legal pluralist, then, is the extent to which official law actually monopolizes the normative field.

Because a secured transactions regime rests on basic concepts of private law, it is important to attend to the nature and form of this private law. In most market-type economies, this private law is either codified (as in Continental Europe), or it is largely unenacted (as in the cases of the many autochthonous legal traditions), or it is constructed by an amalgam of several discrete statutes that rest on a largely displaced bed of unenacted law (as in the case of most common law systems). If the regime is codified, a decision will have to be made as to whether to integrate the proposals for legal change into the civil code or keep them as free-standing legislation. The answer is not given simply by formal factors. For example, if a State has just enacted a new civil code, to replace its provisions about security on property would be disruptive to the stability of the code as artifact and therefore a separate statute might be preferable.

A secured transactions regime must also be adapted to domestic legal architecture. Not every jurisdiction deals with legal issues in the same place. Some may deal with priority issues exclusively in secured transactions statutes, while others may also address them in a bankruptcy statute. One should not presume that rules governing security on property have to be enacted within a single statute that carries the label "secured transactions." In addition, some jurisdictions have separate commercial courts with

---

86. For a subtle discussion, see Guy Rocher, *L'Effectivité du Droit*, in *THEORIES ET ÉMERGENCE DU DROIT: PLURALISME, SURDETERMINATION ET EFFECTIVITE* 133 (1998).

separate legal norms, rules of evidence, courts, and rules of civil procedure, and still others have distinctive consumer protection rules and courts. If so, a choice will have to be made as to whether to cast the reform in generic terms, or to disperse its rules in separate statutes for enterprises and consumers.

The institutions and legal infrastructure of civil procedure, i.e., the process for liquidating obligations, exemptions from seizure, enforcement of judgments, and execution priorities, etc., also shape the possibilities for the regime. If the regime starts from the principle *nul ne peut se faire justice à soi-même*,<sup>87</sup> considerable collateral reform needs to be undertaken to permit consensual realization. Even more importantly, one must account for how the system works in practice. If it can take three to four years to obtain a money judgment and another year to obtain enforcement after that, and if there is no procedure to obtain interim and interlocutory orders, the regime cannot be based on premises that assume fast and efficient public enforcement mechanisms.

A legal pluralist conception of legal change contests the two salient dimensions of legal centralism: (1) the centrality of the normative order of the State as determinant of the actual social practices to be modified; and (2) the centrality of North American conceptions of how commercial law should and will work in any particular economy.

### C. Positivism—Interpretation: Cyan<sup>88</sup>

In general, law reform entrepreneurs have great faith that the formal artifacts they advocate can impose strict limits on the scope of the legally relevant. The assumption is that, just as the visible spectrum is limited to the colors the eye and brain can process, the structure of law is limited to the normative forms that the primary law-applying organ will recognize as exclusionary reasons for action. In this conception, the conclusion is that, while infrared and ultraviolet waves are of the same electromagnetic structure as colors in the visible spectrum, they are simply not light. There are two problems with a facile analogy of law to light. The first is that

---

87. Self justice is prohibited.

88. I have associated the notion of positivism with cyan because it is the inverse of red, the additive primary already used to represent institutional and non-canonical forms of law—the common law. In this section, I suggest that the absorption of the manifold, unbounded forms of argument into a hierarchy of bounded sources of law completed with *ex ante* protocols for the relative weighting is the external parallel to the denial of the independent normative status of the common law reconstructed through abstraction from judicial or other decision-making precedents.



the human intellect is shaped by factors different than those that shape human cognition. Perceptual differences between people can only marginally extend the visible spectrum. By contrast, social, intellectual, and political differences can radically change the shape of the understanding of human institutions and artifacts. Second, even if there may be certain “core cases” of human phenomena, these core cases can never be determined *ex ante*, except in a formalistic or tautological way that destroys the utility of the proposed *ex ante* standards as differentiating criteria.<sup>89</sup>

Here, once more, law reform entrepreneurs make a fundamental error. They believe that explicit rules are the substantive result to be achieved, and that these rules can effectively limit recourse to the implicit substantive norms that the explicit rules only partly capture. The legal positivist preoccupation, then, is that the formal artifacts and institutions of law can effectively displace the informal and interactional norms and social structures that they are aimed at regulating.<sup>90</sup>

There are three dimensions in which this preoccupation with delimiting hard frontiers of a given legal regime shows its insufficiency. First, the micro-level conceptual structure of a particular legal regime only provides a set of questions towards which legal interpretation is directed—it does not provide answers. Second, social and professional practices will generate the substantive norms that govern the way the regime is actually played out in practice. The relative diffusion of legal knowledge will generate interpretive communities that will generate, independently of any attempt to control the meaning of the text *ex ante*, their own understandings of the text by which legal change is announced.

Consider first the importance of conceptual structure and methodological principles within a given legal regime. For example, if the regime generally tolerates party attempts to manipulate juridical status or the characterization of a transaction to profit from a *régime d'exception*, it may be necessary to look for more general structural norms to prevent acrobatic creditor activity and also to impede legislative attempts to subvert the priority regime. Again, if a regime is designed to provide detailed guidance for parties through suppletive rules and to trace out the normal course of events, it is important to consider how the legal system typically makes its structural norms meant to deal with the

---

89. Macdonald & Kleinmans, *supra* note 12.

90. For a detailed elaboration of this approach to interpretation, see Roderick A. Macdonald & Jason Maclean, *No Toilets in Park*, 50 MCGILL L.J. 721 (2005).

pathological cases operational, whether it relies on bright-line, *ex ante*, non-defeasible and non-waivable procedural rules, or deploys equitable, *ex post* liability rules that are couched with adjectives like reasonable, appropriate, fair, good faith, etc., radically conditions interpretation.

In addition to these methodological points that look beyond the text of any legislative act, any reform must also take into account the practices of courts and related public institutions, such as the sheriff's office or the State execution service. Sometimes a lack of confidence in the regime of security on property results from a quite justifiable lack of confidence in the legal system as a whole. Where the idea of an impartial and independent judiciary does not form part of the constitutional order, where judges can be bribed, or where their legal education does not equip them to interpret and apply complex legal prescriptions, the reform has to be tailored to provide for alternative adjudicative possibilities, such as commercial arbitration. Like alternatives may also have to be imagined where all aspects of the realization process, up to and including execution of judgments, are in the hands of State officials.

Similar considerations bear on the role of the legal professionals and entrepreneurs in making the regime work. In some States, the legal profession is both unlicensed and unregulated. Here, legislation delegating significant ethical judgment to lawyers may be unwise. Conversely, in other States, the profession is strictly regulated, but there are simply not enough lawyers to provide transaction-specific advice to borrowers and lenders, and therefore the regime has to be designed so it can be operated by people without formal legal training. Typically this means the enactment of a greater number of non-waivable structuring rules and a number of mandatory, fill-in-the-blank forms. Finally, the regime must be oriented to the sophistication of business activity, the nature of entrepreneurship, and the general diffusion of legal knowledge within the State. For example, in some States, capitalist entrepreneurship has acquired decidedly rapacious if not corrupt and thuggish undertones. Providing a surfeit of private coercive creditors' rights in such situations may not be conducive to an efficient, let alone equitable, regime.

A legal pluralist conception of legal change imagines that each of the persons involved in the functioning of a regime of law has an independent role to play in the interpretation of its artifacts. To assume that it will always be the case that "primary law applying organs" have a monopoly on interpretation and that it is possible to stipulate *ex ante* a methodology for generating a true interpretation, is to ignore that other officials are also interpreters, that legal

professionals do so, and that parties themselves are the primary drivers of interpretation. The positivist assumption simply does not track the way in which legal change plays out on the ground.

*D. Prescriptivism—Beyond Legal Subjectivity: Black*<sup>91</sup>

Those who believe that law reform automatically produces legal change tend to imagine law as a top-down enterprise in which there is little difficulty in ensuring human behavior that is compliant with legal prescription. Even those law reform entrepreneurs who are cognizant of the difficulties of subjecting conduct to the governance of rules believe that, with sufficient certainty of enforcement and sufficient severity of sanction, law will produce its normative effect.

While this more subtle conception at least attends to the purposes of law, including the notion that legal rules are intended to produce consequences, it rests on a pair of propositions that are dubious at best. The first of these, to which this article has already adverted, is that, simply because behavior appears to be in conformity with what the formal rule commands, it does not follow that the conforming behavior is in any way consequent to the existence of the rule. Indeed, the judiciary, as an institutional expression of the order imposed by a legal regime, is the only actor that typically interprets legal rules as causative. The second dubious proposition is that consequences (sanctions) within the legal order will be sufficient to induce (if not ensure) compliance. In what way, however, does the consequence of having a will declared invalid for a failure to have it witnessed by two people matter to a testator and beneficiaries who would do what the purported will directed in any event?<sup>92</sup>

Underpinning the prescriptivist claim is a naïve faith that engineering legal change can be a relatively context independent endeavor. Thus, North American norm entrepreneurs, who seek directly to incorporate into the law of another State certain relatively refined principles with which they have become familiar, tend to downplay the extent to which domestic law influences legal regimes.

---

91. As the diagram intimates, at the conjuncture of the three primary subtractive colors, one produces a reflected hue approaching black—the result of the equal mixing of the three additive primaries. When they are mixed in dilution the result is varying shades of grey. The association of black with prescriptivism is meant to suggest that the total normative picture is meaningless when law is conceived as prescriptive. In such cases, the combination of all prescriptive normativities means that there remains no human agency.

92. See generally Macdonald & Sandomierski, *supra* note 12 (discussing a detailed pluralistic critique of prescriptive preoccupation).

But it is simply not possible to make finely grained legislation relating to secured transactions operational until there is broad consensus about and acceptance of the basic operative principles of a modernized secured transactions regime. While some States may be able to immediately adopt reform projects that rest on the same assumptions about the character and capacity of the economy, the market for credit, the ambitions and structure of the legal professions, and the expertise of the judiciary that drives North American law, this will rarely be the case. Frequently, establishing a well functioning rudimentary model of secured transactions is better than enacting an excessively refined regime that cannot be kept in working order.

More than this, a secured transactions regime will necessarily shape human relationships of the type that are usually reflected in basic principles of private law. Typically this means that it must respect the fundamental concepts of obligations and property within a given State. For example, as long as a particular State maintains rigorous distinctions between owning and owing, and between real rights and personal rights, a unitary “substance of the transaction rule” in the manner of Article 9 of the UCC that attenuates these distinctions for certain publicity and enforcement purposes cannot be imported directly. The substantive idea must be recast so that the goal of achieving functional equivalence may be realized through various provisions that respect the logic of the credit provider claiming ownership. This in turn provides recognition for the fact that social relationships between sellers and buyers will be understood in such countries as fundamentally different from social relationships between lenders and borrowers.<sup>93</sup>

If we attend to the way in which subtractive primaries work to enable us to produce different colors without the need to constantly project a source of light, the character of this last claim becomes clear. A subtractive primary, like cyan, magenta, or yellow, is a hue (say of paint) that reflects light wavelengths of that hue and absorbs all others. As a result, our eyes perceive that hue. When the three primary hues are combined together, their effect is to absorb all light. If we imagine that formal rules alone induce behavior, this is like assuming that any particular hue absorbs all light. In fact, only some light is absorbed. If one seeks total absorption, then it is necessary to combine all subtractive primaries to the point of saturation. At this point, the prescriptivist claim

---

93. See Michael G. Bridge et al., *Formalism, Functionalism, and Understanding the Law of Secured Transactions*, 44 MCGILL L.J. 567 (1999).

reveals its blackness. All human agency, the possibility to choose normative commitments, vanishes.

The anti-prescriptivist claim in law reform, i.e., the claim for agency, is radical in that it also contests many versions of sociological legal pluralism.<sup>94</sup> That is, if other normative sites are to be understood simply as another legal regime of the same character as that hypothesized for the State there is really no difference between legal pluralism and its everyday foil. Adopting an anti-prescriptivism stance empowers legal actors not only to constitute and choose among rules. It also enables them to choose the role that rules will play in their lives: do they constrict? empower? facilitate? teach? entertain? inspire? The way in which people position themselves in relationship to law, of whatever kind, must be as distinctive in consequence as individual people are themselves.

Monism, centralism, and positivism all reflect a different preoccupation with delineating the legal from the non-legal, either numerically (monism), spatially (centralism), or analytically (positivism). Prescriptivism is animated by the same ambition: it asserts that there are rules, and that there is the rest of the world on which they operate. Anti-prescriptivism is an alternative way of characterizing an interpretive choice for citizens about how they wish to conceive law, themselves, and the relationship they have to law. The anti-prescriptivist perspective invites legal subjects to imagine themselves as legal agents, and to discover the constitutive potential of their own actions. Let me recur to the second question posed earlier: "What is the law *in* Louisiana on the perfection of security interests in corporeal moveable property?" The anti-prescriptivist response is not to look somewhere "out there" for an answer. Rather, it is to reply, "Whatever the person posing the question wants it to be."

\* \* \*

In the various sections of this Part, standard accounts of everyday instrumental law reform have been contrasted with an alternative account characterized as pluralistic, polycentric, interactional, and anti-prescriptivist substantive legal change. Law reform understood as legal change is a complex endeavor embracing everything from the explicit, textual, legislative modification of legal rules, all the way to the implicit, non-textual,

---

94. A similar conclusion is announced by Emmanuel Melissaris. Emmanuel Melissaris, *The More the Merrier? A New Take on Legal Pluralism*, 13 SOC. & LEGAL STUD. 57 (2004).

informal, even tacit, re-orientation of practices and the principles they instantiate. Such a palate of legal responses directly raises a fundamental question: "To whom does law belong, and to whom does its 'reform' belong?" In the discussion of doing law reform in this Part, the premise has been that the successful practice of legal change depends on engaging with and being understood by those to whom it is intended to speak. This means not just politicians, the legal professions, and the principal lobby groups that can influence politicians, but also, above all, the public.<sup>95</sup>

The various considerations reviewed in this Part cannot be reduced to a formula or plotted onto a template against which enacting legislatures can assess the merits or demerits of any specific proposal for legal change. This is true first because the problem is polycentric.<sup>96</sup> Each factor implies the exercise of judgment in the weighing of the relative significance of a given factor within an overall legal framework and in determining optimal tradeoffs in any particular State. It is also true because the precise nature of most contextual factors will be highly contested. Both those who argue for the impossibility of legal transplants and those who claim that the specialized character of the knowledge possessed by legal *élites* makes transplantation relatively unproblematic are given to monochromatic assertions about the context of law reform. By contrast, jurists who have actually participated in the international law reform process and then stuck around to assess the effects of their handiwork are much more sanguine about the monist, centralist, positivist, prescriptivist "recipe book" approach.<sup>97</sup>

#### CONCLUSION: AFTER THE RAINBOW

These reflections on law reform and substantive legal change argue that the future of the endeavor must have a different *timbre* than presently. Because law is more than a system of explicit rules, specialized offices and institutions, and determinate

---

95. For a discussion of law reform that does not presume that those with a formal legal training are the primary agents and addressees of legal change, see Roderick A. Macdonald, *In Search of Law* (Oct. 4, 1998) (unpublished manuscript prepared for the Law Commission of Canada, on file with author).

96. I derive my notion of polycentricity from Lon Fuller. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 393-405 (1978).

97. The issues are nicely framed by Roger Cotterell and Lawrence Friedman. See generally Roger Cotterell, *Is There a Logic of Legal Transplants?*, in ADAPTING LEGAL CULTURES, *supra* note 3, at 70; Lawrence Friedman, *Some Comments on Cotterell on Legal Transplants*, in ADAPTING LEGAL CULTURES, *supra* note 3, at 93.

procedures which serve an instrumental purpose, legal change must be primarily non-instrumental. This is not to denigrate official law reform. State legal institutions and their explicit artifacts give form to debate about life's most important questions. They can be powerful symbols of how we imagine who we are, and how we conceive of our relationships with others. In the end, however, it is this human imagination, reflected in the implicit and inferential contexts of diverse modes and sites of legal activity that makes substantive legal change possible.<sup>98</sup>

Understanding law reform from the perspective of human interaction is not like compiling a grammar and lexicon to compare the formal properties of diverse natural languages. It is, rather, like understanding the relationships among language and other communicative symbolisms such as art, dance, music, and ballet. Legal pluralism also leads to a disdain for defining systemic boundaries by reference to official institutions and for a conception of law not rooted in the coercive authority of institutions. Because the forms of law are not, in themselves, instrumentally normative, should not the endeavor of law reform also be about providing alternative linguistic vehicles for enacting legal rules? And, if legal normativity may also be expressed in non-linguistic forms (consider, for example, the earlier discussion of practice), it would not be unthinkable for a law reformer to engage in non-linguistic symbolic discourse designed to suggest new legal practices. All human communicative symbolisms can become resources of legal change: an agency could, conceivably, commission symphonies, put on plays, sponsor art exhibitions, undertake sports activities, etc.<sup>99</sup>

In any case, law reform requires, first of all, the internal exercises of seeing the various forms of law in their disaggregated yet constantly interpenetrating context; this allows for agility and openness in law reform design. But law re-substance acknowledges that law re-form is only ever exhortatory. It can only aspire to bring out the self-made re-substance on the ground. The more law reformers act in a manner that avoids the external pitfalls of monism, centralism, positivism, and prescriptivism, the

---

98. Of course, official law reform has been a point of entry for engaging the question of normative change. A parallel exercise could have been undertaken in various other contexts: law reform in formal institutions such as clubs and churches, unions and universities, corporations and communities; in high-affect institutions such as families; or in knowledge-based institutions such as professional associations. This idea is nicely framed by Nicholas Kasirer. Nicholas Kasirer, *Values, Law Reform and Law's Conscience*, in *THE UNIDROIT PRINCIPLES AND THE CIVIL CODE OF QUÉBEC: SHARED VALUES* (1997).

99. For various suggestions to this effect, see Macdonald, *supra* note 18.

more plural they can be, and the more likely that re-substance will occur.

The point of “law reform” is to bring about legal change. It does not mean imagining a perfect set of rules, such as legislative, customary, or common law rules, to achieve a change in legal form—a *re-form* of the law. It means imagining legal rules to *re-substance* the law. Whatever the *mode* and whatever the *site*, law and legal change indwell: they are not *there* (as form) for the taking, but are *here* (as substance) for the constant (re)making.

#### EPILOGUE

Law making in a global world is an evocative idea. It conjures conflicting images. In one, we can attempt to perceive how “globalization” might affect not only the forms and instruments, but also the content of domestic law. Do our trading partners shape the trajectory of our law? Does significant immigration change the assumptions upon which our legal order is based? In the other, we can attempt to perceive the influence of “global law” as a transnational overlay upon national law. Do our treaty commitments require us to acknowledge their supremacy over our domestic legal order? Do our own multi-national enterprises generate an autochthonous law that displaces national law everywhere?

In this article I have approached the matter differently. I am much less concerned about any particular outcome of globalization than I am about how it has an inevitable retrogressive consequence on our ability to understand the liberating potential of law. Just as scholars with anodyne, punitive conceptions of the criminal law have been fleeing to the international domain now that they have lost credibility domestically, so too scholars with anodyne, formalistic conceptions of high-affect adult relationships are now fleeing to international human rights organizations, and scholars with anodyne, efficiency-driven conceptions of commercial law have been fleeing to international agencies promoting legal reform to States in the course of development. However beneficial the loss of naïve norm entrepreneurs may be for domestic endeavors of legal change, it is probably more detrimental to States without the resources to resist the blandishments.

My hypothesis that unitary law re-form is the antithesis of pluralistic law re-substance rests on two propositions. First the plurality of *modes* of law within any legal system requires us to adopt a theory of legal change that sees these *modes* of law not as pieces of a single legal order, but as each constituting a discrete normative regime. Second, the plurality of *sites* of law within any



psycho-social-geographic space requires us to adopt a theory of legal change that does not see these *sites* of law as human artifacts that are separate from the world upon which law is meant to operate. In the end, I believe that attending to the inescapable complexity of law and explicitly disanchoring our understanding of law reform from theories of the legal enterprise long discredited are the best strategies for ensuring meaningful engagement with the idea of law making in a global world.