

Law at *L'Arche*:
Reflections from a *Critical* Legal Pluralist Perspective

by

Thomas McMorrow
Faculty of Law
McGill University, Montréal
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Abstract

This thesis is an on- the- ground exploration of the radical hypothesis that each individual human being bears responsibility for constructing order out of the overwhelming plurality and dissonance of normative experience. It constitutes an empirically-based, critical legal pluralist analysis of everyday life at *L'Arche Montréal*— a community serving persons with intellectual disabilities. The aim of this thesis is to highlight the active role persons with intellectual disabilities living at *L'Arche Montréal* play in constructing legal normativity.

Résumé

Ce mémoire est une exploration sur le terrain de l'hypothèse théorique radicale que chaque être humain porte la responsabilité de construire l'ordre de l'écrasante pluralité et des dissonances de l'expérience normative. Il constitue une analyse empirique du point de vue du pluralisme juridique critique, de la vie quotidienne à *L'Arche Montréal*—une communauté qui accueille des personnes ayant une déficience intellectuelle. L'objectif de ce mémoire est de souligner le rôle actif que jouent les personnes avec une déficience intellectuelle vivant à *L'Arche Montréal* dans la construction de la normativité juridique.

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My foremost thanks go to my friends at *L'Arche Montréal* whose stories I share in this paper. I am very grateful to both Robert Larouche and Jocelyn Girard for welcoming me so warmly and engagingly to *L'Arche* and supporting this research project. My supervisor Professor Macdonald has taught me much through his writing but even more so through his deeds—quite something for a man who has written as voluminously as he. I feel most fortunate to be continuing my studies with his guidance. I very much appreciate Professor Fox-Decent for serving as external reviewer and providing constructive comments on this thesis paper. I am also obliged to Professors Manderson and Van Praagh for their helpful discussions and encouragement. Lindall McDonald, Steffen De Kok and Coel Kirkby have proved fruitful interlocutors on many a subject pertaining to this work. Philipp Kastner and Hinda Rabkin contributed much appreciated editorial advice in the final phase. I thank my aunt, Kathryn McMorow, for her most constructive feedback when this thesis was still in its nascent stages. I thank my uncle, Tony Eaton, for his rock solid support. Je donne un gross merci à Joanie Piecharski aussi. I am profoundly grateful to Maura Eaton, my grandmother, who is an inspiration. Finally, I end by thanking my mom and dad because I would not know where to begin.

1- INTRODUCTION

Yahweh saw that the wickedness of man was great on the earth, and that the thoughts in his heart fashioned nothing but wickedness all day long...But Noah had found favour with Yahweh.... God said to Noah... "I mean to bring a flood, and send the waters over the earth...everything on earth shall perish. But I will establish my Covenant with you, and you must go on board the ark, yourself, your sons, your wife, and your son's wives along with you. From all living creatures, from all flesh, you must take two of each kind aboard the ark, to save their lives with yours." Genesis 6:5,8,13,17-19

The story of Noah and the Ark serves as a meta-structure for this thesis for three reasons: first, the site in which I conducted my empirical research is an international, faith-based community serving people with intellectual disabilities, called *L'Arche* or the Ark, in deliberate allusion to the Noahite narrative.¹ Secondly, this mythical story is one of many that serves as an implicit and inferential source of legal normativity at *L'Arche*. Any connection between the excerpt from Noah and the Ark at the top of each of the next four chapters and the contents of those chapters is only implied. I invite the reader to draw his or her own inferences, and to reflect on how the presence of the story affects his or her reading of the rest of the thesis. Thirdly, by way of conclusion to the thesis I wish to discuss my own interpretation of the story and reflect on the relationship that stories and story-telling have to the emergence of legal normativity at *L'Arche*.

First of all, however, I provide a general description of "*L'Arche Montréal*" and briefly discuss what I mean by "persons with intellectual disabilities". Furthermore, I explain why I chose *L'Arche* as the site for my empirical research.

¹ The history of the community's foundation and how it got its name is given in Jean Vanier, *Histoire de L'Arche: des communautés à découvrir* (Ottawa: Novalis, 1995) at 16. For further history on *L'Arche* and a biography of its primary founder, see Kathryn Spink, *Jean Vanier and L'Arche: a Communion of Love* (New York: Crossroad, 1990).

L'Arche Montréal

L'Arche is an international, faith-based organization that provides homes and care-giving to persons with intellectual disabilities. *L'Arche* began in 1964 when Jean Vanier invited Raphael Simi and Philippe Seux—two men with intellectual and physical disabilities—to move in with him to a small house in the village of Trosly, France.² Vanier was appalled by the conditions at state institutions in which persons with intellectual disabilities, like Raphael and Philippe, were living at the time. He felt that more than anything, what these men yearned for, was friendship.³ Soon their tiny household in Trosly began to expand into a community of persons with intellectual disabilities and others who came to be their care-givers while at the same time live in community with them. Today there are twenty seven communities across Canada and eight in the province of Québec, including Montréal.⁴ Member communities belong to the *International Federation of L'Arche Communities*, and have incorporated the *Charter of L'Arche Communities* into their constitutions.⁵

Persons with intellectual disabilities (known at *L'Arche* as “core members”) and their care-givers (referred to there as “assistants”) live together in family-like settings in homes that are integrated into local neighbourhoods.⁶ Some core members work with assistants in the *L'Arche* community workshop; still others attend school or go to sheltered

² *ibid.* Vanier.

³ For an excellent discussion of the confluence of worldviews that shaped Vanier's foundations of *L'Arche*, see Pamela J. Cushing, *Shaping the Moral Imagination of Caregivers: Disability, Difference & Inequality in L'Arche* (Phd. Thesis, McMaster University, 2003) [unpublished] at 108 [Cushing, *Shaping the Moral Imagination of Caregivers*].

⁴ For information about *L'Arche* and links to news on current events and activities in its various communities, visit the organization website online: <http://www.larche.ca/>; for information on *L'Arche* communities in Québec, see online: <http://www.larche.ca/en/communities/qc/>; for information on *L'Arche Montréal*, see online: <http://www.larche-montreal.org/>.

⁵ Jean Vanier, *Histoire de L'Arche: des communautés à découvrir* (Ottawa: Novalis, 1995) at 83. See also *Charter of L'Arche*, Appendix.8.3.

⁶ The term “core member” is used to emphasize that persons with intellectual disabilities constitute the very core or heart of the community. This is accurate not only in terms of the mission of the organization but also that individuals with intellectual disabilities tend to live at *L'Arche* much longer than most assistants do. While the vast majority of core members once they come to *L'Arche* stay for the rest of their lives, few assistants do. In Québec, the term “personne accueillante” is used instead for the same reason. However, previously the term had been “personne accueillie”; it was only once a resident with intellectual disabilities pointed out to her Community Leader that it did not make sense to refer to her as a “welcomed person” when it was she who was always doing the welcoming of new assistants that the change in term occurred.

workplaces outside of the community. *L'Arche* aims to promote a vision of the value or "gifts" of all human beings and especially people with intellectual disabilities. Thus, while *L'Arche* recognizes it cannot offer everyone with an intellectual disability a home, "it seeks to offer not a solution but a sign, a sign that a society, to be truly human, must be founded on welcome and respect for the weak and the downtrodden."⁷

Communities vary in size; for example, *L'Arche Montréal*, which served as the site of the empirical research for this thesis, is home to twenty core members and twelve full-time paid assistants. In addition, there are other part-time assistants, volunteers, administrative staff members, community friends and family members; however, they do not live on a full-time basis in the homes. As a faith-based community, *L'Arche* places an emphasis on prayer and spirituality but is not affiliated with an official religious organization. Instead, individual communities tend to reflect the religious make up of their locales. *L'Arche* in Bangalore, India is made up of Muslim and Hindu core members; whereas, nearly every core member at *L'Arche Montréal* is Roman Catholic.⁸ The vision behind *L'Arche*, however, is profoundly inspired by Vanier's interpretation of Gospel values and the Beatitudes.⁹ According to this vision, cognitive difference is revalorized in order to emphasize its consequences for the special gifts and abilities of persons with intellectual disabilities. Vanier argues that intelligent people have as much to learn about how to live and be fully human from persons who, due to their intellectual disabilities, have a simpler approach to life and human relationships.¹⁰ He acknowledges that, among other things,

⁷ "L'Arche Charter", *supra* note 5.

⁸ "L'Arche does not proselytize but seeks to support each person in his or her own faith tradition."

"Frequently Asked Questions about L'Arche", online: L'Arche Canada <<http://www.larche.ca/>>.

⁹ Gospel means "the Good News" of Christ; however, the emphasis in Vanier's spiritual thought focuses on the four gospels as well as letters by St. Paul. See Pamela Cushing, "Chapter 4: Emerging and Converging Forces in the History of L'Arche", *supra* note 3. The Beatitudes are contained in Matthew 5:1-11. See generally Thomas Philippe, "Communities of the Beatitudes" in Vanier, Jean, et al. *The Challenge of L'Arche* (London: Darton, Longman & Todd, 1982) at 37. (Père Philippe was a profound influence on Vanier's spirituality and foundation of *L'Arche*.) See Jean Vanier, "Introduction" in Jean Vanier, et al., *The Challenge of L'Arche* (London: Darton, Longman & Todd, 1982) at 1.

¹⁰ Jean Vanier, *Becoming Human* (Toronto: House of Anansi Press Inc., 1998); *Finding Peace* (Toronto: House of Anansi Press Inc., 2001); *L'Histoire de L'Arche: des communautés à découvrir* (Ottawa: Novalis, 1995); *Made for Happiness* (Toronto: House of Anansi Press Inc., 2001); *The Scandal of Service* (Toronto: Novalis Press, 1998). For similar observations by other men and women who have lived at L'Arche, see generally Jean Vanier, et al., *The Challenge of L'Arche* (London: Darton, Longman & Todd, 1982); Ceyrac, Odile. *Découvrir ton visage* (Montréal: Fayard/ Bellarmins, 1988); Henri Nouwen, *The Path of Power* (New York: Crossroad, 1995).

persons with intellectual disabilities tend to be more frank with their emotions than persons without intellectual disabilities do. He notes:

“They have shown me what it is to live simply, to love tenderly, to speak the truth, to receive openly, to be humble in weakness, to be confident in difficulties, and to accept handicaps and hardships with love. And in a mysterious way, in their lives they have revealed Jesus to me.”¹¹

Persons with Intellectual Disabilities

An “intellectual disability” refers to a cognitive or biological difference that develops before the age of eighteen and results in limitations of a person’s ability to learn and perform life skills.¹² A person may be born with an intellectual disability due to a genetic condition, problems experienced while *in utero* or during birth.¹³ In addition, childhood diseases and exposure to environmental toxins as well as malnutrition may also cause a person to develop an intellectual disability. An intellectual disability is different from “a learning disability”, such as dyslexia, which can often be corrected.¹⁴ Nor is an intellectual disability the same thing as a psychiatric or mental illness.

In this thesis I refer to “persons with intellectual disabilities” rather than the “intellectually disabled” in order to emphasize who they are (persons) as opposed to what they are (disabled).¹⁵ Different terms and definitions for intellectual disability have proliferated over the last one-hundred and fifty years.¹⁶ The classification of intellectual

¹¹ Jean Vanier, Interview in James H. Clarke, *L’Arche Journal: A Family’s Experience in Jean Vanier’s Community* (Toronto: Griffin Press Limited, 1973) at 26-27.

¹² See “Some Definitions”, online: Canadian Association of Community Living <<http://www.cacl.ca/english/aboutus/definitions.html>>.

¹³ See “Frequently Asked Questions About Mental Retardation”, online: American Association on Intellectual and Developmental Disabilities <http://www.aamr.org/Policies/faq_mental_retardation.shtml>.

¹⁴ Pamela J. Cushing, *Shaping the Moral Imagination of Caregivers*, *supra* note 3 at 71.

¹⁵ See *supra* note 12.

¹⁶ Even today terms used in the literature differ between countries. While in Canada, the predominantly used term is “intellectual disability”, in the USA, it is “mental retardation” and in the UK “learning disability”. Pamela J. Cushing, *Shaping the Moral Imagination of Caregivers*, *supra* note 3 at 71. However, as of 1 January 2007, the American Association on Mental Retardation, changed its name to American Association on Intellectual and Developmental Disabilities indicating a move away from the former term in professional American discourse on disability. “What’s New?” American Association on Intellectual and Developmental Disabilities <<http://www.aamr.org/>>.

disability may be constructed in different ways with varying consequence.¹⁷ Four primary social and scientific formulations of disability may be identified. Each one, notes Marcia Rioux, focuses on disability as a question of either individual or social pathology.¹⁸ Biomedical and functional approaches are based on a view of disability as an individual pathology (something is wrong with the person); whereas the environmental and the rights outcomes approaches arise from a view of disability as a consequence of social pathology (something is not wrong with the person but with her social environment).

The biomedical approach to disability concentrates on its biomedical origin, treating it as something that needs to be cured. A person identified as having a disability is therefore viewed as sick, injured or afflicted. With its attendant focus on altering the person's biological condition, the biomedical approach confines public responsibility for people with intellectual disabilities to providing them with the appropriate custodial and medical care.¹⁹

While, on the other hand, the functional approach to disability also assumes the deficit stems from an individual pathology or condition, it focuses on the impact that that biomedical condition has on a person's functional capacity. The target becomes changing the person in order to enable her to function as independently as possible within society, as it is currently structured. Thus, physiotherapy, occupational therapy but also job training and teaching of skills for independent living are some examples of the services developed from a functional approach. Primary focus is on the individual rather than the possible environmental and situational factors playing a role in person's inability to lead a "normal" existence. The public responsibility thus devolves to professionals entrusted

¹⁷ See Lucia Carlson, "Docile Bodies, Docile Minds: Foucauldian Reflections of Mental Retardation" in Shelley Tremain ed. *Foucault and the Government of Disability* (Ann Arbor: University of Michigan Press, 2005) at 150 (for a discussion of how 'mental retardation' as a classification affects the process of self-definition and conceptions of moral agency for individuals who are thus labelled as well as those who fall outside the conceptual and practical confines of the classification).

¹⁸ For a further elaboration of this typology, see Marcia H. Rioux, "On Second Thought: Constructing Knowledge, Law, Disability and Inequality" in Herr, Gostin, Hongju Koh, eds., *The Human Rights of Persons with Intellectual Disabilities: Different but Equal* (Oxford; New York: Oxford University Press, 2003) at 287 [Rioux, "On Second Thought"]. Also, see Roeher Institute, ed., *Disability is not Measles: New Research Paradigms in Disability* (Canada: Roeher Institute, 1994).

¹⁹ *ibid.* Rioux, "On Second Thought" at 305.

with defining the best interests of the impaired and developing treatment programmes to realize them.²⁰

In contrast to the biomedical and functional approaches, the environmental and rights-outcome approaches assume that disability is not inherent to the individual but to the social structure. Personal abilities and limitations are seen as the product not just of characteristics residing in the individual but also of the interaction of individuals and their environment. The environmental perspective on disability shifts the target of modification from the individual to her environment. The negative impact of disability may be prevented, or at the very least reduced, by adapting environments to accommodate people with different abilities. The hiring of sign-language interpreters in schools, the construction of wheelchair ramps to restaurants, and the announcement of stops on TTC subway trains are examples of the environmental approach.²¹

Finally, there is the rights- outcome approach, which differs from the environmental one in that it looks beyond particular environments to identify broad systemic factors which lead to the exclusion of certain groups of people from equal participation in society and frames its analysis within the parameters of universal human rights discourse. By identifying wide variations in sensory, cognitive and motor ability as inherent to the human condition, it insists that such variation does not foreclose a human being's potential to contribute to society. From this perspective, disability is not deviant but normal, in the sense that it is inevitable that it will arise in a part of the population. Thus, addressing the disadvantage of people with disabilities with a rights outcome approach becomes a matter of reformulating social and political policy.

This approach reworks questions of disability around principles of universal equality.²² The point of this approach is to stress the impact of social and political policy on the lives

²⁰ *ibid.*

²¹ The efforts of disability rights advocates like David Lepofsky have been instrumental in bringing such changes into place. See David Lepofsky "Achieving Equality for People with Disabilities- what works?" (Annie Langstaff Lecture McGill University delivered 14/3/2007) [unpublished].

²² The rights outcome approach subscribes to a conception of equality not of treatment or opportunity but of outcome for the well being of all. This model is founded on "the premise that all humans—in spite of their

of persons with disabilities as a question of justice not charity.²³ Phrased in the language of universal human rights discourse, proponents of this approach argue that it signals a powerful call for members of society to re-think disability but also to re-act to the marginalisation of those with disabilities through concrete social and political action.²⁴ Disability is normal in the sense that only in a eugenic dystopia would persons with intellectual disabilities be non-existent.²⁵ The chief virtue of a rights-outcome approach is the value it places on achieving equality of well-being for all.²⁶

differences—are entitled to consideration and respect as equals, and have the right to participate in the social and economic life of society.” Rioux, “On Second Thought”, *supra* note 18. In contrast, at *L’Arche*, it is not “in spite” of their differences but because of them that human beings, especially persons with intellectual disabilities and other marginal social groups in society, are entitled not just to consideration and respect as equals but love. “The *raison d’être* of *L’Arche* is the cry of the person with a mental handicap: “I have a place on this earth and a place in your heart.” This caption is written on a sign in one of the *L’Arche* Montréal homes and is attributed to Jean Vanier. I have translated from the French.

²³ Rioux, “On Second Thought”, *supra* note 18 at

²⁴ On marginalization of social groups such as persons with intellectual disabilities, see Marion Young, “Five Faces of Oppression” in *Justice and the Politics of Difference* (Princeton, Princeton University Press, 1990) at 39. For a critical discussion of the “rights-outcome” approach from a critical legal pluralist perspective, see Thomas McMorrow, “Lessons of *L’Arche* for Law” (Paper presented to the Osgoode Hall Graduate Legal Studies Conference) 5 May 2007 available online: Osgoode Hall Graduate Legal Studies Conference <http://www.osgoode.yorku.ca/glsa/2007conference/2007_schedule.html> [McMorrow, “Lessons of *L’Arche* for Law”. There I argue that the rights-outcome approach is too narrowly focussed on “rights discourse”. It is vital to engage other modes of legal discourse to address how State laws and legal institutions fail to respond appropriately to the diversity of abilities that legal subjects possess. I also argue that the advantage of a critical legal pluralist perspective of law is that it dispenses with the notion that any discussion of law always has to revolve around the institutional legal positivist paradigm. This thesis presents an alternative way of seeing the emergence of law through the agency of persons with intellectual disabilities.

²⁵ Lennard J. Davis, “The Rule of Normalcy: Politics and Disability in the USA [United States of Ability]” in Jones & Bassar Marks, eds., *Disability, Divers-ability and Legal Change* (The Hague; Boston; London: Martinus Nijhoff Publishers, 1999) at 35. Indeed, Le Pichon argues that acceptance and caring for more vulnerable members of society, including persons with intellectual disability, is as much a part of the human evolutionary story as predatory domination is. Xavier Le Pichon, *Aux racines de l’homme: de la mort à l’amour* (Paris: Presses de la renaissance, 1997).

²⁶ “Equality of well-being recognizes that while people are not equal in talent, social usefulness, or willingness to serve the community, they are entitled to make choices about how to live and what constitutes the good life for them as long as they operate within the framework of mutual recognition of others’ self-determination... Equality as inclusion and participation shifts the basis for distributive justice away from economic contribution as the primary factor of entitlement to other forms of participation.” Rioux, “On Second Thought”, *supra* note 18 at 300, 301. This is the vision that unites critical disability theory. See For compendious examples see Diane Pothier & Richard Devlin, eds., *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law* (Vancouver: University of British Columbia Press, 2006); Melinda Jones & Lee Ann Bassar Marks, eds., *Disability, Divers-ability and Legal Change* (The Hague; Boston; London: Martinus Nijhoff Publishers, 1999).

Rationale: Why Law at *L'Arche*?

The choice to make *L'Arche* the focus of my Master in Laws thesis came after I paid a visit to *L'Arche* in Toronto in accordance with the requirement in Prof. Macdonald's Legal Education Seminar to visit an alternative site of legal education.

Contrasting *L'Arche* and the law school—as institutions, as social groups, as sites of legal education—the primary difference between them is the presence and involvement of persons who have intellectual disabilities. Whereas such persons constitute the “core” membership of *L'Arche*, they are utterly absent from the classrooms, lounges and corridors of the law school. Of course, we tend to think of this as only natural, given that the purpose of law school is to study, teach and learn about law. However, if we really did recognize the value of having relationships with persons with intellectual disabilities, then might we not re-imagine ways to make the law faculty a place where persons with intellectual disabilities were welcome to engage meaningfully within the law faculty community?

Furthermore, the exclusion of persons with intellectual disabilities from legal education presents a stark contrast to the deep implications that questions of law and justice have in their lives. Moreover, it confirms their ‘otherness’ by keeping them apart and outside of mainstream institutions.²⁷ The net outcome for environments of legal learning is that they play host for discussions and debates about, and never with, persons who have intellectual disabilities.

²⁷ For a discussion of the consequences of material exclusion particularly of racialized groups see Brenna Bhandar, “Always on the Defence: The Myth of Universality and the Persistence of Privilege in Legal Education” (2002) 14 *Canadian Journal of Women and the Law*: “There is an intimate relationship between material forms of exclusion and the ideological and cultural constructions of certain groups of racialized peoples as “Other” or outsiders.”

Though frequently found serving as objects of dominant legal discourse in the courts, parliament and law schools, seldom do they appear as participatory subjects in those same discussions.²⁸

Thesis Outline:

This thesis is an empirically-based, critical legal pluralist analysis of everyday life at *L'Arche Montréal*— a community serving persons with intellectual disabilities. The aim of this thesis is to highlight the active role persons with intellectual disabilities living at *L'Arche Montréal* play in constructing legal normativity.

In *Chapter 2: Legal Theoretical Approach* I describe what I mean by “legal normativity” and “a critical legal pluralist analysis”, as I explain the legal theoretical underpinnings of my research. Next, in *Chapter 3: Research Methodology*, I describe the manner in which I carried out this research while volunteering for several months as an assistant to persons with intellectual disabilities at *L'Arche Montréal*. In addition, I address the various methodological and ethical questions to which the specific nature of my fieldwork gave rise. In *Chapter 4: Research Data*, I present seven stories drawn from the observations I made while immersed in the *L'Arche Montréal* community. In *Chapter 5: Research Findings* I unpack the content of these narratives in such a way as to highlight those aspects that bear legal normative relevance. Thus, I build on the theoretical framework presented in the following chapter in order to underline the legal normative agency of core members at *L'Arche Montréal*.²⁹

²⁸ Shauna Van Praagh, “Stories in Law School” (1992) 2 Colum. J. Gender and Law 111 (on ways of expanding academic discourses to be more inclusive). For a discussion of how education is never a “neutral” or ‘innocent’ institution in relation to racial struggles see Patricia Williams, *The Alchemy of Race and Rights* (Cambridge: Harvard University Press, 1991).

²⁹ Of course, I am not for a second suggesting that the community of *L'Arche Montréal* is somehow a fixed and immutable environment in which to gauge normative flux; on the contrary, as with any meaning we give law, the meaning we give *L'Arche* depends on a whole host of shifting, changing factors. Its ability to defy definition is clear once you ask any one of the dozens of community members what it means to them and find their answer changing every time you pose the question again. This is because the process of self-narration whereby we assign meaning to ourselves and things in the world is always ongoing. *Infra* note 37.

2- LEGAL THEORETICAL APPROACH

Everything with the breath of life in its nostrils died, everything on dry land...But God had Noah in mind and all the wild beasts and all the cattle that were with him in the ark. God sent a wind across the earth and the waters subsided. Genesis 7:23, 8:1

In this chapter, I identify my legal theoretical approach as that of a *critical* legal pluralism.³⁰ I contrast it with institutional legal positivism as well as social scientific legal pluralisms. I show why the approach is, on the one hand, rightly called “pluralistic”—because it is informed by a sociological analysis of normativity that underscores the plurality of potential forms in which legal normativity emerges. On the other hand, I show why the approach is appropriately termed a “*critical* or *radical*” legal pluralism—because of the way in which it goes to the root (*radix*) of law; that is, normativity. In explaining how a *critical* legal pluralist approach contrasts with mainstream legal theoretical approaches, and describing the typological framework for analyzing normativity that it presupposes, I am establishing the legal theoretical foundation of the data analysis I present in Chapter 5 of this thesis.

³⁰ The following discussion of a critical legal pluralism relies heavily on the following writings of Roderick A. Macdonald, *Lessons of Everyday Law* (Montréal: McGill-Queen’s University Press, 2002); “Here, there and everywhere...Theorizing Legal Pluralism; Theorizing Jacques Vanderlinden” in Kasirer, ed., *Mélanges Jacques Vanderlinden* (Montréal: McGill Queen’s University Press, 2006) [Macdonald, “Here, there and everywhere”]; “Les Veilles Gardes : hypothèses sur l’émergence des normes, l’internormativité et le désordre à travers une typologie des institutions normatives” at 233 in Jean-Guy Belley, ed., *Le droit soluble : contributions québécoises à l’étude de l’internormativité* (1996) [Macdonald, “Les Veilles Gardes”]; “Pour la reconnaissance d’une normativité juridique implicite et ‘ inférentielle’ ” (1986) 18 : 1 *Sociologie et Sociétés* 47 ; “Triangulating Social Law Reform” in Ysolde Gendreau ed. *Dessiner la société par le droit: Mapping Society Through Law* (Montréal: Les Éditions Thémis Inc., 2004) at 123; “What is a Critical Legal Pluralism?” (1997) 12 *Can. J. L. & Soc’y* 25 (with Martha-Marie Kleinhans); “Patchwork Law Reform” (2006) 44 *Osgoode Hall Law Journal* 11 (with Hoi Kong); “No Toilets in Park” (2005) 50 *McGill L.J.* 72 (with Jason Maclean); “Wedding a Critical Legal Pluralism to the Laws of Close Personal Relationships” online: (2007) 1 *EJLS* <http://www.ejls.eu/> (with Thomas McMorow); “Le catéchisme de l’islamophobie” *La justice à l’épreuve de la diversité culturelle*, ed., Myriam Jézéquel (Cowansville : Éditions Yvon Blais, 2007) 19 (with Alexandre Popivici); “Against Nomopolies” (2007) 57:4 *N. Ir. Legal Q.* 610 (with David Sandomierski).

Law: Contested Meaning

In ordinary conversation when a person uses the word “law”, what she usually means is “*the law*”; that is, “State law” or “lawyer’s law”: the stuff governments pass, criminals break, police enforce, lawyers argue and judges decide. That is because those who speak with the most authority when framing discussions about law— people like judges, lawyers, politicians, political commentators and law professors— also tend to presume law means “lawyer’s law” as distinct from other, non-State forms of normativity. Being able to distinguish between law and non-law in a given situation can be very important— not least for those whose job it is to do so. However, it is vital to remember that the conceptual boundaries held to separate law and other non-State forms of normativity do not appear *naturally* by themselves; they are *constructed* by human beings.³¹

Whatever the stuff of law is, it exists, along with everything else, as data in the world. Data does not self-identify as law. Rather, it is human observers who interpret data and ascribe to it the label “law”. While identifying “*the law*” involves weighing arguments as to whether certain data fit into a predetermined conceptual category, identifying “law” involves weighing arguments as to the conceptual dimensions of the category itself.³²

Thus, we shape the meaning of law through our interpretive choices. Any conception of law is necessarily hypothetical, although quite often it is understood to be absolute. However, such an understanding is evidence of the effective use of rhetoric; it is not an accurate reflection of reality. Therefore, ordinarily people understand law to mean “*the*

³¹ This reminder echoes philosopher William James’ observation, that: “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 someone has called a big blooming buzzing confusion, as free from contradiction in its ‘much-at-onceness’ as it is all alive and evidently there.” William James, “Percept and Concept -- The Import of Concepts,” in *Some Problems of Philosophy: a Beginning of an Introduction to Philosophy* (New York: Longmans, Green, 1911).

³² “The way a question is asked limits and disposes the ways in which any answer to it—right or wrong— may be given...In this way the intellectual treatment of any datum, any experience, any subject, is determined by the nature of our question and only carried out in the answers.” Suzanne Langer, *Philosophy in a New Key; a Study in the Symbolism of Reason, Rite, and Art* (Cambridge: Harvard University Press, 1957) at 4.

law”, the law of the State, lawyer’s law, because that is the predominate meaning supported within dominant legal discourse.³³ Where law is cast in a rigid mould, the role of human beings in making interpretive choices about what form that mould takes is being suppressed. Hence, argumentative justifications—the reasons on which a decision to conceive of law in a certain way is based— become calcified into dogmatic beliefs.

Therefore, a set of dogmatic beliefs underpins institutional legal positivism, the paradigmatic expression of dominant legal discourse.³⁴ First, *centralism*: the belief that law can be traced to a single official institutional source. Second, *monism*: the belief that normative activity is coherent. Third, *prescriptivism*: the belief that law is a social fact existing above and apart from those it claims to regulate. Finally, *positivism*: the belief that law can be identified on the basis of a specific test of validity.

From a critical legal pluralist perspective, centralism, monism, prescriptivism and positivism appear for what they are: a set of interpretive commitments not universal truths; they represent common beliefs not facts, and accordingly it is up to us to decide whether to reject them. That is, in fact, precisely what a *critical* legal pluralism invites us to do.³⁵

By electing to treat individual human behaviour rather than some external defined entity as the locus for law, a *critical* legal pluralism rejects the assumption that normative justifications for human behaviour exist before people treat them as such. In contrast, as far as institutional legal positivism is concerned, legal norms and orders issue explicitly (and exclusively) from formal State institutions. Social scientific legal pluralisms challenge the exclusive paternity legal positivists attribute to State-based methodologies and processes of norm creation, by pointing out the plurality of grounds on which we identify data as law. Nevertheless, state law retains pride of place in social scientific legal

³³ Macdonald, “What is a *Critical* Legal Pluralism?”, *supra* note 30 at 41.

³⁴ R.A. Macdonald, “Unitary Law Re-form, Pluralistic Law Re-substance: Illuminating Legal Change” (2007) 67:4 Louisiana Law Review 1113 at 1145-1156.

³⁵ R.A. Macdonald & T. McMorow, “Wedding a *Critical* Legal Pluralism to the Laws of Close Personal Relationships”, *supra* note 30 at 5-8.

pluralist topographies of law by providing the scale for tracing the dimensions of all other legal normative structures.³⁶

By presuming the birth of legal normativity can be traced to some external entity exercising the right of primogeniture, the paradox of legal normativity (and indeed the paradox of all perceptions and conceptions of reality) is conspicuously ignored. Law does not just exist out there; it materialises only through the process of our endeavour to grasp it. A.P. Kerby notes that “it is in and through various forms of narrative emplotment that our lives—and thereby...our very selves—attain meaning”.³⁷ This insight informs a critical legal pluralist conception of legal understanding: the designation of the label “law” to certain aspects of the “big blooming buzzing confusion” of sensory experience happens through the process of narration we engage in to make sense of the “big buzzing confusion” of sensory experience. Narrative or story telling is the means we human beings have of recreating “otherwise disparate or unheeded happenings into the significance of a development, a directionality, a destiny.”³⁸

According to a critical legal pluralist perspective, legal normativity does not spring out fully formed but emerges through the process of individual decision-making; thus, the individual is the irreducible site of law. Such an attornment—to subject participation from objective paradigms—means looking beyond “hierarchized legal artefacts, systemic coherence of legal normativity, and homogenous law”.³⁹ Moreover, it presents a promising position from which to consider two fundamental and related questions.⁴⁰ First, how do we know when someone has a normative basis for her behaviour and, secondly, when is it appropriate to call a normative basis for behaviour *law* rather than something else? I now wish to discuss how a *critical* legal pluralism goes about hypothesizing responses to these questions.

³⁶ See Desmond Manderson, “Beyond the Provincial: Space, Aesthetics and Modernist Legal Theory” (1995- 1996) 20 Melb. U. L. Rev. 1049.

³⁷ A.P. Kerby, *Narrative and the Self* (Bloomington & Indianapolis: Indiana University Press, 1991) at 40.

³⁸ *ibid.*

³⁹ Macdonald & Kleinmans, “What is a *Critical* Legal Pluralism?”, *supra* note 30 at 29.

⁴⁰ *ibid.* at 27. The authors identify these two questions, one epistemological and the other ontological, and note their treatment necessarily precedes any empirical enquiry into the law and society nexus.

Law: a Normative Basis for Behaviour

In the *Concept of Law*, H.L.A Hart, one of the most influential legal positivists in the 20th Century builds a case for understanding law as distinct from just any type of social control.⁴¹ Indeed, he argues that what makes law distinctive is its normative character.⁴² To be normative is to give rise to an obligation on behalf of the individual subject to behave in a certain way. Deciding on a particular course of action out of a feeling of *obligation* to follow a rule is different from choosing to behave in a certain way because one feels *obliged* to do so. In the latter instance, it is not a question of performing an action for its own sake, but to avoid the consequences of not performing it.

The difference between obligation and oblige is only evident where we adopt the view of someone accepting a rule as a guide to her personal conduct. This internal perspective contrasts with the view of a purely external observer. To illustrate the difference between the two perspectives, Hart presents the example of an external observer at a busy intersection who sees that when the light turns red, there is a high probability the traffic will stop.⁴³ Without the internal perspective, that of the drivers stopping at the intersection, one fails to see that the red light is not just a sign but a signal for drivers to stop. To understand what is really going on, Hart argues, one needs to take into account not only the external perspective of the objective observer, but the internal perspective of the person behind the wheel, the legal participant, as well. The driver follows the rule not because he is obliged to do so (i.e. by the possibility of sanction or collision) but because he considers himself obligated to do so. In this way, says Hart, when we speak of law, we necessarily speak of obligation: the recognition of a legal subject that he ought to act in compliance with a particular rule. Hart's conclusion, therefore, is that law functions as an affair of rules, not as a set of orders backed by threats.

⁴¹ For Austin's jurisprudential thought, see John Austin, *The Province of Jurisprudence Determined* (Aldershot: Dartmouth Pub., 1998). See H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Oxford University Press, 1997) at 6-8, 16-21 where Hart critiques Austin's account of law as command supported by threat of sanction.

⁴² The following is a summary of Hart's discussion *ibid.* at 82-91.

⁴³ *ibid.* at 90.

Yet, while Hart presents a more nuanced view of law than the Austinian “orders back by threats model” positivists had previously advanced, he remains within the legal positivist tradition for his insistence on establishing a hard *ex ante* criterion for identifying law. According to Hart, it is not a rule’s normative content alone that makes it law but its satisfaction of certain formal conditions, in other words, its correspondence to what he calls the Rule of Recognition.⁴⁴ Thus, whether a norm is legal or not turns on whether it is recognised as such by those officially charged with the task i.e. explicit legal institutions, paradigmatically manifested, in the case of the laws of England, by the Queen in Parliament and her judiciary.

In this way, the question for the legal subject, what is the law?, always has an apparently objective answer; it is what legal officials, having due deference to the Rule of Recognition, say it is. Thus, the internal perspective ends up being the one moulded by an externally fabricated threshold for testing legal validity. Thus due to its preoccupation with abstract coherency of a legal system, institutional legal positivist theory whittles down the normative criterion of law by basing it solely on the perspective of an “ideal” legal subject. In contrast, according to a critical legal pluralism, if a directive is not normative, if it does not give rise a genuine sense of obligation on behalf of an individual purported to be a legal subject to follow it, then it is wrong to call it law. A better term would be coercion, or even managerial direction, but it is not law because it is not a form of legal normativity.

Where the task of all legal subjects is simply to follow the list of instructions that has been stamped and certified as “the law”, they are portrayed as being like employees in a company who carry out the tasks they have been assigned by their manager just because the boss says so.

However, contends Lon Fuller, the problem with this managerial conception of law is that it assumes law functions merely as the one-way projection of state authority onto its

⁴⁴ Ibid. at 94: “[The rule of recognition] will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts.”

citizens. Fuller argues that law is in fact much more interactive than the managerial model would suppose. In a managerial context the subordinate applies the directives he has been given in order to serve a purpose set by his superior. Fuller explains:

The law-abiding citizen, on the other hand, does not apply legal rules to serve specific ends set by the lawgiver, but rather follows them in the conduct of his own affairs, the interests he is presumed to serve in following legal rules being those of society generally. The directives of a managerial system regulate primarily the relations between the subordinate and his superior and only collaterally the relations of the subordinate with third persons. The rules of a legal system, on the other hand, normally serve the primary purpose of setting the citizen's relations with other citizens and only in a collateral manner his relations with the seat of authority from which the rules proceed.⁴⁵

Let us return to the driver at the stoplight. While the fact a driver stops at a red light may indicate his acknowledgement of an obligation to comply with the state law requiring him to do so, does such an acknowledgement not also assume that the legal rule exists for a reason beyond the assertion of state authority alone? His decision to follow the legal rule, therefore, is predicated on the assumption that it exists to serve some discernible purpose; for example, the legal rules of the road exist to facilitate the safe and efficient circulation of traffic.

If a mechanical malfunction causes all the traffic lights at an intersection to get frozen red, would drivers continue to feel obligated to wait until a repair crew had resolved the problem? It is likely that not everyone would recognize the obligation to proceed only on a green light. Thus, the people who felt that the rule was failing to serve its larger purpose would no longer accord it the same normative weight. Does this mean that until the lights start working again, there is no law at this intersection? It does if law is only a matter of the prescriptions expressly promulgated by explicit state legislative and judicial

⁴⁵ See Lon Fuller, *The Morality of Law: A Reply to Critics* (New Haven: Yale University Press, 1964) at 207,208. The above quotation of Fuller as well as the foregoing paragraph also appear in a research paper I wrote before submitting this thesis. Parts of the research paper consist of a previous iteration of some of the views presented in this chapter on critical legal pluralist theory. See: Thomas McMorow "Advocating a Student-Centred Approach to Legal Research into Cyber Bullying" (2007) [unpublished, archived at McGill University, Faculty of Education, with Prof. Shaheen Shariff] at 9.

institutions, which it turns out have failed to anticipate the possibility of this dilemma arising. Would such a sentiment necessarily accord with the perspective of drivers in such a situation? Or would the expectations of drivers resulting from their interaction with each other as they queued up to pass through the intersection not also constitute their own set of rules and obligations? Would such expectations not be relevant to a court later trying to decide how to resolve a dispute over a collision that had happened in this intersection?

For Hart, unless a norm is carried by an official act through the archway of legality, it is not a law. Imagine, though, if someone had gotten out of his vehicle to conduct the traffic and every driver had been following his signals until one driver chose not to and ended up crashing into another car. Drivers might not have been officially bound to follow the person's directions, but in this instance, the rules of the intersection would be for all intents and purposes as adequate as any State law governance of the situation. Hart's insistence that what counts as law depends on the outcome of some pedigree test relating to a pronouncement by state institutions acting officially makes the internal perspective of people who were there subject to the *post* and (*ad hoc*) evaluation of someone with an external perspective who was not. Also, it makes the distinction between law and non-law hinge on a criterion of form rather than content. A criterion that canvassing a sociological typology of legal normativity highlights is tenuous at best.

Plurality of Forms of Legal Normativity

A typology of legal norms, orders, processes, methodologies and institutions sensitizes us to the inherent plurality of legal normativity and underscores just how arbitrary a single formal criterion for legality necessarily is.⁴⁶ This typology may be graphed along two axes, one representing law's sites and the other law's modes. First, the site of law (its manner of elaboration) may be explicit or implicit; this depends on whether the norm

⁴⁶ Macdonald, "Les Veilles Gardes" at 233; See also Macdonald, "Pour la reconnaissance d'une normativité juridique implicite et 'inférentielle'", supra note 30. For a recent application of this normative typology to the laws of close personal relationships see Macdonald & McMorow, "Wedding a Critical Legal Pluralism to the Laws of Close Personal Relationships", supra note 30 at 13.

came into being as a result of a deliberate creative process or not. The mode of law (the way meaning may be extracted from norms) comprises 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. In contrast to canonically formulated norms, 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 justice or equity are fluid concepts that are nowhere either written out or summed up in canonical form.

In sum, four normative archetypes emerge: 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). Where we plot existing artefacts onto this graph depends. We might locate legislation as patent norm, judicial precedent as allusive norm, trade usage as customary norm, and general principle of law as latent norm but some statutes may enact symbols or pictograms, rendering the norm allusive; some judgements may state a “rule of law”, or a patent norm; previously general principles may be specified by a judgement or a statute into patent or allusive form.⁴⁷ These categories constitute a frame of reference for evaluating how law emerges in a myriad of forms. The point of elaborating a sociological typology of norms is not to provide a set of discrete compartments in which to pack away. It is

⁴⁷These internormative transfers are addressed in R.A. Macdonald and H. Kong, “Patchwork Law Reform”, *supra* note 30.

intended to expose and challenge our assumptions about what form these legal artefacts can and do take.

The same typology may be used to analyse such legal artefacts as concepts, institutions, processes, methodologies, and the basis of legitimacy or legal authority itself. For example, describing an institution as explicit or implicit depends on whether it is the product of conscious elaboration or not. If a particular institution is laid out in a constitution, this is evidence of it being explicit. Such institutions have relatively public and structured procedures of recruitment of new members. However, institutions that emerge simply through social practice, as opposed to a conscious deliberation process, are best described as implicit institutions.⁴⁸

Legitimacy or authority can also be conceived along these lines.⁴⁹ Coercive power is the use of physical force or psychological constraint on another person. To be a legitimate or authoritative exercise of coercive power, it must be justified by a reference to one of four types of argument.⁵⁰ Explicitly- grounded legitimacy has the potential of being justified through an appeal to reason or another criterion or pre-existing logical system; whereas implicitly- grounded legitimacy may be justified through an appeal to established practice. Formal legitimacy invokes a method of identifying authority with an individual not by reference to his essential qualities but by other mechanisms like bureaucratic procedures, elections and rules of consanguinity. In contrast, inferential legitimacy does rely on certain personal attributes of the particular individual being taken into account. Thus, a bureaucracy appeals to explicit and formal grounds of legitimacy; traditional authority, which relies on its own long revered status rather than any specific rational justifications is an example of implicit and formal legitimacy. Expertise makes claims to

⁴⁸ Macdonald gives examples of such implicit institutions existing in communities as disparate as summer camps and law faculties. He refers to them as “Old Guards”— associations of individuals whose membership is not based on any clearly defined set of criteria, but who nonetheless exercise a significant influence on the normative environment. For instance, Macdonald points to the group of persons with whom he often found himself consulting when making decisions at the McGill Faculty of Law. See Macdonald, “Les Veilles Gardes”, *supra* note 30.

⁴⁹ *ibid.*

⁵⁰ *ibid.* at 254, 255.

explicit and inferential legitimacy; while trusted friends and charismatic leaders appeal to implicit and inferential forms of legitimacy.

Different procedural mechanisms “(modes of establishment of the social order) by which normativity enters into our social relations” may also be graphed into these quadrants.⁵¹ The difference between explicit and implicit procedures: existence of a third party, whose role is to structure the relations between the two parties (as in the case of adjudication). Where there is no third party, it is those subject to the norms who have instigated them (such as in the negotiation of a contract). The distinction between formal and inferential procedures hinges on the degree to which form comes in to play in governing how the norm ends up being articulated. For example, having to present reasons for a decision would be an example of a formal procedure. Patent procedures or methodologies are explicit and formal, such as adjudication. Allusive ones are explicit and inferential, such as discretionary decisions. Routinized procedures or methodologies are implicit and formal, such as contractual negotiations. Finally, latent decision making-procedures are both implicit and inferential, and are best seen in the course of every day human relationships.

Distinguishing *Critical* and Social Scientific Legal Pluralisms⁵²

What critical and social scientific legal pluralisms approaches to law share is recognition of the variety of forms of legal normativity. They find in legal positivism’s privileging of official state institutions not only an ignorance of alternative types of norm-producing institutions, but also an ingrained imperialistic arrogance. Informed by research in the fields of anthropology, ethnography and sociology, they detect the absurdity of the claim

⁵¹ *Ibid.* at 254.

⁵² See Macdonald & Kleinmans, “What is a *Critical* Legal Pluralism?”, *supra* note 30. For further criticism of social scientific legal pluralism see Jeremy Webber, “Legal Pluralism and Human Agency” (2006) 43 *Osgoode Hall L.J.* 167. Sally Engle Merry, “Legal Pluralism” (1988) 22 *L. & soc. Rev.* 869; Baudouin Dupret, “Legal Pluralism, Plurality of Laws and Legal Practices: Theories, Critiques, and Praxiological Re-specification” online: (2007) 1 *EJLS* <http://www.ejls.eu/>; J.G. Belley, “Le pluralisme juridique de Roderick Macdonald: une analyse séquentielle” in A. Lajoie & R. Macdonald et al. eds., *Théories et émergences du droit: pluralisme, surdétermination et effectivité* (Montréal: Les Éditions Thémis Inc., 1998) ; G. Teubner, “The Two Faces of Janus: Rethinking Legal Pluralism” (1992) 13 *Cardozo L. Rev.* 1443; Chiba, Masaji, “Other Phases of Legal Pluralism in the Contemporary World” (1998) 11 *Ratio Juris* 228.

that the only law is State law. The legal positivist position implies norms guiding human behaviour in territories conquered by an imperial power, for instance, would not constitute law until they were validated as such by the official organs of state power.⁵³

Legal pluralism reveals that the formalist logic of the approach Hart advocates possesses all the elegance and versatility of a mink coat. It is functional and appealing, weather permitting. Unfortunately, normativity is, at the very least, just as variable and unpredictable as the weather. Accordingly an approach to law must take into account the plurality of legal normative orders shifting like cloud formations across the sky and not just the meteorological phenomena within reified constructs of Euro-centric microclimates. However, what distinguishes a *critical* legal pluralism from other strictly social scientific legal pluralist approaches is that it goes even further in rejecting the legal positivist paradigm, first of all, by refusing to conceive of law as something out there and above legal subjects.

While a *critical* legal pluralism recognizes the insights an empirical science like sociology has to offer a normative science like law it stops short of conflating the two, thus bringing law out of the ether and back down to earth. A *critical* legal pluralism differs from a strictly social scientific legal pluralism by maintaining the connection between legal normativity and legitimate authority in its approach to law.⁵⁴ Moreover, a critical legal pluralism acknowledges the radical indeterminism of all normativity; whereas, a social scientific legal pluralism endeavours to define it within the terms of functional, systemic or structural regularities.⁵⁵ This type of social scientific legal pluralism actually represents little more than a weigh-station before an inevitable return to the institutional legal positivist perspective.⁵⁶ A critical legal pluralist perspective

⁵³ Thus, ideologically speaking, it becomes important for some to wrest the label law from those who would apply it only to the products of distant (and perhaps even tyrannical) official authorities. For example, see de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York, Routledge, 1995).

⁵⁴ Thus, a critical legal pluralist approach involves using the tools and methods of legal analysis to explain the sociology of law. See Macdonald, "Les Veilles Gardes" *supra*, note 30.

⁵⁵ Belley, "Le pluralisme juridique de Roderick Macdonald: une analyse séquentielle", *supra* note 52 at 62-63.

⁵⁶ For a discussion of this type of critique of social scientific legal pluralism see Baudoin Dupret, "Legal Pluralism, Plurality of Laws and Legal Practices: Theories, Critiques, and Praxiological Re-specification"

avoids such a fate by focussing not on the external causal explanations for all normative phenomena (which given the dissonance and flux of normative phenomena is dismissed as a vain glorious task) but on the individual person, who in the course of deciding which norms to follow, constitutes the irreducible site of all legal normativity.⁵⁷

In contrast, the institutional positivist approach (to which an *uncritical* legal pluralism inevitably leads) fails to budge in response to this normative heterogeneity and flux because it is chained to a ball of dogmatic beliefs. In light of an empirical inventory of legal normativity that exposes the plurality, heterogeneity, inter-penetrability of norms, normative orders, processes methodologies and institutions, faith in this quartet of beliefs begins to wither under the intense scrutiny of reason. Once we stop believing in the existence of a formalist condition of law and a predetermined legal normative hierarchy we start to see that the ultimate locus of legal normative activity is the individual human being. Law is not to be found out there, like an object to be hoarded in the stores of our imagination but in the process of individual legal actors deciding which norms to follow on the basis of which reveals more legitimate authority.

Relating law to legitimacy in this way speaks to a certain conception of the purpose of law. For Hart, (and indeed all legal and social scientific positivists) law's purpose is nothing more than "controlling men by rules".⁵⁸ Fuller insists, however, that there must be some further justification for subjecting human behaviour to the governance of rules. In his view, the purpose of law is to enable "an effective realization of morality in the actual behaviour of human beings."⁵⁹ As baselines of human conduct and interaction, laws furnish us with the necessary framework in which to exercise our own free choice. In this way, law is fundamentally about human freedom not social control.⁶⁰

(2007) 1 EJLS. Unfortunately, Dupret appears unfamiliar with the critical (or radical) legal pluralist hypothesis.

⁵⁷ See Macdonald & Sandomierski, "Against Nomopolies", *supra* note 30 at 617.

⁵⁸ H.L.A. Hart, "Lon L. Fuller: The Morality of Law" in *Essays in Jurisprudence and Philosophy* (Clarendon, Oxford University Press) at 357.

⁵⁹ See Lon Fuller *The Morality of Law: A Reply to Critics*, *supra* note 45 at 205.

⁶⁰ See Lon Fuller, "Freedom: A Suggested Analysis" 68 Harv. L. Rev. 1305.

A note of caution is in order before proceeding here. Imagining law as a type of shorthand for identifying the minimal conditions necessary for the realization of genuine human freedom requires us to distinguish it from ethics or religion, which in their own way may also aspire to this purpose.⁶¹

Critical Legal Pluralist Hypothesis: Framework for Circumspection Not Definition

Rather than beginning by imposing a specific definition of what is law, a critical legal pluralism proposes a framework in which to conduct our inquiry. Therefore, law is presented as “the endeavour of symbolizing human conduct and interaction as governed by rules”.⁶² Macdonald breaks down this framework for conducting inquiry into law word by word.⁶³ An ‘endeavour’ is an undertaking, an intentional activity carried out to achieve some purpose. Here the endeavour is an intellectual one, that of labelling some things we experience as law and not others.

According to the legal pluralist hypothesis, this process is described as the act of ‘symbolizing’, which denotes the understanding and intellectual reconstruction of that which is symbolized. Therefore, it is incorrect to say ‘law just is’; rather, law comes about through the process of perception and reflection. Within this framework, that which is symbolized is ‘human conduct and interaction’. In other words, the action as opposed to merely the thought of human beings is symbolized both on an individual basis but necessarily on an interpersonal or relational level as well.

However, it is that human conduct and interaction as ‘governed by rules’ which completes the legal pluralist framework for conceiving law. ‘Governance’ implies an orientation of oneself and one’s intentions and behaviours in relation to a point of reference external to the act or intention. Governing are ‘rules’: norms or generalized prescriptions that pre-exist the human behaviour that is being symbolized.

⁶¹ See Macdonald, “Triangulating Social Law Reform”, *supra* note 30 at 123-125.

⁶² Macdonald, “Here, there and everywhere”, *supra* note 30 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* (2d) (New Haven: Yale University Press, 1969) at 106.

⁶³ See Macdonald, “Here, there and everywhere”, *supra* note 18.

Within this framework, no type of either symbolization or human conduct and interaction is excluded *a priori*.⁶⁴ In other words, a critical legal pluralist approach to law does not presume that law is necessarily restricted to one paradigmatic symbolic form.⁶⁵ Instead the focus is on the individual human being negotiating the heterogeneous plurality of norms, normative orders, methodologies, institutions, and modes of authority to which she is subject. Acknowledging law as normative, and seeing it where a human being chooses to govern his or her behaviour according to a norm that in his or her view has a legitimate basis, we see that “the legal decision-making process in reality consists in finding and recognizing, beyond the formal manner of the resolution of disputes, the interplay of implicit and inferential norms. For this reason, only implicit and inferential norms are really normative.”⁶⁶

Therefore, a critical legal pluralist approach to understanding law is valuable when studying normative agency among people who in some cases due to profound cognitive impediments cannot really be seen to participate as a creative “legal actor”.⁶⁷ Core members belong to a complex, pluralistic and mutating normative world, whose ways of being recreated and reinvented are fundamentally implicit and inferential.

From Critical Legal Pluralism to Law at *L'Arche*

As a heuristic device for describing everyday law at *L'Arche* I have chosen to adopt the ‘law-jobs’ framework set out by K.N. Llewellyn and E. Hoebel in *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence*.⁶⁸ The challenge is to expose the legal

⁶⁴ See Macdonald, “Here, there and everywhere”, *supra* note 30.

⁶⁵ Thus, law is not just a verbal language of interaction, but one encompassing many different non-verbal kinds of human communication as well. The non-verbal potential of law comes especially to the fore when we look at the laws by which persons with sensory and intellectual impairments govern their conduct and interactions. See: Hans Furth, *Thinking Without Language: Psychological Implications of Deafness* (The Free Press: New York, 1966).

⁶⁶ Roderick A. Macdonald, “Pour la reconnaissance d’une normativité juridique implicite et ‘inférentielle’” at 58 (trans. by author).

⁶⁷ See Macdonald & Sandomierski, “Against Nomopolies”, *supra* note 30 at 61.

⁶⁸ K.N. Llewellyn & E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman: University of Oklahoma Press, 1941) [Llewellyn & Hoebel, *The Cheyenne Way*];

aspect of life at *L'Arche*. This is no easy task given that to the ordinary observer life at *L'Arche* does not appear to have legal content, except when there is some extraordinary crisis or trouble. However, notes Macdonald “everyday life has long been a fertile ground for legal analysis.”⁶⁹ Identifying situations of everyday law can be instructive on many levels. Studying everyday law at *L'Arche* not only brings a legal perspective to bear on *L'Arche*, but a *L'Arche* perspective to bear on law.

In explaining a critical legal pluralist perspective, I have shown how it differs both from institutional legal positivist and social scientific legal pluralist accounts of law. Reflection on the plurality of norms, institutions, methodologies and authority destabilize common assumptions about what counts as legal. Thus, we peer over the four walls of institutional legal positivism— centralism, monism, prescriptivism and positivism— that imprison much legal scholarship. In doing so, the point is not to render legal analysis banal, but to challenge the banalization of human experience that does not readily conform to the contours of orthodox legal analysis.

For years, research in the area of narrative legal anthropology has shown (sometimes consciously at other times unconsciously) how cultural bias colours conceptual understanding.⁷⁰ Indeed, so intertwined are activities such as law and culture that course titles bearing such double- barrelled names appear as nothing short of redundant. While acknowledging all knowledge as hypothetical, and all language as inadequate, I can still have something to say; hopefully, I will just now say it with less arrogance, mindful of how much contingency is at play.

S.F. Moore, *Law as Process: An Anthropological Approach* (Boston: Routledge & K. Paul, 1978); C. Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983).

⁶⁹ R.A. Macdonald, *Lessons of Everyday Law*, *supra* note 30 at 13.

⁷⁰ K.N. Llewellyn & E. Adamson Hoebel, *The Cheyenne Way*, *supra* note 68.

3- RESEARCH METHDOLOGY

God said to Noah... "Make yourself an ark out of resinous wood. Make it with reeds and line it with pitch inside and out. This is how to make it: the length of the ark is to be three hundred cubits and its height thirty cubits. Make a roof for the ark...put the door of the ark high up inside the ark, and make a first, second and third deck." Genesis 6:14-16

I. Theory & Practice:

Theory and practice are inextricably bound.⁷¹ Both complement each other in the course of cultivating our imaginations. Theoretical knowledge empowers us to change our practices.⁷² Where it is no longer feelings or intuitions alone drawing us to embark on a particular path but reasoned articulations as well showing us such a way is possible, new horizons begin to open up. Yet, how we choose to live affects the way we think as much as the way we think affects how we choose to live. The ultimate source of all theoretical questions is to be found in practical problems. How pressing theoretical questions feel depends on how acute the practical problems from which they spring appear to us. So long as our lived reality is enclosed by barriers—social, mental, emotional, spiritual etc.— the more limited the scope and depth of our theoretical enquiry will be.⁷³

⁷¹For discussion of this question in relation to empirical research, see: N.K. Denzin, & Y. S. Lincoln, eds., *The Sage Handbook of Qualitative Research* (3rd ed.) (Thousand Oaks, CA: Sage, 2005); Douglas Ezzy, *Qualitative Analysis: Practice and Innovation* (London: Routledge, 2002). For an analysis of this issue as it pertains to empirical legal research especially, see: Karl Llewellyn & Hoebel, *The Cheyenne Way* (Oklahoma: University of Oklahoma Press, 1941); Bonaventura de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (1995); Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, Inc., 1983); For a discussion with an especially philosophical perspective, see: Hans Gadamer, *Truth and Method* (New York: Crossroad, 1988).

⁷²R.A. Macdonald & Hoi Kong, "Patchwork Law Reform: Your Idea is Good in Practice, but It Won't Work in Theory" (2006) 44 Osgoode Hall L.J. 11 (discussing the interdependence of theory and practice in law reform).

⁷³Jennifer Nedelsky, "Law, Boundaries, and the Bounded Self" (1990) 30 *Representations* 162 (discussing how the pervasive imagery of boundaries evoked in everything from legal discourse to child-development literature reflects a liberal ideal of autonomy that fails to pay due regard to the social dimensions of self-hood).

Discussions about “the other”, as necessary as it is in the course of academic discussions about legal, philosophical, political, social, economic or ethical questions ought to make us wince. The abstract “other” is faceless and ethereal, whereas Edgardo with the rough beard and angry eyes who has asked me for change on Rue St. Laurent is real as lice or thirst. He is one of the living, breathing human beings on this planet, in this city with whom my relations are governed by laws. That guy—with his vulnerability and loneliness, resentment and chattiness, desperation and hunger—has some pretty practical problems— that can only begin to have an impact on the way I think about him, myself and the world, if I recognize him and seek to know his problems in the first place. How I react is the next question. Acknowledging the other, and having a sense of his due without making the personal commitment necessary to see that he gets it represents the worst kind of shameless human limpness. As Martin Luther King Jr. reminded us, just as “power without love is reckless and abusive...love without power is sentimental and anemic.”⁷⁴

II. A General Comment on Method

A microscope consists of a set of lenses that, when properly aligned, work in unison to reveal what would otherwise be invisible to the naked human eye. One’s research method functions much like a microscope, because that is what permits one to bring into view one’s subject of study.

Just as the lenses on a microscope work in tandem, requiring mutual adjustment before the subject of examination will come into relief, the multiple modes of one’s research method require continuous realignment. That is because each mode of research informs the others. The *McGill Policy On the Ethical Conduct of Research Involving Human Subjects* defines research as, “the systematic investigation to establish and communicate

⁷⁴ Martin Luther King, Jr., “Where Do We Go From Here?” Annual Report Delivered at the 11th Convention of the Southern Christian Leadership Conference, August 16 1967, Atlanta, GA. Online: The Speeches of Martin Luther King
<http://www.stanford.edu/group/King/publications/speeches/Where_do_we_go_from_here.html>.

facts, principles, understandings or generalizable knowledge”.⁷⁵ In the *Student Guide to Ethics Review for Research Involving Humans Research* it is pointed out that research involving human subjects includes everything from “observing people in the mall to conducting a clinical oncology trial”.⁷⁶ Approval from one of the McGill University Ethics boards is required for carrying out either type of research. The difference is, unlike conducting a clinical oncology trial, observing people in the mall is a part of everyday life.

One may infer from the definition above that two things make “research” different from the process of knowledge acquisition that happens in the course of everyday human experience: the manner in which one goes about conducting it and the purpose behind doing it in the first place. Thus, there must be a “systematic investigation” whose point is to “establish and communicate facts, principles, understandings or generalizable knowledge”. The implicit assumption in this formulation of research is that human beings can and do intentionally control and predict how they actually go about learning. Truly, anyone who has ever carried out this sort of systematic research continues to do research, at least in the broad sense of the term, even while she sleeps. How does one account for the methodological contribution made by dreams, billboards, snippets of conversation on the Metro, musical concertos, car collisions, sunsets, and paintings we experience, especially when it may be taking place subconsciously? Furthermore, if one is studying law and understands law not as a field of human behaviour to be viewed, but rather as a field of view in which to see human behaviour, how does one know whether one is doing legal research or not?

⁷⁵ “McGill University Policy on the Ethical Conduct of Research Involving Human Subjects” online: McGill University <<http://www.mcgill.ca/files/researchoffice/McGillHSPolicy.pdf>> at 9.

⁷⁶ Lynda McNeil, Research Ethics Officer, “Student Guide to Ethics Review for Research Involving Humans” online: McGill University <<http://www.mcgill.ca/files/researchoffice/StudentGuide2005.pdf>> at 2. See “McGill University Application Guidelines for Ethics Review Policies and Procedures” online: McGill University Ethics Review Board <<http://www.mcgill.ca/files/researchoffice/REBIIIGuide.doc>>

III. Choice of Research Site

In the preceding chapter, I have propounded an approach to understanding law that, in my view, represents a basis both for theoretically sound legal research and emancipatory social practice. By identifying individual human beings as the irreducible site of law, and thus the locus of legal inquiry *par excellence*, we are reminded that discussion of abstract concepts like law, normativity, norms, legitimacy, procedures and methodologies is relevant because it relates to the concrete particulars of individual human decision-making and behaviour. Law in all of its theoretical complexity is worthy of interrogation because it bears on the experience of each and every individual human being, who, by virtue of simply being human, possesses an inviolable sanctity, or (to use a less theologically-charged term) inalienable dignity.

Inspired by the critical legal pluralist perspective advanced in Macdonald's writings and his teaching in the Legal Education Seminar class I took with him in the first semester, I felt not only did I have to start doing something more meaningful with my life, but also that it was possible to do so while still committed to my graduate legal studies.⁷⁷ I began volunteering at *L'Arche* in February because I knew I could be of practical use there as a part-time, assistant to persons with intellectual disabilities and I was yearning to live more fully. Moreover, I also had a feeling that regardless of how I went about it spending time at *L'Arche* would be a learning experience.

So I telephoned the *L'Arche Montréal* office, expressing interest in the community and was invited to come along to an open community supper on January 29, 2007. Soon after I arrived at the potluck dinner, a young lady had me by the hand introducing me to everybody around us. About sixty people were there: core members, assistants, community leaders, office staff, as well as family, friends, and guests who were experiencing *L'Arche* for the first time. After the last plate was washed and put away in

⁷⁷ When I say I felt I needed to start doing something more meaningful in my life, I am not implying that full engagement in academic pursuits whether as teacher, student or researcher in itself suffer from a deficit of meaning. As I explained in the preceding chapter, things do not possess meaning without us giving it to them, and I had not arrived at a point where my graduate legal studies had this kind of resonant significance for me.

the cupboards and all the chairs stacked at the side of the hall, I spoke with the Director of Human Resources, Robert Larouche. I told him that I was a law student and that I was interested in learning about *L'Arche* from a legal point of view. We agreed that the best way for me to learn about *L'Arche* was to get immersed in it myself. Thus, I started volunteering at *L'Arche* in February before I actually knew how I was going to relate it to my Master's thesis.

After I began volunteering at *L'Arche* I prepared an application to the *McGill Ethics Review Board I*. McGill University prohibits research involving human subjects without prior approval from a McGill Ethics Review Board. I had not devised any sort of system to collect data at *L'Arche*. I was living there three days and three nights a week as a volunteer assistant while attending a class in jurisprudence at the Faculty of Law and reading various materials chiefly relating to the legal theoretical understanding of law that I was developing. I informed the ERB in my application that I was currently engaged as a volunteer at the proposed site of my research. I submitted my application February 20th, received approval pending modifications March 7, 2007 and then final approval on April 11th.⁷⁸ It was upon receipt of this approval that I began my fieldwork at *L'Arche*.

IV. Thesis Method: Two Interrelated Aspects

a. Theory

My method for researching law at *L'Arche* involved, on the one hand, examination of cultural artefacts concerning five primary themes: legal theory, *L'Arche*, disability, positive legal materials (ones produced both by *L'Arche* and by the State officials) and research methodology.⁷⁹ Books, articles, court cases, *L'Arche* community documents did

⁷⁸ See *Research Ethics Board I Certificate of Ethical Acceptability of Research Involving Humans*, Approved April 11, 2007 (Appendix 8.1); Thomas McMorow, "Application to the McGill University Ethics Review Board" (Archived with Ethics Review Board I and with author).

⁷⁹ Mainstream legal research tends to be concentrated on the study of texts like statutes, judicial opinions, and secondary sources. Given the orthodox fashion with which most inquiry into law is carried out, any discussion of research methodology is ordinarily presumed to amount to nothing more than a statement of the obvious. For a critique of what may be called a 'textbook view' of legal research, owing to the popularity of this notion among textbook writers (and, I would suggest, the primacy it places on texts as the

not have to expressly self-identify as bearing on one of these themes to be relevant.⁸⁰ Similarly, other textual sources—ranging from discursive academic tracts to non-discursive poetic works—not to mention other cultural artefacts such as music, mime and visual art—all had an impact on the formulation and development of the theoretical (and by implication, the empirical) component of the method for compiling research in this thesis.

Biographical, historical, spiritual, religious, anthropological and literary works have all drawn from life at one or more of the *L'Arche* communities in the world. Many of these materials offer rich sources of insight and reflection. Reading these books has informed my understanding about *L'Arche*, law and methodological approaches to linking the study of the two. Also, some of the writings about *L'Arche*, in particular those of Jean Vanier and other well-known community members, may be seen as inferential sources of legal normativity at *L'Arche*.⁸¹ Knowledge of this literature increased my awareness of *L'Arche* and gave me reference points for interviews with members. However, the approach to studying law at *L'Arche* that served as the lynchpin of my entire methodology was living at *L'Arche* as an assistant myself.

b. Fieldwork

The other aspect of my research method consisted of fieldwork. This incorporated two chief components:

1. Formal interviews with four core members, an assistant, a parent of one of the core members, the Director of the Community and the Director of Human resources.

sole legal research resource), see Desmond Manderson & Richard Mohr, "From Oxymoron to Intersection: an Epidemiology of Legal Research" (2003) 6 *Law Text Culture* 165.

⁸⁰ The attached bibliography provides a list of the various textual references I consulted. Moreover, contained in the appendix are some of the relevant *L'Arche* documents, such as the *Charter of L'Arche* (Appendix 8.3), *Association des Arches du Québec: Code d'Éthique* (Appendix 8.2).

⁸¹ Most assistants at *L'Arche* are familiar with at least some of Vanier's work and although he no longer holds an official position within the international institutional structure of the community, as founder and most renowned spokesperson, he has a certain authority. Assessing the influence of Vanier's thought on everyday laws of *L'Arche Montréal* presents an interesting point of analysis that I will address in a later chapter.

2. Participant field observation, which consisted of living three days a week for three weeks in a *L'Arche* home, followed by spending one full day a week in the same home during three months. In both cases, I was working at *L'Arche* on a volunteer basis as an assistant.

I underline persistent methodological and ethical questions implicated by the fieldwork I did. Moreover, I describe how my presence as both researcher and assistant at *L'Arche*, which turned out to be vital to the character of the research I carried out, also proved problematic. While pointing out the advantages of the overall method I adopted, I identify mistakes I made, describe how I endeavoured to minimize their harm and explain how in future empirical research projects they may be avoided.

V. Interviews

I acknowledged also that it was important not to let the status I already had in the community be a source a pressure on people to agree to participate in interviews. Thus, the interview selection process, the consent forms that I drafted and the way I performed the interviews were very sensitive to this issue of informed consent. First, I prepared a list of prospective interviewees which I passed on to the Director of Human Resources who agreed they were good choices of their ability to understand the terms of the informed consent form and take part effectively in an oral interview. He then asked them if they wished to take part, noting that they were not obligated to do so. Everyone of the core members agreed. Thus, the four subjects I interviewed were among the most expressive and articulate core members living in the community.

I did not conduct interviews until the summer, when I had formed a better idea of what it was I was actually looking to uncover about law at *L'Arche*.⁸² Core members did not constitute the only interview subject group. I had a formal interview with a fulltime assistant, a parent of one of the core members and the Director of the Community as well

⁸² In addition, it was also after I had obtained approval from the REB and signed permission from the Director of the Community to conduct the interviews and observe daily life for the purpose of my thesis research.

as the Director of Human Resources. While most of the interviews lasted about half an hour, the interviews with the two directors lasted upwards of two hours. I posed a wide range of questions to these men about the history, origins and institutional structure of the community. In addition to these formal interviews, I had many informal conversations with assistants about a wide range of issues pertaining to normativity at *L'Arche*.

I tried to make the wording in the consent forms clear and intelligible; indeed, the form drafted specifically for core members was stated in direct, simple terms to explain as fully as possible to persons with intellectual disabilities the conditions of participation in the interview process. The forms identified me, the researcher, as well as other pertinent information including the purpose of the interview and a description of the research. Stated also was the manner I intended to use any data compiled from the interview as well as guarantees of anonymity and confidentiality. Moreover, the forms stipulated that the interview subject was under no obligation to take part in the interview; that she could terminate it at any time if she so chose; and that she did not have to answer any questions that she did not want to. Furthermore, I stressed each one of these points verbally prior to each interviewee both prior to and during our interviews. Moreover, I interviewed each of the core members in the presence of an assistant of his or her choice in order to emphasise that I was interviewing them for the purposes of my thesis research.

When the assistant present in the interview was signing the consent form, I explained that this required him or her to also keep the substance of the interview confidential. My previous involvement as an assistant at *L'Arche* meant I knew the persons I was interviewing and that we were able to talk in a relaxed manner. I also was familiar with their reference points, and thus was able to tailor abstract questions about law into specific questions about their relations in the home. Each person appeared to enjoy the process: first of all, being asked to participate and then have a chance to talk about themselves and their friends at *L'Arche*.⁸³

⁸³ The advantages as well as some of the challenges of conducting research where one is also an insider is explored in Desmond Manderson & Sarah Turner, "Coffee House: Habitus and Performance Among Law Students" (2006) 31:3 *Law and Social Inquiry* 649. See also Alexandra Law, "Formal and Informal Norms at the McGill Legal Information Clinic" [unpublished paper, 2004] reprinted in R.A. Macdonald,

However, in the household where I conducted the bulk of my research through participant observation, none of the four core members had oral abilities conducive to oral interviews. Thus, I did not conduct formal interviews; however, through sign, gesture and some degree of oral communication, these core members expressed things to me through informal interviews. My implication in the community, my status as a normative actor there gave me an excellent vantage point from which to observe their engagement in the interactional process that is law.

VI. Participant Field Observation

As an assistant, my duties at *L'Arche* were custodial, normative and personal. My responsibilities included doing grocery shopping to supplement supplies brought in from the food bank, cooking and cleaning, as well as accompanying core members on certain outings, arranging doctor and dentist appointments, assisting core members with their laundry and daily hygiene. I was also responsible for settling disputes and addressing violent behaviour. However, I was also there to develop relationships of trust and friendship with core members and assistants at *Blue Skies* and other homes in the community. Thanks to the multiplicity of my roles (as researcher, as assistant, as friend, as advisor, as authority, as citizen, as believer) I was subject to a variety of norms which require constant negotiation.

The subject population was made up of members of the community as well as more peripheral actors who have everyday life at *L'Arche*. Therefore, it included: persons with intellectual disabilities who live at *L'Arche* full-time as well as those with disabilities who only visit for community functions and to take part in workshops; full-time as well as part-time paid assistants and volunteers; family and friends.

The primary way in which I obtained data was through participant field observation. Once I obtained ethics approval and permission from *L'Arche*, I began compiling notes on my observations about what I observed at *Blue Skies*. I did not make the notes in the course of carrying out my duties as assistant. First, I wanted to minimize the impact of my presence as a researcher in the home. I did not want to disturb the assistants and core members by making them feel like they were under surveillance. Secondly, I did not feel it was necessary to take copious amounts of notes. Often I found it more useful to mull over the events of a visit I had spent at *Blue Skies* and then make notes on what I thought was potentially pertinent to my research. I would think about an interaction I had that day and think about the questions it had raised in my mind. Quite often this would stimulate me to engage in further reading on an issue of legal theory. Thirdly, I did not take notes during the day while with core members because it would have been very easy to have engrossed myself in my own work and ignored them.

The hours could pass slowly and certainly not every minute was filled with sixty seconds of legal research. Because each core member at *Blue Skies* had verbal communication challenges, at times it was tempting to treat them as part of the scenery and go about writing up research I had hitherto gathered. However, being there as an assistant as well as researcher, I could not just come and go as I pleased.

As an assistant I was obligated to be present to other members of the household. This did not mean waiting on them hand and foot, but rather showing myself to be open to engagement with my fellows, ready to make suggestions for activities and prepared to respond to theirs'. Moreover, when one starts taking notes one stops observing. Because the data I wished to compile concerned the interactions I myself was having with core members, it would not have been feasible to interrupt these interactions to go and record data.

Methodologically speaking, I think my approach would have benefited from being more systematic. I should have had a set regimen each day for recording data. That would have enabled me to keep closer track of what I was observing and rely less on memory work.

Although on occasion I felt like I was mentally processing data by mulling over it in my head, getting things down on paper is always more demanding than just thinking about it. However, not making notes was even more problematic from an ethical point of view. The fact was, while I worked as an assistant, I was making observations; I was watching. This represents the crux of my ethical concerns involving my fieldwork: the issue of meaningful, informed consent of core members to participate as research subjects.

Although in relation to the formal interviews I conducted, I set out and followed clear and explicit consent procedures, when it came to the observation component of my fieldwork I did not obtain each individual participant's formal, written consent. On the one hand, because of the initially broad subject of my research, this would have required me to obtain individual consent from every member of the community. Instead, I obtained the permission of the Director of the Community to carry out my research. I gave him a consent form attached to a letter stating my intention "to observe life at *L'Arche* for the purposes of examining it in my LL.M. thesis as a legal community and to carry out interviews with members of the community to the same effect".⁸⁴ Furthermore, I discussed the nature of the project with the Director of the Community and Director of Human Resources on several occasions throughout the course of my research. In fact, the Director of Human Resources read a draft of a preliminary paper I prepared about my research and provided me with helpful comments and criticisms about my work.

During and after completion of the project data was stored in my personal possession. I have used pseudonyms for all of the core members and assistants and changed the name of the house where I stayed in order to guard anonymity. I refer to the names of the Director of *L'Arche Montréal* and the Director of Human resources because they are readily identifiable given that their names and titles are located on the *L'Arche* website.

⁸⁴ See *Letter to Director, L'Arche Montréal* and the attached *Consent Form* (Appendix 8.4)

VII. Critical Reflections on My Participant Fieldwork Method

First, a well- thought- out research method, described in clear and intelligible language is important from both a methodological and ethical point of view. Methodologically speaking, honing in on a research question enables greater focus and direction in the course of interviews and participant observation in the field. However, unduly narrowing one's focus can actually stifle one's research aims. I knew that I was interested in law at *L'Arche* but it took an active period of discovery consisting of reading, writing, reflection, note-taking, observation and discussion before I recognized what it was about *L'Arche* that I wished to describe in this thesis.

In retrospect, I would have benefited from analyzing various anthropological methods earlier on in my research. Coming from a law background—with no previous experience in field research— I inadvertently spent too much time concentrating on how the diversity of human ability at *L'Arche* had lessons for state law, rather than looking at how individual human beings, given their diversity of ability, were constructing normativity themselves. Fortunately, I had a relatively catholic legal theoretical approach and thus was able to shift between different avenues of inquiry.

Once I recognized the specific direction I wished to take, I began moving forward. Instead of trying to sketch a comprehensive presentation of *L'Arche* as a legal apparatus or system in which persons interact., I concentrated on examining the persons interacting and noted in what instances the more official legal normative machinery at *L'Arche* started coming into play. I became increasingly aware of the variety of roles I was playing as assistant, researcher, student, friend, authority figure, care-giver, and even sometimes, entertainer. My expression through these roles in relating to people in *L'Arche* meant I, like everyone else, was living law at *L'Arche*. As interactions involving core members began to take a more central place in my research methodology, the issue of informed consent became increasingly relevant.

Two key issues surround the consent of persons with intellectual disabilities. First, is the question of whether they in fact understand what it is they are being asked to consent to. Secondly, is the question of whether they are actually giving consent. Because of the range of abilities of persons with intellectual disabilities, the capacities of individuals to understand what it is that she or he is being asked to consent to vary also.

Communicational difficulties are the chief reason for a person being unable to comprehend what is being demanded of him or her. Even where there are no great communicational barriers, there may be other limitations impeding the person from fully grasping the gist of what is being proposed.

Accordingly, I endeavoured to discuss with each core member my research work, describing my thesis as a big article I was writing, like one you find in the newspaper but only longer, and that I was writing it about how we lived together at *L'Arche*. However, in each case I was unsatisfied that the individual really understood. In addition to effectively informing the person, there is also the issue of the quality of the consent itself. For example, if a person does understand what the consent is about, is she giving it because she wants to or because she is used to acquiescing to others?

Moreover, given the fact I was an assistant, and that all of the subjects had known me in that capacity since I began my volunteering, it was even more difficult to ensure the person would feel capable of the sort of detachment necessary to make an objective decision about whether she wished to consent or not. On the other extreme, some persons habitually respond in the negative to just about anything. How can one ascertain if a person is saying "No" for the wrong reasons? I was not in the position to judge this as a researcher. For all of these reasons, I decided against introducing individual consent forms for subjects I was observing. I made being a good assistant my top priority, and felt that this did not impair the method of my research. On the contrary, for the sort of "thick description" I finally chose for this thesis, it was essential.

Many well-meaning researchers have in the past held up persons with intellectual disabilities as “objects of scientific interest or...voyeuristic curiosity”.⁸⁵ My research, on the contrary, has focussed on revealing the complexity of core member subjectivity and observing their interactive role in legal normativity. If as Kleinhans and Macdonald argue, knowledge does in fact create realities, and we aspire to new and better realities, then it is equally vital to recognize that knowledge is possible beyond our present ways of knowing, just as what there is to say always surpasses what at the present moment can be said.⁸⁶

⁸⁵ See K. Stalker, “Some Ethical and Methodological Issues in Research with People with Learning Difficulties” (1998) 13 *Disability and Society* 5. See also Cushing, “A Statement on Method” in *Shaping the Moral Imagination of Caregivers*, *supra* note 3 at 19.

⁸⁶ Macdonald & Kleinhans, “What is a Critical Legal Pluralism?”, *supra* note 30 at 46.

4- PRESENTATION OF RESEARCH DATA

The flood lasted forty days on the earth. The waters swelled, lifting the ark until it was raised above the earth. Genesis 7:17-18

Preliminary Remarks:

The rich, complex and unique personality of each core member exposes legal analysis, when conceived merely as an effort to slot human behaviour into a fixed, formal, objective normative framework, as hopelessly inadequate.⁸⁷ Conceived narrowly in this way, legal analysis is highly exclusionary. When someone fails on first blush to match up to the criteria assumed to be characteristic of legal subjects, the logical conclusion is that their actions are no longer fit for legal analysis.

Thus removed as subjects of interest from the discipline, these persons lie outside law. Within an institutional legal positivist understanding of law, legal discourse revolves around an ideal legal subject: someone who rationally accepts the rule of recognition of the state legal system in which he lives, recognizing it to be the measuring stick for the validity of laws within that system.⁸⁸ If some persons do not have the intellectual capacity to rationally accept the rule of recognition then they do not fit the mould of the ideal type of legal subject. Instead of being at the centre of legal discourse, they are somewhere on the periphery. Any attempt at incorporating these outsiders into legal discourse when circumscribed in such a way requires using one of the two techniques law-reformers tend to adopt when trying to expand a category of persons: analogy or fiction.⁸⁹

⁸⁷ For a post-modern criticism of the “ideal” subject so prevalently featured in institutional positivist legal theory, see Jack M. Balkin, “Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence” (1993) 103 Yale L. J. 105. For a critique of rationalism within orthodox legal theoretical discourse, see Schlag, Pierre. “A Brief Survey of Deconstruction” (2005) 27 Cardozo Law Review 741; “‘Le Hors de texte c’est moi’— The Politics of Form and the Domestication of Deconstruction” (1990) 11 Cardozo Law Review 1631; “Missing Pieces: A Cognitive Approach to Law” (1998-1989) 67 Tex. L. Rev. 1195.

⁸⁸ See my discussion above of the “ideal legal subject” in H.L.A. Hart, *The Concept of Law*, 2nd ed. *supra* note 41.

⁸⁹ Macdonald, “Legal Fictions— The Law’s Little White Lies” in *Lessons of Everyday Day Law*, *supra* note 30 at 69.

In the former case, the story goes: persons with intellectual disabilities—albeit essentially inadequate to filling the shoes of the classic legal subject—can be seen to function in some ways that resembles him. Thus, by analogy, by virtue of the fact they are similar to the ideal type, the one on the conceptual inside, persons with intellectual disabilities are shown a way into the “legal” fold. Whereas, in the latter case, their differences are just ignored outright; they are ushered in to legal discourse under the cover of denial. In this way, persons with intellectual disabilities are treated not equally, but the same as everybody else, under the fictional pretence that having an intellectual disability poses no difference at all.

The following stories, compilations of some of the data I recorded during my fieldwork at *L'Arche* show, I think, why these two common juridical techniques, analogy and fiction, just will not do when it comes to conceptualizing law in light of the existence of persons with intellectual disabilities. First of all, I hope the reader will see that the value of these people as human beings does not depend on the extent to which they are like somebody else—least of all some supremely rational legal subject-prototype dreamed up by scholars. Secondly, I hope the reader will also see how each one of these human beings is unique. Gabriel, one of the *L'Arche* core members told me in our interview “each and everyone of us (core member or not) is a handicap in his own way”. Thus, far from being irrelevant, disability plays an important role in the lives we lead and the choices we make. A legal analysis that assumes legal subjects must be a certain way puts the cart before the horse. Conceptual understanding must be based on as wide an empirical base as possible. If instead of fixating on the “ideal type” of legal subject (and all its attendant assumptions regarding individual intellectual ability) we acknowledge and include from the outset the great diversity of human beings, legal analysis becomes less about telling and more about listening, less about showing and more about seeing.

I have chosen to present stories that I feel are representative of life at *L'Arche* and reveal significant aspects of the normative experiences of core members who live there. Six core members are mentioned in these stories, the four residents of Blue Skies—Yvonne,

Debbie, Eric and Helen— as well as two men who live at two other homes in *L'Arche Montréal*, Billy and Zack. Where the events I describe seem mundane and the general rate of activity calm, it is because that is life as I observed it at *L'Arche*. For the most part, as far as the following research data is concerned, law comes in latent form, and is best characterised as aspirational and facilitative, as opposed to propositional and proscriptive. However, examples of the patently legal can also be found, as well as the sort of situations that more readily correspond to the idea of law as criminal law that pervades the popular imagination.

I. Making Supper with Yvonne

Relationships of mutuality between core members and assistants (as well as other members of the community) transcend power imbalances, revealing to each person the tremendous gifts the other has as a human being.⁹⁰ Cultivating such relationships is a fundamental aspect of the *L'Arche* mission or philosophy. Running in tandem with the objective of providing for the material needs of its members is the goal of enabling fulfilment of their mental, spiritual and emotional needs as well.

Thus, at *Blue Skies* and throughout other *L'Arche* households I either visited or received reports about, suppertime is regarded as an opportunity to nourish more than just each person's body. It is a chance to engage with one another and celebrate each other's presence. During the week all of the core members spend the day either at work, school, or the community workshop so breakfast tends to be a simpler affair, pinched between morning ablutions and heading out the door. Core members eat their lunches when they are out during the day. Assistants, sometimes with the help of a core member (especially one who wants to make sure the lunch menu is to her liking) pack them the night before.

Supper, then, is the only time when everyone gets together to share a meal; hence, its ritualized aspects and special significance. Before consumption, though, comes

⁹⁰ See Cushing, *Shaping the Moral Imagination of Caregivers*, *supra* note 3 at 240. See generally Roy Herndon Steinhoff Smith, *The Mutuality of Care* (St. Louis: Chalice Press, 1999).

preparation of the meal, which serves as a chance for an assistant and core member to spend time one on one working together. Therefore, doing an activity with a core member, like preparing supper with Yvonne, is not just about getting food on the table as quickly as possible. The measure of its significance is in the manner in which assistant and core member interact while carrying out that process.

On the wall in the kitchen is a rota assigning different weekly duties to each core member. The days of the week are written across the top, underneath which are photos of the various core members and assistants, lined up with pictures of their chores. Since only one of the core members, Helen, can read, the schedule is made using as much visual imagery as possible rather than the written word; that way, it functions both as a direct means of communicating the housekeeping schedule for those who can read it (the assistants and Helen) and as reinforcement for those who cannot read it (Debbie, Eric and Yvonne) and are informed by the assistants of their tasks either through verbal language (Eric and Yvonne) or gesture (Debbie).

One day when Yvonne was assigned to help me prepare dinner, I called her over to give me a hand in the kitchen. At *Blue Skies* everyone tends to be very willing to do these types of activities, whether it is dusting the living room, taking out the garbage, drying and putting away dishes, doing the laundry, or in this case, getting dinner ready. According to accounts from other homes, such enthusiasm for this sort of mundane menial labour is far from universal. Fortunately, though, Yvonne was most happy to oblige. The challenge then came in determining what would be the best way for her to lend a hand; however, communicating effectively with Yvonne presents its own difficulties.

Unlike Debbie who is deaf, Helen who communicates primarily through sign-language and Eric who struggles to get a few words out, Yvonne can certainly speak. For the most part, though, I often find what she says unintelligible.⁹¹ I recognize a few words here and there, especially the names of people we both know. However, as with Eric, my strategy

⁹¹ Claire, who had spent more time at *Blue Skies* than I, could understand her better.

for conversing with Yvonne involves listening to her then repeating aloud what I think she has been trying to say and letting her confirm whether I have got her meaning right or not. Often times, Yvonne will respond by saying "No", dragging the syllable while her mouth curls into a wry smile. Frequently, she in fact means, "Yes." On such occasions, Yvonne peels into laughter, as she watches me slowly detect the ruse.

Between the use of verbal language and some hand gestures, we do manage to communicate. The more simple and concrete my instructions and the more attentive I am to what she is doing and saying as we prepare supper, the more we avoid having our lines crossed. On this occasion, I began by asking Yvonne to peel the potatoes, pointing to the workstation I had already set up for her at the counter. She walked over scooped up the cutting board with her other one and placed it on the kitchen table. Once she had ferried over the potatoes and peeler as well, she slid her long, thin body onto the wooden chair and set both hands to work.

As I busied myself at the sink, she alerted me that she was having trouble with the peeler. I put down the vegetables I was rinsing and went over to explain how to use it; however, after repeated attempts at emulating my example, she just seemed unable to get the knack. Instead I got her to peel an onion, which she was able to do with her fingers once I started it by making an incision with a knife. After that, I asked her to chop some carrots, which she did, rejecting the long carving knife I offered, selecting instead to do it with a much smaller steak knife.

Once she finished, I said: "Okay, Yvonne. This meal, I think, is going to be fantastic. We'll have to set the table so it's just as nice as the food."

Yvonne got up and put the dishes and cutlery out, filling up the water jug, checking with me that everything was in order.

"Excellent, Yvonne. Everything's in the oven, now. We just have to wait."

Once the supper was ready, I asked everyone to wash their hands. Then I dished the meal out onto plates, which Yvonne distributed to the other hungry members of our household seated at the table. Once everyone was sitting down, we joined hands for the blessing.

Although there is no rigid schedule, the assistant responsible for the supper usually asks someone different each night to say the blessing, so this time I asked Yvonne. With one hand, she pointed with her finger to each person around the table:

“Helen, Tom [me], Eric, Claire [a full-time assistant], Debbie and [adding at the end although she was not there] my mom”.

We all said “Amen” then dug in.

Before grace Eric had been anxious to start eating, but the rule at the table is that everyone waits it has been said. When I said his name that sufficed to get him to wait. During the meal, Claire and I tried to encourage everyone to talk about their day. By posing each person questions and reminding others not to interrupt, the attempt at each meal is to get everyone involved. Not everyone can participate equally in conversations, nonetheless, the aim is to try and give everyone a chance to have the attention of the group. Once Debbie had polished off her plate, though, she was, as she invariably always is, quite eager to start clearing the dishes. Claire reminded her to wait until everyone was done. Helen also interjected, pointing to herself then the rota, saying that it was her turn to help clear the table and clean the dishes.

Once the table was cleared, everyone retired to the living room where in the corner Sylvain, one of the other full-time assistants, had made a small shrine to Our Lady of Guadalupe. The print of the faded image of the Virgin Mary as it is believed to have appeared to a poor indigenous Mexican, St. Juan Diego, was resting on a small table, framed by the silver curtain hanging in behind and the dark green foliage of the plant just beside; a pale blue candle squatted in front. Once Eric had lit the candle I began the prayer by telling the story of the Good Samaritan. Then we passed the candle from person to person and everyone shared his or her intentions. When the candle came to Debbie, she, as she generally does, pressed her hands together, and leaned over the flame, ululating in tones at once intent and unintelligible.

II. Taking a Trip with Debbie

On a fair day in early summer, everyone else had gone out, leaving Debbie and me at the house. I decided that, rather than stay cooped up inside, we would make an outing together to Saint Joseph's Oratory, a massive church edifice built into the foot of Mount Royal.

Debbie is a petite woman, about five foot tall, with fine hands and a small delicate bone structure to her face. Her thick, naturally spiky hair is cut short, a dark armour-grey. Like most women in their mid-fifties, she thickens around the waist although her movements are quick and deft. While she will refuse a helping of food if she considers it too large, she clearly derives great pleasure from her meals, intently applying herself to the alimentary task right down to the last sumptuous bite. If she finds a dish particularly to her liking, she will indicate this to the assistant who prepared it with an enthusiastic thumbs-up. Once she has finished her plate, as I mentioned above, she is always anxious to clear the table, either to make way for the serving of the next course or to get down to the business of washing the dishes. Debbie is not a great fan of sitting still for too long.

Thus, she takes a walk every evening with one of the assistants, usually for about ten minutes—just around the couple of blocks surrounding the house located in a working-class residential area south of Montréal. Her habit of taking these briefs strolls, like her propensity for pattering through the hallway around the sunlit kitchen, dining area and living room testify to her restless nature. Sometimes at night after supper she will appear on the landing at the top of the stairwell to the basement, mop and bucket in hand, ready to busy herself on the blue and white linoleum floors below. “Debbie, no need to do that. I washed those floors this morning,” I once called out absent-mindedly, realizing only once the words were uttered the sheer impossibility of them eliciting any type of response.

Debbie is deaf. She was also diagnosed with childhood schizophrenia, a condition that would today more likely fall under the rubric of autism; however, it is difficult to know

not only whether the diagnosis was correct but to what extent the experience of institutionalization during her most formative years has affected the way she acts. When I first met Debbie I was disturbed by her unpredictable, banshee-like cries. It took a while to begin to accustom my sensibilities to the sharp screams and to discover patterns to them, not from the cadence of the shouts themselves, but from the instances when she would see fit to fire them like arrows into the air.

Because she has almost absolutely no hearing capacity, it is certain that she does not know what it feels like to have her ears impaled on such piercing sound; however, she can see how others react to it. Not just when she is angry or upset does she emit these shrills, but when she's trying to get others' attention to communicate something to them. It's not just through the yells that she communicates, either. Having never learned standardized sign language, she relies on a limited set of gestures, whose symbolic meaning would seem to depend on a host of contextual factors that she does not appear to always treat consistently. The more familiarity one has with Debbie's reference points—her daily routines, preferences and relationships with other people in the house—the easier it becomes to understand what she is trying to say.

As a site for our picnic and destination for our outing, Saint Joseph's Oratory appealed to me for many reasons—its impressive architecture, accessibility, and view of the city among them—but most of all because previously all of the core members in our home except Debbie had attended an opera concert there, a fundraiser for *L'Arche* and its sister organization, the *Faith and Light* community. Because she has trouble sitting still for long periods of time and would not have been able to hear, let alone, enjoy the music, Claire, one of the other assistants, had suggested Debbie spend the night at home with her. Because Debbie had missed out, and I did not know whether she had been to the Oratory before, it seemed like the place to go. Besides, I reckoned that it would be nice for Debbie to get out and see a bit of the city. She enjoys a good walk, and always seems most content while in transit. So we put a picnic lunch together and she quite cheerfully accompanied me out to greet the day.

As we walked out the door, Debbie waited for me to go down the stairs first. I am not sure why she always waits to follow me down the stairs. They certainly are creaky but I do not think each time she is using me to test out their architectural soundness. In the same way, if we are walking down the street and I pause to tie my shoe or let someone else who is walking with us catch up, there Debbie will stop and wait for me too. Fortunately nothing delayed us on the quick stroll to the Metro station. As Debbie and I boarded the crowded train, her hand reached for mine, testifying to the insecurity she felt among so many strangers and the sense of safety with which she identified being in the presence of me, her assistant.

When we alighted from the train, we began walking up the slope of Mount Royal. I had not been sure of the correct stop to get off at, so we ended up having a farther walk up to the Oratory than I had thought we would. Although, as I mentioned, Debbie enjoys walking, it was not long before she started gesturing for us to turn back. What she wanted to do was stop in to somewhere along Côte- des- Neiges and get a coke. I encouraged her to stay the course, promising her that afterwards we would have a coke. We could not have very well stopped in the middle of the sidewalk to have our picnic, and the Oratory was the closest place I knew nearby that would provide the proper ambiance. Besides, I did not want to have to give up on the quest already so we trudged on. Several times Debbie stopped, pointing back down from whence we came, but I remained steadfast for, sure, as I tried to tell her through signs and gestures, we were nearly there.

Soon thereafter, much to Debbie's relief, we finally did arrive. Having acquired quite the appetite from our trek, we laid out the delectable tuna sandwiches we had prepared together, apples, fruit juices and chips, and joined hands to say grace before meals. I uttered a few words, giving thanks for the food and our friendship, and praying for those who had neither. Debbie could not hear me, but she kept her head inclined, her fingers laced in mine and made sounds of her own, all the while maintaining an air of solemnity. Outside of *L'Arche* I am not in the habit of saying a blessing before meals, but as it is a regular practice at *L'Arche*, one Debbie seems to value, I initiated it when we sat down. Besides, I feel it grants me the opportunity to connect with Debbie; something we so

rarely ever manage to do through conversation since so often neither of us has any idea what the other is thinking. When we say grace together, the inability to articulate our thoughts to one another does not seem to matter.

After lunch I approached the stairs up to the Oratory, while Debbie waved back down towards the road we had just come up. I pointed up the mountain; she pointed to her vein, signalling "coca cola". I gestured that we would get the coke after we had made our ascent; she grudgingly assented.

Debbie is Catholic and goes with the household to mass every Sunday, so, with its elaborate candles, shrines, crucifixes and religious art work, I thought she might find the interior of the Oratory to her liking; however, none of these things made much of an impression on Debbie. She barely seemed to look at them. Instead she took up her refrain for that holiest of waters and we went back down the foot of the mountain on a mission to find some *coca cola*.

Once we had gotten cans of the sweet nectar into our hands, we sat on a bench sipping them greedily beneath the thin white clouds stretched like a swathe of cotton across the deep blue face of the sky. We sat there quietly, save for the sounds of her slurping. Once we had both finished I handed her my can, which she deposited along with hers in a nearby garbage receptacle. Adverse to mess and disorder, Debbie very diligently sorts things and tidies up around the house. She dries and puts away all the pots, pans, dishes and cutlery the instant they hit the dish rack, unless an assistant intervenes to stop her in order to let another core member have their turn. Now, the drink was done, the refuse put in its place, and it was time, Debbie motioned, for us to get going, so we made our way back home.

III. Billy Phones Home

The 1982 Stephen Spielberg film *ET: The Extra Terrestrial* is the hands-down crowd favourite at *L'Arche*.⁹² I learned this when Billy, a core member living at one of the other *L'Arche* homes, came to stay with us one weekend, and much to the delight of all the core members in the home, brought along the video. Abandoned on earth, ET, an alien from outer space, is given refuge by a young boy who, no matter how strange ET looks and sounds or uncouthly he acts, accepts him for the "person" he is. ET phones home and the mother ship returns to get him, for she never meant to leave him behind in the first place. The reality is very different for many core members at *L'Arche*. In instances where there is a family home (a parent's or brother's or sister's) to call, there is not always someone willing to pick up the receiver at the other end.

When Billy was staying for the weekend, he told us that he had arranged with his sister to spend all day Saturday with her. He phoned her several times when he arrived at Blue Skies on Friday night, and again on Saturday morning, but all he kept getting was her voicemail. There are a few phones in the house, one in the living room, another in the hallway, and a third one that is cordless. Billy did not seek out privacy, though, when he was making his efforts to get in touch, so one could not help but overhear the shifting emotions in his voice as he left message after message for his sister. Perplexity, frustration and finally near-exasperation could be heard in his speech. It was not completely distracting for him, we still managed to watch ET together on the Friday evening, then have breakfast on Saturday and get some singing in too, but the moment he was not preoccupied, he would reach for the phone to try to reach her again.

As Saturday's grey overcast morning light gathered into the glare of noon, a shadow of disappointment hung over Billy's face. "Why doesn't she answer? Why doesn't she phone?" he asked. His usually cheerful, friendly and considerate manner began to sink under the affliction of his sister's neglect. It was obvious from his reaction that this was not the first time she had let him down like this. Eventually she did call and asked to

⁹² *ET: The Extra Terrestrial*, 1982, DVD (Universal Pictures 20th Anniversary Edition, 2002).

speak to “one of the workers in the group home”. I picked up the receiver and heard her say that Billy could go to see her for a couple of hours that afternoon. I had to restrain myself from acting on my instinct by telling her where *she* could go.

I was angry because of how she had left her brother in the lurch all morning. In the brief exchange I had overheard from Billy’s end, and so far with me, she did not seem at all sorry for having treated her brother like that. With Billy there beside me, with me not knowing her, and not feeling it was my place to tell her my opinion of how she was treating her brother, I also feared what the consequences of castigating this woman might be. I did not want her to cancel, for Billy likely would have been crestfallen, or give her grounds for justifying avoiding contact with her brother, because of the hard time “those workers in the group home” give her.

If I had had reason to believe that Billy’s sister was doing harm to him, it would have been a different story. I would have tried to ascertain the facts from Billy, his assistants, his sister; I would have spoken to my house leader, the Director of Human Resources, the Director of the Community. So long as she was a credible danger to Billy, I would have stopped him from going to see her. Here, though, I did not think she was doing him harm; I just felt she was not doing him any good. In this instance, the very thought of asking Billy whether he reckoned it was a good idea to see his sister, struck me as both hurtful and preposterous. It is his sister after all and Billy loves her.

In fact, Billy is fond of a lot of people. One morning a few days after having moved in to my new apartment I was walking down the street when by chance I happened to run into him. It turns out his work placement is just down the road.

I said, “Hello, Billy” and he greeted me with a big hug, and kiss on the cheek.

“Who are you again?” Billy then asked.

“Tom, Billy, from Blue Skies”.

“Oh Yeah, I spent a couple weekends with you.”

“That’s right.”

While Billy was no doubt aware that he knew me from somewhere, it would not be unusual for him to greet perfect strangers in the same warm, embracing way. Billy has a condition known as Williams Syndrome, one effect of which is to render those who have it extremely friendly and sociable.⁹³ It also results in a deficit of fine motor skills, strong memory retention, a good ear for music and language. Thus, along with being an extremely affable and friendly individual, Billy also has near perfect pitch and can speak fluently in English and French. His IQ is low relative to the general population, so while he is happy to engage with others, he is not able to read subtler signs in their body language that perhaps they do not wish to engage with him.

Therefore, Billy's warm and open way with others can serve as a tremendous source of joy and animation, but can also leave him vulnerable to exploitation, abuse, misunderstanding and even conflict. He loves parties and get-togethers, takes an interest in everyone (especially attractive women) and has a great singing voice. An avid listener to the radio ("Q-92" he drawls out with all the bass and flair of a professional disc jockey), who also watches TV, takes walks and train rides by himself and is constantly interacting with others, Billy is much more autonomous than the residents at Blue Skies, Debbie, Eric, Helen and Yvonne. However, more autonomous core members, like Billy, pose different challenges to assistants from less autonomous persons do. They want to be more independent but at the same time require certain supports. Being sensitive to a person's wishes while looking after their interests is no easy task and requires constant learning and evolution to be done well.

When Billy was getting ready to head out the door to see his sister, he called out to me: "Going to take my personal time now, Tom."

I said, "OK, Billy. See you later." I smiled to myself, because that is how assistants refer to their daily time off from the community. No doubt it is just as important to Billy to have this time to do what he wants to as well. Despite all of the fruitless attempts at contacting her earlier, now with no apparent bitterness or resentment, Billy put on his

⁹³ "What is Williams Syndrome?" online: Williams Syndrome Association <<http://www.williams-syndrome.org/forparents/whatiswilliams.html>>.

rubber raincoat and headed out the door to go see her. A cold, fine, grey drizzle filled the air like smoke.

Hours later, I thought of Billy sitting on the bus, riding home. That morning he had spontaneously broken into song while we all sat in the living room. Now his melodious voice came flooding into my memory:

“I’ve been through the desert on a horse with no name

It felt good to be out of the rain

In the desert you can remember your name

cause there ain’t no one for to give you no pain

La, la...”⁹⁴

It occurred to me that there would likely be no Hollywood ending to the story of the self-preoccupied sister who struggles to tolerate, let alone reciprocate, the affections of her devoted, loving brother. Instead, the saga—of which, at this point, I had to admit I really only possessed the slightest knowledge—would go on and on. Torn between disappointment and longing, juggling between signs of rejection and the possibility of acceptance, Billy would keep playing his part. I realized that I was not really in the best position to judge the character of this sibling relationship. Even if I were, it would not have been for me to try and re-write these daunting scenes out of the script. Authorship lay with Billy, both by necessity and by right. It was his story, his life. Mine was but a supporting role. To some extent, we all have to go it alone. I was glad when I pictured him there coming back on that bus, alone, humming a tune and for the moment, out of the rain.

IV. Seeing Eric Sit Next to Debbie

Human relationships are seldom defined by one all- powerful emotion, whether it be love or hate. However, sometimes Eric seems to absolutely despise Debbie; whereas, she would appear utterly indifferent to him. The man has very sensitive hearing, so when

⁹⁴ America, “Horse with No Name”, CD: *The Complete Greatest Hits* (New York: Columbia Music, 1986).

Debbie screams, he finds it especially upsetting. Yet, she will yell in her high-pitched manner if she wants to and never have I noticed Eric's presence being of any consequence to this, unless something he has done is the reason for her cry. Twenty years have they lived together in the same home. When asked over the years, neither one has ever expressed an interest in moving out to another *L'Arche* home.

Recently, the possibility of relocating—or rather, being relocated—was presented to Eric as a consequence of his conduct toward Debbie. He has been known to lash out at her from time to time either with a pinch on the arm or a quick open-handed strike to her shoulder or back. Mostly, each of them stays out of the other's way. Eric spends a lot of his time in the basement, whereas Debbie spends most of her time upstairs. In fact, one time when Eric and I were watching a programme on the television in the basement and Debbie came down to find Claire, the other assistant who was helping Yvonne with her bath, Eric stammered angrily “No— not allowed”. I immediately told him that of course Debbie was allowed downstairs, that it was her home too. Eric was upset, and it seemed to me he would have argued his point further with me, had he the expressive ability to do so. Instead, he begrudgingly accepted the fact she was there and some moments later she had found Claire indisposed and headed back up the stairs apparently oblivious to Eric or the objections he had to her being down there in the first place.

Eric does not seek her out to strike her. When I have seen him hit her, it has been when she has passed by him closely enough that she was within arm's length. Eric is uncomfortable with people in his personal space, particularly when they catch him by surprise. I saw him stiffen, swing round and push his friend Billy, one time when the latter leant in for a hug without Eric expecting it. So when Debbie squeezes past him during dinner as she sometimes does when taking a trip to the bathroom, he tightens up as well, and a couple of times has tried to poke her, but she has already gone by. The times he has struck her—always to the back, side or arm and more in the manner of a quick,

strong tap than a punch or slap—they have happened to cross paths, and he is evidently already not in a very good mood.⁹⁵

The assistants meeting begins with a prayer and reflection then involves each of us sharing something personal: challenges she or he is facing, plans she or he has made etc. Afterwards, we discuss each core member in turn—looking at what they got up to during the past week, how they are relating with the others in the house and what events they might have coming up. The discussion aims at looking at the whole person and seeing what the assistants can do to better support him or her. Recognizing that Eric was displaying a pattern of violent behaviour toward Debbie, who quite obviously got on his nerves, we discussed what could be done to redress his conduct. We decided that not only was it important that Eric be lectured verbally for hitting Debbie but that he also be sent to his room in order to reinforce the inappropriateness of his behaviour.

Subsequently, it was also decided that Jocelyn, the Community Director would also have to have a word with Eric. Thus, Eric was called down to the director's office, where Jocelyn explained to him that if he struck Debbie again, he would be suspended from *Blue Skies* for three days; again and the suspension would be for two weeks. Once more and he would be expelled from the house permanently. After that, if Eric persisted with such violent behaviour, he would be removed from the community as a whole. Eric said he understood the consequences, and expressed a strong willingness to stay at *Blue Skies*, and not hit Debbie anymore.

His assistants, the house leader and the Community Leader each told Eric that such violence was totally unacceptable at *L'Arche*. Rooting out the behaviour has meant addressing not only the act of hitting itself— although this was of course an important aspect to their response— but also the reasons behind the violence. In the interviews both directors described a vital element of the *L'Arche* response to someone hitting is to ask: where is he hurting?

⁹⁵ In providing a description of the relatively limited amount of physical force involved I am not at all downplaying Eric's violence toward Debbie. Rather, I am pointing out that she is not at risk of physical bodily harm. That does not mean, however, that she does not perceive it that way.

It is not hard to see that Eric has a lot of anger bottled up inside. In part, this is no doubt due to, what is for him, a significant physical struggle when it comes to speaking. With great effort he manages to coax out a word or two, typically the name of a person place or thing. Otherwise, to communicate with Eric, one has to imagine what it is he might be trying to express, say it aloud to him and then let him confirm or deny whether what you have said is correct. Eric cannot read or write and does not know standard sign language. However, he can understand when being spoken to in English. He takes the Metro by himself everyday to work where he loads boxes at the food bank; he makes coffee every morning for everybody and takes out the garbage without being asked. When he is in the company of one of the assistants, Sylvain, whom he has known for some years, he talks a lot more. Every day after supper during the evening prayer, Eric prays for his friend Sylvain.

He has another friend too named Cecile. She is a lovely young woman with startling eyes and a beautiful smile. Cecile is also visually impaired, quadriplegic and mute. She communicates through the way she opens her eyes, tilts her head, or cries out for those around her to hear. Eric loves to sit beside Cecile at community gatherings, such as the shared suppers. She cannot eat solid food but Eric makes her part of the supper by holding her hands. When there is a dance Eric swings her around on her chair with a joyful smile on his face.

* * *

One day, quite awhile before Eric had his meeting with Jocelyn, he and Debbie were sitting beside each other in the van, waiting for the rest of us to get ready to head out. I was aware that the relationship between the two of them could be rather acrimonious. In fact, Eric had hit Debbie a couple of days before and been lectured by one of the other assistants. I was all the more surprised, therefore, when I saw Eric reaching over to her to extend his hand in friendship. She took his right hand in hers as he patted her on the shoulder and smiled, saying her name. This moment of atonement was all the more powerful since it was done privately. They did not know I was there peering through the

opening in the door. Eric did not do it to win points with anyone; he was trying to rebuild the relationship he had with Debbie. Since then, I have seen him make some tender gestures to Debbie— his big smile beaming, extend a welcome home or invite to the table for supper. Neither irritation nor disdain sums up the relationship between Eric and Debbie; and no one else but they can really determine the content of what those relations will be.

V. Personalities in Conflict

Having rushed up the stairs upon hearing a commotion I saw Debbie strike Helen in the chest. Debbie looked very upset, her cheeks flushed, her mouth open, screaming; whereas, Helen appeared quite shocked, staring back at Debbie quizzically not aggressively. I quickly walked over to where they stood in the living room to intervene. My presence there was enough to get Debbie to stop accosting Helen; however, it was not enough to persuade her to pay attention to me and respond in the way I wanted.

I was trying to communicate to her that her behaviour was unacceptable by crossing my arms back and forth around my waist, resembling a field goal judge telling the football empire a kick was no good. Much taller than she I stood imposingly over her and pointed to her room; she knew very well where I was telling her to go. Bringing her to her room, changing the locale, was a way to separate her from Helen but also to signify that something was not right, that she had done something wrong and would have to face the consequences.

Claire, the other assistant, then joined me from downstairs. She also essayed to get Debbie to go to her room, and eventually succeeded by leading her there by the hand. Once the three of us were all in Debbie's room, however, she set up huge communication barriers around her to prevent any meaningful engagement. Refusing to stay still, avoiding eye contact, screaming blue murder, trying to exit the room, then trying to go to bed, Debbie ducked and weaved, obstructing in any way she could the household administrators of justice. Nevertheless we persisted, eventually getting Debbie to go and shake Helen's hand in a gesture of forgiveness, but one that seemed hollow given that

Debbie's greater concern seemed to have been to avoid the imposition of us haranguing her, rather than making up for what she had done to Helen.

I asked Helen if she knew why Debbie had hit her, and she said she did not; that Debbie had suddenly become very angry and then struck her. It may have seemed out of the blue to Helen, and indeed it was a shock also to me that Debbie had hit her, for I had never seen Debbie hit anybody before. Nevertheless, in my view the anger Debbie had exhibited was really the spill- over of tension that had been boiling up all afternoon. Earlier that day, when Claire and Debbie were about to go for a stroll, Helen wanted to go too. Claire told her, "No", saying Helen was insisting on being around her too much, that she was too attached and that she and Jocelyn had already told her to stop. In response, Helen blocked the doorway, refusing to let them go.

Not only would Helen's behaviour have annoyed Debbie, by holding her up from taking a walk with Claire, but it also seemed like whatever it was Helen was doing, she was the cause of Claire's bad mood. Others in the house, Eric and Yvonne, also seemed to resent Helen this fact.

"Stop, Helen" Eric said, as she put on her coat blocking the passage of the ladies standing in the hallway.

Eventually Helen wilted from the door and went to her room. Later she came and spoke to me, tears and snot staining her reddened face.

"Why?" she asked. She held her hands out, shaking them up and down in the air.

"Why is Claire so angry?"

In reply, I tried to reiterate what Helen had already discussed with the Community Director and acting House Leader—that it was not fair to Claire or healthy for Helen herself to always insist on spending so much time with her.

"Why?" Helen asked.

I tried to re-state what I had already been telling her; then she asked the same question again.

This was the very sort of thing that got on Claire's nerves so much. In a way, seeing Claire's reactions to Helen granted me the necessary detachment to be better equipped to deal with her myself. It made me wonder if maybe Helen did not say the word "why" so often because it was one of the only ones she possessed. Of course, personalities can conflict. High esteem can condense into over-attachment. That is what had happened to Helen and Claire: they had developed a fusional relationship. Both assistants and core members separately take part in formal formation sessions with psychologists on the issue of fusional relationships. In addition to retreats, the accompaniment program (every full-time assistant and core member is accompanied by a mentor to talk to) and informal conversations with other friends (assistants, house leaders, Community leaders) assistants and core member endeavour to avoid but then sometimes also grapple with fusional relationships. It has been noted to me on several occasions that both parties in a relationship are nearly always to blame for it becoming fusional, and, unfortunately, hardly ever do positive relations end up getting restored once it takes place.

Helen has a history of fusion, having developed relationships of especial dependence on women assistants in the home. However, Claire, a young woman and relatively new assistant, faced her own difficulties in responding to Helen's particular needs. Helen is definitely the most expressive core member in the home, which is wonderful but can also be a source of annoyance, especially for someone who is herself shy. As it became more clear that Helen and Claire had developed a fusional relationship, the Director began to intervene, to discuss with Helen how to give Claire more space. Rules about how much time they would spend together during the week started to come into place. Other assistants began to take more prominent roles in assisting Helen. For example, I helped her floss her teeth. On one occasion, she asked me to wash her hair, which we did in the kitchen sink.

As my hands ran over the back of her head, I discovered large bumps in her skull. At first, I was repulsed. In my hands was this rough, soapy wet mop of hair. Was I to grit my teeth and bear it? For a moment I thought, well, I must. But then I realized that no, that was not the right attitude. Deep down I knew that her life and vitality meant so much

more than any physical deformity. Indeed, what deformity could it be when it was the very form of the person who had had the trust and humility to ask me for help? That misshapen skull was infinitely more precious than all the marble heads in the Louvre. For it was part of this woman, this wonderful living person, who would always get me to do a cheers with her before we started eating our meals—whether we were holding coffee cups at breakfast or water glasses at lunch. She was the woman who would say, “Thank you”, by jutting her hand out from under her chin uttering the words, “merci, merci, merci”. In the same way, Debbie could not be reduced to the decibels of her screams or pack of her punch. One time Debbie came over and pointed to my head. Offering me her shampoo, she guided me by the hand to the bathroom to take a shower. While I will respectfully maintain that I was not so un-presentable as Debbie would allege, I was still very touched by this expression of interest in me from this often aloof person.

VI. Driving Down the 401 with Zack

Before this jaunt down the 401 to visit Zack’s sister, he and I had not spent much time together, and I had never assisted him with a personal task like this before. He lives in a different home from *Blue Skies*. However, I have met Zack at community gatherings before and, when the Director of *L’Arche* asked me to drive Zack down to visit his sister in Milton, I agreed.

After driving for a few hours, we stopped around Kingston and ate lunch in McDonald’s, I suggested to Zack that we make a trip to the washroom so we would not have to stop again later. A small busy bathroom with two sinks, two urinals, and two stalls, like most fast-food facilities it did not inspire much in the way of sanitary confidence. That morning his assistant had told me before Zack and I hit the road that for him to go to the bathroom I would need to undo his belt. We entered the handicap stall, for the added room, and Zack stood docilely as I undid the clasp around his waste. I did not rush but proceeded carefully and respectfully in order to try and make the process as comfortable and natural as possible for us both.

Afterwards, we walked out to the sinks where the faucets were triggered by a sensor. I demonstrated how to use the faucet. Making gestures with one hand to the soap dispenser and putting the other against the sensor to make the water flow, I said to Zack, "Go ahead and wash your hands". However, instead of complying with my request, Zack pressed his face right up to the mouth of the faucet, as if to inspect how it worked. I was growing impatient and I was not quite sure what he was trying to do. All the while, men and boys milled around us, toilets flushed and feet scuffled anxiously over the linoleum floor. Zack was now leaning over the sink drinking, apparently undeterred by either the sordid state of the tap or the disagreeable temperature of its effluent. Repeatedly he swished the warm gulps of liquid in his mouth then spat loudly back into the sink. Despite my protestations, he would not stop and I wondered how I was going to get him out of there. Then I remembered his assistant having said before we left his house that morning that, "after meals, Zack likes to brush his teeth". Having failed to comprehend what he was doing, I had been pressing him to leave, saying "we have to get back on the road...if you want a drink of water, we can get one at the counter." Finally, I realized that this business with the tap was Zack's oral hygiene regimen, one I had been interrupting. Now, I quit annoying him and waited for him to finish. Soon after, he stepped back from the sink, raised himself upright and exhaled "okay". He was ready, so we left and got back on the road.

Zack walks in a slow deliberate manner. Although not very tall, he is thick around the neck, arms, legs and waste. If he were a football player, one would describe him as boasting "a low centre of gravity". Imagine a small powerful running- back powering through his opponents and you get a picture not only of Zack's physical stature, dogged determination and apparently, formerly quite aggressive demeanour. I have never seen Zack hit or push anyone. However, the Community Leader, Jocelyn, told me a bit about Zack's history before he and I headed off on our road trip.

A few years ago apparently, everyone was quite aware of how aggressive Zack could be. Indeed, people in his home—assistants and core members alike— were afraid of him. Everyone knew not to touch Zack unless it was absolutely necessary and only then with a

great deal of caution—this was a practice that became implicitly established in the home, and was no doubt leant considerable coercive force every time Zack behaved violently. However, when a new core member, Marie-Claude, arrived at the home three years ago, no one had thought of acquainting her with the custom before she was leaning over to touch Zack. Everyone else around the dinner table gasped in horror at the sight of this rare, and no doubt dangerous, gesture. But instead of flying into a rage, Zack laughed and was visibly quite amused with Marie-Claude, as she whispered “wisswiss, wisswiss” and tickled him playfully in the same gentle teasing manner with which she treats all of her friends. Zack the lion, so used to being approached in a tentative, nervous, defensive, fearful or confrontational manner (even by the most well meaning assistants), was utterly disarmed by this joyful easy playfulness and appeared as contented and good natured as a lamb. Since Marie-Claude moved in to the home, Zack has not had a violent incident. While he still no doubt must find it frustrating and difficult to express himself— given that he has only a vocabulary of a couple of words at his disposal—now, having emerged from this cloud of violence, Zack is in a better position to relate to others.

Knowing this story about Zack informed the way I chose to act when much to my chagrin, he remained steadfast in front of the bathroom sink in McDonald’s. My own absent-mindedness—forgetting that Zack likes to brush his teeth after meals— and neglect of normative duties—failing to facilitate this by getting him his tooth brush, or at the very least waiting patiently and supportively until he was finished— meant I was getting impatient with Zack as I stood in that crowded men’s room. Of course, the reason why I forgot in the first place probably had something to do with my lack of composure in trying to assist a core member in a setting outside the familiar confines of the *L’Arche* environment.

5-RESEARCH FINDINGS

God spoke to Noah and his sons: "See I establish my Covenant with you, and with your descendants after you...There shall be no flood to destroy the earth again...I set my bow in the clouds and it shall be a sign of the covenant between me and the earth." Genesis 9:8, 10-11, 13-14

In this chapter, I analyze the empirical research data presented above through the prism of what Llewellyn and Hoebel describe as the five basic law-jobs: "The law-jobs entail such arrangement and adjustment of people's behaviour that the society (or the group) remains a society (or a group) and gets enough energy unleashed and coordinated to keep on functioning as a society (or as a group)."⁹⁶ They are:

1. The disposition of trouble-cases.
2. The preventive channelling and reorientation of conduct and expectations.
3. The allocation of authority and the arrangement of procedures which legitimize actions as being authoritative.
4. The net organization of the group or society as a whole so as to provide cohesion, direction, and incentive.
5. The juristic method or manner in which the demands of all the law-jobs are fulfilled.

Examining how the work of each of the 'law-jobs' gets done at *Blue Skies* provides multiple lenses through which to appraise the raw social data of everyday life for a group of people who self-identify as members of the *L'Arche* community. In this way, the 'law-jobs' framework is like a scaffold set up alongside the data compiled in the last chapter in order to permit reconstruction of the research material along legal normative lines. In other words, it is a way of identifying "law at *L'Arche*" in relation to what is actually relevant for people living in the community. Furthermore, with the 'law-jobs' as a base, I use the typologies of norms, institutions, procedures/methodologies and legitimacy

⁹⁶ K.N. Llewellyn & E. Adamson Hoebel, *The Cheyenne Way*, supra note 68 at 290.

discussed in Chapter 1 as tools for describing various aspects of the legal normative plurality present in the lives of core members at *L'Arche Montréal*.

1. The disposition of trouble-cases.

Here I look at the data presented in the previous chapter by focusing on the instances in which offences, grievances or conflicts arose between group members and how those came to be resolved. In other words, I analyze the disposition of trouble-cases, which Llewellyn and Hoebel liken to “garage-repair work on the general order” of the social group.⁹⁷ They go on to stress that while this law-job mainly involves fixing minor problems, getting it done prevents the Whole from experiencing a major breakdown. Attaining felt justice and affirming greater social health in the settlement, all the while causing a minimum expense of energy and disruption to other activities, represents the fine balance involved in an exemplary handling of trouble-cases.⁹⁸

Every one of the stories presented in the last chapter features the disposition of trouble-cases. On the one hand, stories IV (“Seeing Eric Sit Next to Debbie”), and V (“Personalities in Conflict”) especially highlight explicit and formal attempts on behalf of assistants and administrators acting collectively to address disruptive behaviour. For instance, we see the trouble at issue—whether it is Eric’s hitting Debbie (IV) or Helen and Claire’s “fusional” relationship (VI)—being brought up at the weekly assistant meeting and being discussed with the House Leader. We also find the Community Leader, Jocelyn, being informed and getting involved in the process of addressing these matters.

On the other hand, stories I,II to III and VI particularly underline the implicit and inferential manner in which this law-job is performed in the course of member interaction. When Yvonne gives up on peeling the potatoes, Debbie stops walking up the mountain, Billy’s sister fails to pick up the phone and Zack insists on staying in the

⁹⁷ *ibid.* at 293.

⁹⁸ *ibid.* at 294.

washroom, the trouble is resolved, for the most part, without recourse to explicit legal institutions, processes or norms. Rather, each conflict is resolved in a much more implicit and inferential manner through the exchanges between me, the assistant, and the core members.⁹⁹ This kind of trouble, as minor as it may seem, constitutes the majority of ‘law-stuff’ in *L’Arche*.¹⁰⁰

In addition, it is important to note that the two stories that showcase examples of patent forms of normativity also display latent ones. Conversely, the four other stories that primarily trace implicit and inferential normativity reveal explicit and formal normativity as well. In the picture of daily life each story represents, questions of authority, obligation, judgment, order, rules and institutions are all present in the background. By bringing them to the fore, I hope to show the active and productive role that core members take in contribution to latent normativity at *L’Arche*.

First, let us consider instances that reveal more patent normativity. In story IV, after consulting with the assistants and Robert at *Blue Skies*, Jocelyn calls Eric down to his office to explain to him that his behaviour towards Debbie is unacceptable and that if he persists he will have to face serious consequences. In a subsequent interview I had with Jocelyn, he informed me that when he told Eric that he would ultimately face expulsion, he did not really mean it. “No one wants to see Eric leave *L’Arche Montréal*.” Despite repeated suspensions from *Blue Skies*, if Eric kept behaving violently toward Debbie, he would be removed from the house but not from the community as a whole.

But, Jocelyn said, since Eric wished to continue living at *Blue Skies*, he needed to understand that he could not, under any circumstances, hit Debbie. To impress upon Eric the gravity of his actions, it was necessary to make the process of addressing his behaviour sufficiently grave. In electing to conduct the meeting with Eric in his office rather than in the more familiar surroundings at *Blue Skies*— all the while laying out a

⁹⁹ See the discussion in Chapter 2 of this thesis where I discuss the explicit/implicit; formal(canonical); inferential normative typologies.

¹⁰⁰ On ‘law-stuff’ see Llewellyn & Hoebel, *The Cheyenne Way*, *supra* note 68 at 273.

series of graduated consequences culminating in expulsion— Jocelyn was endeavouring to construct what in our interview he referred to as, the “theatre of law”.

We can see the disposition of trouble-cases takes place in what Jocelyn coins, the ‘theatre of law’, when a backdrop of official formality is deliberately set up and a script of canonical norms consciously laid down for the purpose of mending a tear in the otherwise generally implicit and informal social fabric of the community. Story V “Personalities in Conflict” is another instance in which Jocelyn, acting as Community Leader, explicitly alters and re-formulates the latent norms governing interactions between Claire and Helen into a set of formal rules. In light of concerns Claire was expressing about the amount of time Helen insisted on spending with her— as well as observations other assistants had made about the deterioration in the relations between the pair— Jocelyn stepped in to set down concrete parameters limiting the number of activities Helen and Claire were to do together each week.

Story V “Conflict of Personalities” shows obvious instances in which something has to be done in order to restore relations between members of the group. Moreover, the story illustrates how the ineffective disposition of a trouble case can lead to more problems sprouting up elsewhere; the strained relations between Claire and Helen leads to animosity on the part of Debbie toward Helen. In considering how law, in the critical legal pluralist sense, governs the relations between Claire and Helen (or Helen and Debbie, or the three of them all at once) it is important to bear in mind what the sociologist Talcot Parsons once noted, “that no structuralization of human relationships is ‘foolproof’ and immune to change.”¹⁰¹ Human interaction is much more fluid and unpredictable than a purely mechanistic analysis would suggest. Recognizing the complexity of the relations between people living together at *L’Arche* highlights the limitations of the automotive metaphor we have used to describe the disposition of trouble cases there.¹⁰²

¹⁰¹ Talcot Parsons, “Introduction: the Institutionalization of Authority” in Max Weber, *The Theory of Social and Economic Organization* (New York: The Free Press, 1964) at 68.

¹⁰² Recognizing the limitations of a heuristic device permits a maximization of its utility.

Deliberate attempts by assistants to redress conflicts between core members usually suffice. In both cases above, however, resort is made to the explicit and formal intervention by the Community Leader because such efforts to settle social disruptions in the home have proven unsuccessful. Such disruptions in the social cohesion within the home may be considered to be the product of dissonant interpretations of inferential normativity within the home that have not managed to become reconciled in the typical, implicit way.

However, once Jocelyn had set down rules regarding how Helen and Claire were going to interact with each other, they did not just automatically implement them into their conduct. Helen and Claire had to interpret them in light of each other's behaviour. From my vantage point, I was able to tell that both women struggled with the explicit rules that came into play to govern their relationship. Helen was easier to help because she was more open and frank about the problems she was having.

She appeared to recognize that she was under an obligation to do what Jocelyn had told her. In fact, from my interview with Jocelyn, my discussions with Helen and other *L'Arche* assistants, Helen had a sense of why—both for her sake and for Claire's—their relationship had to change to become healthier. The difficulty, therefore, arose when it came to interpreting how to change their relationship, knowing the way to behave and then of course also following through.

What she had trouble coming to terms with, though, was her sense of feeling rejected by Claire. The emotional tumult Helen experienced was not all just her fault either; Claire's patience had begun to run out and she was no longer acting in the same supportive manner expected of assistants.¹⁰³ In the heat of the moment rules vanish. Their functionality rests substantially on whether cooler heads prevail.

¹⁰³ Assistants have many roles, which at times can be difficult to balance, especially given the close proximity in which they live with core members. Thus, the fact Claire was a young woman in her early twenties, did not have the support of another full-time assistant in the home, or the mentorship of a full-time House Leader made maintaining the necessary detachment of resolving the emotionally charged problems she was having with Helen all the more challenging.

In story IV we concluded that Eric's disruptive behaviour was a symptom of a deeper problem: his tendency to turn inward and shut others out. Without ignoring the case at hand, we also attempted, under the guidance of Robert, to find ways that would address the root of the matter as well. That meant exploring latent as well as patent normativity in trying to dispose of the trouble-case.

Just as proscriptive norms such as the ones above require active interpretation by core members as well as assistants, so too do facilitative ones pertaining to personal care. Norms of this kind pertain to the law job described in the following section, concerned with the coordination of life in the community.

2. The preventive channelling and reorientation of conduct and expectations.

The work of preventive channelling is chiefly concerned with ways of distributing "the scarce and desirable, from physical things on to power and prestige" in ways that avoid conflicts of interest between members within the group.¹⁰⁴ This law-job is responsible for producing and maintaining a going order, a general structure for interaction between group members. "High efficiency in preventive channelling ('discipline if you like it'; 'regimentation' if you do not)", note Llewellyn and Hoebel "competes as an ideal with large leeways ('license'; 'liberty') and creative uses thereof ('captain of industry'; 'industrial pirate'".¹⁰⁵ If the disposition of trouble-cases is analogous to "garage-repair work on the general order" then the law-job of preventive channelling concerns the engineering of that general order.¹⁰⁶

In story I. "Making Supper with Yvonne" the law-job of preventive channelling of behaviour is being carried out through the coordination of everyday household chores, such as cleaning the house, doing laundry, working in the garden or preparing a meal.

¹⁰⁴ Llewellyn & Hoebel, *The Cheyenne Way*, *supra* note 68 at 294.

¹⁰⁵ *ibid.* at 297.

¹⁰⁶ John Finnis remarks that even in a society of angels, there would still be need for law to solve "coordination problems". Adjusting the analogy slightly, then, we can see preventive channelling as relating to establishment of rules of the road, whereas the first law job, the disposition of trouble cases, involves dealing with automotive collisions. See John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 2005) at 244.

The rota hanging in the kitchen constitutes an explicit and formal set of directives to people in the home. Yet, even the most clearly authoritative norms, phrased in the most direct manner still require interpretation from legal actors. The rota may tell me and Yvonne that each of us is under an obligation to see that she helps me make supper, but as far as each of us is concerned what does fulfilling that obligation specifically entail? Does it mean Yvonne has to peel the potatoes because I asked her to? She and I may each have a different opinion about the answer to that question. However, it is through our interaction that we actually respond.

The rota is only one normative source for the preventive channelling of behaviour, and any given norm it issues is meaningless without a wider context in which to interpret it. For example, there are the norms issuing from other normative sources that must be taken into account: First, the entente I signed with *L'Arche Montréal*, stating that I agree to work as a volunteer assistant; this explicitly sets out an obligation, once again whose meaning I must infer.¹⁰⁷ Secondly, what I have experienced through the actual doing of the job. Through my participation in community life at *L'Arche* I have encountered norms in terms of how to fulfill the role of assistant that are not written down anywhere, but in practice are adhered to regularly by other members.(implicit/inferential); the mission laid out in the *L'Arche Constitution* (explicit/inferential; explicit/ formal); the stipulations of the *Arches of Québec Code of Ethics* (explicit/inferential; explicit/formal);¹⁰⁸ the expectations of my behaviour set out by the Director of Human resources to me when I first started (explicit/formal; explicit/ inferential); my witnessing other assistants, including the House Leader and other long-term assistants interact with core members while preparing meals and doing other activities (implicit/ formal; implicit/inferential); my reading of writings about *L'Arche*, notably by Jean Vanier (implicit/inferential);¹⁰⁹ my general cooking experience both by myself and with others, at *L'Arche* and in other environments, that has given me a certain set of expectations of how to go about preparing a meal with someone (implicit; inferential); statutory laws

¹⁰⁷ *Entente Avec L'Arche* (archived at *L'Arche Montréal*); also, the *Ethics Review Board Approval Certificate*, see *supra* note 78.

¹⁰⁸ See *Association des Arches du Québec: Code d'éthique* Appendix 8.2.

¹⁰⁹ See Thesis Bibliography at 90.

setting out the standard of care (explicit/ formal; explicit inferential). Then there are circumstantial factors, such as how well Yvonne and I communicate with each other; what sort of things she is capable of doing; what she needs to be taught; what she is willing to do.

Prior to coming to *L'Arche* their care-givers, whether their family, staff in a state institutional facility or at a group-home may have not taught them much in the way of practical skills, or just rarely encouraged them to perform tasks independently, or treated them in other ways that has left them lacking in self- confidence. Such experiences manifest themselves in unhealthy feelings of dependence that core members exhibit toward assistants. At *L'Arche*, the philosophy of care encourages assistants to “do *with*” as opposed to “do *for*” core members. Hence, chores serve as vital opportunities for personal growth and relationship- building between assistants and core members. These collaborative activities like preparing supper with Yvonne, going to the bathroom with Zack, washing Helen’s hair or taking a walk with Debbie reveal core members constructing inferential normativity through the way they carry out their interactions with other people, such as their assistants.

There is a temptation to see the lives of core members, and correspondingly the normative worlds they construct, as entirely mediated by their relations with their assistants. But that would mean turning a blind eye to how core members engage with each other and other people outside of *L'Arche*.

Story III shows that core members have relationships and commitments that extend beyond the ones they share with others in the *L'Arche*. Billy’s interaction with his sister is a good example of how no one living at *L'Arche* is subject to a unitary normative regime. The norms governing Billy’s exchange with his sister, as well as my involvement in the interaction were incorporated into our behaviour from a vast number of sources. That of the home in which Billy and his sister grew up in, that of the home he lives in now, as well as that of Blue Skies where he was staying with us that weekend, not to mention other normative regimes that speak to relations between family members,

persons with and without disabilities, care givers and family members, men and women etc.

How he negotiates them is, in the end, up to him. He did not have any choice in being born with an intellectual disability or in how his sister would respond to having a “disabled” brother. Indeed, it was not really up to Billy whether or not he came to *L’Arche*, once his parents decided it was the best thing for them to go ahead and do. When someone is reliant on others in the way Billy is, and other core members at *L’Arche* are, it is possible to dismiss their role as passive as opposed to active legal normative subjects. However, a history of oppressive acts never records resistance, save the successful crushing of it; nor does it describe the creative responses of those forced to endure it. So long as we approach describing Billy’s life and behaviour through a calculus of controlling factors—disability, familial, institutional or legal restraints—then the vitality of the man is crunched into numbers, and left to wither and die. How do we know what has a greater impact in the lives of others, the words of a statute or expression of concern, until we have opened our ears to hearing Billy ask Yvonne how she is doing, or Eric if he has had a good day?

Setting guidelines for Billy, like not to kiss and embrace people he meets for the first time, is important not only to protect others who might find his behaviour frightening but also enables him to be more successful at developing relationships. It is a constraint that in this way gives him more freedom to have positive social engagements.¹¹⁰ I was made aware of the importance of giving these reminders to Billy by the Director of Human Resources. In the case of most core members, there is no need to establish a clear rule that they should not be “overly tactile”, because their behaviour is consistent with such a norm already.

¹¹⁰ This rationale is consistent with the view of law as guidelines that serve the purpose of facilitating human freedom discussed by Fuller. See Lon Fuller, “Freedom: A Suggested Analysis” *Harvard Law Review* Vol. 68 at 1305; Lon Fuller, “Freedom as a Problem of Allocating Choice” (1968) 112 *Proceedings of the American Philosophical Society* 101; Lon Fuller, “The Case Against Freedom” in K. Winston, ed., *The Principles of Social Order: Selected Essays of Lon Fuller* (Oxford: Hart Publishing, 2001) at 316. See also, K. Winston, “Introduction” in K. Winston, ed., *The Principles of Social Order: Selected Essays of Lon Fuller* (Oxford: Hart Publishing, 2001) at 1.

Even where “official” legal measures are put in place they are relativized by the ongoing interplay of inferential and implicit normative construction. This may be seen in Story IV. where Eric took it upon himself to make amends with Debbie. Were he required by someone else to do so, the way Debbie was by Claire and me in story V. to apologize to Helen, any gesture he made could never have the same resonant meaning as that spontaneous, private act. This suggests that the place of law in establishing boundaries of social behaviour, are really about establishing opportunities for people to live their commitments more fully. While it is true that Eric’s apology to Debbie in the van did not signal the end of his violent treatment of her, and so it was necessary for Jocelyn to intervene in the way he did to protect Debbie, it served as a sign of Eric’s personal attempts to set things at rights.

External factors, such as the physical environment, bring new dimensions to otherwise typical activities, rendering them novel situations that require more imagination from legal actors.¹¹¹ How I interacted with Zack in story VI. was influenced a great deal by the story Jocelyn told me about how well Zack responded when Marie-Claude reached out to him through kindness and friendship versus how defiant he had been when approached in a combative or even simply deferential manner. From the story, I inferred that cajoling Zack or abandoning him to his own devices in the bathroom was not the right thing to do under the circumstances.

3. The allocation of authority and the arrangement of procedures which legitimize actions as being authoritative.

Concentrating on each ‘law- job’ in turn is meant to accentuate different aspects of normativity at *L’Arche*. While the discussion of the first two law jobs already speaks to the question of the allocation of authority or legitimacy at *L’Arche*, here I address that law-job expressly in order to present another vantage point of how core members at *L’Arche* go about constructing legal normativity. In adopting a critical legal pluralist

¹¹¹ On the spontaneous interpretation of legal normativity in unfamiliar environments see Michael Reisman, *Law in Brief Encounters* (New Haven: Yale University Press, 1999).

perspective we have made an attornment to the individual as the irreducible site of law.¹¹² Thus, to the extent that different persons and groups of persons have legal normative legitimacy at *L'Arche* depends, on the one hand, on whether they make a claim to that effect in prescribing a norm, and on the other, whether a purported subject of that norm actually recognizes its basis in legitimacy (or, in other words, actually treats it as normative).¹¹³

At *L'Arche Montréal* the offices of Community Leader, Director of Human Resources, members of the Discernment Committee, and the position of assistant all assert an explicit claim to legitimacy. However, the authority of the persons who hold these positions may appeal to other forms of legitimacy as well. Thus, a person may be officially (explicitly) in charge, have (implicitly) acquired authority through long standing in the community, possess a high level of (formal) leadership expertise, or simply make his authority felt (inferentially) through the way he engages personally with each of the individuals who look to him as a leader.

The legitimacy or authority of good leaders may usually be justified on all four of these bases. Whether core members share this view of normative authority at *L'Arche*, and what their opinions are of its realization in practice depend on a variety of influences and factors in the same they do for individual assistants. However, having an intellectual disability means a decreased capacity for analyzing rationalized systems and judging expertise. Persons with intellectual disabilities tend to value continuity and stability in their lives; moreover, interpersonal relationships are vital to them, especially given their need for close personal assistance. Thus, implicit and inferential forms of legitimacy would seem to have greater relevance.

By the same token, someone who has had no verbal cognitive development like Debbie would still appear to be able to recognize explicit authority in the sense that she knows

¹¹² See Macdonald, *supra* note 30. This is a theme developed in each of the works cited there.

¹¹³ See Macdonald & Sandomierski, "Against Nomopolies", *supra* note 30 at 616 footnote 20.

who the assistants are and what their role is. That is why in story V, after she hits Helen, she spends the rest of the time evading and then trying to place her assistants.

The question is, though, does a core member like Debbie recognize her assistants' claims to legitimacy, or does she just do what they say either out of habitual acquiescence or fear of coercion?¹¹⁴ How much of the assistance required by a core member is due to a specific physical or cognitive impediment, and how much of it is due to a lack of autonomy that has been inculcated in the person through a lifetime of being treated as "disabled" is not easily determined. As far as assistants are concerned, the best way to promote core member independence are not always clear. Training, experience and supports are vital but not fail-safe. There may be different reasons for why, on the one hand, Debbie waits for her assistants to go down the stairs before she does and, on the other, Yvonne grabs out for her assistants' arms when their walking down the street. Where we see normative legitimacy being acknowledged by core members in the stories in Chapter 4 then, is in their various responses to and initiation of interaction with their assistants, community leaders, and each other. There is no question that the line is blurry as regards whether core members do whatever an assistant wants due to affective (or coercive) reasons or whether they are doing something out of recognition that they 'ought' to do it, given the legitimate basis of the claim asking them to do so.

For persons who do not have intellectual disabilities and pride themselves on their own independence, such an image of affect, authority, autonomy and dependence all interlaced may seem unusual, given how individual agency and isolated individualism tend to be conflated in capitalist cultures.¹¹⁵ Thus, we mythologize our own ability to stand alone.

¹¹⁴ This is a question Hart addresses when criticizing theories of law that centre on an all-powerful sovereign and the use of coercion. Hart, "Chapter IV: Sovereign and Subject" & "Chapter II: Laws Commands & Orders" in *The Concept of Law*, 2nd ed., *supra* note 41 at 50 and 18, respectively.

¹¹⁵ Charles Taylor, *The Malaise of Modernity* (Concord: Anansi, 1991); Multiculturalism and the Politics of Recognition (Princeton: Princeton University Press, 1992); Sources of the Self: The Making of the Modern Identity (Cambridge: Harvard University Press, 1989).

Yet, all of the stories, especially Story VI, illustrate how exposing our weakness and letting another person help us can be a powerful expression of human agency. It is not easy for anyone to be vulnerable. As we know, Zack can be very stubborn when he wants to be. He knew that I did not need help to go to the bathroom. Yet, he did not choose to resent me for the fact he did, standing there calmly serenely and cooperatively. Although I understood my duty “to respond to his physical, intellectual, spiritual and social needs and be attentive to his expectations” my understanding of how to perform that duty, as well as the significance of carrying it out, was enlightened by what Zack showed me through his actions.¹¹⁶

While explicit norms through their generality prepare us to enter a wide variety of circumstances, and stories through their particularity help us to negotiate more shadowy territory, from interaction with another person is where we learn most about how to act. Law is not simply a matter of the general, conceived abstractly, and to be applied concretely to the particular. Law is a product of an interplay between the general and the particular, the abstract and the concrete, the imagined and the lived. In this way, the authority of core members of *L'Arche* themselves, and their capacity to reinvent, recreate and reform legal normativity is strikingly revealed.

At *L'Arche* one implicit institution or Old Guard particularly stands out. This is made up of a handful of assistants who object to what they see as the creeping institutionalization of *L'Arche*. They wish to see *L'Arche* remain true to their view of how it was when they first arrived in the community. The model they have in mind is one in which assistants live full-time, at long-term in the home with core members. The crucial problem facing *L'Arche* is the shortage of assistants. It is a problem world-wide for the community, but particularly in North America and especially in Québec. In order to keep the community functioning, community leaders and directors of human resources have had to find ways to increase recruitment of assistants and encourage them to stay. One plan has been to offer university students full-time accommodation in the assistant apartments located beside the *L'Arche* workshop and administration offices in exchange for part-time work

¹¹⁶ *Association des Arches du Québec: Code d'éthique* Appendix 8.2.

as assistants on weekends. In the face of measures like these, members of the Old Guard worry that the vocational aspect to assistant life in *L'Arche* is being lost. Without a full-time commitment to community life such part-time assistants cannot provide core members with care, support and amity with the same level of regularity and stability.

Official community leaders who advocate the measure, while admitting it to be less than ideal, insist it is necessary if *L'Arche* is to adapt and flourish in the midst of changes to the community and society as a whole. As one points out, the rationale behind lodging the university students for free is to compensate them for all that they are missing out by spending just two days a week participating in community life with core members in the home. In positions of official authority, Jocelyn and Robert both believe that the heart of *L'Arche*—living, doing and being with core members—is being preserved in good health. However, they recognize the concerns of the Old Guard; alienating community members would surely lead to severe breakdowns in the functioning of the Whole. Procedures for consultation, both formal and informal, go about preventing conflicts while at the same time allocate legitimacy.

Rather than conduct elections for the designation of Community Leader (or Director), persons on the Discernment Committee visit homes in the community to ask assistants and core members for their comments and criticisms regarding what is happening in the community and the direction the current Community Leader has been providing. From these consultations the Discernment Committee gauges whether there is general satisfaction with maintaining the current Community Leader, and what changes he ought to make to better reflect the diverse interests of the members. If the Community Leader has announced that he is leaving at the end of his term, then another candidate is put forward by the Discernment Committee to the members of the community. When a decision has been reached as to whether the person under consideration would be a good choice for the community, that person is then asked by the Discernment Committee to begin as Community Leader. His nomination is then officially recognized by the Community's Council of Administration—an explicit and formal institution responsible for final decisions on the purchase and sale of property, fundraisers etc.

Because the procedure for selecting the Community Leader and approving the community mandate are chiefly implicit and inferential in character, the Old Guard has more influence than in an environment where such procedures are comparatively explicit and formal. Choosing a new leader and affirming the community mandate for which he is primarily responsible takes place through a method called "discernment".

There are resemblances to the phenomenon of Old Guard among core members too in the sense that they display implicit authority in their interactions with others. However, it is difficult to make out specific social sub-groups from among the core members that implicitly self-identify as normative institutions. Each core member has certain other core members with whom they are closer; in some way these friendships, like the one Yvonne and Helen enjoy, have a certain impact on the normativity in the house in which they live. However, the interesting thing about core members is that though they distinguish between core members and the assistants on whom they rely for assistance, there is little evidence of a pecking order among core members, at Blue Skies at least, based on formal criteria such as age, beauty, intellectual ability, talent or physical prowess. On the one hand, this is a reflection of the explicit values of *L'Arche*, which assistants consciously adopt when they join the community. Their work in the community, the manner in which they relate to each other and core members serves to reinforce values like human dignity, equality and the revalorization of intellectual disability.

That is not to say rivalries and jealousies do not emerge between core members, and that some core members do not sense that they are better than others because they are more like the assistants in terms of intellectual ability. However, this is going on in an environment where disability is revalorized not degraded. Thus, it is common to see a person with severe intellectual disabilities actually being more influential in a community than one with relatively lighter disabilities but who does not embrace *L'Arche* values in the same way.

Cushing observes that the values of *L'Arche* reflected in everyday life go to making it a distinct "moral world".¹¹⁷ In agreeing with her assessment but wishing to ground it in a critical legal pluralist approach, what she refers to as a "moral world", I call a "normative order or regime".¹¹⁸ Furthermore, I would stress that this does not represent the sole normative order at *L'Arche*; that rather a plurality of such regimes competes to capture the imaginations of its members. Suppressed discourses within the community, like the one belonging to the Old Guard described above, speak to the normative order to which the people taking part in those discourses see themselves as rightfully subject.

Furthermore, members of the community (leaders, assistants, core members) are exposed at work, with their families or while otherwise engaged in the world outside of *L'Arche*, an even greater plurality of normative order intersecting and colliding and bidding for allegiance.¹¹⁹

Furthermore, how I interacted with Zack (VI) was influenced a great deal by the story Jocelyn told me about how well Zack had responded when Marie-Claude reached out to him through kindness and friendship versus how defiant he had been when approached in a combative or even simply deferential manner. From the story, I inferred that cajoling Zack or abandoning him to his own devices in the bathroom was not the right thing to do under the circumstances.

At any rate, Cushing identifies two maintain strategies that characterize the *L'Arche* legal order: first, "the revalorization of difference"; and, second: "the reformulation of efficiency as fecundity or generativity".¹²⁰ She points out that these are ways community members go about assuring community health, and thus individual well-being. However, as much as such strategies are consistent with the Gospel-based world view of community founders Jean Vanier, he claims to have learned most from living with persons with intellectual disabilities.

¹¹⁷ Pamela Cushing, *Shaping the Moral Imagination of Caregivers*, *supra* 3 at 187.

¹¹⁸ See Macdonald, "Les Vieilles Gardes", *supra* note 30.

¹¹⁹ See generally Macdonald & Sandomierski, "Against Nomopolies", *supra* note 30 (on the plurality of *nomoi*).

¹²⁰ Cushing, *Shaping the Moral Imagination of Caregivers*, *supra* note 3 at 189.

The ability to think and communicate at a relatively higher level means that someone like Billy is more disposed to contribute to formal discussions around the organization of community life, the channelling of behaviour, and the disposition of trouble cases than someone who has an inferior capacity to constructively engage others, like Debbie for example. However, as stories II, IV and V demonstrate Debbie is a far more intriguing and mysterious woman than her relatively basic language capabilities would imply. Her interaction with me on the walk up the mountain, her private exchange with Eric in the car and her unexpected act of kindness when she took responsibility for enhancing my aesthetic appearance indicate how she too takes an active role in the generation of law at *L'Arche*.

An even more dramatic example of how persons who by conventional standards demonstrate a low level of autonomy manage to effect powerful normative influence presents itself in story VI when Marie Claude arrives as a new member at Zack's home, and transforms the way in which people had previously interacted with Zack.

Another example is Cecile. She often goes along with Robert and other core members and assistants to represent *L'Arche* at recruitment and information sessions for the community. Everyone at *L'Arche Montréal* knows her. Far from living on the margins of the community as one might imagine a person who by any conventional standard is so severely disabled would in society at large, Cecile is right in the thick of things at *L'Arche*. Indeed, whether sitting at the table at community suppers with someone beside her holding her hand or brushing her shoulder now and then to say hello, or being rolled around on the dance floor at one of the community parties, she is a visibly vibrant member of *L'Arche*. Moreover, the normative impact she has is equally remarkable.

That is because Eric's relationship with Cecile helps to transform the anger and frustration he has pent up inside into something quite different. The way he is around her shows how someone discovering his capacity to love and having the opportunity to cultivate it will alter his patterns of behaviour more profoundly and permanently than the enforcement of propositional rules will do for him. To classify Marie Claude and Cecile

as part of an “old guard” would be inaccurate, since they do not appear to identify as members of a group distinguishable within the community as a whole. Instead they are representative of all core members at *L’Arche*, who to a greater or lesser extent, use their unique gifts to slowly and subtly create and condition law at *L’Arche*.

4. The net organization of the group or society as a whole so as to provide cohesion, direction, and incentive.

L’Arche is an intentional, faith-based community, but it is also a care-giving agency. The community- agency tension requires balance both at an administrative level and in the course of conducting daily activities.¹²¹ The official legal status, and thus access to government funding, of *L’Arche* communities varies between provinces in Canada. Satisfaction of formal legal requirements does not in itself give satisfaction to the human being; nor is it sufficient for meaningful, enriching human interaction. There are a number of State legal norms governing *L’Arche* assistant behaviour when it comes to these intimate situations.

The explicit and formal law stated in the *Criminal Code of Canada* prohibits a person in a position of trust toward a person with a mental or physical disability from non-consensual touching for a sexual purpose.¹²² Neither in the *Code of Ethics of the Association of Arches of Québec* nor the *L’Arche Montréal Constitution* is this prohibition stated explicitly. Instead, it is implied in a number of provisions, including one identifying the obligation of all community members “to respect each person’s dignity and integrity”.¹²³ It is neither because sexual assault is permissible at *L’Arche* nor because there is no risk of it happening that sexual assault is not specifically prohibited in a *L’Arche* code of

¹²¹ See Cushing, *Shaping the Moral Imagination of Caregivers*, *supra* note 3 at 130.

¹²² Part 5, “Sexual Offences, Public Morals and Disorderly Conduct” *Criminal Code*, R.S.C. s. 153.1: “Every person who is in a position of trust or authority towards a person with a mental or physical disability or who is a person with whom a person with a mental or physical disability is in a relationship of dependency and who, for a sexual purpose, counsels or incites that person to touch, without that person’s consent, his or her own body, the body of the person who so counsels or incites, or the body of any other person, directly or indirectly, with a part of the body or with an object, is guilty of (a) an indictable offence and liable to imprisonment for a term not exceeding five years; or (b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.”

¹²³ “Respect” s.1 *Association des Arches du Québec: Code d’éthique* Appendix 8.2.

unlawful activity. It has more to do with the fact that *L'Arche Montréal* is an association based around common aims, whose positive legal materials tend to delimit institutional competencies and individual obligations rather than enumerate prohibitions and list sanctions.¹²⁴

Measures included in the screening process of prospective assistants and volunteers, like police checks, as well as the fact new assistants and volunteers are assigned duties to attend to the intimate care of core members only gradually, following observation and evaluation by other assistants, house and community leaders, attest to the fact sexual assault is not permitted in the community. Moreover, incidents in the past of sexual assault of core members, that have resulted in removal of a volunteer from the community and criminal prosecution, speaks not only to the seriousness with which such unlawful behaviour is addressed at *L'Arche* but also to the fact that people in the community are not immune from this type of danger. This web of implicit normativity attests to just how anathema sexual abuse is to the fundamental norms of *L'Arche*.

Life at *L'Arche*, particularly in relation to situations involving intimate personal care, evokes for any one person a wide variety of norms beyond the black letter of community documents. Pursuing research of the laws of *L'Arche*, while subscribing to a conception of law “as the endeavour of symbolizing human action under the governance of rules”, involves focussing on human interaction itself.¹²⁵ The wide range of potential laws pertaining to interactions in which *L'Arche* assistants provide intimate assistance to core members are most fully revealed through an examination of those interactions themselves. While a review of positive legal materials at *L'Arche* may expressly identify my legal obligation to provide care for Zack, and prescribe to some extent the content of that obligation, there remains a lot of room for interpretation of what fulfilling that obligation actually entails in practice. In effect, there is a much wider web of legal normativity, whose many threads variously serve to fill out and go beyond, but also empty out and come up short of written state and community laws. The constraints of

¹²⁴ See on the concept of institution of common aims Fuller, *infra* note 127.

¹²⁵ Macdonald “Here, there & everywhere”, *supra* note 30 at 393.

canonical phrasing do not circumscribe the domain of law because the diversity of sites in which legal norms are produced and the variety of manners in which they are communicated extend well beyond the statutory paradigm. Realising that we see law in our expressions of the reasons for why we choose to act in one way as opposed to several others obliges us to take a closer look at the conditions under which we arrive at such choices.

Story VI shows how the laws governing the interaction between Zack and me—a core member and an assistant carrying out a personal care activity—stem from the panoply of normative sources he and I interactively interpret and instantiate through our choices of conduct. Of course, instructions from persons in positions of explicit authority at *L'Arche* serve as one such legal normative source. Both formal and informal instruction I receive from other *L'Arche* assistants, my house leader, and the Director of Human Resources delineate certain expectations of my behaviour and serve as guidelines for my interaction with core members, including Zack. But the fact such informal instruction is necessarily ambiguous and formal instruction cannot anticipate all eventualities—not to mention the inconsistencies that I also may perceive emerging from this plurality of normative sources—mean my role as a legal agent involves considerably more than simple compliance or mere disobedience with “the law” of *L'Arche*. Moreover, while I am negotiating all this normative plurality and flux, so too is Zack. Given our roles, and yes given our different intellectual and expressive capabilities, indeed given the mere fact that we are two different people, this jurisgenerative process in which we engage as legal actors is different for each of us. It is in the course of our interaction, in the way choose to conduct ourselves while relating with each other, that we bring to bear the laws governing this particular trip to the bathroom.

His acquiescence to my help speaks to his recognition of the necessity of this type of support and to his familiarity with assistants supporting him in this way in the past.

5. The job of juristic method: keeping claims and the order in balance, or keeping both law-stuff and law-personnel up to the demands of all law- jobs

L'Arche aspires to be a community of the heart: one based on covenantal relationships, mutual growth and common commitment rather than personal interest and contractual gain.¹²⁶ We may juxtapose this organic, aspirational mode of being in community with a wooden, formally legalistic ordering of human interaction.¹²⁷ Fuller notes two ways in which people come together to form associations. He calls them “association by reciprocity” and “association to achieve common aims”. He posits these as two poles that human associations—be they states, businesses, debating clubs or school boards—tend to gravitate towards. An association typically evinces a pull in both directions. Rarely is an association purely a matter of reciprocity or merely a matter of common commitment. If the association relies on explicit, formal rules and centres on individual rights and obligations this puts it more squarely in the “reciprocity” camp. The more implicit the norms and less formally rigid the normative structure, the more aptly the association exhibiting these features is described as an “association to achieve common aims”. The latter places a preponderant emphasis on form over content, appearance over substance and profits, cunning and manipulation over good-faith mediation.

However, *L'Arche* like any social group exists in a tension between these two poles.¹²⁸ Both personal and collective survival depends on things getting done. Resources have to be distributed: food has to get on the table; the house has to be cleaned, people need to

¹²⁶ On the idea of being a community of the “heart”, see generally Vanier, *supra* note 10. It is a recurrent theme in all of his writing. See also *Charter of L'Arche Communities* Appendix. In regards to the difference between ‘covenantal’ and ‘contractual relationships’ see Jonathan Sacks, *The Dignity of Difference: How to Avoid the Clash of Civilizations* (London; New York: Continuum, 2002) at 151.

¹²⁷ See: Lon Fuller, “Two Principles of Human Association”, reprinted in Winston, ed., *The Principles of Social Order* (2002) at 84.

¹²⁸ Vanier, who is retired from the position of Director of the Council of Administration of the International Federation of Arches, has made a major impact on the vision informing the juristic method within *L'Arche* communities. He articulates an awareness of how social groups are pulled between these two poles, when he writes: “Too much security and the refusal to evolve, to embrace change, leads to a kind of death. Too much insecurity, however, can also mean death. To be human is to create sufficient order so that we can move on into that insecurity and seeming disorder.” Jean Vanier, *Becoming Human*, *supra* note 10 at 13.

have their health looked after. Plus, disputes must be resolved; direction must be given and activities need to be coordinated.

Thus, necessity serves as the basis of legality. Core members' innate humanity grounds duties of care owed by non-core members of L'Arche to core members. The content of these obligations is determined in part by the interaction of core with non-core members, including the core members' understanding of their own best interests and how to serve them. Creating an enabling environment in which core members exercise their agency requires certain limits. Therefore, the good of the Whole and its enabling of core member agency is the ultimate basis of the core members' duty to comply with the limits that must be maintained for the Whole to exist as intended.¹²⁹ However, just as life at *L'Arche* is never static, nor is law. That is because, there, like anywhere else, not only do competing visions of the good of the Whole exist. Opinions about how best to facilitate core member (and non-core member) agency differ as well.

Now the final law-job, juristic method, is really about how the values informing performance of the other law jobs get realized by the people carrying out the work. While on the surface, the aim is to eliminate violence from Eric's behaviour toward Debbie, on a deeper level, the goal is to banish the violence raging in his heart. Thus, whether the behaviour of a person acting out of fear of coercion may be more effectively controlled than the conduct of an individual deciding freely out of a sense of normative obligation is beside the point; that is, if the point has anything to do with the good of the individual human being himself.

Addressing an offender's conduct requires examining the reasons why he is offending, then responding in appropriate, creative, sensitive and reliable ways to give him more options than he currently feels he has. Finding out where someone is hurting and finding ways to relieve them of that hurt encompasses legal methodology as much as mere apprehension, punishment, and deterrence of the offender.

¹²⁹ I am indebted to Prof. Evan Fox Decent, the external reviewer of this thesis paper, for outlining this point in his comments.

Plurality and conflict are inevitable at *L'Arche* particularly because of the breadth of its ambitions. To serve “the whole person”, to value the good of the individual and make the person with an intellectual disability the *core* member of the community requires an *upset* of typical rational understandings of power as hierarchy, and law as social control. It would of course be much easier to “run” *L'Arche*, if keeping it running were all one had to worry about and thus could be justified at all costs. It gets trickier when one recognizes that keeping things going means keeping them moving in the right direction. Divergent claims between members must not only be recognized to preserve the Whole; they must be reconciled in such a way that preserves the identity of the Whole.

L'Arche's mission is to be a place where persons with disabilities and those who serve them can flourish as human beings. *L'Arche* aspires beyond mere endurance as a group to be a certain type of group. The mission is not just to be, but to be *L'Arche*. However, *L'Arche* is many things, both imagined and real, to a good many people. The identities individuals ascribe to *L'Arche* are inextricably linked to the identities they ascribe to themselves. How they understand *L'Arche*— what it is or is not, should or should not be, does or does not do, can or cannot achieve— implicates their understanding of themselves in relation to it, and their responsibility for it being what it is to them.

The question is not, what is *L'Arche*? but who is *L'Arche*? Similarly, the question a *critical* legal pluralism asks is not, what is law? but who is law? Personalizing the inquiry in this way requires us to acknowledge plurality: for *L'Arche*, like law, represents the efforts of the many engaged in the ongoing endeavour of living together as one.

6- CONCLUSION¹³⁰

Noah, a tiller of the soil, was the first to plant the vine. He drank some of the wine, and while he was drunk, he uncovered himself in his tent. Genesis 9:20

We live in a world after the Flood. Of course, we could imagine the great injustices of today as signs that the Flood is still to come. The conditions would seem just as ripe now as they were in the time of Noah for a divine creator to unleash a punishing, purifying deluge upon a creation gone wrong. On the other hand, we might see these heady times, so mercilessly inundated with violence and suffering, as evidence that the waters have already broken and right now we are living the destruction of the Flood.

These two latter interpretations are certainly valid and it is the power of a story to offer us many ways of understanding our world, our lives and our selves. However, to see ourselves as living in a world after the Flood, frees us, on the one hand, from a fatalistic resignation to impending doom and, on the other, from a desperate helplessness in the face of unmitigated disaster. The world after the Flood, founded on a promise that the waters of such wholesale destruction have now ceased for good, calls out for

¹³⁰ For a discussion of various interpretations of Noah and the Flood and other Great Deluge narratives see: H. Hirsch Cohen, *The Drunkenness of Noah* (Alabama: University of Alabama Press, 1974); Florentino Garcia Martinez & Gerard Luttikhuisen, eds., *Interpretations of the Flood* (Leiden: Brill, 1998); Harold Peake, *The Flood* (London: Kegan Paul, Trench, Trubner & Co., Ltd., 1930). However, the richest source of reflection on this narrative I found throughout Northrop Frye, *The Great Code: The Bible and Literature* (San Diego: Harcourt Inc. 1982). The book is inundated not just with references to the Flood narrative in particular, but water image generally. Here is the bulk of the works involving myth, narrative and their implications for the way human beings live in the world and symbolize their commitment through law that I relied on for this concluding reflection: Northrop Frye, *The Educated Imagination* (Toronto: CBC Enterprises, 1985); *The Secular Scripture: A Study of the Structure of Romance* (Cambridge: Harvard University Press, 1976); Ernst Cassirer, *Language and Myth* (New York: Dover Publications Inc., 1946) A.P. Kerby, *Narrative and the Self* (Bloomington & Indianapolis: Indiana University Press, 1991); Paul Ricoeur, Translated by David Pellauer *Figuring the Sacred: Religion, Narrative and Imagination* (Minneapolis: Fortress Press, 1995); Robert Cover, "Nomos and Narrative" (1983) 97 Harv. L. Rev. 4.; Desmond Manderson, "From Hunger to Love: Myths of the Source, Interpretation, and Constitution of Law in Children's Literature" (2003) 15.1 Law & Literature 87; Roland Barthes, *Mythologies* translated by Annette Lavers (New York: Hill and Wang, 1972). Bert Van Roermund, "Law is Narrative, not Literature" (1994) 23:3 Dutch Journal for Legal Philosophy and Legal Theory 221. Roderick A. Macdonald, *Lessons of Everyday Law* (Montréal: McGill-Queen's University Press, 2002); "Epistles to Apostles" (2001) 39 *Alberta Law Review* 668. The specific interpretation of the narrative presented in this conclusion, however, is my own.

reconstruction—the complex, dynamic and uncertain process of rebuilding lives for our selves in the world.

After the cataclysmic devastation of the flood, and the long sunless days cooped up on the ark, the flood ends, the world becomes habitable once again and everyone emerges from the ark. Through the covenant God makes with Noah, humanity is reborn, but as Noah discovers, with rebirth comes the challenge of living in the world. At first, this challenge appears too much for Noah to bear so the first thing he does is try to escape it by getting drunk.¹³¹ Suffering through the flood is one thing: Noah knew the difficult life on the Ark (to which there was no genuine alternative since it was a matter of survival) would eventually end, God would stop the deluge and Noah and the rest of the creatures would return to living in the wide spaces of the earth, rather than cramped crevices of a watercraft. What I think proved toughest for Noah was not sailing through the awful deluge—an isolated instance of adversity, which he had been assured by God he would persevere—but all those other streams of idleness, rivers of frustration, oceans of pain and rivulets of despair that come with everyday life in the world after the Flood.

From the time God decides to punish the world—while sparing a chosen few—until He stops the waters, and makes his covenant with Noah, His will is clear. God intervenes in the world, speaks to Noah, lets His justice be known; in this way Noah knows what he must do. The problem, then, comes after the flood, when God stops talking.¹³² All that remains for Noah is memory and the task of getting on with life. The power to use symbols and create narrative—in short, the ability to tell stories that resonate—is the only means by which Noah can strive to hear the voice of God, to discover His will, and know what divine justice requires him to do. In this light, the outcome of the story of the Flood is not as nearly as important to Noah as knowledge of the story of the outcome because it is knowledge of that story that serves to get him through the rest of his days. In the same

¹³¹ Genesis 9:20.

¹³² “The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.” *Interpretation Act* R.S., c. I-23, s.10. Thus, the human need to always have a normative reference for behaviour is reincarnated into classic positivist style.

way, knowing the story, we can relate to Noah—as he was on the precipice of the catastrophe, as he was under the deluge etc.

Whether we hold them as sacred or secular, we connect with myths in various ways, divine many different meanings from them as we endeavour to narrate ourselves and give our suffering, folly and faith (in sum, ourselves) meaning.¹³³ In the story of Noah and the Flood, Noah, his family and all of the animals emerge from the Ark to a landscape that, though significantly altered, rests substantially the same.¹³⁴ All creatures of the earth and sky, save the chosen few who survived on the Ark, have been decimated; however, for the most part, it is the same earth and sky. What is more, these are not new creatures descending from the Ark to re-populate the world. Noah and his family belong to that same race of sinners, punished by the deluge. The slate is not wiped clean, but polished up so humanity can take a fresh look at its reflection and see who it wants to be. In the wake of the flood is a second chance. What's galling, frustrating, exciting and inspiring all at once is that there's also a third, a fourth and potentially many more chances too. That is because the end of the story where Noah, his wife, their sons and their sons' wives, the giraffes, the iguanas, the aardvarks, the porcupines (along with their significant others too) go back into the world, is really just the beginning. No longer is there flood or ark; now there is only the story of the Flood and the Ark. Having weathered the apocalypse we return to genesis. Re-born to a world after the flood, no longer is it a question merely of avoiding death but of endeavouring how to live. Under the crest of a wave, there are fewer options than under the arc of a rainbow.

In the world after the Flood, we have choices. In discussing how human beings go about constructing their normative worlds, I have situated my discussion, metaphorically speaking, in a world neither on the brink nor in the mire. In conclusion, I invite us to imagine that here and now, each of us, like Noah, is charged with the task of re-creating our world. Every human being has a life to lead, a project through time whose trajectory,

¹³³ I use the word "myth" in the same sense literary critic Northrop Frye does: "Myth is an imaginative verbal structure...Myth, like the words fable and fiction, is a technical term in criticism, and the popular sense in which it means something untrue I regard as a debasing of language. Northrop Frye, *The Educated Imagination* (Toronto: CBC Enterprises, 1985) at 46.

¹³⁴ Genesis 8:1.

though subject to a thousand and one variables over which she has no control, still, in the final analysis, rests in her own hands.

Whether seen as curse or blessing, the freedom to choose—albeit mitigated as it is by forces at once physical, psychological, economic and political— is our lot as human beings. This is a fundamental premise of a critical legal pluralism—that our actions as human beings are not predetermined— and I have accordingly attempted to bear witness to that fact through the research I have presented about core members recreating the normative worlds in which they live at *L'Arche*. It is important to remember, however, that adopting a post-flood perspective does not come at the expense of bearing witness to the tempest growing on the horizon or the waters swelling at our knees. It is about believing in the capacity of human beings to overcome. With that belief in our hearts we will never view the world, each other or ourselves the same way again.

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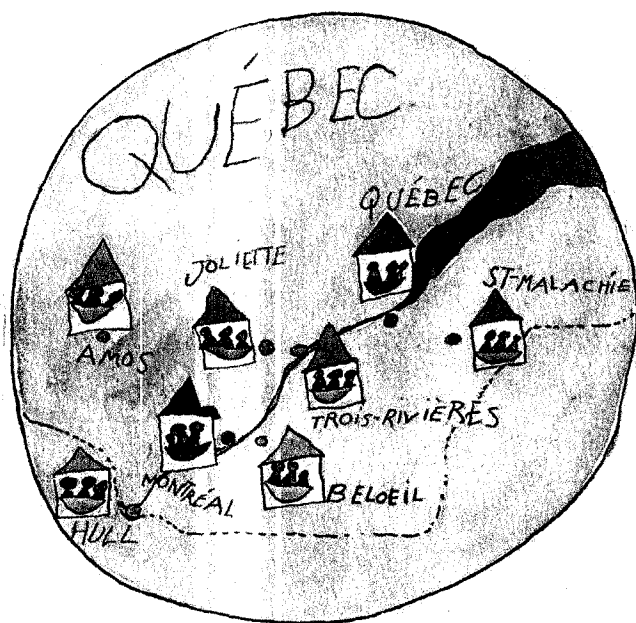
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Présentation

«Les communautés de l'Arche à travers le monde se regroupent dans la Fédération Internationale des communautés de l'Arche. Le but de la Fédération est d'unir les communautés dans une vision commune et dans un même esprit».(1)

L'Association des Arches du Québec (AAQ) regroupe toutes les communautés de l'Arche au Québec. En tant qu'organisme communautaire, l'AAQ a pour mandat de faire «la promotion du rôle, de la place et des besoins des personnes ayant une déficience intellectuelle auprès de leurs concitoyens autant que des diverses instances gouvernementales et des groupes décisionnels».(2)

L'adoption d'un code d'éthique a pour but d'aider les membres des communautés à mieux vivre la Mission de l'Arche et les valeurs exprimées dans sa Charte.



Le présent code d'éthique est un guide des pratiques et des conduites attendues de la part des personnes qui œuvrent dans les communautés de l'Arche au Québec. Il est complété par les documents d'orientation régionaux. Il énonce les droits des personnes vivant avec une déficience intellectuelle (**nos engagements envers elles**) et précise leurs responsabilités et celles de leurs proches (**nos attentes de leurs parts**).

Enfin le code d'éthique se veut un outil vivant et en constante évolution capable de susciter la réflexion critique concernant l'influence réciproque des valeurs de l'Arche, celles de la société et celles des individus, sur les questions et les enjeux qui émergent de la vie quotidienne.

1. Constitution internationale de l'Arche
2. Lettres patentes de l'AAQ

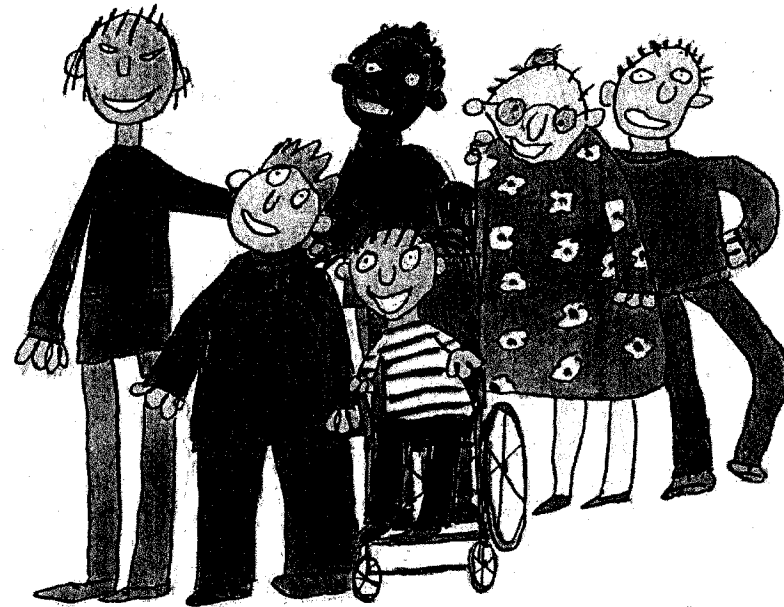
La Mission de l'Arche

Notre mission est d'accueillir dans des communautés de vie, des personnes vivant avec une déficience intellectuelle et de révéler leur don propre.

Ce sont ces personnes qui forment le cœur des communautés et qui appellent d'autres personnes à partager leur vie.

Notre mission est également d'être un signe qu'une société réellement humaine doit être fondée sur l'accueil et le respect des plus petits et des plus faibles.

Les communautés de l'Arche sont fondées sur des relations de mutualité entre des personnes de niveau intellectuel, d'origine sociale, de religion et de culture différents et sont un signe d'unité, de fidélité et de réconciliation.(3)



3. Charte des communautés de l'Arche

La philosophie d'intervention



- Toute personne, quels que soient ses dons ou ses limites, partage une humanité commune. Elle a une valeur unique et sacrée et possède une égale dignité et les mêmes droits.
- Pour développer ses capacités et ses dons dans le but de se réaliser, chaque personne a besoin d'un milieu dans lequel elle puisse s'épanouir. Elle a besoin de tisser des liens avec d'autres au sein d'une famille ou d'une communauté. Elle a besoin de vivre dans la confiance, la sécurité, l'affection réciproque. Elle a besoin d'être reconnue, acceptée, soutenue par des relations chaleureuses et vraies.
- Les personnes vivant avec une déficience intellectuelle ont souvent des qualités d'accueil, d'émerveillement, de spontanéité et de vérité. Elles ont le don de toucher les cœurs et d'appeler à l'unité. Elles sont un rappel des valeurs essentielles du cœur sans lesquelles le savoir, le pouvoir et l'agir perdent leur sens et sont détournés de leur finalité.
- La faiblesse et la vulnérabilité de la personne humaine, loin d'être un obstacle à son union avec Dieu, peuvent la favoriser.
- Pour développer la liberté intérieure à laquelle elle est appelée et pour grandir dans l'union à Dieu, toute personne doit avoir la possibilité d'être enracinée dans une tradition religieuse qui la nourrisse.(4)

À qui s'adresse ce code d'éthique ?

Les personnes concernées par le code d'éthique de l'Arche au Québec sont:

- Les personnes vivant avec une déficience intellectuelle accueillies dans nos communautés;
- Toutes les personnes qui participent de près ou de loin à la vie de la communauté: les assistants(5), les membres du Conseil d'administration, les membres associés, les familles, les employés, les bénévoles, les stagiaires et les partenaires.



5. Assistants: Des personnes qui choisissent de venir partager leur vie avec les personnes ayant une déficience intellectuelle dans un contexte de vie communautaire et qui y ont un engagement quotidien, soit en foyer ou sous d'autres formes (administration, travail en atelier/centre de jour, formation, etc.)

1. RESPECT

Nous croyons que chaque personne a une valeur unique et sacrée. (Charte)

Nos engagements sont:

- De respecter chaque personne dans sa dignité et son intégrité;
- De reconnaître ses croyances, ses valeurs, sa langue et sa culture tout en tenant compte de la vision communautaire de l'Arche; (6)
- De respecter son besoin d'intimité dans les soins d'hygiène et dans sa vie personnelle;
- De lui permettre de vivre dans un foyer où elle disposera d'un espace privé qui respecte ses goûts;
- De s'adresser à elle de façon respectueuse et courtoise;
- De respecter son rythme de vie et d'apprentissage;
- De l'accompagner et de l'informer dans ses prises de décision et de respecter ses choix, incluant le consentement ou le refus aux soins;
- De prendre en considération et d'être à l'écoute de sa vie affective, amoureuse et sexuelle;
- De lui permettre d'exprimer les situations où elle considère avoir vécu un manque de respect et l'accompagner dans la recherche de solutions.

6. Voir document « Éléments essentiels d'une communauté de l'Arche »



Nos attentes sont:

- Que chaque personne respecte les valeurs de l'Arche et son cadre de vie communautaire;
- Qu'elle développe des relations respectueuses et courtoises avec les personnes vivant le quotidien avec elle et avec toutes les personnes qui collaborent avec la communauté;
- Qu'elle respecte l'intimité des personnes qui habitent dans le même foyer qu'elle;
- Qu'elle s'exprime à propos des situations où elle juge que nous lui avons manqué de respect et qu'elle participe à la recherche de solutions.

2. QUALITÉ DE VIE

Nous croyons que chaque personne a besoin d'un chez soi dans lequel elle puisse s'épanouir, tisser des liens chaleureux et vrais. (Charte)

Nos engagements sont:

- De fournir à chaque personne, un foyer accueillant, favorable à son bien-être et qui donne la priorité aux relations;
- De lui assurer une qualité de présence dans sa vie quotidienne;
- De lui assurer une qualité de soins et d'interventions avec le souci de tenir à jour notre compétence;
- De répondre à ses besoins physiques, intellectuels, spirituels et sociaux et d'être à l'écoute de ses attentes;
- De créer des activités personnalisées et communautaires qui répondent à ses goûts et aspirations;
- De lui offrir un accompagnement individuel dans la vie quotidienne et dans les différentes étapes de sa vie;
- De lui offrir de participer à l'évaluation de la qualité de son milieu de vie.



Nos attentes sont:

- Que chaque personne collabore avec nous pour maintenir un environnement accueillant et favorable à son bien-être;
- Qu'elle participe aux activités de la vie communautaire;
- Qu'elle formule ses besoins et ses attentes;
- Qu'elle transmette aux autorités toutes difficultés ou insatisfactions concernant son milieu de vie.

3. CROISSANCE, PARTICIPATION, AUTONOMIE

Nous croyons que chaque personne peut développer ses capacités et ses dons et qu'elle est capable de faire des choix. (Charte)

Nos engagements sont:

- De reconnaître et nourrir le rôle de chaque personne dans la mission de l'Arche afin d'enrichir la vie de la communauté et de la société environnante;
- De favoriser les liens avec sa famille;
- De travailler en collaboration avec tous nos partenaires à l'élaboration de son plan d'intervention;
- De lui donner des lieux de parole pour s'exprimer;
- De lui permettre d'être partie prenante dans les décisions concernant son foyer, sa communauté et les structures de l'Arche;
- De favoriser sa participation aux activités de son milieu de vie;
- De lui trouver du travail, un milieu scolaire ou des activités de jour selon ses besoins et ses capacités et qui sont source de dignité, de croissance et d'épanouissement;
- De lui permettre de développer son potentiel et son autonomie au quotidien en lui offrant le soutien nécessaire;
- De la soutenir dans son intégration sociale et dans ses engagements au service des autres;
- De l'informer régulièrement sur les événements communautaires et tout ce qui la concerne.



Nos attentes sont:

- Que chaque personne nous transmette tous les renseignements nécessaires qui peuvent nous aider dans l'élaboration de son plan de service;
- Qu'elle s'exprime et participe aux prises de décisions concernant sa routine, sa vie de foyer et sa vie communautaire;
- Qu'elle travaille à développer et maintenir son autonomie.
- Qu'elle collabore avec tous nos partenaires dans les différents milieux.

4. PROTECTION ET CONFIDENTIALITÉ

Nous croyons que chaque personne a besoin de vivre dans la confiance et la sécurité. (Charte)

Nos engagements sont:

- D'assurer à chaque personne, les mesures de protection que requiert son état ou sa situation;
- De lui assurer que le contenu des renseignements de son dossier sera traité de manière confidentielle et dans les lieux appropriés;
- De favoriser l'accès et la transmission de toute information pertinente à la compréhension de sa situation uniquement aux personnes pouvant l'aider;
- De lui fournir les directives et procédures à appliquer dans des situations d'urgence;
- De la protéger contre toute forme de violence, d'abus et d'exploitation physique, morale ou psychologique, financière et sexuelle;
- De l'accompagner dans la prise de ses médicaments;
- De la soutenir dans la promotion et dans la défense de ses droits.



Nos attentes sont:

- Que chaque personne collabore dans la mesure de ses capacités aux démarches de représentation de ses intérêts;
- Qu'elle transmette aux autorités de la communauté toutes informations concernant un abus dont elle est victime;
- Qu'elle autorise la transmission des informations pertinentes pour la compréhension de ses besoins.

APPENDIX 8.4

Mr. Jocelyn Girard
Director, L'Arche Montréal
6115, Jogues, Montréal QC H4E 2W2

Dear Mr. Girard,

I am a part-time volunteer at l'Arche Montréal who spends three days a week at l'Arc-en-ciel, one of the five homes in the Montréal-Verdun area. I am currently pursuing my Master's in law and I would like to make L'Arche Montréal the focus of my thesis. My academic interests lie in legal theory and in particular legal pluralism. I would like to study the community as a legal system from a legal pluralist point of view. That involves observing life at L'Arche for the purpose of analyzing it as a legal system. Also, it involves interviewing members of the community—including core members (i.e. those with intellectual disabilities), their families, friends and employers as well as community administrators, assistants and volunteers—to get an idea of their perspectives on the law of L'Arche.

I am writing to ask you if you would agree to have me study L'Arche Montréal in this way and present my research in my Master's Thesis. In other words, I wish to obtain your permission as director to observe life at L'Arche for the purposes of examining it in my LL.M. thesis as a legal community, and to carry out interviews with members of the community to the same effect. Naturally, anyone I interviewed would be asked to sign forms indicating their consent to having the content of those interviews used as research materials for my thesis. While all L'Arche members would remain anonymous, I would be identifying L'Arche Montréal in my thesis.

Because I have been volunteering at L'Arche since mid-February 2007 and already know certain members of the community, I understand the importance of stressing to them in the course of asking for their consent that they are under absolutely no obligation to agree to the interview. While everyone in the community is over 18 years of age, not all members possess legal capacity to consent. I will not seek interviews with anyone without first finding out whether they have legal capacity to provide consent. For the purposes of selecting a neutral site, I will conduct all interviews with community members at the l'Arche community centre.

Insofar as you are director of L'Arche Montréal, I would ask for your permission to attend formation sessions, community consultations and other meetings relevant to community decision-making. I will not seek the specific consent of individual community members to observe these processes. Once again, as regards this observational component of my research, all data will remain confidential until it is presented in my thesis. At this point, individuals will remain anonymous through the use of pseudonyms. I also wish to interview you about your experience, knowledge and impressions of L'Arche. I will, therefore, ask you to sign two separate consent forms, one granting me permission to carry out my research at L'Arche and the other to interview you personally.

I have attached my research proposal, which has been approved by the McGill University Research Ethics board, for your perusal. Should you have any questions about the nature of my research interests or methods, please do not hesitate to contact me.

Yours sincerely, Thomas McMorow

CONSENT FORM: DIRECTOR'S PERMISSION TO OBSERVE COMMUNITY MEETINGS/ACTIVITIES FOR THE PURPOSES OF MY RESEARCH

My name is Thomas McMorow. I am a law student at McGill University. My phone number is 514 933 8194. My email address is Thomas.mcmorrow@mail.mcgill.ca. My supervisor's name is Professor Macdonald. His email address is Roderick.macdonald@mail.mcgill.ca.

Project Description & Purpose:

For my Master's thesis in law, I am studying L'Arche as a legal system. One of the main premises of my thesis is that to understand law we must understand how human beings interact with it. Therefore, I wish to observe a wide range of community activities and decision-making processes to see how people take part in them.

Confidential and Anonymous

My Master's Thesis will be available to the public. However, should you agree to observing these activities and meetings, I will not refer to anyone by their real name in the course of my thesis. Everyone shall remain anonymous. Moreover, no one else will have access to the data I collect in the form of the notes I make at these meetings. All of that shall remain confidential.

No Compensation

There will be no financial compensation for allowing me to carry out this study.

Questions/ Clarifications?

Please ask me any questions you might have surrounding the terms of this consent form.

Consent

I consent to having Thomas McMorow attend community activities and meetings for the sake of his research on L'Arche as a legal system.

Jocelyn Girard, Director L'Arche Montréal

Signature: _____

Date: _____

INTERVIEW CONSENT FORM: CORE MEMBERS OF L'ARCHE (PERSONS WITH INTELLECTUAL DISABILITIES)

What is this consent form about?

My name is Thomas McMorrow. I am a law student at McGill University. My phone number is 514 933 8194. My email address is Thomas.mcmorrow@mail.mcgill.ca. My supervisor's name is Professor Macdonald. His email address is Roderick.macdonald@mail.mcgill.ca.

I am writing my Master's Thesis about L'Arche. I want to look at all the rules that are in place at L'Arche and write a large essay, called a thesis, about it.

To do this I want to have an interview with you. That means sitting down with you and asking you questions about your everyday life in L'Arche. I'm going to ask you about the rules that you live by, where they come from and what you understand them to mean. The answers you give me I will use in my paper when I try to describe the law of L'Arche.

It's important to know, however, that I will not use your name in my paper. That way you will remain anonymous. In other words, people reading the paper will not know it was actually you who told me what you did.

Also, all the notes I make in the course of our interview will remain confidential. That means I will keep them to myself and not share them with others.

But before I ask you any questions and use the answers you give me in my paper, you first must agree to me interviewing you. That's called consenting.

If you do not consent to me asking you these questions and using the answers you give me in my paper, that's perfectly fine. I will not be upset and neither will anyone else. Whether you agree or not is entirely up to you.

You will not be punished for deciding not to consent to the interview. On the other hand, there is no reward for consenting either; you will not get paid for consenting to the interview.

You do not have to answer any question you don't want to.

Statement of Consent:

By signing this form, I consent to Thomas McMorrow interviewing me and him using what I say in that interview for his essay about L'Arche. I understand that he will not use my real name in his essay and will not tell anyone what it is I said. I understand that I do not have to consent. I understand that I would not get into trouble if I chose not to consent and I will not be rewarded with money or anything else by choosing to consent.

Core Member Name: (Printed) _____

Signature: _____

Date: _____

I have witnessed Thomas McMorrow read and explain this consent form and I am satisfied that the person who has signed above has consented freely and willingly.

Assistant Name: (Printed) _____

Signature: _____

Date: _____

[INTERVIEW CONSENT FORM: ASSISTANTS, VOLUNTEERS; FAMILY MEMBERS, FRIENDS, EMPLOYERS, TEACHERS OF CORE MEMBERS; L'ARCHE ADMINISTRATORS]

My name is Thomas McMorow. I am a law student at McGill University. My phone number is 514 933 8194. My email address is Thomas.mcmorrow@mail.mcgill.ca. My supervisor's name is Professor Macdonald. His email address is Roderick.macdonald@mail.mcgill.ca.

Project Description & Purpose:

For my Master's thesis in law, I am studying L'Arche as a legal system. One of the main premises of my thesis is that to understand law we must understand how human beings interact with it. Therefore, I wish to conduct interviews with L'Arche members in order to get a sense of what rules people live by at L'Arche.

What am I asking you to do?

You are being asked to agree to an interview, where I will ask you questions about aspects of your experiences in and impressions of life at L'Arche.

Confidential and Anonymous

My Master's Thesis will be available to the public. However, should you agree to participate in this study, I will not refer to you at any point in my thesis by your real name. You shall remain anonymous. Moreover, no one else will have access to the data I collect, as in the notes of the interview we carry out. All of that shall remain confidential.

No Obligation to Participate

You are under no obligation to participate. You will not suffer any adverse consequences by your refusal to take part in this study.

You do not have to answer any question you don't want to.

No Compensation

There will be no financial compensation for participation in this study.

Questions/ Clarifications?

Please ask me any questions you might have surrounding the terms of this consent form.

Consent

I consent to having Thomas McMorow interview me about my perceptions regarding the law of L'Arche.

Name (printed): _____ Signature: _____



CHARTER OF THE COMMUNITIES OF L'ARCHE

This Document is a Fundamental Text - International - 101.
This Charter has been approved by the General Assembly of the Federation
Cap Rouge, Quebec, Canada, May 1993 (French).

CHARTER OF THE COMMUNITIES OF L'ARCHE

L'Arche began in 1964 when Jean Vanier and Father Thomas Philippe, in response to a call from God, invited Raphaël Simi and Philippe Seux, two men with mental handicaps, to come and share their life in the spirit of the Gospel and the Beatitudes that Jesus preached.

From this first community, born in France and in the Roman Catholic tradition, many other communities have developed in various cultural and religious traditions.

These communities, called into being by God, are united by the same vision and the same spirit of welcome, of sharing and simplicity.

AIMS

1. The aim of l'Arche is to create communities, which welcome people with a mental handicap. By this means, l'Arche seeks to respond to the distress of those who are too often rejected, and to give them a valid place in society.
2. L'Arche seeks to reveal the particular gifts of people with a mental handicap who belong at the very heart of their communities and who call others to share their lives.
3. L'Arche knows that it cannot welcome everyone who has a mental handicap. It seeks to offer not a solution but a sign, a sign that a society, to be truly human, must be founded on welcome and respect for the weak and the downtrodden.
4. In a divided world, l'Arche wants to be a sign of hope. Its communities, founded on covenant relationships between people of differing intellectual capacity, social origin, religion and culture, seek to be signs of unity, faithfulness and reconciliation.

FUNDAMENTAL PRINCIPLES

1. Whatever their gifts or their limitations, people are all bound together in a common humanity. Everyone is of unique and sacred value, and everyone has the same dignity and the same rights. The fundamental rights of each person include the right to life, to care, to a home, to education and to work. Also, since the deepest need of a human being is to love and to be loved, each person has a right to friendship, to communion and to a spiritual life.
2. If human beings are to develop their abilities and talents to the full, realizing all their potential as individuals, they need an environment that fosters personal growth. They need to form relationships with others within families and communities. They need to live in an atmosphere of trust, security and mutual affection. They need to be valued, accepted and supported in real and warm relationships.

3. People with a mental handicap often possess qualities of welcome, wonderment, spontaneity, and directness. They are able to touch hearts and to call others to unity through their simplicity and vulnerability. In this way they are a living reminder to the wider world of the essential values of the heart without which knowledge, power and action lose their meaning and purpose.
4. Weakness and vulnerability in a person, far from being an obstacle to union with God, can foster it. It is often through weakness, recognized and accepted, that the liberating love of God is revealed.
5. In order to develop the inner freedom to which all people are called, and to grow in union with God, each person needs to have the opportunity of being rooted and nourished in a religious tradition.

THE COMMUNITIES

1. Communities of faith

- L'Arche communities are communities of faith, rooted in prayer and trust in God. They seek to be guided by God and by their weakest members, through whom God's presence is revealed. Each community member is encouraged to discover and deepen his or her spiritual life and live it according to his or her particular faith and tradition. Those who have no religious affiliation are also welcomed and respected in their freedom of conscience.
- Communities are either of one faith or inter-religious. Those which are Christians are either of one church or inter-denominational. Each community maintains links with appropriate religious authorities and its members are integrated with local churches and other places of worship.
- Communities recognize that they have an ecumenical vocation and a mission to work for unity.

2. Called to unity

- Unity is founded on the covenant of love to which God calls all the community members. This implies welcome and respect for differences. Such unity presupposes that the person with a handicap is at the centre of community life.
- This unity is built up over time and through faithfulness. Communities commit themselves to accompany their members (once their membership is confirmed) throughout their lives, if this is what those members want.
- Home life is at the heart of a l'Arche Community. The different members of a community are called to be one body. They live, work, pray and celebrate together, sharing their joys and their suffering and forgiving each other, as in a family. They have a simple life-style, which gives priority to relationships.
- The same sense of communion unites the various communities throughout the world. Bound together by solidarity and mutual commitment, they form a world-wide family.

3. Called to growth

- L'Arche communities are places of hope. Each person, according to his or her own vocation, is encouraged to grow in love, self giving and wholeness, as well as in independence, competence and the ability to make choices.
- The communities wish to secure for their members' education, work and therapeutic activities, which will be a source of dignity, growth and fulfilment for them.
- The communities wish to provide their members with the means to develop their spiritual life and to deepen their union with and love of God and other people.
- All community members are invited to participate, as far as possible, in decisions concerning them.

4. Integrated in society

- L'Arche communities are open and welcoming to the world around them. They form an integral part of life in their localities and seek to foster relationships with neighbours and friends.
- The communities seek to be competent in all the tasks they are called to accomplish.
- The communities wish to enable people with a handicap to work, believing work to be an important means of integration.
- The communities seek to work closely with:
 - ◇ The families and guardians of people who are handicapped
 - ◇ Professionals
 - ◇ Government authorities
 - ◇ And with all those who work in a spirit of justice and peace for people who are handicapped.

CONCLUSION

L'Arche is deeply concerned by the distress of people who suffer injustice and rejection because they are handicapped. This concern should impel the communities of l'Arche to do all they can to defend the rights of people with a mental handicap, to support the creation of places of welcome for them and to call our society to become more just and respectful towards them.

The communities of l'Arche want to be in solidarity with the poor of the world, and with all those who take part in the struggle for justice.