Wedding a Critical Legal Pluralism to the Laws of Close Personal Adult Relationships

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Entrance chant:[1]

From so much loving and journeying, books emerge.
And if they don't contain kisses or landscapes,
if they don't contain a man with his hands full,
if they don't contain a woman in every drop ,
hunger, desire, anger, roads,
they are no use as a shield or as a bell:
they have no eyes, and won't be able to open them,
they have the sound of dead precepts.[2]

I. Greeting[3]

In the Name of the Father, the Son and the Holy Spirit

Is legal pluralism,[4] and in particular what may be characterized as a critical (or radical) legal pluralism[5] merely an interesting scholarly hypothesis about law, or may it actually inform the way we apprehend, understand, interpret and engage with legal normativity today?

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[1] The *Entrance Chant* opens the celebration and accompanies the procession of the priest and wedding party up the aisle to the altar. Instead of the priest, the bride and groom come last in the procession in order to signify that they are the ministers of the Sacrament of Marriage. The purpose of the Entrance Chant is to foster the unity of the congregation and to introduce their thoughts to the mystery of the liturgical celebration. The capsule statements of the components of the mass presented in the footnotes to each title are derived from the United States Conference of Catholic Bishops (USCCB): **Committee on the Liturgy**, "General Instruction of the Roman Missal: The Structure of the Mass, Its Elements and Its Parts" online at: http://www.usccb.org/liturgy/current/revmissalisromanien.shtml and the *Ordo Celebrandi Matrimonium Intra Missam : Rite of Marriage During Mass* available online at: http://www.catholicliturgy.com/index.cfm/FuseAction/TextContents/Index/4/SubIndex/67/TextIndex/8. For the *Entrance Chant* see *ibid.,* at III A.

[2] **Pablo Neruda**, "Ars Magnetica" *Isla Negra: A Notebook,* New York, Farrar, Straus, Giroux, 1999 trans. by Alastair Reid, at page 326, lines 1-8.

[3] The purpose of the *Greeting* is to render manifest the mystery of the Church gathered together. This is usually followed by a brief introduction to the Mass of the day: *USCCB*, *supra* note 1, at IIIA.

[4] For reflections on various contemporary dimensions of legal pluralism see "Special Issue: Pluralizing Discourses of Law and Governance" *Northern Ireland Legal Quarterly*, 2006, No 57, p. 577-672 . See also **E.**

This is the root question we address in this article. We explore the implications of adopting a critical legal pluralist conception of law for interrogating how different legalities purport to govern close personal adult relationships.[6] The decision to structure inquiry into these relationships roughly along the lines of (although also in counterpoint to) a Roman Catholic wedding ceremony has several rationales.[7] It reminds us that various normative orders have always been in competition to define the form, substance and finalities of marriage. It signals that even a canonical set of rituals can be emptied of their content and co-opted for other purposes. It instantiates the porosity of different legal orders and the internormative trajectories, patterns and practices of close personal adult relationships in contemporary multi-lingual, multi-cultural, multi-religious and multi-ethnic societies. And it reminds us that one of the supposed secular foundational institutions of private law -the procreating family- may be both less secular and less foundational than imagined.

The choice of a rite in an institutionalized and episcopal religion as organizational frame[8] underscores the particularity of how human beings interact with each other and with the world around them. Even a religious tradition as strongly hierarchical as Roman

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Melissaris, "The More the Merrier? A New Take on Legal Pluralism" *Social and Legal Studies*, 2004, No 13, p. 57.

[5] In a number of earlier texts one of the co-authors has sought to develop a conception of a critical legal pluralism. See **R.A. Macdonald and M-M Kleinhans**, "What is a *critical* legal pluralism?" *Canadian Journal of Law and Society*, 1997, Vol. 12, No 1, p. 25; **R.A. Macdonald**, "Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism" *Arizona Journal of International and Comparative Law*, 1998, No15, p. 69; **R.A. Macdonald**, "Critical Legal Pluralism as a Construction of Normativity and the Emergence of Law" in **A. Lajoie, et al**, eds., *Théories et émergence du droit: pluralisme, surdétermination, effectivité*, Montreal, Éditions Thémis, 1998, at 12; **R. A. Macdonald**, "Pluralism in Law and Regime Theory" in **R. Wolfe**, ed., *Transatlantic Identity: Proceedings of the 1996 Canada-U.K. Colloquium*, Kingston, Institute of Intergovernmental Relations, 1997, at 37; **R.A. Macdonald** "Here, There … and Everywhere - Theorizing Legal Pluralism; Theorizing Jacques Vanderlinden" in **N. Kasirer**, ed., *Étudier et enseigner le droit: hier, aujourd'hui et demain – Études offertes à Jacques Vanderlinden*, Montreal, Éditions Yvon Blais, 2006, at 381 (hereinafter "*Here, There … and Everywhere*"); **R.A. Macdonald and D. Sandomierski**, "Against Nomopolies" *Northern Ireland Legal Quarterly*, 2006, No 57, p. 610 (hereinafter "*Nomopolies*").

[6] Of course, the very decision to deploy a concept like "close personal adult relationships" signals a departure from orthodoxy in that inquiry is framed without reference to traditional concepts like marriage or even filiation through which private law has historically imagined status relationships. On the justifications for and consequences of such a strategy see, **Law Commission of Canada**, *Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships*, Ottawa, Minister of Public Works and Government Services, 2001.

[7] "In the Latin rite the celebration of marriage between two Catholic faithful normally takes place during Holy Mass, because of the connection of all the sacraments with the Paschal mystery of Christ. In the Eucharist the memorial of the New Covenant is realized, the New Covenant in which Christ has united himself forever to the Church, his beloved bride for whom he gave himself up." See *Catechism of the Catholic Church*, London, Geoffrey Chapman, 1998, at 363.

[8] See **E. Goffman**, *Frame Analysis: an Essay on the Organization of Experience*, Cambridge, Mass., Harvard University Press, 1974, for an analysis of how frames of reference such as those associated with ritual structure the possibilities of understanding we are capable of imagining.

Catholicism with its long established body of canon law and catechism acknowledges individual conscience as final referent for matters of personal conviction. Our individual experiences of life presuppose the operative presence of our own human agency. Pablo Neruda's insight about books of poetry applies equally to accounts of religion and more importantly, accounts of law. If they "don't contain a man with his hands full / if they don't contain a woman in every drop" then "they have no eyes, and won't be able to open them, / they have the sound of dead precepts". Hence, two central premises of this essay: the vitality and relevance of any conception of law hinges on its capacity to reveal the complex dimensions of law's interaction with human agency; and the premises, the context and the memory of any normative order are never fixed. A normative order is simply one among many hypotheses by which human beings engage in conversations -projected across particular places and through time- about interpersonal relationships. [9]

Neruda's poem serves as an Entrance Chant (or Processional Hymn) preceding this Greeting. In the next following Penitential Rite, we call for renunciation of the four tenets of contemporary legal orthodoxy and the confession of intellectual idolatry. Through the Opening Prayer, we seek to clarify our methodological approach. During the Liturgy of the Word, we will explain the entailments of a critical legal pluralism, both as concerns competing conceptions of normativity (law's sites) and competing conception of legal normativity (law's modes). Next comes the Rite of Marriage itself, where we will argue for dissolution (by nullity rather than divorce) of the current matrimonial bond between the law of secular states as it relates to close personal adult relationships, and the law of Christian religions. In the Liturgy of the Eucharist we deploy a critical legal pluralist methodology to emphasize heterogeneity, flux and dissonance in our normative lives and, in doing so, to contemplate how human agency overcomes and transcends the subservience of legal subjectivity. The Final Blessing constitutes an invitation to, rather than a conclusion of, a meditation on the eschatological questions raised by legal pluralism. The remaining portion of Neruda's *Ars Magnetica* serves as the closing, Recessional Hymn.

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[9] An analogous argument about the character of legal traditions is advanced in **H.P. Glenn**, *Legal Traditions of the World*, 2nd ed., New York, Oxford University Press, 2005 at chapters 1, 2 and 10.

II. Penitential rite[10]

Matthew 7: 1 – *"Do not judge, and you will not be judged"*.[11]

How easy it is to live in a world where we need not question either belief or behaviour. Solace (and sin) lies in denying personal responsibility for our commitments and, more tragically, in denying that these are commitments rather than facts.

A. Confession

Traditional conceptions of law within the legal academy and professional practice relieve us from the burden of justifying our faith. There is no faith; law simply is. The first step to penitence is to recognize and confess our enslavement to a false necessity. Law is a label we attach to a set of human phenomena; before we apply the word law, there are just data in the world – and even the conception of the "big, blooming, buzzing confusion"[12] of experience as data implies a human intellectual endeavour. Through our labeling we construct the phenomena, the data, and the confusion as "law" rather than as something else.

The everyday articles of faith that sustain such false necessity act together like a filter on the conceptual category of law, letting in a certain colour or shape of experience while keeping out all the rest.[13] The core exclusionary beliefs of legal orthodoxy reflect an incontestable apostolic credo and, like the Gospels, are four. First, *monism:* the belief in the unity of normative activity. Second, *centralism*: the belief in the law and state as co-terminus. Third, *positivism*: the belief that a hard *ex ante* criterion may be propounded for distinguishing between that which is, and that which is not, law. Finally, *prescriptivism*: the

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[10] The purpose of carrying out this general formula of confession is for people to prepare their hearts for participation in the liturgical celebration: *USCCB, supra*, note 1 at III A.

[11] All biblical extracts are taken from *The Jerusalem Bible: Reader's Edition*, Garden City, New York: Doubleday & Company, Inc., 1967. This is the version accepted for Roman Catholic masses and differs from the more well known Protestant text known as *The King James Version.*

[12] The quoted expression is from **William James**, "Percept and Concept -- The Import of Concepts," in *Some Problems of Philosophy*, 1911: "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."

[13] For a discussion of how conceptions of law function in an analogous fashion to colour filters see **R.A. Macdonald**, "Unitary Law Re-form, Pluralistic Law Re-substance: Illuminating Legal Change", *Louisiana Law Review*, 2007, No 67, (forthcoming).

belief that law is a social fact existing outside and apart from those whose conduct it claims to regulate.[14]

B. Penitence

To recognize choice, and the possibility of error, is the consequence of eating the fruit of the tree of knowledge of good and evil. Adopting a *critical* legal pluralist perspective implies rejecting the constricting matrix of doxology. The cult of *isms* is the reduction of ritual to rote: it is to stress law's pedigree to the exclusion of law's purpose or point. Worshipping a threshold test for law means that sources of law become nothing more than stamps of legal authenticity. Any reflexion about law's causal inception is dismissed as a non-legal inquiry more appropriately left to philosophers, sociologists, anthropologists, political scientists, or even economists. Setting law apart from human agency and the interaction among human beings from which it springs allows us to imagine the first question as one of validity and to then tie criteria of legal validity to state institutions. This, in turn, reassures us that we can easily locate and define a formal and coherently organized set of norms as "the law".

What we purchase in recognition and coherence, however, we sacrifice in range and comprehension. How may we express our sorrow for our idolatry and our desire for amendment of our conduct? Let us begin by conceiving another image of law – law not as artefact and instrument, but law as process and aspiration: "law as the endeavour of symbolizing human interaction under the governance of rules".[15] This conception of law recognizes the dynamic and unstable quality attendant on symbolizing the formation and following of rules in the course of human interaction. Instead of fixating on the mere end-product of that interaction, inquiry focuses on how that interaction is engaged.

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[14] See "*Here, There and Everywhere*", *supra,* note 5. The allegory is not merely conjunctural. Monism, centralism and positivism like Matthew, Mark and Luke, are synoptic; prescriptivism like John resonates as a meditation on identity. See **R. Brown,** *et al, The New Biblical Commentary*, London, Chapman, 1995, c. 41, 42, 43 and 61. For an application to legal analysis that implicitly ties Mark to monism, Matthew to centralism, Luke to positivism and John to prescriptivism, see **R.A. Macdonald**, "Epistles to Apostles", *Alberta Law Review*, 2001, No 39, p. 668.

[15] The implications of such a view are explored in "*Here, There and Everywhere*", *supra*, note 5 at 393-394. For a slightly different statement see **L. Fuller**, "law is the enterprise of subjecting human conduct to the governance of rules" in *The Morality of Law*, 2nd, New Haven, Yale University Press, 1969, at 106.

C. Absolution

To examine law as engagement, process and aspiration requires us continuously to redirect our gaze towards legal actors, for it is ultimately their purposes which law serves and their behaviour through which law is revealed. Such attornment reminds us that we are each responsible "legal actors" rather than passive "legal subjects". Each person who commits herself or himself to a legal regime -and not just the over-emphasized "legal official" who purports to "make the law"- has a role in constructing the normativity of that regime.

While the term "legal subject" implies that human beings are cast outside and below the law (*sub-iacere*), the term "legal actor" stresses human agency and interaction with others in creating and recognizing law. Legal actors engage in the jurisgenerative[16] process by imagining, inventing and interpreting legal rules. Through their beliefs, behaviour and practices, they instantiate the rules they conceive and perceive. There is neither singularity, nor coherence, nor stability, nor boundary to an agent's normative commitments.[17]

Each of monism, centralism, positivism and prescriptivism reflects a different preoccupation with delineating a frontier between the legal (the communion of believers) and the non-legal (heretics or apostates) – either spatially (centralism), numerically (monism), analytically (positivism) or intellectually (prescriptivism). Legal orthodoxy fuses them into the golden idol of dogma. But like all idols, the conception of law as extrinsic to human agency, is false.[18]

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[16] The term is from **Robert Cover**, "Nomos and Narrative" *Harvard Law Review*, 1983, Vol. 97, No 4 at 28. Cover's jurisprudence is ambiguous. Some such as **Martha Minow**, "Introduction", in **Minow *et al***. (eds.), *Narrative, Violence and the Law: The Essays of Robert Cover*, 1993, claim, at p. 9, that Cover did not concede the necessary superiority of state norms; others, like **Ryan**, "Meaning and Alterity", p.267, *ibid.,* suggest the contrary.

[17] For development of the theme of normative heterogeneity, flux and dissonance, 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, at 233 (hereinafter *Les Vieilles gardes*).

[18] The assumptions through which orthodoxy constructs legal actors as subjects are explored in "*Nomopolies*" *supra* note 5, at 623-632.

III. Opening prayer[19]

Psalm 121 – "I lift my eyes to the hills, whence cometh my help?".

Having lifted our eyes to hills we face the challenge of re-thinking law interactionally. From where can we find a methodology to overcome the supposed distinction between law and human interaction? The legal pluralist project is, to be sure, not about ignoring distinctions by subsuming them under a structural-functional model that purports to find a single explanation for the different dimensions of legal normativity.[20] Rather, the goal is to portray legal and social phenomena in relation to each other and in their full richness and detail, questioning and testing concepts and categories by which legal and social life are presented as discontinuous.[21]

A. Understanding human relationships

Just as the conceptual distinctions we make in developing a legal theory derive from the epistemological framework of our inquiry, so too the conceptual bases of particular legal doctrines stem from more imbedded intellectual commitments. Dominant socio-cultural-religious structures have historically provided the background frame for a whole series of interconnected legal doctrines and policies. Until quite recently the private law -what Jean Carbonnier called, in its presentation as a civil code, the civil (or social) constitution-[22] stood as the most significant reflection of these dominant socio-cultural-religious structures.[23]

Within the private law human interaction is cast in both instrumental and symbolic terms: the former primarily through obligational relationships deriving from conjunctural

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[19] The faithful, together with the priest, observe a brief silence so that they may be conscious of the fact that they are in God's presence and may formulate their petitions mentally. Then the priest says a prayer to express the character of the celebration— in this case, a celebration of the Sacrament of Marriage. The people, uniting themselves to this entreaty, make the prayer their own with the acclamation *Amen*. See *USCCB, supra* note 1 at IIIA.

[20] For a strong critique of misplaced social scientism in legal pluralist theory see **B. Z. Tamanaha**, "The Folly of the Social-Scientific Version of Legal Pluralism" *Journal of Law and Society*, 1993, Vol. 20, p. 192, reprinted in *A General Jurisprudence of Law and Society*, Oxford: Oxford University Press, 2001.

[21] **Daniel Jutras**, "The Legal Dimensions of Everyday Life" *Canadian Journal of Law and Society*, 2001, Vol. 16, p. 45; **R.A. Macdonald**, *Lessons of Everyday Law*, Montreal, McGill-Queens University Press, 2002.

[22] **J. Carbonnier**, "Le Code civil" in **P. Nora**, ed., *Les Lieux de mémoire*, vol 2, *La Nation*, Paris, Gallimard, 1986. In Quebec the 1993 Civil Code is often characterized as representing a « projet de société ». See « Préface » in *Commentaires du Ministre de la justice*, Quebec, Éditeur Officiel, 1993.

[23] For a discussion of the social and political origins of the French civil code see **J. Carbonnier**, "Le Code Napoléon en tant que phénomène sociologique" *Droit prospectif: Revue de la recherche juridique*, 1991, p. 327

agency and framed through institutions like contracts, torts, restitution, and gifts *mortis causa*; and the latter primarily through status relationships built around high-affect social institutions – notably (1) spousal relationships like husband, wife, widow, widower, *de facto* spouse, putative spouse, concubine, separated spouse, and divorced former spouse, and (2) filiative relationships like parent, child, legitimate, illegitimate, niece, nephew, brother, sister, half-brother, half-sister, aunt, uncle, grandparent, in-laws, *de cujus*, heir at law, *etc.*. While obligational relationships have traditionally served a central organizing role in economic life, the deep import of status relationships has been most closely revealed in the law of persons, intestate succession, and the family.**24**

B. Marriage as status

Until the last 50 years or so, European private law conceived only a limited number of both spousal and filiative status relationships, all of which were nested within larger conceptual frameworks and policy judgments derived from religious (and particularly Christian) understandings of the family and marriage. These judgments initially addressed diverse first order issues like: (1) who is entitled to marry and under what conditions? (2) what are the economic consequences of marriage for couples? (3) what is the bearing of marriage on the contractual capacity of spouses? (4) what impact does the marriage of a child's parents have on his or her name and economic entitlements? (5) what types of legal exclusions are visited upon people married to each other (conflicts of interest, gift in fraud of creditors, and spousal non-torts, for example)? (6) when should marriage bear on principles of the criminal law such as those relating to evidentiary privilege, to conspiracies and accessories, and to the definition or non-definition of crimes (as, for example, the impossibility of spousal rape, sexual assault and theft)?

More recently, the normative impact of these private law concepts has come to transcend their direct personal object. Contemporary contractual arrangements with third parties also reflect the presuppositions of dominant socio-cultural-religious status relationships. The law of what was formerly known as the status of "Master and servant"

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24 Of course, certain other institutions, notably the trust, the concept of fiduciary relationships, the ideas of tutorship and curatorship, and more remotely the notion of administration of the property of others, inescapably combine both economic and status relationships. See, for discussion of this point, **D. Waters, L. Smith and M. Gillen**, *Waters' Law of Trusts in Canada*, Toronto, Carswell, 2005; and **M. Cantin Cumyn**, *L'administration du bien d'autrui*, Cowansville, Éditions Yvon Blais, 2000.

offers several striking examples: (1) the concept of a family, and not a, living wage; (2) the designation of beneficiaries of private insurance, pension, health and disability benefits; (3) the types of state-run medical coverage, workers' compensation and wage-related social security entitlements that are transferable to family members; and (4) other fringe benefits of all descriptions (access to company housing, health clubs, golf clubs, conference travel, *etc.*).[25]

Of course, it should not be assumed that the State's attitude to status relationships is always benign. For many years, marriage itself was conceived as a patriarchal institution within which women were subjected to the power of their husbands, lost contractual capacity, could not own property apart from the "community" that was exclusively managed by her husband. Nor was the State's role merely passive as regards other social structures. Today, the State systematically encourages private institutions that nurture adult relationships (*i.e.* churches, benevolent associations *etc.*) and it broadly facilitates relationship-based contractual ordering that transcend previous conceptual boundaries (private pension, insurance, sick leave or other employment entitlements). Nor should it be assumed that the State has either a formal litmus test or settled functional criteria -like duration, intensity, scope, cohabitation, degree of economic and psychological integration or whatever- by which to identify which status relationships it will recognize. That said, most States imagine the primary domestic status to be marriage.

C. Status as marriage

Today there is an obvious disjuncture between the sociological reality of close personal adult relationships of dependence and interdependence and legal definitions of marriage. The disjuncture is exacerbated because, over the past century, legislatures have consistently deployed the marriage relationship to organize public policy responses to a wide range of social issues.[26] What then, are alternative forms of justification open to states seeking to ground policy in respect of close personal adult relationships?

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[25] See the discussion in *Beyond Conjugality, supra*, note 6, at 40-42 and sources cited. At the same time, the public, non- employment related social welfare network was built up in large part around the notion of the child-rearing family, and especially where the parents were married to each other. See *ibid*., at 37-112.

[26] The obvious consequence is the need for States to develop a secular conception of marriage which, while fundamentally grounded in socio-cultural-religious dogma acknowledges – sometimes through legal fiction (like the recognition given to putative marriages) sometimes through presumed intention (like the recognition given to relatively stable *de facto* relationships from which issue children) – is grounded in other policy considerations.

One mode of justification is neo-conceptualism: the invocation of "rights ideology" as a way of disanchoring concepts from their cultural grounding. In this endeavour discrimination and equality have assumed a dominant role. For example, a socio-cultural-religious concept of filiation that depends on notions of legitimacy flowing from the marriage of the child's parents is seen to discriminate against children born out of wedlock. Equality demands that the legal default rule should be one that treats all biological children in the same way. Of course, claims of equality and non-discrimination depend on prior constructions of similarity, claims that invariably are not justified by those who wield the weapon of exclusion.

Functionalism is another justificatory approach which focuses on the question: what is the purpose for any given legal construction and given substantive policy? Of course, since purposes are themselves judgments of value about the way we construct facts, a host of other issues come immediately to the fore. Many of these resonate in social science disciplines like sociology and psychology. A handful of questions are pertinent.

The first is a sociological question. As a matter of sound public policy, why should the law worry about relationships at all? Are there things that happen in relationships that we see as socially beneficial, such that we should actually orient our legal-regulatory regimes to promote relationships rather than just targeting individuals? For the functionalist, the answer depends on the empirical evidence of the effects of stable, longer-term relationships on the health, happiness and productivity of peoples' lives.[27]

The second inquiry is of a psychological character. Are there certain needs of adults as individuals -whether or not they are in any kind of relationship at all- that underpin our understanding of the human condition? [28] In identifying such needs (a not uncontroversial task) can we say the state has any role in recognizing, legitimating and meeting them? If so

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See **Robert Leckey**, "Profane Matrimony" *Canadian Journal of Law and Society*, 2006, Vol. 21, p. 1 for a careful analysis of these disjunctures as they arose in debates about whether the State should permit the marriage of a man to his deceased wife's sister.

[27] See the multiple studies sponsored by the Vanier Institute of the Family, available at -- http://www.vifamily.ca/about/about.html

[28] On this point consider the idea of a hierarchy of needs as elaborated by A. Mazlow, *A Psychology of Being* (Princeton: Van Nostrand, 1962).

how should the State go about it? How, for example, do we know which relationships, if any, should be encouraged?

Finally, if we think that it is an important individual need to build and nurture affective relationships with other adults, how do we ensure that these relationships are neither dysfunctional nor pathological? What might be the central characteristics of healthy relationships? According to empirical research, equality, commitment, respect, recognition and stability are central characteristics of healthy adult relationships. Even though one can see these qualities reflected in the modern bivalent Christian marriage vows -"to love, honour, cherish and respect, for better or worse, in sickness and in health, *etc.*"- they in fact have little to do with either religious dogma or with conjugality as such. Rather they signal the features of all adult relationships of high affect and interdependence in which parties have some understanding of their roles, and are comfortable with and accepting of those roles.[29]

IV. Liturgy of the word[30]

John 1: 1 – *"In the beginning was the Word: the Word was with God and the Word was God"*.

A. First Reading[31]

Genesis 11:9 – *"That is why it was called Babel - because there the Lord confused the language of the whole world. From there the Lord scattered them over the face of the whole earth"*.

For a legal pluralist, law is a language – a language of interaction. And like the manifold natural and artificial languages that human beings have invented,[32] the manifold

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[29] See **Law Commission of Canada**, *Discussion Paper: Recognizing and Supporting Close Personal Adult Relationships*, Ottawa, Minister of Public Works and Government Services, 2000.

[30] This section of the Mass features readings and chants drawn from Sacred Scripture. Thereby, God speaks to his people, revealing the mystery of redemption and salvation while offering them spiritual nourishment; moreover, it is believed that Christ himself is present in the midst of the faithful through his word. See *USCCB, supra*, note 1, at IIIB.

[31] Non-biblical texts are excluded from the Liturgy of the Word. The first reading is typically drawn from the Hebrew Scriptures and the second reading from the Christian Scriptures in order to shed light on the unity of both testaments and salvation history. See *USCCB, supra*, note 1, at IIIB.

[32] On law as a social symbolism generally see **S.K. Langer**, *Philosophy in a New Key*, 3rd ed., Cambridge, Harvard University Press, 1957. On the idea of law as a language of interaction see **L. Fuller**, "Law as an Instrument of Social Control and Law as Facilitation of Human Interaction", *Brigham Young University Law Review*, 1975, p. 89.

legal languages we speak and act out every day are human inventions. Thus is raised the spectre of difference, of diversity, of social disaggregation.

A critical legal pluralism does not fear Babel. Rather than seeing the multiplicity of languages as the source of all discord, or the challenge to construct some unified harmony in defiance of this auditory variety, we can appreciate the potential of such plurality of difference for our flourishing as human beings. Just as a child brought up speaking more than one language benefits early on from learning that there can be drastically different ways of saying the same thing, so also does the jurist who learns that there is more than one way of expressing a legal idea.[33]

There is a plurality of differences in how human interaction can be symbolized as normative.[34] Plurality is present not just in the recognition of discrete languages of interaction, nor just in the recognition of multiple dialects, pidgins and creoles. Plurality is at the foundation of interaction itself – in its grammar, its syntax, its vocabulary, and its practice. What appears as one plays out as the many. A verb is more than just a word: it may have moods (indicative, imperative, interrogatory, subjunctive, hortatory), and voices (active, passive), tenses (present, imperfect, past, future, conditional, future anterior), number (singular, plural), cases (first, second and third persons), grammatical functions (gerunds, gerundives, present participles, past participles), and structural properties (transitive, intransitive, reflexive).

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[33] The story of Babel is often presented as teaching that when human beings had but one language, they were able to undertake a conquest of the heavens. Only God's wrath prevented them from building upon the unity of our speech. However, an alternative interpretation commends itself. We were misguided in believing that a single language would give us the power to reach absolute heights. Far from being wrathful God saved us from our hubris. To ensure that we would never fall prey to it again, we have been blessed with a multiplicity of languages. This latter reading, in which God's creation of a plurality of languages is regarded as a blessing and a gift rather than a curse and a hindrance to our life on earth together, reflects the hermeneutic commitment of critical legal pluralism. See **R.A. Macdonald**, "Legal Bilingualism", *McGill Law Journal*, 1997, Vol. 42, p. 119. Another reading of the story of Babel is given by **Barbara Johnson**, *Mother Tongues: Sexuality, Trials, Motherhood, Translation*, Cambridge, London, Harvard University Press, 2003, pp. 16-17. She discusses how the mythical narrative construction of a period like the one in Babel is an exercise in back-formation. According to the logic of back-formation, the presence of a multiplicity now indicates an original unity. This, however, is not necessarily true. The motive for this particular type of back-formation stems from a desire to justify the difficulty we encounter when faced with the multiplicity of languages; rather than confront the challenge we invent a story that explains it as punishment, to be borne and gritted not embraced and engaged with.

[34] The differences between economic, sociological, theological, psychological and legal normativity are discussed in **R.A. Macdonald**, "Triangulating Social Law Reform" in **Y. Gendreau**, ed. *Mapping Society Through Law*, Montreal, Éditions Thémis, 2004, p. 199.

In the same way, a legal rule is more than just a norm, and the grammar of normativity is equally complex.[35] The multiple moods and voices of interaction reflect the plural sites and modes of legal normativity. These moods and voices may be imagined as two spectra, the former capturing their site (the manner of their elaboration) and the latter their mode (the way in which meaning is extracted from them).[36] When these two spectra are imaged as intersecting axes, a four-cell table of normativity emerges.

The site of law (its manner of elaboration) may be explicit or implicit; this depends on whether the norm came into being as a result of a deliberate creative process or not. Because statutes are promulgated and judicial decisions handed down in full awareness of their normative status, as official product of an institutional process, they are examples of explicit legal norms. By contrast, implicit norms do not result (within any particular normative regime) from a conscious elaboration. Rather, they emerge from behavioural practices at home, at work or in the community. An implicit norm may result directly or indirectly from an identifiable social practice.

The modes of law (the way meaning may be extracted from norms) comprise the second axis of this normative typology; this relates to how a given norm is articulated. On the one hand, there are formal norms that are presented canonically and typically reflected in words like those of a statute. However, a formal norm may not necessarily be explicit in terms of the fact they may never have been consciously elaborated. Thus, norms derived from commercial practice are at once formal and implicit. On the other hand, there are inferential norms. Unlike formal norms, these do not possess a fixed textual or practical formulation. Thus, judicial decisions constitute examples of explicit yet inferential norms. While the courts are conscious of the fact they are elaborating legal norms, the *ratio decidendi* of a court judgment cannot be reduced to a precise rule through the simple application of a succinct formula; it must be inferred from the entire text of the judgment. Inferential norms may also be implicit. For example, the general principles at the foundation of a normative system like

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[35] Many jurists have attempted a grammar of norms. At one extreme one may situate Kelsen, who imagine a formal singularity to legal normativity: "law is the norm that stipulates the sanction" **H. Kelsen**, *General Theory of Law and State,* A. Wedberg trans., New York, Russell and Russell, 1961, p. 61; At the other, one may situate Bentham, who imagines an incredibly diverse taxonomy of legal rules. **J. Bentham**, *Limits of Jurisprudence Defined: Of Laws in General*, London, Athlone Press, 1970.

[36] See **R.A. Macdonald**, "Vers la reconnaissance d'une normativité implicite et inférentielle", *Sociologie et Sociétés,* 1986, XVIII, p. 47.

justice or equity are fluid concepts that are nowhere either written out or summed up in canonical form.

Together this normative map yields four archetypes: explicit and canonical norms (manifest or patent norms); explicit and inferential norms (allusive norms); implicit and canonical norms (customary norms); and implicit and inferential norms (latent norms). While it is intuitively plausible to plot existing artefacts into this matrix -for example, legislation as patent norm, judicial precedent as allusive norm, trade usage as customary norm, general principle of law as latent norm- no one-to-one parallel is possible Some statutes may enact symbols or pictograms, rendering the norm allusive; some judgments state a "rule of law", or a patent norm; some erstwhile general principles are specified by a judgment or a statute into patent or allusive form.[37] As in the grammar of natural languages, the grammar of normativity is hypothetical and is constantly shifting through its deployment. Understanding the possibility of law's grammar is to understand both its syntax -the established usages of grammatical construction and the rules deduced therefrom- and modern usage.[38]

V. The responsorial psalm[39]

Psalm 145 - "The Lord is compassionate to all his creatures".

Given that normative phenomena like the law of the political State are not tangible objects, the question becomes how to recognize the dynamic heterogeneity of different types of legal norms that shape understandings of marriage within any particular official system. For example, in the sociological sense, the concept of a close personal adult relationship is a congeries of implicit practices and inferential normative intendments. If, however, within any given legal regime, this relationship has been certified (canonized) through marriage, then the relationship is overlain with manifold explicit and formal rules and expectations. More than this, over time the normativity of a close personal adult relationship may come to be

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[37] There is a further complication. Norms may change their character through internormative transfer. It may be that a consciously elaborated norm from a particular legal regime reflects itself as an implicit norm by unconscious adoption within a different regime. And it may be that one regime explicitly enacts a norm that is only implicit in the regime from which it is transferred. These internormative transfers are addressed in **R.A. Macdonald and H. Kong**, "Patchwork Law Reform" *Osgoode Hall Law Journal*, 2006, Vol. 44, p. 11.

[38] On this general conception of normativity see **R.A. Macdonald**, "Office Politics" *University of Toronto Law Journal*, 1990, Vol. 4à, p. 451.

[39] The purpose of the responsorial psalm is to foster meditation on the word of God. See *USCCB, supra*, note 1 at IIIB.

significantly shaped by implicit and formal practices of those within the relationship. And finally, especially where people in a troubled relationship seek help from a counselor, the relationship may also develop a set of highly explicit, but inferential norms. There is no language that holds these different normative registers in harmony. Each is an independent theme upon which the others can only be variations.[40]

VI. Second reading

> 1 Corinthians 13: 1, 9, 12 - *"If I have all the eloquence of men or of angels, but speak without love, I am simply a gong booming or a cymbal clashing […]. For our knowledge is imperfect and our prophesying is imperfect…Now we are seeing a dim reflection in a mirror; but then we shall be seeing face to face"*.

Any conception of law is necessarily partial; we speak only what we know, and we can never know unmediated by our time and location.[41] Before we say what we see is the law, we must be conscious of what we are doing and how we are doing it. Fully to understand law as a language of interaction we must attend to the grammar of all legal artefacts. The endeavour requires applying this typology of norms -this normative map- to law's concepts, its institutions, its processes, its methodologies, and even the very bases of its authority.[42]

Consider, first of all, normative institutions. Explicit institutions may be distinguished from implicit ones by the degree to which they are the result of a conscious creation. Whether they are formal or inferential turns on the scope of authority to which they lay claim. Formal institutions, whose principal and primary goal is to create norms, justify their authority by reference to their "jurisdictional power". Whereas inferential normative institutions are not solely based on the creation of norms but possess a commitment to broader social objectives that nonetheless involves the exercise of a certain external authority. Once again legal normative institutions may be both explicit and formal, like state legislatures, implicit and formal, like voluntary associations, explicit and inferential, like non-incorporated religious communities, or implicit and inferential, like persons of experience such as a trusted mentor or parent.

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[40] The notion of theme and variation in legal normativity is explored in **R. A. Macdonald and C. Siebert**, "Orchestrating Legal Multilingualism: *12 Études*" in **J.-C. Gémar and N. Kasirer**, eds., *Jurilinguistique: entre langues et droits*, Montreal, Thémis, 2005, p. 377.

[41] We are like the traveler in Kafka's *Before the Law,* forever precluded from a face to face encounter with the law. See **F. Kafka**, *The Trial* in *Complete Stories*,W. and E. Muir trans.,London, Minerva, 1992, p. 3.

[42] See **R.A. Macdonald**, *Les Vieilles gardes*, *supra*, note 16 for a more extensive elaboration and application of the legal pluralistic analysis of normative types to institutions, processes and methodologies.

Normative procedures and methodologies may also be conceived as patent, customary, allusive or latent. Explicit normative processes may be distinguished from implicit processes by the presence of an outside third party whose role is to structure the relations between the two parties. In the case of implicit normative procedures, no such third party exists and it is the parties involved who themselves subject their behaviour to a normative analysis. Whether such procedures may be characterized as formal turns on whether they permit only a limited number of justificatory arguments to support the resulting norm. By contrast, an inferential procedure is elaborated from a variety of justificatory arguments whose inclusion is not governed by any particular constraint and whose spontaneous normative result is not presented in a syllogistic or otherwise imposed form. Thus, adjudication is an example of a manifest legal normative procedure, being both explicit and formal. Giving a discretionary decision, however, as it is both explicit and inferential, may be called an allusive normative procedure. Contractual negotiations, by their at once implicit and formal character, are a customary form. Finally, the continuation of relations based on trust and confidence, is a latent form because of its implicit and inferential nature.

Every artefact we associate with law in western society may be plotted along these intersecting axes. Normative diversity is inherent to social life and this heterogeneity presupposes that legal pluralism must reveal the normative complexity both across multiple legal orders occupying the same social space as well as within each one of them. Normative fluctuations persist: there exist unequal distributions of power among normative orders; and there exist different dynamics of power and counter-power within them. These fluctuations in power determine the trajectories of norms, normative institutions and normative processes. Such a plurality of artefacts both within regimes and across regimes can suggest that there is, in fact, no normativity – or at best that there is an irreducible normative mêlée.

Yet, human beings communicate despite the apparent sophistication of grammar, syntax and vocabulary of any given language. And human beings communicate despite the plurality of languages that we speak. And human language remains incredibly rich and diverse, despite the constant exportation and importation of linguistic artefacts. A legal pluralist would reach the same conclusions about the language of law. While all law is

normative, all legal normativity, like all grammar and syntax is hypothetical.[43] The obligatory nature of a norm depends on the agency of the purported "norm-subject". If the human agent does not regard himself or herself as having an obligation then no obligation exists. Because legal subjects are legal actors that play a role in constituting their normative reality, every person is the irreducible site of law. All human agents ultimately decide the relative weight of different normative regimes and different types of norms, and the precise bearing they have on their normative lives.

VII. Gospel[44]

Luke 20: 25 - *"Well then", he said to them, "give back to Caesar what is Caesar's-- and to God what belongs to God".*

The concept of marriage that is predominant in states whose legal systems have been derived from Romano-Germanic and Common Law traditions emerged over the past millennium from a particular socio-cultural-religious heritage. While this concept never completely captured the sociology either of close personal adult relationships or of adult conjugal relationships, for several centuries the prescriptive idea of marriage as a formal rite consecrating a partnership (1) between one man and one woman, (2) who freely consent to the partnership, (3) who are not closely linked by consanguinity, (4) who pledge conjugal exclusivity to each other whatever life's fortune, (5) and who do so for their natural lives, did reflect (and perhaps even helped to construct) the dominant paradigm of domestic relationships.[45]

Today, however, this traditional concept can no longer be taken either as a descriptively accurate or a prescriptively dominant account of close personal adult relationships. The nuclear family (and the associated idea of marriage for love) exerts a less powerful bond on spouses than that historically exerted by the extended family (and the

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[43] For a like conclusion see **H. Fowler**, *A Dictionary of Modern English Usage*, 2nd ed. revised by E. Gowers, Oxford, Clarendon, 1968.

[44] The reading of the Gospel is central to the Liturgy of the Word because through relating the words and deeds of Jesus Christ one most powerfully evokes the presence of the Risen Lord among the faithful; therefore all stand up just before it is read and sing the Gospel Acclamation. See *USCCB, supra*, note 1, at IIIB.

[45] For discussion see **M.D. Jordan**, *Blessing Same-Sex Unions: The Perils of Queer Romance and the Confusions of Christian Marriage*, Chicago, Unviersity of Chicago Press, 2005. For a broader cultural perspective see **A. Gautier**, "Legal Regulation of Marital Relations: An Historical and Comparative Approach", *International Journal of Law Policy and Family*, 2005, Vol. 19, p. 47.

associated idea of marriage as a socio-political-economic arrangement between families). Latent and customary norms have been emerging that are at odds with the manifest legal norms treating high affect adult relationships. As people live longer, marriages last longer and marriage vows "till death do us part" become harder to sustain. The social stigma that once attached to practices like spousal abandonment, desertion, separation from bed and board, and divorce on the one hand, or living together as an unmarried couple, adultery and group conjugality on the other, is much less potent than previously. Moreover, many other domestic arrangements between adults that historically remained relatively discreet are now being overtly proclaimed.

At the same time, States have increasingly come to deploy the concept of marriage as the primary omnibus referent for a whole gamut of social and economic policies - tax, pension, social welfare benefits, survivorship, housing and insurance rights. Even though it is not always clear that there is a direct connection between the fact of marriage and the policy goals being pursued, because marriage is a handy concept for identifying a large number of those who are to be targeted by the policies in question, it is often reflexively used by legislatures in this way. And because the law has now invested so much policy baggage in the concept of marriage it has made the definition of marriage and not the policy goals themselves the focus of political and social debate.[46]

Two fundamental roles of law are to announce principles for the effective organization of social life that take account of actual patterns of human interaction, and to state the central values and moral principles that are thought to be at the foundation of social life. Whatever the utility of a legal definition of marriage derived from religious ideals for consecrating certain high affect adult relationships, as the basis of legislative policy designed to promote the physical, emotional, economic, and psychological security of couples, the concept of marriage is both under and over inclusive.

It is under-inclusive because it excludes many stable, nurturing adult relationships of independence and interdependence that are deserving of being embraced within the social policies adopted by Parliament and recognized as involving such high affect relationships.

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[46] For a comprehensive discussion of more than 1000 usages of the term marriage in federal legislation in Canada, and an inventory of the manifold policy concerns that these usages instantiate see *Beyond Conjugality, supra,* note 6.

The concept is also over-inclusive because some *de jure* marriages have no *de facto* content worthy of legal deference - the couple no longer lives together; or got married to facilitate immigration; or contracted a March-December marriage as an estate-tax planning vehicle; or sought simply to benefit from public or private income support programmes.

The traditional socio-cultural definition of marriage may have been, in the 19th and early 20th centuries, a reasonably effective proxy for identifying the beneficiaries of social policies. Most married persons were, most of the time, apt targets of the legal principle being announced (or appropriate recipients of whatever benefit was intended). Today, however, the increasing diversity of stable, nurturing, adult relationships means that marriage is no longer the optimal policy point of reference. Rather, it has simply become an easy tool for legislatures that do not have the political will to articulate the precise situations that they seek to target with any particular social or economic programme.

VIII. Homily[47]

> Genesis 1: 27 – *"God created man in the image of himself, in the image of God he created them, male and female he created them"*.

Early each summer, municipalities typically organize a "family day" in the local park. The community assembles for a picnic involving games and entertainment. Yet not all who actually attend are members of a conventional nuclear family. And of course, it would be silly for members of the local police force to be posted at the boundaries of the park to ensure that only real "families" were permitted to attend. After all, what is a real family?

If once the law had a well-worked out conception of what a family was it clearly no longer does. While at some level, law still makes a bow towards the idea of formal marriage, it only takes a moment's reflection on contemporary social arrangements to see how attenuated that bow has become. The popular language by which couples describe themselves -"partners", "chums", "roommates" or "spouses"- confirms the small regulatory impact that the religious notion of marriage now exerts. Today there is great variety in the types of conjugal relationships between two adults: married heterosexual couples; unmarried heterosexual couples, whether

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[47] The homily is a reflection on some aspect of the readings from Sacred Scripture and is meant to take into account both the mystery being celebrated and the particular needs of the listeners. See *USCCB, supra*, note 1, at IIIB.

one or both have either never been married, previously married or are still married to someone else; same-sex couples, whether one or both of whom have been, or still are married to someone; and polygamous households, regardless of formal marital status.

But this is not all. There are a wide range and variety of households that do not involve conjugal relationships at all: a parent and adult child who live together; two unmarried adult siblings of the same or opposite sex who live together; close friends who have been housemates for years; mutual support households of persons, one or both of whom is suffering from a physical or mental disability; persons living together in institutions, long-term care facilities, nursing homes; and so on. In many, if not most, of these situations the people involved have no hesitation in conceiving of themselves as a domestic unit.

However much governments may wish to control the types of relationships that adults may form with each other, they have recently discovered their limited capacity to do so. The precise character of a close personal adult relationship between two people -whether solemnized by marriage or not, whether recognized by a church, the state, a community, or a family- is made unique by them. In a practical, day-to-day sense, the word marriage has become a self-defining or self-ascriptive concept. The concept comprises all those couples who consider themselves to be married, and all those who are considered as married by others.[48]

IX. Profession of faith[49]

Matthew 22: 37-40 – *"Jesus said, 'You must love the Lord your God with all your heart, with all your soul and all your mind. This is the greatest and the first commandment. The second resembles it: you must love your neighbour as yourself. On these two commandments hang the whole Law, and the prophets also'"*.

Being faithful goes well beyond adhering to empty doctrinal formulae. A critical legal pluralism is not concerned with propounding a core set of beliefs to the person endeavouring

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[48] For a like conclusion in the context of same-sex marriage, see **R. Leckey**, "Private Law as Constitutional Context for Same-Sex Marriage", *Journal of Constitutional Law*, 2007, Vol. 2 (forthcoming).

[49] The purpose of the Profession of Faith, or Creed, is to respond to the word of God by calling to mind and proclaiming the great mysteries of the faith just prior to these mysteries being celebrated in the Eucharist. The profession of faith originates with the apostle, Peter. *Luke 9:20 - "'But you', [Jesus] said, 'who do you say I am?' It was Peter who spoke up. 'The Christ of God,' he said."* In the Roman Catholic Mass, the profession is made through the recitation of a formula approved for liturgical use i.e. the Nicene or Apostle's Creed, each emphasizing different doctrinal positions of the Church. See *USCCB, supra,* note 1 at IIIB.

to understand the law.[50] Rather, it assumes the task of reminding those who profess that professions of faith begin with "credo" not "cognito".

Self-ascriptive concepts are an important part of the official law in a liberal democracy. Allowing people to fashion their own lives, their own commitments, and their own families above and beyond what the state may choose to recognize is a powerful recognition of individual autonomy and responsibility. Unfortunately, however, self-ascriptive concepts are not always terribly helpful in cases where governments seek to organise social policy through law. There are two reasons why.

On the one hand, self-ascriptive concepts are culturally defined. There is a cultural meaning -more to the point, there are cultural meanings- to the concept that co-exist with whatever meaning or meanings the law seeks to impose. Since the law uses concepts and definitions as a way of announcing and framing rights and obligations, in these cases it constantly runs up against cultural practices that push on the limits of legal meaning. On the other hand, self-ascriptive concepts, being culturally rooted, often are not wielded to contest existing distributions of social power. Since one of the usual objects of social policy is to overcome gross disparities in power and to ensure that relationships have a strong dynamic of mutuality and equality, the law normally uses its concepts to identify a factual situation for which it imposes certain obligatory consequences.

No matter how broadly a concept is defined by law, if the status it confers depends only on self-ascription, many of those intended to be the beneficiaries of the status will be excluded. Suppose that the law were amended to provide that persons of the same sex could get married, and that were they to do so, the full panoply of rights and responsibilities currently attaching to the status of marriage would apply to the same sex-couple. This opening up of the concept of marriage might well address many of the legal concerns now expressed by same-sex couples. But just as in the case of heterosexual couples, it would be of no help to one of the partners in a common law same-sex relationship who wants to get married, but who is unable to convince the

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[50] The observations that give rise to monism, centralism, positivism and prescriptivism as interpretations of law are not in themselves uncongenial to a critical legal pluralism. But by over-accentuating the importance of any or all of these interpretive commitments, one risks falling into the fanaticism of the heretic or even apostate. The debate between Richard Posner and Robin West addresses the risk. See **R. West**, "Authority, Autonomy and Choice: the role of consent in the moral and political vision of Franz Kafka and Richard Posner", *Harvard Law Review*, 1985, Vol. 99, p. 384; **R. Posner**, "The Ethical Significance of Free Choice: A Reply to Professor West", *Harvard Law Review*, 1986, Vol. 99, p. 1449; and **R. West**, "Submission, Choice and Ethics: A Rejoinder to Judge Posner", *Harvard Law Review*, 1986, Vol. 99, p. 1449.

other that they should do so. Nor, even more so, would it assist an adult involved in a close personal interdependent relationship seeking to formalize a status when the other party refuses.

One's faith must always be tested in the faith of others.**51**

X. Prayers of the faithful[52]

1 John 3:18 - *"My children, our love is not to be just words or mere talk, but something real and active"*.

Adopting a critical legal pluralist perspective facilitates informed human action. Acknowledgement of plurality and uncertainty does not preclude activity; it readies the soil for seeds of change. Take the example of determining who should be the appropriate beneficiaries of diverse State social policies. Over the past fifty years, a chasm has opened between the traditional socio-cultural-religious concept of marriage and the panoply of personal relationships ideally to be targeted by State social policy.

This disjuncture confronts States with deciding whether a response is warranted. They might, for example, decide that since the point of law is to be normative, the appropriate response is simply to police more effectively the forms of close personal relationships between adults. That is, States may insist of the primacy of law over fact. Or, they might choose the alternative route for bridging the gap – accepting the primacy of fact over law. As a rule, European States have taken the latter approach, adopting one of two predictable legal responses in doing so.

The first reflex is to extend the concept of marriage by analogy. Many legislatures have been responsive to the argument that other non-marriage relationships should be analogized to marriage for purposes of identifying who should be eligible to receive a given benefit. During World War II they often provided that most "common law" spouses of soldiers killed on active duty would be able to claim a military widows' pension under the same conditions as legally

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[51] In this sense, all law, whatever its site and whatever its mode can only be a hypothesis of action. All normativity is ultimately implicit and inferential. See **R.A. Macdonald and J. MacLean**, "No Toilets in Park", *McGill Law Journal*, 2005, Vol. 50, 721.

[52] In the Prayers of the Faithful, the people offer prayers to God for the salvation of all. In this way, the Prayers of the Faithful serve a particular purpose in the course of the wedding celebration, by situating the marital union between two people within the context of society at large. *See USCCB, supra*, note 1 at IIIB.

married widows of soldiers killed on active service. Over the years this type of extension of the definition of marriage by analogy has become a frequent practice.[53] Yet, because these extensions have always been an *ad hoc* response to particular situations where the appropriateness of the extension has been almost unanimously agreed, they have never provoked a rethinking of the policy bases of the benefit in question. Moreover, because the concept of marriage remains the default register for identifying who should receive these social benefits, there are clear limits on the kinds of relationships to which the analogy can be extended: no extended concept of the traditional socio-cultural definition of marriage will ever reach two elderly siblings who have always lived together in a non-conjugal relationship.[54]

For these reasons, other legislatures have accepted the argument that the concept of marriage should be explicitly expanded and redefined so as to remove from the idea two elements upon which it has heretofore rested: the notion of a relationship between two persons of opposite sexes; and the notion of a relationship that has as one of its potential outcomes, procreation. On this view, marriage would be redefined so as to cover all manner of non-traditional stable, adult relationships of dependence and interdependence.

These two responses have, of course, provoked consternation among policy-makers and confusion verging on a crisis among those charged with trying to draft legislation. As governments recognize the pitfalls of using socio-cultural concepts to ground the legal definitions through which social policies are advanced they are compelled to grapple with figuring out the best ways to express who should be entitled to claim the benefit of these policies. In a modern socio-demographically diverse society, where the life projects of citizens can be multiple and highly different one from the other, legal definitions grounded in the moral-religious traditions of a particular group are no longer a sound basis for deciding legal policy. In

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[53] The Canadian example is instructive. During the 1970s the regulatory frame was extended to all common law couples whose relationships lasted for three years. In the 1990s, following a decade of test cases, the Supreme Court of Canada determined in *M. v. H.*, *S.C.R.*, 1999, No 1, p. 328 that legislation denying to sex-same couples the benefit of support obligations under family law legislation was unconstitutional. The Parliament of Canada then responding by enacting legislation entitled the *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12 which amended several hundred federal statutes to extend social benefits previously available only to heterosexual couples, whether married or not, to same-sex couples.

The extent of the policy conundrum can be seen in the different reactions of Canada's federal Parliament and provincial legislatures to the *M. v. H.* decision. In the *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12 Parliament merely extended the scope of the definition of common law spouse, which till then had been analogized to the definition of "spouse" in federal legislation, so as to include same sex couples. In Ontario, by contrast, the *Act to amend certain statutes because of the Supreme Court of Canada Decision in M. v. H.*, S.O. 1999, c. 6 redefined the word "spouse" to exclude common law spouses, and created a new category of "non-spousal relationships" that included both heterosexual and homosexual couples.

effect, whatever symbolic victory traditional marriage appears to enjoy by its continued presence on the statute books is unsustainable in the long term if the concept cannot reach a range of relationships of the same order as those it does embrace.[55]

XI. The rite of marriage[56]

Mark 10: 8-10 - "*But from the beginning of creation God made them male and female. This is why a man must leave father and mother and the two become one body. They are no longer two, therefore, but one body. So then, what God has united, man must not divide*".

A. Statement of intentions[57]

The bond between state law and the concept of marriage is, in a secular society, an unholy union crying out for annulment or divorce. In contemporary debate the relationship is presented as one of conflicting supremacies.[58] For some, marriage has always been a religious institution and that "deeply held cultural traditions and religious belief in the sanctity of marriage as a union of one man and one woman" would be betrayed should the State disjoin the two. For others, the two ought never to have been conjoined and the State today is merely claiming ground it always controlled but never possessed.[59] Both mistake the issue. While the State in Europe could exist perfectly well without itself defining the concept of marriage until the 19th century -deferring that question to religious bodies- such an option is no longer possible in the 21st? The denial of internormative effect is not an option because there is neither one religious or cultural perspective nor a single secular perspective. To reconcile

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[55] More than this, current legislative and judicial responses consciously use an outdated conception of family and marriage to avoid addressing the policy concerns that underlie the recognition of close personal adult relationships. For example, in Canada the federal Parliament was explicitly invited by the Law Commission of Canada in 2001 to address the fundamental policy question. It declined, but rather, in the *Reference re Same-Sex Marriage* , *S.C.R.*, 2004, No 3, p. 698 it asked the Supreme Court to pass on the constitutionality of legislation that when enacted became the *Civil Marriage Act*, *S.C.* 2005, c. 33. The Court obligingly concluded that the proposed legislation -- which removed the opposite sex requirement as a requisite to marriage -- did not infringe section 15 (the equal protection section) of the *Canadian Charter of Rights and Freedoms.*
[56] "According to the Latin tradition the spouses as ministers of Christ's grace, mutually confer upon each other the sacrament of Matrimony by expressing their consent before the Church." *1623 Catechism of the Catholic Church*, London, Geoffrey Chapman, 1998.
[57] The priest questions the couple about their freedom of choice, faithfulness to each other, and the acceptance and upbringing of children. See **Rev. Joseph Champlin**, "The Rite of Marriage" in *Together for Life*, Notre Dame, Indiana, Ave Maria Press, 2004, p. 87.
[58] The expression is from **R. Leckey**, *Profane Matrimony, supra*, note 25, at 2.
[59] In Canada the two positions were argued in these terms by leaders of Canada's leading political parties. See **Canada**, *House of Commons Debates* (16 February 2005) at 3580 *et seq*. (Mr. Harper), and 2575 *et seq*. (Mr. Martin)

diverse and competing secular interests in a democratic society requires first the recognition of diversity within religious and cultural traditions themselves.

B. Expression of consent[60]

Some would argue that whatever its sectarian origins, legal marriage now performs an important function as a secular institution; namely, it permits people the opportunity publicly to affirm their commitment to each other. To banish marriage from the legal landscape would create a void in society that religion either no longer can or should fill. However, the mere fact of legal solemnization says nothing of a relationship's duration, intensity or scope. Indeed, there is no necessary correlation between the legal concept of marriage and the fact of economic and psychological integration or even evidence of cohabitation. Far from signifying the presence of the traditional Christian wedding vows, the legal concept of marriage is more likely to evoke the image of a shaky institution laden with a legacy of patriarchy and chauvinism. No-fault divorce mechanisms and the absence of a limit on the number of times one can remarry provided the previous marriage has been legally dissolved results in civil marriage being a very weak symbol of mutual devotion.[61]

C. Blessing and exchange of rings[62]

What is more, religious ceremonies do not offer the only alternative to people wishing to express publicly their commitment to a relationship. A wide variety of media and expressive forms are possible for this action. Why should it matter whether "society" acknowledges this relationship at all? Besides, as it stands, does the place of marriage in the State law rubric actually lead to anything more being conferred on couples than certain social and economic benefits? Those who have engaged in the long struggle for equal recognition of

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[60] In the first form of the consent, the ritual text indicates the groom and bride make this statement to each other. See **Rev. Joseph Champlin**, "*The Rite of Marriage*" *loc. cit.* note 57. In actual practice, however, they generally repeat it phrase by phrase after the priest or deacon. Thus, even though the Western theology of marriage stresses that the bride and groom are the ministers, in practice, they do not often exchange their consent in either form without the mediation of the priest or deacon; See **Paul Turner**, "The Theology of Marriage in the *Ordo* and Practice of the Roman Rite" Ephrem's Theological Journal (8/2) available online at: http://www.paulturner.org/marriage_theology.htm.

[61] In *Sex and Social Justice*, New York, Oxford University Press, 1999, **Martha Nussbaum** argues that the so-called traditional view covers up a number of doctrinal and practical differences in people's experiences of marriage within every religious tradition.

[62] In the ring ceremony, the groom and bride give the rings to each other. The priest or deacon blesses the rings, but the ministers – the couple – make the presentation. See **Rev. Joseph Champlin**, "*The Rite of Marriage*" *supra* note 57, p. 89, 90.

same-sex partnerships may answer that it does. If anything the symbolic significance of the legal concept of marriage is its privileging of heterosexual monogamous relationships over homosexual ones. Maintaining the concept of marriage in law in order to expand its definitional boundaries to include same-sex couples, some would argue, is important for affirming the equal rights of gays and lesbians.

D. Signing of the registry and certificates

Another question is if the law is to distribute benefits based on concepts of relationship status, is not *some* form of legal certification necessary to recognize the relationships that qualify? In effect, some argue, since elimination of the concept of marriage would just lead to its reincarnation under another name, why bother? The purpose of state withdrawal from the marriage business is to see that people in certain relationships of dependence and interdependence gain access to the large number of benefits currently being reductively funneled through the legal concept of marriage. A critical legal pluralist approach to the question of how the State may reinforce close personal relationships in their fulfillment of peoples' social and psychological needs requires paying attention to legal norms, institutions and methodology beyond those appearing in manifest form. Changing law's expressive forms means deferring to the wildly heterogeneous character of social life, and being resourceful in creating legal artefacts that recognize and engage with this heterogeneity.

XII. Liturgy of the eucharist[63]

> Luke 22: 4 - *"Then [Jesus] took some bread and when he had given thanks, broke it and gave it to them saying, 'This is my body which will be given for you; do this as a memorial of me'. He did the same with the cup after supper and said, 'This cup is the new covenant in my blood which will be poured out for you' ".*

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[63] Eucharist is one of the seven sacraments of the Roman Catholic Church, and is also considered the "the source and summit of the Christian life". It acknowledges Jesus' instruction to his disciples (1 Corinthians 11:24-25) and is a commemoration of the Passion, Death, and Resurrection of Christ (the Paschal Mystery). See *Catechism of the Catholic Church*, *supra* note 6.

A. Presentation of the gifts[64]

Matthew 25: 29 – "*For everyone who has will be given more, and he will have abundance. Whoever does not have, even what he has will be taken from him*".

There are two conceptions of law that may inform understanding of every one of its institutions. Law may be conceived of as a mere instrument of social control and made up of a series of commands directing human beings in their life projects and actions. Or it may be seen as a mechanism of interaction and empowerment that works by providing guidelines for self-directed human behaviour.[65]

The first conception rests on a rather pessimistic view of human nature. Because most people are not usually inclined to act fairly and responsibly towards each other, the directing hand of law, preferably official law in the form of statutes enforced by the governmental agencies and the police, is needed to organize people's lives. Law's role is to set out precisely not only what must be done, but how it must be done, and when. This idea of law leads to a quite specific model for the way in which legislation should be written. It treats laws as if they were the top-down orders of a business manager or the commands of an army general. The only concern of legislatures should be to draft a statute that is the most effective mechanism for issuing, transmitting and enforcing orders intended to regulate behaviour. Their purpose is to specify exactly what people can and cannot do, and to empower officials to ensure compliance.[66]

People who cleave to the second view usually have a more optimistic view of human nature. They believe that people really do have the capacity to live responsibly and with due regard for the interests of others. For them, fairness and reciprocity generally characterize social interaction. People only need to be reminded of their obligations and of the variety of ways in which to fulfil them. Official law directly comes into play only at the margins of everyday activity, in those few cases when people behave irresponsibly. On this view, since most social

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[64] Bread, wine and water are brought to the altar because according to the Gospel these are the elements Jesus took into his hands at the Last Supper. See *USCCB, supra*, note 1, at IIIC.

[65] On the general character of rules see **H.M. Hart and A. Sacks**, *The Legal Process: Basic Problems in the Making and Administration of Law*, in W. N. Eskridge and P.P. Frickey, eds., Westbury N.Y., Foundation Press, 1994; **F. Shauer**, *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, Oxford, Clarendon Press, 1991.

[66] This view is implicit **Jeremy Bentham**, *An Introduction to the Principles of Morals and Legislation*, H.L.A. Hart and J.H. Burns, eds., Oxford, Oxford University Press, 1996.

practices and values reflect the aspirations of a liberal-democratic society, successful law depends only on enacting rules that are largely in harmony with these practices and values. The role of law is to help people to recognize the duties they have to each other, to encourage them to fulfil those duties, and to give them legal techniques and devices for doing so.[67]

The gift of law is its capacity to accomplish both purposes together - to celebrate our potentialities as human beings while recognizing our frequent shortcomings.[68] A critical legal pluralism takes such a view and avoids framing law dogmatically.[69]

B. The eucharistic blessing[70]

John 8: 1-11 - *"Let he who is without sin cast the first stone."*

If the law of marriage is fundamentally a law about human relationships, this requires a recasting of basic orientations. On the one hand, it suggests that procreation is only one feature of close personal adult relationships. On the other hand, it also suggests that conjugality – the sanctification of sexual desire is no longer a central element of close personal relationships. The policy centrepiece is to nurture the physical, emotional, psychological and economic security of persons in stable, nurturing, adult relationships of dependence and interdependence. How then, may such relationships be blessed? How might a legislature rewrite its various laws relating to pensions, tax, insurance, or whatever, so that the criterion for eligibility would relate to purposes of, and substantive facts about, the relationship -its length and character, for example- rather than to the precise marital status of the persons in it?

Since at least Roman times European private law and the law carried over to former European colonies have been grounded in an approach to legal definitions that lawyers usually call "legal formalism". This means that fundamental legal concepts have been defined in one of two ways. Some are defined by reference to something in the material world - physical persons,

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[67] See **Thomas Aquinas**, *Summa Theologica*, *prima secundae*.
[68] See **L. Fuller**, "*Law as an Instrument of Social Control*" *supra*, note 31.
[69] Just as Jesus, in responding to those who would condemn the adulteress, draws a line in the sand accompanied by an invitation to those who would act in good faith rather than carving commandments into stone to discipline the unfaithful, a legal pluralist does not presume that law must proscribe definitively in order to prescribe the possibilities for responsible behaviour.
[70] In this blessing thanks is given to God for the whole work of salvation; according to the doctrine of transubstantiation, the offerings of bread and wine become the Body and Blood of Christ. See *USCCB, supra* note 1, at IIIC.

land, objects; others, that do not relate to a thing, but rather a status or an activity -a sale, a lease, heirship- have been defined by deducing their "true characteristics or their essential nature". Nonetheless, where a legal concept defined by its "essential characteristics" is grounded in socio-cultural reference points such as custom, tradition, religion, morality or ideology, analogical extensions can cause significant debate. This is particularly the case when they are fictitiously or even analogically extended by law well beyond the definitional limits provided by these other socio-cultural reference points. Enter functionalism.

C. From Form to Function

Only rarely have everyday legal concepts initially been defined by asking what purpose they serve. Today functionalism is becoming an increasingly common recourse, because a purposive approach allows more room for interpreting social facts and developing organizing frameworks than a neo-conceptualist or rights-based approach to legal change. But functionalism is not without its pitfalls. Years ago Hannah Arendt signaled the pervading tendency, particularly within the social sciences, of the "almost universal functionalization of all concepts and ideas".[71] Just because two things perform the same function, does not mean they are the same thing. "It is as though I had the right to call the heel of my shoe a hammer because I, like most women, use it to drive nails into the wall". Distinctions matter. Indeed, the purported "function" that unites disparate phenomena is itself a conceptual construction. Yet the plausibility of functionalism obscures its own contingency.

This said, in order for a legal pluralism to be hypothetically normative and not merely observational it is necessary to adopt *some* interpretive approach. What drives a *critical* legal pluralist approach to law is the acknowledgement that even if a functionalist approach involves the evaluation of purposes with no pre-determined ideological attachments, as interpretation it is not neutral. For a critical legal pluralism, functional equivalence must be found in a separate inquiry about the justness and justice of any particular claim to equality or equivalence. Functionality is an approach, not an outcome.

Our construction of social fact depends on our interpretive purposes. Because we are not all knowing, one of our purposes must be to keep our eyes and ears open to the potential

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[71] **Hannah Arendt**, *What is Authority?* in *Between the Past and the Future: Eight Exercises in Political Thought*, Harmondswort, Penguin, 1968, p. 101.

plurality of conceptual tensions resulting from the act of interpreting social data. This admission is the key to employing a functionalist approach to examining legal concepts in general, and the concept of marriage in particular. The acknowledgement enables us to situate legal pluralism as legal theory: it presupposes that certain questions must be addressed; it is relatively catholic about the ideological foundations of normative systems; it acknowledges the contingency of notions such as "efficacy"; and it accepts that its descriptions will always be works of imagination, no matter how much they are informed by empirical enquiry.

D. From function to symbol

We propose reforming the law in light of these concerns. To be effective law reform must capture the loyalty and fidelity of citizens to the implicit values being advanced. The symbolic aspect of normativity, the message that a particular means of conceiving of rules gives to citizens is as important as any instrumental measure.

As Jean Hampton notes law possess a significant expressive force, symbolizing a community's sense of values, what she call its "political personality".[72] The use of concepts that have a deep social meaning in order to achieve policies that have no necessary connection with the concept actually comes to change the essential characteristics of the concept, often in a way that conflicts with the understanding of the diverse non-state normative communities where it had its origins. It is time to stop thinking about the true definition of marriage and start thinking about how to identify the true scope of legitimate state interests in structuring and nurturing healthy adult relationships of dependence and interdependence that serve the interests of those who are involved in such relationships. The symbolic value of law that reflects this reordering in priorities expresses a political personality more attuned to the needs of human beings.

Almost all the social policies that are now made parasitic on the concept of marriage can be seen actually to depend on legislative assessments of the intensity of dependence and interdependence and nurture within a relationship. Thinking through what public policies we wish to pursue as a society, given the evident plurality of domestic situations that seem to cry out for some response is, obviously, a delicate and difficult task.

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[72] **J. Hampton**, "Punishment, Feminism, and Political Identity: A Case Study in the Expressive Meaning of the Law", *Canadian Journal of Law and Jurisprudence*, 1998, Vol. 11, p. 23.

XIII. The Lord's prayer[73]

Matthew 6:9-13 - "*So you should pray like this: Our Father in heaven, may your name be held holy, your kingdom come, your will be done, on earth as in heaven. Give us today our daily bread. And forgive us our debts, as we have forgiven those who are in debt to us. And do not put us to the test, but save us from the evil one*".

The prayer for sustenance and purification is a recurrent, unceasing one in law. We need to believe that what we do has intrinsic meaning and we need reassurance that we can commit ourselves to finding and acting on that meaning. Remembering our debts reminds us to forgive our debtors. There is no fixed geography of temptation. Evil is in our failure to acknowledge the other, in our treatment of the Samaritan as unworthy of our regard.

XIV. The nuptial blessing[74]

Luke 10: 30-37 **-** *Jesus answered, "A certain man was going down from Jerusalem to Jericho, and he fell among robbers, who both stripped him and beat him, and departed, leaving him half dead […]. By chance a certain Samaritan, as he traveled, came where he was. When he saw him, he was moved with compassion, came to him, and bound up his wounds, pouring on oil and wine. He set him on his own animal, and brought him to an inn, and took care of him […]. Now which of these do you think seemed to be a neighbor to him who fell among the robbers?"*.

How important is the contemporary religious conception of marriage to deciding which close personal adult relationships are worthy of legal regard? This question begs for an answer that can only be given by questioning the rationale for current substantive restrictions on who may marry. In principle, there are six preconditions to marriage that are generally found in European and European derived law. Intending spouses: (1) must have reached the minimum aged to consent to marriage; (2) must have legal capacity to express that consent; (3) must not be too closely related to each other by consanguinity or alliance; (4) must not be lawfully

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[73] In the Lord's Prayer a petition is made for daily food, which for Christians means preeminently the eucharistic bread, and also for purification from sin, so that what is holy may, in fact, be given to those who are holy. See *USCCB, supra,* note 1, at IIIC.

[74] This blessing replaces the embolism that would otherwise follow the Our Father. It signifies the blessing of the couple's marital union in the eyes of God and his church.   While it is the couple's consent that is essential to the sacrament of marriage, the priest bestows God's blessing on the couple to signify that their union has been formed within the Church. See **Rev. Joseph Champlin**, "*The Rite of Marriage*" *supra* note 57, p. 89.

married to someone else; (5) must be one of only two persons proposing to marry; and (6) must be of the opposite sex.

Today, each of these restrictions is subject to significant political contestation and is, to a greater or lesser extent, under reconsideration.

Some feel that there should be no difference between consent or capacity in marriage and consent or capacity to contract generally, or even that individual consent should be dispensed with. By contrast, others feel that consent is not enough – not just arranged marriages, but also March-December and December-March marriages (so-called intergenerational marriages) should not be permitted.

Again, some feel that the rules of consanguinity are too restrictive and that biology has disproved the "gene-pool" rationale for them. In any event, not all marriages are conjugal and not all conjugal marriages produce children. Conversely, some feel that these restrictions are too narrowly drawn and should be expanded to include relationships of alliance such as brother-in-law, sister-in-law, non-consanguineous nieces and nephews, and so on.

Still again, there are those who think the bigamy prohibition is anachronistic. Why cannot those who are married set up more than one marriage household? They point to the fact that support payments between ex spouses produce this effect as an economic matter anyway. By contrast, there are those who see it as too narrowly drawn. Most often this viewpoint is expressed in the idea that married couples should not be permitted to divorce.

The fourth requirement is also a point of friction. On the one hand, many religious traditions do permit polygamy and polyandry today. As secular States become more culturally diverse, why should they not do likewise? On the other hand, some feel that there is no difference between true polyandry and true polygamy and serial polyandry and serial polygamy. There must be a limit on the number of times people can marry.

Finally, there are many who believe that same-sex couples should be permitted to marry under exactly the same conditions as opposite-sex couples. Conversely, there are those who believe so strongly in the opposite sex requirement that they would prohibit marriage even between opposite sex couples when one or the other is trans-gendered.

XV. The rite of peace[75]

> Revelation 19:7-9 - *"And I seemed to hear the voices of a huge crowd, like the sound of the ocean or the great roll of thunder answering, 'Alleluia! The reign of the Lord our God Almighty has begun; let us be glad and joyful and give praise to God because this is the time for the marriage of the Lamb. His bride is ready, and she has been able to dress herself in dazzling white linen, because her linen is made of good deeds of the saints'. The angel said: 'Write this: Happy are those who are invited to the wedding feast of the Lamb'".*

In the current "preconditions" to marriage lie a number of lessons for the design of social institutions.[76] Many are central to the critical legal pluralism imaginary of law. For example, none of these preconditions are naturally given; all are the result of socio-cultural-religious judgements – judgements that are grounded in time and space and that are typically contested even within relatively homogenous communities. Moreover, the fact that these judgements are contested means that they are important to how people conceive who they other; definitions that are not important in this way -such as, what is a security interest?- are usually dealt with pragmatically.[77] Still again, the various requirements are not inextricably linked; it is possible to permit arranged marriages between those too young to consent without permitting same-sex marriages or *vice versa*, or to permit consanguineous marriages without permitting polygamy and polyandry, or *vice versa*. Fourth, their connection today to any other social policies that the State is pursuing is at best indirect; while at one point they may have been developed because the State was trying to reinforce a particular religious vision for society, this is frequently no longer an explicit policy.[78]

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[75] The Church asks for peace and unity for herself and for the whole human family, and the faithful express to each other their ecclesial communion and mutual charity before communicating in the Sacrament. See *USCCB, supra* at IIIC.

[76] An excellent discussion of the manner in which state regulation of marriage and of same-sex relationships needs to be understood as interacting with other normative regulatory orders may be found in **R. Leckey**, "Harmonizing Family Law's Identities", *Queen's Law Journal*, 2002, Vol. 28, p. 221.

[77] The point is developed in detail in **M. Bridge** *et al.*, "Formalism, Functionalism, and Understanding the Law of Secured Transactions", *McGill Law Journal*, 1999, Vol. 44, p. 567.

[78] There is still considerable divergence even among European States, however, as to the importance of religion to the design of secular institutions. In some, like Poland today, secular conceptions of marriage do not carry significant normative weight, while in others, like France, they do. Further, in some countries like Canada, secular conceptions grounded in equality arguments found in the *Canadian Charter of Rights and Freedoms* dominate the way policy is debated. For a discussion of the complexity of different type of identity claims see **R. Leckey**, "Chosen Discrimination", *Supreme Court Law Review,* 2nd, 2002, Vol. 18, p. 445.

These lessons are only slowly percolating into legal policy. For example, people are now asking whether it is appropriate for legislatures to reconsider their use of definitions grounded in moral-religious ideals when they have available other ways of identifying the beneficiaries of social policies. In the 1970s, the legislative abolition of filiative distinctions between legitimate and illegitimate children, between legitimated and illegitimate children, and between adulterine and incestuous children is an example where social practice and government policy aimed at ensuring the "best interest of children" overtook religious precept. Should legislatures today abandon this type of legal definitions as the mechanism by which to advance social policies designed to ensure the physical, economic, emotional and psychological security of adults living together? To put the matter slightly differently, it is now the case that we are capable of imagining marriage not as the reference point for social policies that transcend its boundaries but simply as a status relationship that has no purpose other than its own symbolic expression of commitment.[79]

Imagining the certification of close personal relationships between adults as a purely instrumental act that is no different from the process of obtaining a permit to drive an automobile misses the important symbolic function of socio-cultural-religious concepts. Even were it possible to pursue social policies by defining entitlement by reference to the policy being promoted, rather than by reference to traditional socio-cultural definitions, it is not clear that this would change the contours of much contemporary policy debate. It is true, of course, that in so far as the issues of physical, emotional, psychological and economic security are concerned, the policy question could then be seen as no longer involving an attempt to determine the "true definition" of marriage.

And yet, the metaphorical use of marriage has largely transcended both its religious and even its conjugal referents. People are said to be "married to their jobs", or "wedded to a particular course of conduct". What the term marriage in everyday life implies is intensity, a status and a sense of commitment. Is it necessarily inappropriate to characterize the bond between two sisters who have always lived together, or between a father and a son who have kept a common household as a marriage? A legal pluralistic peace allows for a non-totalizing catholicity. The paradox of a critical legal pluralism eclipses a tolerant totalitarianism because

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[79] Of course, the paradox in Canada is that, until very recently, the very cases that led to the recasting of marriage have been historically cases brought precisely for economic purposes, not symbolic purposes. See the discussion in *Beyond Conjugality, supra,* note 6.

it allows us to see in our differences (not through them) our solidarity. The act of the rebel is, in this light, an individual but not a selfish act.[80]

XVI. Communion[81]

> 1 John 3:18-24 - *"God is greater than our conscience and he knows everything. My dear people, if we cannot be condemned by our own conscience, we need not be afraid in God's presence"*.

Despite the multitude of close personal adult relationships excluded from the orthodox legal definition of marriage, debate has primarily focused on same-sex conjugal unions alone. The social, economic and political responses have been several, highlighting the fact that even abstractly cast rules nonetheless privilege one conception of identity over numerous other conceptions. In the normative lives of those engaged with gay and lesbian communities the intendments of marriage may differ from the intendments presumed by insurance companies, employers and pension funds. In the normative universe of bridge clubs to which co-habiting sisters belong, the intendments of the relationship may have little to do with any legislative regime proclaimed by the State. What is important to consider in assessing responses to claims for recognition by those committed to a close personal adult relationship is the way they frame their claims, and the reaction of other similarly situated couples to these claims.

Given that the most pressing claims for recognition over the past two decades have originated in the gay and lesbian communities the issue can be best examined by considering the way in which policy responses from the State might be framed, and the positions taken by diverse same-sex couples themselves to those possible responses. There are about a half-dozen commonly mooted positions offered in response to the claim for the recognition of same-sex unions.

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[80] "Man's solidarity is founded upon rebellion, and rebellion, in its turn, can only find its justification in this solidarity." **A. Camus**, *The Rebel*, New York, Vintage Books, 1956, p. 22.

[81] Though they are many, the faithful receive from the one bread the Lord's Body and from the one chalice the Lord's Blood in the same way the Apostles received them from Christ's own hands. See *USCCB, supra* at IIIC. **D. Thomas** "My Bread you Snap" *Collected Poems 1934-1952*, London, Phoenix, 2003: *"This bread I break was once the oat,/ This wine upon a foreign tree/ Plunged in its fruit;/ Man in the day or wind at night/ Laid the crops low, broke the grape's joy./ Once in this wine the summer blood/ Knocked in the flesh that decked the vine, / Once in this bread/ The oat was merry in the wind; / Man broke the sun, pulled the wind down./ This flesh you break, this blood you let / Make desolation in the vein, / Were oat and grape/ Born of the sensual root and sap; / My wine you drink, my bread you snap."*

Some would maintain the legislative *status quo* with no accommodation even of a "registered partnership" alternative for same-sex couples. This has been, and continues to be in most States with western European legal traditions, the approach of the past twenty decades.[82]

Others see the creation of a "registered partnership" alternative in parallel to marriage is the only available status for same-sex couples. Some proposals to establish "registered domestic partnerships" or "pactes de solidarité civile" are of this nature.[83]

Still others believe that the creation of a "registered partnership" alternative for everyone, including heterosexual couples, same-sex couples and other adults in non-conjugal but high-affect relationships of dependence and interdependence, with marriage as traditionally conceived preserved as an additional option for heterosexual conjugal relationships would be optimal.[84]

A fourth position is to redefine marriage so as to overcome certain prohibitions, notably by including same-sex couples. Presently, there are two areas where there exists a significant call to do so - the recognition of same-sex marriages and the recognition of polygamy and polyandry. It is not inconceivable, however, that because marriage remains the "preferred symbolic status marker" for close personal relationships there will soon be claims to remove consanguinity prohibitions such that parent-child and sibling partners (whether opposite sex or same-sex) can marry.

And finally, some would argue for the creation of a "registered partnership" regime open to all and the withdrawal of the State from the business of recognizing or legitimating

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[82] Such responses are often grounded in the (demonstrably false) claim that the concept of marriage has been impervious to previous attempts to modify its character. For example, rules relating to the age of capacity, parental requisitions, the nature of the consent required of intending spouses, the rules relating to prohibited degrees of consanguinity or alliance, the legal capacity of married women, the exercise of parental authority, and the generalized introduction of no-fault divorce are significant legislative initiatives that, over the past 200 years, have reconstituted marriage. See, for a careful analysis, **R. Leckey**, Family Law as Fundamental Private Law" *Canadian Bar Review*, 2007, (forthcoming).

[83] At one point, the National Assembly in France considered adopting such a measure, but when article 515-1 was added to the Civil Code in 1999 it was expressly made open to both same-sex and opposite sex couples: *Art. 515-1.* – "Un pacte civil de solidarité est un contrat conclu par deux personnes physiques majeures, de sexe différent ou de même sexe, pour organiser leur vie commune. " (Added by Loi n° 99-944 du 15 novembre 1999).

[84] In no proposal currently in force has a legislature contemplated that the "registered domestic partnership" or "civil union" might be extended to parent and child or siblings. See, for example, article 521.1 para. 2 of the *Civil Code of Québec*, which explicitly excludes ascendants, descendants, brothers and sisters from its scope. A similar exclusion may be found in article 515-2 of the French Civil Code. These exclusions confirm that the solidarity in question is sexual in character

marriage. Were such an option to be taken, the State would simply eliminate the concept of marriage from the statute book without replacing it with any other concept. All legal policies now made contingent upon marriage, or analogies to it, would be pursued by reference to concepts directed specifically to the pursuit of those policies.

As a matter of antidiscrimination law, the fourth and fifth options would necessarily pass constitutional muster. As a matter of broad social consensus the first and second options seem to have broadest support. As a matter of social psychology, and the idea of State recognition of symbols of social solidarity, the third and fourth are most plausible. As a matter of reconciling competing interests in a multicultural, diverse society, where the life projects of citizens are displaying an enormous diversity the fifth may be the preferred option.

The last argument is most attractive to a legal pluralist perspective concerned with the objective of respecting the agency of those claiming particular sexual-orientation identities. Pluralists would not, that is, assume that within the same-sex community there is an essential identity that can be legally captured by a single regulatory regime tailor-made for the purpose.[85]

The character of the pluralist position can best be seen by looking at the various ways in which people who claim a particular identity within the gay-lesbian-bisexual-transgendered communities conceive the appropriate policy response. The different identity-positions that have been argued to date can be grouped into four main archetypes.

Some persons in same-sex relationships feel that their relationship is legally or morally incomplete unless it is certified by the State as marriage. This position imagines that non-State normative recognition -by a dissentient church for example, or by a community, an employer, or neighbours- is insufficient, even if that recognition is branded as a marriage. A response to the claim to be included in the form of public recognition by the State is required.

By contrast, some do not feel the need to formalize their relationship for reasons of moral or legal completeness, but support same-sex marriage because the current configuration

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[85] This conclusion is specifically argued in **R.A. Macdonald**, "Legal Republicanism and Legal Pluralism: Two Takes on Identity and Diversity" in **M. Bussani and M. Graziadei**, eds. *Human Diversity and the Law*, Brussels, Bruylant, 2005, p. 43-70.

of government policies provides certain desired benefits to married couples. Of course, the instrumental position could be accommodated either by opening up marriage to same-sex couples, or by a registered partnership regime for same-sex couples attributing the same social and legal benefits, or by the State withdrawing from the marriage business, and creating a universally-accessible regime of registered partnerships. This position again looks to the State, but in requiring no particular response beyond not differentiating types of status relationships is more consistent with the anti-prescriptivist logic of legal pluralism.

Some feel that the life-style and ethic of same-sex relationships are such as to contest normality and that permitting same-sex marriage will destroy the distinctiveness of same-sex relationships and turn them into a mere reflection of heterosexual marriage with its attendant pathologies. Indeed, there are many who consider marriage to be an inherently heterosexual institution incapable of reforming itself. They fear that many same-sex couples will be unable to resist the normalizing pattern. Here, of course, one falls on the horns of a dilemma. The claim for resistance to recognition is a strong legal pluralist claim, but the accompanying claim to State-mandated exclusion is grounded in the conception of law as social control characteristic of legal orthodoxy.

Finally, some feel that while the third perspective has merit, the most radical opposition to any normality is the abnegation of a possibility. They seek to maintain State recognition of marriage, to make same-sex marriage a possibility, to make registered unions a possibility, and let both heterosexual and same-sex couples choose what forms of recognition, non-recognition or mis-recognition they desire. In such a positioning one sees the four claims of external legal pluralism -pluralism, polycentricity, interactionalism and anti-prescriptivism- conjoin to open up law's domain (law's sites); one also sees a reflection of internal legal pluralism in the rejection of institutionalization and formalization as litmus tests for identifying legal rules (law's modes).

Who, then, owns the concept of marriage? For the legal pluralist the answer must be – everybody, individually and collectively. The preferred alternative would be to allow two (perhaps even more than two) people involved in a high-affect relationships of dependence and interdependence to themselves decide how to express their particular identities. By de-coupling the legal framework currently glued together by the concept of marriage from the moral framework currently glued together by religious orthodoxy, each competing normative

order would signal its commitment to facilitating the full richness of a plurality of individual identities.[86]

XVII. Final blessing[87]

In the name of the Father, Son and Holy Spirit

In discussing a critical legal pluralism -its recognition of the inherent heterogeneity, flux and dissonance in the normative lives of human agents, the multiple trajectories of internormativity, and the fundamentally interactional nature of law itself- we have been advancing a view of the place of human beings in constituting their social and legal reality. We have framed inquiry through an examination of how the law of political States currently conceives close personal adult relationships. The success of any normative regime, including that of the State, depends on it 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 legislatures; it means, above all, the public. A critical legal pluralism invites us to think about law in new ways, by emphasizing law as an endeavour to symbolize the way we live in the world. The consequences for us may ultimately be that we decide to live in the world differently.

Consistently with *critical* legal pluralist methodology, we organize this inquiry around (and in counterpoint to) an explicit and formal normative regime - the liturgical form of the Roman Catholic wedding mass. This ceremony formally concludes in the same way it begins with the congregation making the sign of the cross. This action constitutes both a profession of faith in the central Christian doctrine of the Trinity and a familiar ritual for regular mass-goers. Indeed, the Roman Catholic wedding ceremony diverges very little from the standard format of the ordinary mass.[88] Laden with all the traditional dogma, symbols and rituals of

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[86] Of course, to amend State law in such a fashion could well be perceived as a last resort of those who would deny a secular sacramental to same-sex couples. For this reason, any reconfiguration of marriage within the State legal order should presume a transitional period (say, of one year) when all those who today are committed to a high affect adult relationship but who may not marry would have the option to do so. Only thereafter would the State recast its symbolic vision of close personal relationships between adults.

[87] The people are dismissed to go out and praise and do the good works of God. See *USCCB, supra* at IIID.

[88] According to the ordinary form, where both parties are baptized Catholic, the marriage rite will take place in conjunction with the Mass; however, within the extraordinary form of the marriage rite i.e. where there is a danger of death or no priest or deacon is available, the marriage rite may be celebrated without the Mass.

Roman Catholic religious practice, the celebration of the sacrament of marriage signals an avowal and expression of Roman Catholic belief. While some couples may really only be testifying to a fondness for the photogenic quality of the religious aesthetic, theoretically at least, by marrying in the church each intending spouse expresses a willingness to situate the relationship within the normative domain of that religious institution. However, to say that there is only one normative realm within Roman Catholicism and merely a single set of norms would be a denial of the lived experience of many married Catholic couples. More than that, it would be to deny the role the believer plays in constituting his or her own faith.

Reconciling the values, principles and canons of one's religion with other sources of knowledge and experience is the challenge that confronts every Catholic, married or not, for "a human being must always obey the certain judgment of his conscience. As much as the *Magisterium* of the Roman Catholic Church presents an official interpretation of the tenets of the faith in the form of the *Catechism* and other canonical documents, ultimately it is individual followers of Roman Catholicism themselves who decide how to live out their faith.[89]

Faith without good works might be dead,[90] but without the faithful, the very conception of faith is unachievable. Faith like law lives in people. A critical legal pluralism rests on this dialogue of action and aspiration. After all, in a legal pluralist cosmology, eschatological questions are always present because they can themselves never be finally decided.

Moreover, where a Catholic is marrying a non- Christian, the marriage rite will follow a paraliturgical form; that is, there will be no celebration of the Eucharist. See **Assembly of Québec Catholic Bishops**, *Canonical and Pastoral Guide for Parishes*, Montréal, Wilson & Lafleur, 2003.

[89] *Catechism of the Catholic Church*, London, Geoffrey Chapman, 1998, p. 1790; See **John Henry Cardinal Newman**, 'Letter to the Duke of Norfolk' V in Certain Difficulties felt by Anglicans in Catholic Teaching II, London, Longmans Green, 1885, p. 245.

[90] James 2: 14 – *"What does it profit, my brethren, if someone says he has faith but does not have works? Can faith save him?"*

XVIII. Recessional hymn[91]

From so much loving and journeying, books emerge.

And if they don't contain kisses or landscapes,

if they don't contain a man with his hands full,

if they don't contain a woman in every drop ,

hunger, desire, anger, roads,

they are no use as a shield or as a bell:

they have no eyes, and won't be able to open them,

they have the sound of dead precepts.

I loved the entangling of genitals,

and out of blood and love I carried my poems.

In hard earth I brought a rose to flower,

fought over by fire and dew.

That's how I could keep on singing.[92]

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[91] The Recessional hymn is played at the end of mass as the priest and wedding party exit down the aisle. The song is intended to signal that those who have just shared in the Eucharist are now sent forth to spread the Good News to the world. See *USCCB, supra,* note 1 at IIID.

[92] **Pablo Neruda**, "Ars Magnetica", *supra* note 2, page 326, lines 1-13.