

What is a *Critical* Legal Pluralism?*

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Abstract — *Legal pluralism is a contemporary image of law that has been advanced by sociolegal scholars in response to the dominant monist image of law as derivative of the political state and its progeny. The pluralistic image redirects law and society research toward the myriad normative orders outside the circle of “the Law.” This essay considers the epistemological foundations of both legal pluralism and the legal monist image of law against which its proponents are reacting. It argues that contemporary pluralistic imaginations rest on the same impoverished view of law and its subjects that sustains the traditional claim that law comprises only the processes and institutions*

* This essay derives from several studies previously prepared by the authors. See e.g. M.-M. Kleinhans, “The Creative Self as a Site of Internormativity: A Non-Essentialist Aesthetic Approach to Legal Pluralism” (Paper presented to the Annual Meeting of the Law and Society Association, 1996) [unpublished] [hereinafter “The Creative Self”]; M.-M. Kleinhans, “Critical Legal Pluralism: A Hermeneutic Turn Through Narrative” (Third Term Research Essay, Faculty of Law, McGill University, 1996) [hereinafter “A Hermeneutic Turn Through Narrative”]; R. A. Macdonald, “Multiple Selves and Legal Pluralism” (Paper presented to the Annual Meeting of the Law and Society Association, 1996) [unpublished]; R. A. Macdonald, “Critical Legal Pluralism as a Construction of Normativity and the Emergence of Law” in A. Lajoie, ed., *Théories et émergence du droit* (Montreal: Thémis, 1998) [forthcoming] [hereinafter “Critical Legal Pluralism”]. It goes without saying that the views expressed here are those of the authors and should not in any way be attributed to the Law Commission of Canada.

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emanating from the modern political state. The authors propose an alternative image of law in an effort to redirect the sociolegal studies research agenda.

Challenging the traditional social-scientific legal pluralism presented in this essay rests on the insight that it is knowledge that maintains and creates realities: a critical legal pluralism imagines legal subjects as “law inventing” and not merely “law abiding.” The authors argue that, once the constructive, creative capacities of legal subjects are recognized alongside the plurality of these same subjects, the relationship between laws and selves reveals its complexity. They acknowledge that their approach is only one of many possible critical legal pluralist approaches; but they maintain that any reconception of law within a framework of critical legal pluralism is a form of emancipatory prescription. As definitions of law are revised and rejected, new vistas are opened for sociolegal scholarship.

Résumé — *Le pluralisme juridique est une image contemporaine du droit mise de l'avant par les sociologues afin de répondre à la dominante image monolithique du droit dérivée de l'État politique et de sa progéniture. Cette image pluraliste réoriente les recherches en droit et société vers une série d'ordres normatifs situés à l'extérieur du cercle du «Droit». Le présent article examine les fondements épistémologiques du pluralisme juridique et de l'image monolithique du droit auxquels les pluralistes s'opposent. Les auteurs soutiennent que les images des pluralistes contemporains reposent sur une vision traditionnelle et appauvrie du droit et de ses sujets. Cette même vision sert de base aux revendications de ceux et celles qui croient que le droit ne comprend que les processus et les institutions provenant de l'État politique moderne. Les auteurs proposent une nouvelle image du droit en vue de réorienter les recherches sociojuridiques.*

Remettant en question le concept traditionnel et socio-scientifique du pluralisme juridique des cultures et communautés «réifiées», le «pluralisme juridique critique», présenté dans cet article, repose sur l'idée voulant que le savoir est l'élément qui maintient et crée les réalités : un «pluralisme juridique critique» offre un portrait des sujets légaux en tant que sujets créatifs» du droit et non en tant que simples «sujets assujettis» du droit. Une fois admises parallèlement à la pluralité de ces mêmes sujets, les capacités constructives et créatives des sujets légaux révèlent la complexité de la relation entre le droit et le soi. Les auteurs reconnaissent que l'image du droit qu'ils avancent ne représente qu'une approche d'un «pluralisme juridique critique» parmi plusieurs. Ils maintiennent par contre que toute image émanant du cadre du «pluralisme juridique critique» se veut émancipatoirement normative. La redéfinition et le rejet des images du droit serviraient à peindre un nouveau paysage aux études sociojuridiques.

Introduction

This paper is about one way of imagining law and about the law and society (or sociolegal studies) research agenda that such an imagination implies.¹ Images of law are ideological. Conceptions of personhood, visions of society and treasured myths (grand beliefs about God, country, culture, love, hate, liberty, equality, etc.) plot out schemas of law. Yet neither legal doctrine as internal exploration nor social scientific methodology as external critique provides purchase on why any one schema of law is preferable to another. Neither law nor society self-identifies. Neither norm nor social practice is self-evident in any particular context. Indeed, neither belief nor behaviour exists apart from believers and behavers.

Hence, the sociolegal research conundrum. Both the epistemological question about the possibilities of intersubjective normative contact (that is, how do we know that human action to which the law seems indifferent—about which it neither prescribes nor proscribes—is conceived and pursued with any conscious reference to normative standards at all?) and the ontological question about what types of human interaction are to count as law (that is, how do we hypothesize the frontier of the normativity we are prepared to characterize as legal?) necessarily precede empirical research into the law and society nexus.

Scholarship penned by jurists usually presumes that the traditional image of lawyer's law—law is only about those forms, processes and institutions of normative ordering that find their origins and legitimacy in the political State or its emanations—offers a satisfactory intellectual framework for inquiry.² Yet, the lawyerly *hubris* sustaining the beliefs that law is essentially an explicit creation of human agency, and that law is unlimited in its capacity to reorder social life, has confronted recalcitrant data in almost every sphere of legislative endeavour.

The image of law advanced by legal sociologists and anthropologists—law is the most organized, comprehensive, institutionalized and sophisticated agency

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1. In describing our endeavour as one of imagining a research practice, we take our cue from K. Calavita & C. Seron, "Postmodernism and Protest: Recovering the Sociolegal Imagination" (1992) 26 *Law and Society Rev.* 765 at 770: "This is a crucial juncture for sociolegal studies ... It is a time of self-reflection and reevaluation ... a time of self-criticism and skepticism ... about the validity of the endeavour itself."
 2. See e.g. J. Gilissen, "Introduction à l'étude comparée du pluralisme juridique" in J. Gilissen, ed., *Le Pluralisme juridique* (Brussels: Université de Bruxelles, 1971) 7; M. B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Oxford: Oxford University Press, 1975).

of social control—is no more sustainable as an intellectual framework.³ The prevailing social scientific focus on theoretical generalizations washes out specific features of legal normativity that suggest not just differences in degree, but differences in kind, between various modes of interpreting social organization such as the political, the economic and the legal.

These failures have discouraged neither jurists nor social theorists from pursuing their endeavours. Indeed, a number of intellectual strategies are open to those who, faced with the normative and descriptive deficiencies of their theories, seek to save appearances. Three are common: denial, accommodation, and resignation.⁴ Although these three strategies are each variations on a theme that has been well worked over, they merit brief notice, if only to show both their pervasiveness in legal literature and their insufficiency.

Insofar as conceptions of legal normativity advanced by jurists are concerned, denial simply requires the repeated assertion of a pedigree criterion for law that rests on definitionalism. Where the “law properly so called” proves an inadequate explanatory device, the inadequacy is attributed to unreliability of data, mismeasurement or, when all else fails, the ascription of bad faith to apostates. The schema of lawyers' law rests intact and its power remains undiminished and unlimited; the impact of its instantiation in particular legal systems can, however, be occasionally misinterpreted. Any failure is strictly empirical.

Accommodation is also a standard technique for dealing with the misfit between theory and evidence. In law, it only requires positing law as an instrumental technology. Lawyers' law exists as an identifiable and autonomous phenomenon, even if sometimes it does not take hold of the slice of social life to which it is directed. This “law in books—law in action” dichotomy explains away the difficulty; law is an independent variable that may be simply underenforced or ineptly administered in particular cases. Any failure is strictly a failure of practice.

Resignation manifests itself in the attitude that any descriptive deficit flows directly from society's overinflated and unrealistic expectations of law in the first place. Scale down the expectations of law's reach and impact and the image of lawyers' law will be seen to work. Once law is redefined as the legislative or judicial product that directly guides human conduct through the promulgation and application of general rules—once purely regulatory commands are expelled

3. See B. Z. Tamanaha, “The Folly of the ‘Social Scientific’ Conception of Legal Pluralism” (1993) 20 *Journal of Law and Society* 192. Compare D. Black, *Sociological Jurisprudence* (New York: Oxford University Press, 1990); D. Nelken, “Law in Action or Living Law? Back to the Beginning in Sociology of Law” (1984) 4 *Legal Studies* 157.

4. See A. O. Hirschman, *The Rhetoric of Reaction* (Cambridge: Harvard University Press, 1993).

from the legal universe—, then much of dissonance is alleviated. Any failure is strictly a failure to understand the theory.

These three strategies are each reactionary motifs designed to preserve an intellectual *status quo*. In the present context, what is being saved is a faith that human beings can explicitly construct law as a normative regime that is rational, comprehensive and exclusive. All the above strategies presuppose a formalized, institutional, definitional criterion for law that is located in State action (centralism). They all conceive of law in terms of systems of normative ordering that have impermeable territorial and intellectual boundaries (positivism). And they all posit a singular distinction between law and society as if one were measuring the relationship of two (and only two) separate commensurables (monism). To recognize, and then transcend, this contemporary conceptualization of hierarchized legal artefacts, systemic coherence of legal normativity, and homogeneous law is the touchstone of a fourth approach to recalcitrant experience: the adoption of an alternative image.

The Hypothesis of Legal Pluralism

The hypothesis of legal pluralism has been, for the past quarter-century, that promising alternative. But like any novel image, its “true definition” remains a matter of controversy. Legal pluralists have succumbed to revolutionary Cabbalism: they have sought to historicize and to essentialize legal pluralism; and they have focused more on extirpating heresies than on propagating their myth. Scholastic disputes aside, it is possible to see in legal pluralism a concern with how manifold legal norms emerge, change, and negate or reinforce one another in social situations not derived from, tributary to or purportedly structured by State action.

While the legal pluralistic insight dates from at least Montesquieu⁵ (if not the Romanistic distinction between *ius civile* and *ius gentium*), and could be seen in the early 20th-century writings of jurists like Santi Romano⁶ and Gurvitch⁷ as overt legal imagery, it had its renaissance only in the late 1960s. Two tendencies were then discernible: a doctrinal legal pluralism evident

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5. C. L. Montesquieu, *De l'esprit des lois* (Paris: Lefevre, 1826) at 128: “La loi, en général, est la raison humaine, en tant qu'elle gouverne tous les peuples de la terre; et les lois politiques et civiles de chaque nation ne doivent être que des cas particuliers où s'applique cette raison humaine.”
 6. The original Italian version was published in 1915 [*L'ordinamento giuridico*, 2nd ed.]. See, for the French version, G. Santi Romano, *L'ordre juridique*, 2nd ed., trans. L. François & P. Gothot (Paris: Dalloz, 1975).
 7. Gurvitch's monograph was first published in French in 1940. G. Gurvitch, *Éléments de sociologie juridique* (Paris: Aubier, 1940). See, for the English version, G. Gurvitch, *The Sociology of Law* (London: Routledge & Kegan Paul, 1942).

particularly in the economic enterprise of Lon Fuller,⁸ and a social-scientific legal pluralism emerging from those pursuing a law and society studies research agenda.⁹ While the former sought to pluralize legal forms by beginning within the frame of official law, over time, the latter, social scientific and external, conception has come to drive the legal pluralism agenda. Early sociolegal studies of non-State legal ordering tended to focus on either the exotic or the pathological—colonialism,¹⁰ folkways,¹¹ urban sub-cultures.¹² Since the mid-1980s, however, legal pluralists have also sought to explore and analyze the diverse nonpathological manifestations of non-State law in modern, Western, multicultural and polyethnic societies.¹³

Contemporary Legal Pluralism

Contemporary legal pluralism scholarship has focused on the rejection of the State legal order as the lynch-pin of legal normativity, on resistance to the

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8. See K. Winston, ed., *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Durham: Duke University Press, 1983); L. L. Fuller, "The Law's Precarious Hold On Life" (1969) 3 *Georgia L. Rev.* 609; L. L. Fuller, "Law as a Means of Social Control and Law as a Facilitation of Human Interaction" [1975] *Brigham Young University L. Rev.* 89; L. L. Fuller, "Some Presuppositions Shaping the Concept of 'Socialization'" in J. Tapp & F. Levine, eds., *Law, Justice and the Individual in Society* (New York: Holt Reinhart & Winston, 1977) 33.
 9. J. Griffiths, "What is Legal Pluralism?" (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1. For an early interpretation of social-scientific pluralism—since repudiated by its author—, see also J. Vanderlinden, "Le Pluralisme juridique: Essai de synthèse" in Gilissen, *supra* note 2, 19.
 10. See e.g. A. Césaire, *Discours sur le colonialisme* (Paris: Présence Africaine, 1955); L. W. Pye, *Aspects of Political Development* (Boston: Little Brown, 1966); G. R. Woodman, "Some Realism About Customary Law: The West African Experience" [1969] *Wisconsin L. Rev.* 128.
 11. See e.g. H. V. Ball, G. E. Simpson & K. Ikeda, "A Re-examination of William Graham Sumner" (1962) 14 *Journal of Legal Education* 299; J. Stone, *Social Dimensions of Law and Justice* (London: Stevens & Sons, 1966).
 12. See e.g. S. F. Moore, "Law and Social Change: The Semi-autonomous Social Field as an Appropriate Subject of Study" in S. F. Moore, ed., *Law as Process: An Anthropological Approach* (London: Routledge & Kegan Paul, 1978) 54; J. Auerbach, *Justice Without Law* (Cambridge: Harvard University Press, 1983); B. de Sousa Santos, "The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada" (1977) 12 *Law and Society Rev.* 5.
 13. See also J. Vanderlinden, "Acadie: À la rencontre de l'histoire du droit avant le dérangement" (1996) 23 *Manitoba Law Journal* 146; J. Vanderlinden, "La Réception des systèmes juridiques européens au Canada" (1996) 64 *Legal History Rev.* 359.

prescriptions of this State legal order, and on the reconciliation of multiple competing legal orders within a given social or geographic field. In theory, State law was no longer conceived of as a dominating normative force acting upon a passive society. Instead, these social-scientific legal pluralists have hypothesized a variety of interacting, competing normative orders—each mutually influencing the emergence and operation of each other's rules, processes and institutions.¹⁴

Legal pluralists do not simply proclaim a normative competition between official State law and unofficial, indigenous or customary law. They signal a pervasive pluralism in law. There will always be a plurality of unofficial legal orders competing with each other and with State law. And State law itself is multiple. This latter multiplicity is both internal and external: internally, it derives not only from formal divisions of normative jurisdiction such as one finds in unitary systems that referentially incorporate local custom and commercial practice as part of the official legal regime in explicitly federal systems, but as well where diverse administrative agencies compete with each other and with different judicial bodies to regulate conduct;¹⁵ externally, it may be found in every situation involving what jurists conventionally label "choice of law" in the conflicts of laws.¹⁶ In other words, for legal pluralists, State law

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14. See e.g. G. R. Woodman, "Legal Pluralism and Justice" [1996] 40 *Journal of African Law* 152 at 157: "Legal pluralism in general may be defined as the state of affairs in which a category of social relations is within the fields of operation of two or more bodies of legal norms. Alternatively, if it is viewed not from above in the process of mapping the legal universe but rather from the perspective of the individual subject of law, legal pluralism may be said to exist whenever a person is subject to more than one body of law." See also J. Vanderlinden, "Return to Legal Pluralism: Twenty Years Later" (1989) 28 *Journal of Legal Pluralism and Unofficial Law* 149; J. Vanderlinden, "Vers une nouvelle conception du pluralisme juridique" (1993) 53 *Revue de la recherche juridique* 573, in which the author elaborates a modification of his earlier position: "Je modifierais ma définition de 1969 de la manière suivante: le pluralisme juridique est *la situation, pour un individu, dans laquelle des mécanismes juridiques relevant d'ordonnements différents sont susceptibles de s'appliquer à cette situation.*" [emphasis in original].
 15. On the latter type of State pluralism see, notably, H. W. Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in 19th Century England* (Toronto: University of Toronto Press, 1985) [hereinafter *Without the Law*].
 16. On this point generally, see L. Brilmayer, *Conflict of Laws: Foundations and Future Directions* (Boston: Little, Brown, 1991) at 1–2: "The fundamental and unavoidable problem of choice of law is one of perspective. What normative perspective should a court adopt in making the choice between the law of one state and the law of another state? ... Choice of law theory vacillates erratically between two different answers to this question of proper perspective. One tradition is unabashedly *a priori*; it locates the source of choice of law rules in some normative system external to and more important than the authority of any particular state ... The other, internal tradition avoids the problem of authoritative source by treating the choice of law issue as turning on the forum state's local law."

itself typically comprises multiple bodies of law, with multiple institutional reflections and multiple sources of legitimacy.

Some legal pluralists also note the diversity of norms, processes and institutions within any given normative system within any particular legal order. Explicitly announced legal rules (fashioned by whatever type of political or social law-making institution that may exist in a given society) are not the only vehicles of normativity; these legislative artefacts complement a variety of indigenous and customary rules, practices and purely implicit interactional expectancies. Conceptions of justice also are infinitely plural, even within relatively organized institutional settings. Furthermore, normativity cannot be equated with institutional organization (especially with the specialized office of law-application—courts), but is secreted in patterns of deference and contestation to tacit (and occasionally, virtual) claims of authority. Processes of human interaction are infinitely more varied than those suggested by a myth of law that gives priority to legislatively announced claims of right and judicial adjudication of these rights. Finally, because families, sociocultural communities, workplaces, neighbourhoods, bureaucratic organizations, commercial enterprises and an almost infinite variety of other sites of human interaction are seen as sites of legal regulation, the root conceptions of normative interaction within and among them must themselves be plural. In brief, legal pluralists claim that their image of multiplicity can illumine every facet of legal symbolization.¹⁷

This image of pervasive pluralism has not, however, gone unchallenged. For some critics, the objection is overtly ideological: legal pluralism undermines respect for the Rule of Law.¹⁸ Without a systematic, integrated, unitary set of legal prescriptions, normative conflict is inevitable and official action cannot be subjected to the censure of controlling constitutional and jurisdictional norms. For other critics, the objection is apparently methodological: legal pluralism lacks a criterion for distinguishing non-State law from anything else that has a normative dimension (e.g. social practice, economic forces, religion, etc.), and this is said to be revealed in the inadequacy of attempts by legal pluralists to find a term for “non-State law.”¹⁹ Without a proper pedigree-based definitional

17. For a more complete examination of this theme, see R. A. Macdonald, “Les Vieilles Gardes: Hypothèses sur l'émergence des normes, l'internormativité et le désordre à travers une typologie des institutions normatives” in J.-G. Belley, ed., *Le Droit soluble: Contributions québécoises à l'étude de l'internormativité* (Paris: L.G.D.J., 1996) 233.

18. This is essentially the point argued by J. P. B. Josselin de Jong, “Customary Law: A Confusing Fiction” in A. D. Renteln & A. Dundes, *Folk Law: Essays in the Theory and Practice of lex non scripta* (New York: Garland, 1994) at 111.

19. See Tamanaha, *supra* note 3 at 210: “If legal pluralists accepted the standard view of law as state law, they would be free to examine in each case, as separate questions, whether or when or in what ways state law (this legal apparatus) actually

criterion of identity, the project of legal pluralists collapses insofar as its aim is to explore the how diverse legal phenomena interact.

This second, purportedly methodological criticism is naive at best since it assumes the priority of State law as the governing standard. In doing so, it merely confirms the political role of definitions as creative of ideological power structures.²⁰ Indeed, the rhetorical argument may be inverted. One might just as well say that law is everywhere, and that the relationships between its different forms, processes, sites and orders can best be explored through “ideal-type” formal and functional taxonomies.²¹ In this respect, panjuridism is entirely consistent with paneconomism or panpoliticism: economists (at least as far back as the Scottish enlightenment) readily accept that all human phenomena are capable of being hypothesized as economic systems, and political theorists (at least as far back as Aristotle) presume that all human phenomena can be hypothesized as political phenomena.

The intellectual point of legal pluralism has been to ask the central questions of legal analysis across a range of normative activity. These include, for example: What are the rules? What are the institutions? What are the

is involved in maintaining the normative order of society ... The critical potential of this approach is far greater” [footnotes omitted]. In a subsequent communication with the authors, Professor Tamanaha observes that he was not intending to argue the priority of State law, but was rather signaling that social-scientific pluralists themselves implicitly accept this priority.

20. See also P. Fitzpatrick, “Law, Plurality and Underdevelopment” in D. Sugarman, ed., *Legality, Ideology and the State* (London: Academic, 1983) 159 at 175: “Law, as state law, serves to produce some homogeneity in support of the ruling group.”
21. There is nothing new about the fact that deep conflicts about social meaning—about authenticity, solidarity, freedom, equality, democracy—find their expression in disputes about human symbolic artefacts. What is especially characteristic of struggles for law, however, is how these disputes about meaning have been framed by disputants as matters of definition. Within the legal community, stipulative definitions have long been masqueraded as incontrovertible description in the age-old quest to externalize to the opponent the burden of the qualifying adjective. But these expressions of definitional conflict should be recognized for what they are: rhetorical strategies. One set of protagonists identifies the word law exclusively with the explicit product of the political State, compelling opponents to carry the qualifying adjectives (non-state, informal, soft, customary) when discussing the type of law that interests them. The other set of protagonists deploys the word law in a more embracing sense, compelling opponents to carry the qualifying adjectives (State, formal, hard, enacted) when discussing the type of law that interests them. What is important is not to “prove” the “empirical truth” of either definition—itsself a problematic exercise that rests on second-order definitions—, but rather to acknowledge the ideology and the objectives that drive the particular perspective chosen. On this problem generally, see *Without the Law*, *supra* note 15 at 3-4.

processes? What are the criteria of legitimization? What conception of legal personality is imagined?²² The ideological point of legal pluralism is to undercut the hierarchy of normative orders based on some source-based criterion,²³ and to valorize otherwise suppressed normative orders and normative discourses.²⁴ Paradoxically, by according these other discourses a similar instrumental power to that of State legal discourse, the ideal of the Rule of Law is promoted, not undermined.²⁵

The Persistence of the State

While the instrumental object of pluralist studies has been to assert the nonexclusive, nonsystematic, nonunified and nonhierarchical ordering of normativity, most pluralist conceptions have heretofore afforded at least some preponderance to State law.²⁶ This preponderance was apparent not so much in their ultimate deference to the norms and institutions of State law (even in describing this deference as “resistance”), but in their using the particular artefacts of State law as comparative criteria, or in their imagining that the questions of the State legal order necessarily were the only questions of law in general. More recently, the term legal polycentricity has been advanced as a slogan that better “indicates an understanding of ‘law’ as being engendered in many centers—not only within a hierarchical structure—and consequently also as having many forms.”²⁷ But whether the image is one of a plurality of normative orders mutually interacting (as in legal pluralism) or of many centers

22. See Macdonald, *supra* note 17.

23. See, generally, S. E. Merry, “Legal Pluralism” (1988) 22 *Law and Society Rev.* 869 at 890: “[Legal pluralism] ... provides a framework for understanding the dynamics of the imposition of law and of resistance to law ... attention to plural orders examines limits to the ideological power of state law.”

24. G. Teubner, “The Two Faces of Janus: Rethinking Legal Pluralism” (1992) 13 *Cardozo L. Rev.* 1443 at 1443: “Legal pluralism rediscovers the subversive power of suppressed discourses.”

25. It bears notice, however, that the meaning of “Rule of Law” has undergone a transformation. The concern is not with whether, for example, legal officials appeal to some supposedly external standard to legitimate their actions; rather it is with their need to appeal directly to the conceptions of legitimacy and justice held by those in respect of which they purport to exercise their authority. The Law which imposes its Rule is not separate from either the “ruler” or the “ruled.” This point is developed in detail in Part 2 of this essay.

26. T. Wilhelmsson, “Legal Integration as Disintegration of National Law” in H. Petersen & H. Zahle, eds., *Legal Polycentricity: Consequences of Pluralism in Law* (Aldershot, England: Dartmouth, 1995) at 128: “[T]he paradigmatic concept of law is still *the* (one and only) law of the national state” [emphasis in original].

27. Petersen & Zahle, eds., *ibid.* at 8.

of normativity (as in legal polycentricity), the implicit appeal to the primacy of the institutionalized State legal order remains. The official legal order determines the points of reference of the officious legal “language game.”²⁸

Social-scientific legal pluralism focuses on resistance to State law, and the accommodations that State law necessarily makes to other normative orders. It is not surprising, therefore, that a conception of “phenomenal” normative orders that can be identified and analyzed objectively and scientifically, is tacitly, if not explicitly, appealed to. Legal pluralists tend to reify “norm-generating communities” as surrogates for the State. Moreover, notions of communities and, by ricochet, notions of citizen-subjects, are conceived only as they may be constituted by antecedent State law.²⁹ Such State-dependent empiricism is evident in studies attributing legal pluralism to the multiplicity of legal levels,³⁰ of organic corporatism,³¹ of social associations,³² or of semi-autonomous social fields.³³ Indeed, even those who argue that legal pluralism shifts definitions away from essentialist reification still maintain that the dynamism of law emerges in the dialectic between legal orders, each uniquely concomitant to a given social field. In other words, empirically identifiable legal phenomena constitute and reconstitute themselves as legal over the course of time and interaction.

The social-scientific legal pluralist must, then, either accept one essentialist/positivistic image of law, or several such images. Either way, however, the cultural form of law is objectified and reified: each legal order has its unquestionable geography and each legal order operates instrumentally in a presentist moment.³⁴ Law is no more than a social structural network of social

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28. This, of course, is simply an instantiation of a point made forcefully by Ludwig Wittgenstein. See L. Wittgenstein, *Philosophical Investigations*, trans. G.E.M. Anscombe (Oxford: Blackwell, 1958) s. 115: “A picture held us captive. And we could not get outside it, for it lay in our language and language seemed to repeat it to us inexorably.”
 29. For explorations of how law constitutes subjectivity, see generally P. Schlag *et al.*, “Postmodernism and Law: A Symposium” (1991) 62 *Colorado L. Rev.* 439. See also J. Derrida, “Force of Law: The ‘Mystical Foundation of Authority’” (1990) 11 *Cardozo L. Rev.* 919; C. Douzinas & R. Warrington, “The Face of Justice: A Jurisprudence of Alterity” (1994) 3 *Social and Legal Studies* 405; A. Sarat, “A Prophecy of Possibility: Metaphorical Exploration of Postmodern Legal Subjectivity” (1995) 29 *Law and Society Rev.* 615.
 30. L. Pospisil, *Anthropology of Law: Comparative Theory* (New York: Harper & Row, 1971).
 31. M. G. Smith, *Corporations and Society* (London: Duckworth, 1974).
 32. E. Ehrlich, *Fundamental Principles of the Sociology of Law*, trans. W. Moll (Cambridge: Harvard University Press, 1936).
 33. Moore, ed., *supra* note 12.
 34. See D. Manderson, “Beyond the Provincial: Space, Aesthetics, and Modernist Legal Theory” (1996) 20 *Melbourne University L. Rev.* 1048.

fields that fills the “normative vacuum” between legislator and subject. Social-scientific conceptions of legal pluralism disempower the subject and its construction of law; they view the legal subject only as an abstract “individual,” thereby eliminating creativity and effectively erasing any notion of legal subjectivity with a specific content. Law, on this view, is an anthropomorphic creation that regulates itself in the guise of a plurality of social fields; the legal orders of these social fields become themselves the legal subject, and their interaction is posited as responding to a logic of “rational choice.” Even legal pluralists who maintain more critical stances toward law presume that identifiable social fields construct their own legalities: communities which make calculated choices as to dominant and subordinate legalities based on their particular composition.³⁵

At present, the legal pluralistic question is most often posed as “Which legal order has jurisdiction over a given legal subject in a given situation at a given time?” But discussions at the level of normative orders interacting with each other neglect the problem of identifying to which normative order or orders any legal subject “belongs.”³⁶ Hence the complementary question: “Within which legal order does the particular legal subject perceive himself or herself to be acting—whether resisting or sustaining?” Even this manner of casting inquiry has its problems, for it suggests that, in order to be comprehended and in order to voice its concerns, a legal subject will be required to identify with some external normative order or community. Legal subjects still are being subsumed under one (or even several) homogenous labels instead of being allowed to persist as heterogeneous, multiple creatures.³⁷

In its attempt to address the myriad normativities in which law's subjects participate, legal pluralism avoids any discussion of the “being” of these same subjects. As an instrumental theory of law, it fails to discuss fundamental questions about how legal subjects understand themselves and the law. A critical element in a philosophical approach to comprehending law is missing if the legal

35. This is most explicit in writings of progressive legal pluralists such as Boaventura de Sousa Santos. See, for example, B. de Sousa Santos, “On Modes of Production of Law and Social Power” (1985) 13 *International Journal of the Sociology of Law* 299.

36. D. Fuss, *Identification Papers* (New York: Routledge, 1995) at 40–42.

37. A critical view must surely reject the rationalist world view which “constantly asks for the redemption and justification of all descriptive and normative claims and that privileges the individual rationalist self and its ability to make normative recommendations about the law's ideal structure through ego-centered reason.” See P. Schlag, “Missing Pieces: A Cognitive Approach to Law” (1989) 67 *Texas L. Rev.* 1195 at 1208.

pluralist attempts to debate the web of legal normativity without also addressing questions about those who spin its filaments.³⁸

To summarize, because traditional social-scientific legal pluralism purports to be an empirically verifiable hypothesis of law,³⁹ it remains a legal mythology that is as much a positivist image as the stigmatized image of legal centralism. For this reason, some have argued for a postmodern jurisprudence of legal pluralism that would entail “the linguistic turn away from positivist sociology of law, the dissolution of social and legal realities into discursivity, the image of fragmentation and closure of multiple discourses, the nonfoundational character of legal reasoning, [and] the decentering of the legal subject.”⁴⁰ But while legal pluralism may be a key concept in the postmodern view of law, a postmodern view of law is not a sufficient precondition to a *critical* legal pluralism.⁴¹ The reasons why are explored in the next section of this essay.

From Legal Pluralism to a *Critical* Legal Pluralism

Social-scientific legal pluralism rests on an image of law as an external object of knowledge.⁴² Within this image, the norms, institutions, processes and agents of every legal order, however multiple and however incommensurable, exist and can be measured. Legal subjects are exclusively constituted by law, and legal subjectivity is concomitant with the criteria of identification in each such legal order. Legal subjects are abstracted as individuals without a particular substantive content.

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38. B. van Roermund, “Law is Narrative, not Literature” (1994) 23 *Dutch Journal for Legal Philosophy and Legal Theory* 221.
 39. See G. R. Woodman, “Ideological Conflict and Social Observation: Recent Debate About Legal Pluralism” (1998) 40 *Journal of Legal Pluralism and Unofficial Law* [forthcoming]
 40. Teubner, *supra* note 24 at 1444.
 41. See S. E. Merry, “Anthropology, Law, and Transitional Processes”(1992) 21 *Annual Review of Anthropology* 357 at 358, and B. de Sousa Santos, “Law: A Map of Misreading. Toward a Postmodern Conception of Law” (1987) 14 *Journal of Law and Society* 279 at 298. In an attempt to provide a postmodern reconception of law, de Sousa Santos argues that legal pluralism plays a critical role. Here, however, the legal pluralism to which he appeals is not the traditional version of legal anthropologists “in which legal orders are conceived as separate entities coexisting in the same political space, but rather the conception of different legal spaces superimposed, interpenetrated, and *mixed in our minds as much as in our actions*, in occasions of qualitative leaps or sweeping crises in our life trajectories as well as in the dull routine of eventless everyday life” [emphasis added].
 42. See the discussion in B. Z. Tamanaha, “An Analytical Map of Social Scientific Approaches to the Concept of Law” (1995) 15 *Oxford Journal of Legal Studies* 501 [hereinafter “Social Scientific Approaches”].

A *critical* legal pluralism, by contrast, rests on the insight that it is knowledge that maintains and creates realities.⁴³ Legal subjects are not wholly determined; they possess a transformative capacity that enables them to produce legal knowledge and to fashion the very structures of law that contribute to constituting their legal subjectivity. This transformative capacity is directly connected to their substantive particularity. It endows legal subjects with a responsibility to participate in the multiple normative communities by which they recognize and create their own legal subjectivity.⁴⁴

The Legal Subject in Legal Pluralism

A *critical* legal pluralism challenges the traditional social-scientific legal pluralism of reified cultures and communities. It neither cleaves to a hypothesized plurality of empirically discoverable normative orders nor is transfixed upon assessing their status as legal or non-legal objects of inquiry. For these reasons it requires no boundary criteria for sources of legal rules, for the geographic scope of determinate legal orders, for the definition of its subjects, or for normative trajectories between legal orders. A *critical* legal pluralism focuses upon the citizen-subjects of these hypothesized orders, and calls attention to the role of these subjects in generating normativity. It gives legal

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43. There exist many ways of conceiving of “*critical* legal pluralism” in the legal imagination. Although the image presented here has been inspired by hermeneutic and narrative analyses, the intent has not been to restrict the scope of the proposed agenda. The necessary conditions of a *critical* legal pluralism, as outlined in the following paragraphs, are broad enough to encompass numerous images of law, of which ours is but an example. The use of the indefinite article “a” in the title of this essay is meant to signal the diverse possibilities with the frame of *critical* legal pluralism. Alternative and contrasting conceptions of a *critical* legal pluralism are present in the authors’ own previous work. See e.g. “The Creative Self”, *supra* note *; “A Hermeneutic Turn Through Narrative”, *supra* note *; “Multiple Selves and Legal Pluralism,” *supra* note *; “Critical Legal Pluralism,” *supra* note *.
44. Of course, because subjects and communities are in a constructing/constructed relationship, a *critical* legal pluralism could even define “community” as a process of knowledge construction and, thus, capture the relational nature of community within the subject. See A. MacIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame: University of Notre Dame Press, 1984) at 220: “I inherit from the past of my family, my city, my tribe, my nation, a variety of debts, inheritances, rightful expectations and obligations. These constitute the given of my life, my moral starting point.” See also J. Bruner, *Actual Minds, Possible Worlds* (Cambridge: Harvard University Press, 1986) at 67: “It can never be the case that there is a ‘self’ independent of one’s cultural-historical existence.”

subjects access to and responsibility toward law. Legal subjects are “law inventing” and not merely “law abiding.”⁴⁵

Although any structure of knowledge or authority (for example, a legal order) serves the purposes of those who initiate and deploy it, the relational character of intersubjective communication entails the conclusion that resistance need be no more servile than initiation. The claim of a *critical* legal pluralism is that the self is an irreducible site of internormativity. Positing the relational character of communication reconciles the absent subjectivity of traditional legal pluralism with the evident discipline of internormative dialogue. The emphasis, then, is on the constructive capacity of the constructed self.

A *critical* legal pluralism distances itself from traditional legal pluralist accounts of law in its rejection of law's positivity.⁴⁶ Traditional legal pluralism has sought to identify real sites of law; legal regimes have been assumed to possess a positivity that is grounded, indifferently, in semi-autonomous social fields, in workplaces, in neighbourhoods, in ethnic identity, in religious affiliation, in virtual communities, and so forth. Traditional legal pluralism has acknowledged the predominant power of state law—in order to transcend it or to resist it; the State and its apparatus is the center against which the periphery is modeled and evaluated. Traditional legal pluralism has established monism within each social field; even strong legal pluralism has required each legal order both to define its field and to claim supremacy.⁴⁷

A *critical* legal pluralism rejects the supposition that law is a social fact. Instead, it presumes that knowledge is a process of creating and maintaining myths about realities. Subjects of knowledge are also its objects. Legal knowledge is the project of creating and maintaining self-understandings. A *critical* legal pluralism seeks neither a separation, nor an eventual hierarchical reconciliation, of multiple legal orders. Normative heterogeneity exists both between various normative regimes which inhabit the same intellectual space, and within the regimes themselves. How legal subjects recognize and react to relations within and between these regimes is contributive to their own recognition and self-understanding in any given time-space.

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45. B. de Sousa Santos, “Three Metaphors for a New Conception of Law: The Frontier, the Baroque, and the South” (1995) 29 *Law and Society Rev.* 569 at 573.
 46. On the points raised in the next few paragraphs see, generally, S. C. McGuire, “Critical Legal Pluralism: A Thought-Piece on a Direction for Socio-legal Studies” (Doctoral dissertation, Faculty of Law, McGill University, 1996) [unpublished].
 47. These assumptions animate a conception of law as i) a positive phenomenon, ii) centrally defined, even if implicitly, by appeal to the model of state law and, iii) monistic within each of the orders comprising its quantitative plurality. Even more recent social scientific theories such as autopoiesis, for example, rest on the positivity of the characteristic binary distinctions of law: lawful/unlawful; legal/illegal. See M. King, “The Truth About Autopoiesis” (1993) 20 *Journal of Law and Society* 218.

A *critical* legal pluralism is skeptical of authoritative interpretation. It does not perceive law as objective data to be apprehended and interpreted by experts representing the normative community (e.g. judges in the centralist model, and scholastics in the pluralist one). The problem with the assumption that law can be objective data filtered by experts is one of epistemic structures—categories of the expert discourse are imposed upon communities in which such categories are not indigenous. Consequently, the interpretations derived therefrom present a monolithic assessment of community normativity.

A *critical* legal pluralism presumes that subjects control law as much as law controls subjects within its normative sphere. Although traditional legal pluralists are skeptical of the ability to manipulate norms to achieve desired results because of the multiplicity of norms in a given social field, normativity is held to be the method by which a community controls its members. Hence, power becomes a matter of community survival, and the ironic flip of characterizing normativity as a means to the end of power occurs.⁴⁸

A *critical* legal pluralism is a call for a more intense scrutiny of the legal subject conceived as carrying a multiplicity of identities. It takes as its starting point the assumption that all hypotheses of normativity merit consideration from a legal point of view. As in the autopoiesis hypothesis that “any act or utterance that codes social acts according to the binary code of lawful/unlawful may be regarded as part of the legal system, no matter where it was made and no matter who made it.”⁴⁹ a *critical* legal pluralism privileges the legal subject, not the referent of that subject's normativity. But, by contrast with the autopoietic hypothesis, a *critical* legal pluralism does not depend either on phenomena or essences.⁵⁰

For a *critical* legal pluralist, there is no *a priori* distinction between normative orders because these normative orders cannot exist outside the creative capacity of their subjects. Criteria for distinguishing or comparing normative orders (a constitution, an authoritative institution, a common enterprise, a shared ethnicity, etc.) are methodologically heuristic at best. The

48. It is important to note here how power is being conceived of as having a dominating sense, a negative value. The effectivity of power has become the only universal standard through which cultures and histories can be evaluated by social-scientific legal pluralism. Instead, the focus should be on recognizing the creative, constructive, positive effects of power. This is not to deny structures of domination and their effect nor is it to deny the coercive operations that are masked by attention to law, but rather to emphasize the resistance to domination that is evidenced in subjects' creative capacity. For further discussion of the “overarching and integrating structures of domination” in mainstream legal pluralism, see Fitzpatrick, *supra* note 20.

49. King, *supra* note 47 at 223.

50. For a critique of autopoiesis along these lines, see “Social Scientific Approaches”, *supra* note 42.

key is not to seek out the totality of normative orders competing for attention within a single social field, and to then determine the relative place of each in that social field, for this is to turn the inquiry into a search for entities. Rather, it is to understand how each hypothesized legal regime is at the same time a social field within which other regimes are interwoven, and a part of a larger field in which it is interwoven with other regimes.

It might be objected that although no *a priori* distinction between “strictly legal” orders and “purely normative” orders can be proved, human beings intuitively gravitate toward a distinction between State law and other manifestations of normativity.⁵¹ This objection is best met by recalling the limitations of language. The authoritative language of law in contemporary discourse is that promoted by faculties of law, the legal professions, judges, politicians and political commentators; this language either excludes non-State normativity from its realm, or incorporates this non-State normativity into State law by means of devices such as delegation or referential incorporation.⁵² Unsurprisingly, officials tend to envisage as law only official law; and because official discourse carries such weight, even legal pluralists have accepted State law as the defining instantiation of law.⁵³ To allow this customary discursive practice to become an accepted epistemological claim which theoretical argument crystallizes is, however, twice to err.

When we speak of a belief or assumption that the world started more than five minutes ago or that the ground will remain solid under our feet, or that law is distinct from normativity, we go astray. These are matters on which we have not formulated a belief at all; not because we doubt them, but because we are too busy relying on them as we go about believing and doubting other things.⁵⁴ Law, as referring to State law, is part of a tacit background of objects of reliance for any discussion of legal systems and normative orders. It is understandable, then, that a response to the question “what is law?” yields a characterization of law as State law—this is the underlying rhizome upon which we base all our discussions of law. Where we err is in forgetting that this root is a matter of belief, and that today the truth conditions of claims made about law are not

51. Santi Romano, *supra* note 6 at 82–83. “En effet, si l’on peut parfaitement concevoir le droit sans l’État, il est impossible de définir l’état sans recourir au concept de droit.”

52. See R. A. Macdonald, “Vers la reconnaissance d’une normativité implicite et inférentielle” (1985) 18 *Sociologie et Sociétés* 38.

53. For a similar argument made with regards to contemporary debates about modern constitutionalism and cultural diversity, see J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995) at 58ff.

54. L. Wittgenstein, *On Certainty*, trans. D. Paul & G. E. M. Anscombe (London: Basil Blackwell, 1969) at para. 84ff.

empirical, but directly rely upon this belief.⁵⁵ This is not to say that the study and investigation of State institutional processes is otiose. There is a utility in drawing lines in specific settings between what will be considered and what will not be considered, between what will be labeled law and what will not. But a *critical* legal pluralist rejects the claim that the lines drawn reflect an existing, real delineation.

The shifting of focus, in a *critical* legal pluralism, to the subject displaces social scientific inquiry into the empirical phenomena of normative orders in order to make room for the subjects constructing those orders. Such a change in focus does not necessarily entail the replacement of an objective method of inquiry by a subjective one. However, the displacement of the importance of social scientific inquiry does mean that even an autopoietic approach would suffer similar criticisms as those leveled against traditional legal pluralism.⁵⁶ By imagining law as “a mode of giving particular sense to particular things in particular places,” a *critical* legal pluralism shifts inquiry toward hermeneutic thinking—to thinking of law as “meaning ... not machinery.”⁵⁷

The subject posited by a *critical* legal pluralism is best characterized as a multiplicity of selves and not the modern anthropomorphized individual of economics, political science and *Charters of Rights*. The life of the subject is a continuing autobiography of meaning. Subjects seek to explore the variety of possible worlds and possible selves that they can reflect and project. In their relations with other subjects and in their biographies of themselves, subjects evaluate how they want to live in the worlds open to them. Hence relations among the subject's multiple selves will always be relations of reflexive evaluation. Whatever else these legal subjects may be, they are, like the communities in which they participate, normatively heterogeneous. The subject is multiply identified and multiply identifying in a congeries of biographies.⁵⁸

55. One could also argue that, notwithstanding the discursive source of this concept of “law” in European political systems, even there it has transcended the boundaries imposed upon it by its original construction. It is just this local transcendence that makes the present inquiry possible. See e.g. the discussion in L. L. Fuller, “Human Interaction and the Law” in Winston, *supra* note 8, 211.

56. In fact, it might be argued that Teubner's proposed solution to the deconstructive dilemma of postmodern approaches highlights the need to find agency in discussions of legal pluralism. Teubner calls attention to the lack of reconstructive practice in postmodern jurisprudence, and suggests that autopoiesis might be the answer. His solution, however, succeeds only in anthropomorphizing and subjectifying the normative orders. The realm of his inquiry remains the normative orders as phenomena, albeit “living” phenomena. See Teubner, *supra* note 24; “Social Scientific Approaches”, *supra* note 42.

57. C. Geertz, *Local Knowledge* (New York: Basic, 1983) at 232.

58. Even grammar recognizes the multiplicity of selves. Weber signaled four communities. In Latin seven cases have been identified: nominative, genitive,

Subjects construct and are constructed by State, society and community through their relations with each other. Structural-functional representations of almost wholly determined subjects, treated as “the other” to whom duties are to be owed, are impossible. State, society and community are hypothetical institutions within which subjects are shaped by the knowledge they inherit, create and share with other subjects. At the same time, the institutionalized subject reciprocates by shaping and reformulating the hypotheses of state, society and community that are inhabited.

This is not to say that inter- and intra-subjective life is either radically democratic or radically egalitarian. Dominant narratives will, in the end—either directly through the imposition of brute force dressed up in the guise of State officials, or indirectly through the ideology of legitimated State power—be imposed, or at least a version of them that dominant institutions and their subjects can recognize and maintain. But not all institutional narratives are equally persuasive to the plethora of selves of which subjects are composed. In the constant renarration of the subject's autobiography, the narrative imagination of other subjects is engaged, the reciprocal transformation of subjects and institutions is effected.

The Legal Subject As an Irreducible Site of Normativity

The legal subject in a *critical* legal pluralism is an irreducible site of normativity. Hence, both normativity and internormativity are *noumenal*, not *phenomenal*. Two objections may be advanced against this image of law. First, how can such an apparently individualistic approach be reconciled with the concepts of law and normativity? Do they not both presuppose a society, a community or at the very least, a group? A second objection would argue that a *critical* legal pluralism is trivial—or, at most, merely a methodological shift in legal pluralism theory without substantive import. The objection could be phrased as follows: insofar as legal pluralism is concerned with the varied claims normative orders make, it makes no “real” difference whether the adjudication

dative, accusative, ablative, vocative and locative. In Cree there are about a dozen and one-half. Each case might be said to key to a self: subject, belonger, receiver, object, exponent, self-assessor, and locator. Similarly, selves might be conceived as being formed and/or understood through narrative. Within such a narrative approach acts of self-narration, or the autobiographical ruminations that concern the *critical* legal pluralist, leave the realm of mere description, and become fundamental to the emergence and reality of subjects themselves. See, further, A. P. Kerby, *Narrative and the Self* (Indianapolis: Indiana University Press, 1991); H. Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1981).

of competing claims is characterized as occurring at the macro-level of normative orders or whether it is situated within each legal subject.

The first objection is to mistake the conception of legal subject-self being advanced. A *critical* legal pluralism makes no appeal to some “essential” or “anthropomorphic” individual, but rather to the way the modern self perceives itself to be individualistic. The self-perception of one as an individual is indeed a signal feature of the modern self.⁵⁹ The modern self is a construct, but this construct has itself a constructive capacity, and it is upon this constructive capacity that the internormative character of legal pluralism must be focused. While changes to dominant narratives that are effected by the confirmation or rejection of subjects may be imperceptible at the time they occur, over time these dominant narratives are transformed in a very perceptible manner. Any project of law reform must, consequently, ask how best to engender changes to these dominant narratives.

The second objection is equally mistaken. A *critical* legal pluralism does not simply imply transposing internormative inquiry from a macro to a micro perspective. It also entails an element of construction or creativity by the subjects of collective narratives when they are confronted with internormative conflicts. Reconciling internormative conflict is not the task of authoritative agency since the conflict itself flows only from its recognition and acknowledgment by the legal subject-self. Positing internormativity at a macro level entails at least a greater reliance upon the existence of normative orders “in the world” that can be investigated with the rigor and apparatus of an imagined “empirical legal science.” But a *critical* legal pluralism rejects a phenomenological approach which appeals to some sort of absolute or realist conception of the world as something more than just “a consoling myth.”⁶⁰

State law has been imagined as a means for recognizing, characterizing and resolving intersubjective conflict and has, consequently, been typecast as bounded and linear.⁶¹ State law has been symbolized as a limit, a boundary which the legal subject must transgress in order to overcome or change law.⁶² Theorists and practitioners of State law impose this linear image of the rule of law on each and every one of its subjects—largely to avoid deeper epistemological questions of law's normativity.⁶³ By shifting the image of law to

59. See C. Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge: Harvard University Press, 1989).

60. J. McDowell, “Virtue and Reason” (1979) 62 *The Monist* 331 at 339.

61. J. Starr & J. F. Collier, “Historical Studies of Legal Change” (1987) 28 *Current Anthropology* 367.

62. D. Cornell, “Law and the Postmodern Mind: Rethinking the Beyond of the Real” (1995) 16 *Cardozo L. Rev.* 729.

63. For a discussion of an analogous situation in the differing approaches to theater (the linear/transgression model of the Theatre of the Oppressed and the circular model of certain aboriginal groups adopting methods used in “healing circles”), see

one conceived of as an exercise in hermeneutics, the law achieves a different symbolic signifier: the circle. As two distinct standpoints from which to know the world, the hermeneutic circle of law and the linear “ruler” of law measure different aspects of both what the substance of law is to contain, and the subjects that travel the circle and that cross the lines.

As a representation of the world in which we live, an inquiry into the spatial arrangement and the systematically structured approaches to law permits us to challenge the way in which law affords a knowing of the world.⁶⁴ Traditional social-scientific legal pluralism maintains the linearity of definition that dismembers the concept of law. Although different legal orders are posited or empirically claimed to exist, the quest of the traditional legal pluralist is to distinguish between them, to draw lines, or to provide adequate accounts for dealing with the problematic interstices of these same legal orders. A *critical* legal pluralism, however, rejects the image of linear transgression, and provides law with the circularity of hermeneutics.⁶⁵ The perspective of legal meaning moves through a circle of narrative construction by a dynamic, creative subject.⁶⁶

Conclusion

The above elaboration of the questions of a *critical* legal pluralism points to a conception of legal normativity that is best captured by ideas that are the opposite of positive definitions. Implicit in these observations is a counterpoint to mainstream views of the normative science of law: system, jurisdiction and order cannot be the central postulates of law. Implicit in these observations is a counterpoint to mainstream views of the empirical science of law as developed by social theorists: normative regimes cannot be individuated as entities according to either structuralist or functionalist criteria.

C. Graham, “On the Seductiveness of Clarity and the Pain of Erasure” (Paper presented to the Association for Canadian Theatre Research Annual Conference, 1992) [unpublished].

64. G. Bachelard, *La Poétique de l'espace* (Paris: Presses Universitaires de France, 1958) c. 10.
65. Even Teubner, who posits a “new” legal pluralism which relies on autopoietic approaches appeals to linear images: suggesting that the vertical image of relations between law and society be transformed into horizontal ones. See Teubner, *supra* note 24 at 1457.
66. The circular image is not intended to conjure the empty sphere of geometers, rather it embodies the full sphere of being. See G. Bachelard, *supra* note 64 at 244; K. Jaspers, *Von der Wahrheit* (Munich: R. Piper, 1947) at 50: “Jedes Dasein Scheint in sich rund” (Every being seems in itself round).

A *critical* legal pluralism twists traditional analyses of law and society inside out. Rather than beginning with the premise that society and subjects are real entities that law can treat, it investigates how narrating subjects treat law. To some extent the argument for a *critical* legal pluralism is similar to a conscientious protest to the doctrines of a dominant faith. The challenge is both epistemological and ontological. By highlighting the dynamics of reciprocal construction, a *critical* legal pluralism legitimates interpretations of law apart from those endorsed by officials—whether these be institutional office-holders such as judges within a political State, or whether they be empirically identified community spokespersons, or whether they be the scholastic investigators themselves. The law is within all members of any society that purports to recognize them as legal subjects.⁶⁷ This constructivist aspect of legal pluralism is what gives this law its true authority.

The conception of a *critical* legal pluralism presented here is emancipatory practice. For law is the belief of those whose narrative of its prospects succeeds for the narrator. A *critical* legal pluralism is not concerned with “saving the appearances” of conceptual or empirical legal positivism. Instead of asking only “How are legal subjects seen in any given normative order?” it also asks “What do legal subjects see in any given normative order?” But to imagine legal subjects as only the physical presentation of a congeries of discrete selves constructed by reference to the judgments of others about gender, race and class, is erroneous. To begin, there is no presumptive priority to any social category: class, gender, race, child, parent, neighbour, stranger, tortfeasor and tenant are all partial understandings of legal subjects. In addition, there is no presumptive priority to the scrutiny by “the other” over and above the self-scrutiny of legal subjects.

A *critical* legal pluralism presumes that legal subjects hold each of their multiple narrating selves up to the scrutiny of each of their other narrating selves, and up to the scrutiny of all the other narrated selves projected upon them by others. The self is the irreducible site of normativity and internormativity. And the very idea of law must be autobiographical.

67. See J.-G. Belley, “Le Pluralisme juridique chez Roderick Macdonald: Une Analyse séquentielle” in Lajoie, ed., *supra* note * [forthcoming].