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Reining In Pluralist Jurisprudence with the Rule of Law

(Until very recently: Globalization, the Rule of Law, and the Danger of Taking Legal Pluralism Too Far)

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For many legal scholars, the practice of law is no longer uniquely or especially associated with the institutional practices of state-governments. A great many socio-legal theorists and comparative lawyers, in particular, have concluded that legality also manifests in transnational and international contexts as well as within customary, indigenous, religious, and cultural frames. Even analytic jurisprudes are also coming around to this idea, with scholars such as Nicole Roughan, Michael Giudice and Keith Culver supporting the development of a "'pluralist jurisprudence', which seeks to analyse purported instances of law beyond, between, within, and/or outside state borders; and any resulting interactions or overlaps between different legal systems."[1] Indeed, such scholars now feel save to "presume that readers share [their] interest in characterizing what

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[1] Nicole Roughan, *Authorities: Conflicts, Cooperation and Transnational Legal Theory* (Oxford: Oxford University Press: 2013), 1.

is spoken of and thought to be legality in non-state-centric situations as diverse as international law, trans-boundary law and supranational law, as visible in the European Union".[2]

There are many reasons that legal researchers have chosen to expand their understanding of law along these pluralist lines — though two are pre-eminent. First, there is the worry that identifying the law with state-government hinders our appreciation of the true scope and nature of legal practice. Regarding law's scope, numerous researchers have observed that non-state organizations, such as religious orders and cultural or tribal associations, often appear to be possessed of key legal hallmarks. In particular, they often stand as formalized, systemic, and institutional forms of government that speak to the same practical concerns and issue the same sorts of authoritative demands as state systems.[3] Regarding law's nature, it has become increasingly clear that state-governance is rarely if ever constituted through the imposition of a single independent and supreme normative system. Rather, state-law — indeed all law — always seems to involve a number of interdependent institutional frameworks coming together to share in the production and maintenance of social order. Thus, many scholars now argue that, in order to move beyond a superficial understanding of legal governance, we must recognize and engage with the fact of "legal hybridity".[4] That is, we must learn to appreciate and to speak to the ways in which our

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[2] Michael Giudice and Keith Culver, *The Unsteady State* (Cambridge: Cambridge University Press, 2018), 1.

[3] For my part, it is this first consideration that justifies an expansion of our understanding of law.

[4] Sean Donlan, "Remembering: Legal Hybridity and Legal History," Comparative Law Review, v. 2
Paul Schiiff Berman, "Towards a Jurisprudence of Hybridity,". Utah Law Review , v.1, p.11, 2010
Francesca Scamardella (2014) Law, globalisation, governance: emerging alternative legal techniques., The Journal of Legal Pluralism and Unofficial Law, 47:1, 76-95,

institutions of government encompass and negotiate between a multiplicity of sub-state, state, and trans-state forms of law.

The second reason that legal scholars often use to justify descriptive legal pluralism is grounded in the need to challenge and ultimately eliminate the corrupting influence of eurocentrism within both legal scholarship and the larger culture. The idea here is that insofar as legal governance is thought to be a good thing, and insofar as law is associated with state-government, people will be conditioned to believe in "the inferiority of so-called 'primitive' or 'pre-literate' societies".[5] Whereas, "when you stretch the traditional concept of positive law,…and discard the requirement that law is a 'state thing', then indigenous peoples and ethnic minorities can have 'law' too", and will thereby be accorded the respect that they deserve.[6] Some scholars have even argued that the widespread recognition of non-state law problematizes the "subordination and violation" or ethnic and cultural institutions by state agencies.[7]

While these concerns have been repeatedly expounded over the last four decades, they have only recently gained widespread recognition. This increased awareness is surely due to the rapid intensification of globalisation: the fact that the terms of both local and global governance are openly being shaped by the interactions and interrelations of an ever expanding set of governmental, cultural, and technological orders, including (but not limited too):

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[5] William Twinning, "Normative and Legal Pluralism: A Global Perspective,"Duke Journal of Comparative and International Law" Vol. 20, 493.

[6] Wibo van Rossum and Sanne Taekema, Introduction to Law as Plural Phenomenon: Confrontations of Legal Pluralisms" Erasmus Law Review, Issue 3/4 2013

[7] Ida Nursoo, "Indigenous law, colonial injustice and the jurisprudence of hybridity," The Journal of Legal Pluralism and Unofficial Law, Volume, 50(Issue1) January 2018 p. 474

> …empires, alliances, coalitions, diasporas, networks, trade routes, and movements; 'sub-worlds' such as the common law world, the Arab world, the Islamic world, and Christendom; special groupings of power such as the G7, the G8, NATO, the European Union, the Commonwealth, multi-national corporations, crime syndicates, and other non-governmental organisations and networks.[8]

Regardless, the result is that more and more legal researchers have become sceptical of any account of law that appears to be too state-focused. Instead, they have embraced the development of more expansive understandings of law — ones that will allow for a greater diversity of governmental schemes to qualify as 'legal' and, hence, to fall within the ambit of their investigations.[9]

On the surface, this state of affairs would seem to set the stage for significant advancements in legal scholarship. After all, the point and purpose of such research — be it legal anthropology, comparative law, analytic jurisprudence etc, — is to advance our practical and theoretical understanding of the specific type of governance that is law. Thus, to the extent that pluralist inquiries are more open to the diverse realities of legal governance, we can expect to see new avenues of legal inquiry leading to an enhanced appreciation of the nature of law. And, indeed, some scholars are already proving this supposition correct. Within the field of comparative law, for example, Sean Donlan, Werner Minski, and Roberto Scarciglia have relied on the idea of le-

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[8] Twinning, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge: Cambridge University Press, 2009), 14.

[9] Ralf Michaels, 'Globalization and Law: Law Beyond the State' in Reza Banaker and Max Travers (eds), Law and Social Theory (Hart Publishing, 2nd edn 2014); William Twining, General Jurisprudence: Understanding Law from a Global Perspective (Cambridge University Press, 2009).

gal pluralism to justify new types of legal comparisons.[10] While, in the field of legal philosophy, Nicole Roughan's work on the nature of legal authority and Jean Thomas' work on the nature of institutionalized human rights have provided us with new insights into the workings of our legal institutions; insights that only became apparent to these scholars once they moved away from a state-centered view of law and legal order.

Yet at the same time there is a well known problem that lurks in the background of the pluralist zeitgeist. Specifically, since legal theorists have taken it upon themselves to expand their understanding of law, they have found it hard to identify any sort of principled limit on what might be thought of as a legal practice. As William Twinning describes the issue:

> If one opens the door to some examples of non-state law, then we are left with no clear basis for differentiating legal norms from other social norms, legal institutions and practices from other social institutions and practices, legal traditions from religious or other general intellectual traditions and so on…

The result is that today we find a number of prominent legal scholars who are willing to identify law with "day-to-day human encounters such as interacting with strangers on a public street, waiting in lines, and communicating with subordinates or superiors" at work, etc.[11] Some have even argued that legal research would benefit from abandoning the notion of 'law' altogether, and that it should simply inquire into the nature of whatever particular governmental agencies are

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[10] Donlan, n4; Werner Menski, Comparative Law in a Global Context: The Legal Systems of Asia and Africa (Cambridge University Press, 2006) 26. Scarciglia, R. (2015). "Comparative Methodology and Pluralism in Legal Comparison in a Global Age," Beijing Law Review, 6, 42-48

[11] Paul Schiff Berman, 'The Globalization of Jurisdiction' (2002-2003) 151 University of Pennsylvania Law Review 311,

able to exercise 'social control' within a given community or set of communities.[12] In short, when left unchecked, the pluralist impulse can lead to a view where "all forms of legal and social regulation of varying degrees of formality are simply lumped together".[13]

Some scholars are not bothered by this result. Most, however, find themselves balking at it, and the reasons are not hard to appreciate: First, expanding the category of law to this extraordinary degree offends against a widely-recognized truism. Namely, as long as the term 'law' has been used, its main point and purpose has been to denote a particular type of governance. Now, obviously, specific accounts of this form of social control has varied significantly from society to society and from time to time. However, the term 'law' (or 'drecht', 'fă', etc.) was never meant and was never used to refer to all forms of social governance. To suggest otherwise would be akin to proposing that the term 'science' refers to all modes of inquiry. Thus, the move to expand the idea of law to this degree represents an affront to conceptual accuracy. With an awareness of this first problem, a second point of concern comes to light. For, insofar as 'law' represents a particular category of social control, the purpose of legal scholarship has always been to help us understand the functions, structures, and content of a particular sort of governmental enterprise. The worry here is that if legal researchers were to accept and employ too broad an understanding of law then they would end up falling into the study of governance as such. And such a bloated investigative scope, it is said, risks obliviaitng our appreciation of subtle and not-so-subtle differences that exist between various types of governmental practices. Consider, for example, the confusions and conflations that might arise from a comparative law analysis of a na-

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[12]John Griffiths, 'The Idea of Sociology of Law and its Relation to Law and to Sociology' (2005) 8 Current Legal Issues: Law and Sociology 49, 63–64.

[13] Russell Sandberg, "The Failure of Legal Pluralism" (2016) 18 Ecclesiastical Law Journal 137–157

tion's constitutional conventions and another nations conventions of queuing. The foregoing concerns are bluntly summed up by Brian Tamanaha, who states that when pluralism is left unchecked, it results in a view that, "is confusing, counterintuitive, and hinders a more acute analysis of the many different forms of social regulation involved".[14] With these problems in mind, legal researchers of a variety of stripes have sought to establish some kind of limit on the pluralist understanding of law.

The most obvious way forward is to try and establish a conceptual boundary around the practice of law. That is, we could try to identify some particular feature or features that are widely or uniquely associated with instances of legal-governance, but which are not associated with obviously non-legal forms of social control, and then treat those traits as "markers or indicators" of legality.[15] Most scholars of a pluralist bent, however, are very dubious of this strategy. First of all, there is deep scepticism about whether there would even be any plausible candidates for the job. To again quote Tamanaha:

> …over time and in different places people have seen law in different terms. State law is currently the paradigm example of law, but at various times and places, including today, people have considered as law: international law; customary law; versions of religious law; the lex mercatoria; the ius commune; natural law and more. These various manifestations of law do not all share the same basic characteristics — beyond the claim to represent legitimate normative authority — which means they cannot be reduced to a single set of elements…[16]

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[14] Brian Z Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Sydney Law Review* 375 at 394.

[15] Giudice and Culver, Legality's Borders, 139

[16] Tamanaha, 396.

In short, many believe that the practice of law seems far to diverse to be parsed out according to some particular set of distinguishing elements. And, things may be even worse than this, for some authors argue that even if you could somehow find a set of features that, currently, seem to distinguish instances of legal from non-legal governance, any suggestion that they should be actually be treated as necessary features of law is likely to run afoul of the reasons that justify the pluralist project in the first place. In the words of Russell Sandberg, any such attempt is likely to be:

> …overly conservative, understanding legal mechanisms by precedent so that mechanisms are only seen as legal if they are similar to existing legal mechanisms and so excluding novel or different mechanisms. Second, they may be culturally specific, perpetuating a Westernised notion of law. Third, they may fail to take into account changing understandings of what people regard as law.

So again, even if we could find some set of features that seem to accurately parse out legal from non-legal forms of governance, we shouldn't embrace them due to the worry that doing so would just be continuing to privilege an eurocentric conception of legality.

With the foregoing concerns in mind, many legal theorists have conceded conceptual defeat and have tried to develop workaround strategies for dealing with the problem of pluralist bloat. That is, they have tried to find ways of demarcating the scope of law that does not involve any pretence of conceptual accuracy. Twinning, for example, suggests that the right move is for each form of legal inquiry to develop a conception of law that is fit for its specific purposes. On this approach, we should never claim to identify the true scope legal practice. Rather, we should just become comfortable working with whatever ad hoc conceptions of law suit our research

needs.[17] Brian Tamanaha, on the other hand, has famously suggested that the right response is to simply identify legal governance with whatever forms of social control that people happen attach the label 'law', to.[18]

There are other legal scholars, however, who have not been dissuaded by the sorts of challenges that Tamanaha and Sandberg adduce against the conceptual demarcation of law and legal practice. Quite the contrary, some have attempted to engage with these problems head on, by identifying a set of features that they think plausibly parses out the legal from the non-legal and does so in a way that does not obviously offend against the reasons that have motivated the pluralist expansion of law. At the vanguard of this group of stubborn conceptual pluralists are Michael Giudice and Keith Culver who, together, have published three monographs on the subject. For their part, Culver and Giudice have responded to the pluralist challenge by starting with a state-centered conception of law — Joseph Raz's positivist account of law — and then simply stripped it down until they arrived at a set of features that represent what they take to be the lowest common legal denominator. More specifically, they have advocated for a view wherein the idea of legality is no longer to be necessarily associated with the existence of legal systems or even the presence of legal officials. Rather, on their account, the distinguishing mark of legality is simply the existence of social norms constituting independent peremptory reasons for action. In their words:

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[17] Twinning, General Jurisprudence, Definitional Stop section

[18] The problem with such approaches, of course, is that they are so obviously theoretically unstable. They simply don't give us any good reason to trust in their delineation of the field, such that we could think that the distinction between legal and non-legal governance that their respective positions refer us to are true.

> …content independent peremptory reasons for actions are those norms requiring conduct that are capable of being identified and serving as reasons for action independently of consideration of their underlying purposes or justificatory reasons. Although such norms typically do not exist in isolation from other norms, on their own they represent one of the core elements of legality. In our view, where they exist, legality exists.[19]

So, to be clear, on Culver and Giudice's view, the difference between legal and non-legal governance is that legal governance is at least partially constituted by content independent peremptory norms whereas non-legal governance is not.

To see the strength of this position, just consider how it overcomes the worries identified by Tamanaha and Sandberg concerning the viability of drawing a conceptual boundary between legal and non-legal governance. First, their position immediately puts the lie to Tamanaha's claim that international law, customary law, religious law, the lex mercatoria, the ius commune; and natural law do not share any of the same basic characteristics. For, it is quite clear that each of these ostensible variants of legal governance are constituted, at least in part, by content independent peremptory norms. Thus, Giudice and Culver appear to have drawn the boundary of law in a way that speaks to all the ostensibly legal phenomena mentioned by Tamanaha. With an eye to this result, it would be nearly laughable to think that their approach runs afoul of pluralism's underlying rationale. That is, it is hard to believe that identifying law with content independent peremptory norms is somehow unduly conservative, or too Westernised, or would somehow be inhospitable to a change in people's conception of law. After all, this view can comfortably attribute legality to just about any form of intra-, inter-, super-, supra-, and trans-state law imagin-

[19] Giudice and Culver, Legality's Borders, 114-5

able. Indeed, it appears to be so deeply pluralistic as to accord the title of law to social conventions that have never been thought of as legal before, such as queuing up at a bus stop and acts of promise-making between friends. The only restriction it places on the scope of law is that legal practice must be norm-based, meaning that their view only denies legal status to those forms of governance that operate purely on the basis of unregulated force or those that operate solely on the basis of rational assent.[20] But denying legality to these other forms of governance is hardly a western or a contemporary conceit: everywhere the idea of legal governance is present it is associated with the existence of guiding norms. Giudice and Culver have, therefore, have parsed out legal from non-legal governance by reference to a characteristic that is shared amongst all extant and prospective forms of legality. Thus, their account stands as proof against those who doubt the possibility of identifying a conceptual grounding for pluralist jurisprudence.

At this point, let's pause and take a minute to consider where we stand in the discussion: so far we have seen that, left unchecked, the pluralist inclination threatens the meaningful distinction between the practice of law and the practice of governance, as such. Moreover, although some scholars have been skeptical of resolving this issue through the use of conceptual analysis, Giudice and Culver have demonstrated that this is, in fact, possible. In particular, they have shown that identifying the existence of law with the existence of content independent peremptory norms widens the ambit of legal practice to a point that should placate just about any pluralist concern while being able to maintain that law exists as a distinctive form of governance. Certain-

[20] For a sense of what these options entail, think of trying to parent a child solely via physical coercion — dragging them to and from school everyday, pulling them from their bed every morning and pushing them into it every night — on the one hand. And, on the other hand, think of a parenting strategy where you just beg your child to come to the right decision on every question. You might give them suggestions as to what that means, but you always ask them to make up their own minds by reference to their own best lights.

ly, this is no small feat. Yet, it is important to remember that there is a difference between being able to do something and being able to do it acceptably well.

From what has just been said, I'm sure that you can anticipate the existence of a standing worry regarding the work of Giudice and Culver, which is that in their drive to satisfy the concerns of scholars like Tamanaha and Sandberg they may well have taken the pluralist programme too far. As Wilfrid Waluchow noted in an early review of their work, insofar as Giudice and Culver are willing to jettison the idea that legal officials and legal systems are an inherent part of the practice of law, we have to worry whether their view of legal governance:

> …has become so stretched and indeterminate as to no longer allow us, usefully, to distinguish between law and the many other forms of social ordering—politics (international and domestic), positive morality, social agreements—found within the wider normative universe…[21]

Notice that the worry here is not that Culver and Giudice have failed to distinguish between the practice of law and other forms of governance — for, as already noted, their account does distinguish between legal and purely coercive as well as assent-based forms of social ordering. The worry is that they have drawn the conceptual line in the wrong place; for, they have left us in a position where we still seem to be losing sight of what truly distinguishes law's governmental nature. In particular, their manner of distinguishing legal from non-legal governance seems extraordinarily over-inclusive. It is one thing to think that indigenous law and religious law should be accorded the status of legality. But, as we just noted, Saying that law exists wherever we find content-independent peremptory norms would also suggest that even the conventional rules of language are law. But surely this is just as confusing and counterintuitive a conclusion as simply

[21] WJ Waluchow, "Review: Legality's Frontier" (2010) 1(4) Transnational Legal Theory 575–585

conflating law with governance, as such. What's more, it would seem just as likely to hinder an effective analysis of the many different forms of social regulation involved and to, thereby, undercut the perspicacity of legal research.

With an eye to this result, it might be tempting to think that there is an intractable tension between trying to accommodate pluralist concerns, on the one hand, and trying maintain a sense of law's distinctiveness, on the other. That is, you might believe that every step we take towards accommodating the demands of legal pluralism will take us further away from being able to speak to what makes legal governance unique. I am not sure if this this true, but even if it is, there will still be better or worse ways to balance these demands. Thus, we have to ask: have Culver and Giudice set the mark at a place that provides us with the greatest equipoise between these two desiderata? I am worried that they have not.

In what follows, I want to suggest another way of establishing a conceptual boundary around the practice of law; one that seeks to respect the pluralist inclination but which also makes room for certain well known features of legal practice that fall by the wayside on Culver and Giudice's approach. Unlike those scholars, I am not going to start with a state-centered conception of law and strip it down until I feel that I've reached an adequately common legal denominator. Rather, I want to begin by identifying an already existent and deeply held belief about what makes the practice of law distinctive, and use that as the grounds for parsing out the scope of legal governance. In particular, I want to begin by attending to the timeworn notion that there is a meaningful difference between the rule of law and what is archaically referred to as the rule of man.

We all know that for millennia, the “Rule of Law” has been embraced around the world an important political ideal. More than this, we know that this ideal is premised on the belief that legal governance either constitutes or makes possible the realization of certain political goods, such as the capacity to execute a life plan, the ability to constrain the power of our rulers, and even the achievement of democratic government. But, what people sometimes forget is that, as far back as Aristotle, the content this ideal has been developed and elucidated by contrasting the nature of legal governance with the nature of a certain type of non-legal governance (the rule of man) and then suggesting various ways that instances of the former are inherently superior to instances of the latter.[22] What makes the nature of this discourse pertinent is that, while there has always been a significant amount of dispute concerning exactly what moral advantages the practice of law should be thought to provide, there has been virtually no disagreement about the de facto difference between legal and non-legal governance. This means that the discourse regarding represents an intellectual forum where, for millennia, legal scholars and politicians from around the globe have been working with a very stable sense of what differentiates the practice of law from another widespread form of social control. In what follows, I am going to show how we can use this pre-existing consensus on the domain of legal governance to anchor a new conceptual grounding for pluralist jurisprudence.

To get started, let’s talk more precisely about how the discourse concerning the rule of law has differentiated between legal rule and the rule of man. Put simply, this literature suggests that legal governance is always identified with a form of social control wherein the behaviours of the public and especially the operations of government are oriented by a set of binding policies

[22] Aristotle, Politics, Book III

or norms. On the other hand, the rule of man has always been associated with an extreme form of tyranny wherein a polity's rulers operate without reference to any guiding or legitimating norms. As John Locke describes it, the rule of man is realized when a society has:

> …armed one or a few Men with the joynt power of a Multitude, to force them to obey at pleasure the exorbitant and unlimited Decrees of their sudden thoughts, or unrestrain'd, and till that moment unknown Wills without having any measures set down which may guide and justifie their actions. For all the power the Government has, being only for the good of the Society, as it ought not to be Arbitrary and at Pleasure, so it ought to be exercised by established and promulgated Laws[23]

So, to reiterate, the rule of law discourse suggests that legal governance occurs when a society is organized according to norms that guide the actions of common members of society and that guide and legitimate the actions of their rulers. On the other hand, the rule of man involves governing a society without the use of such norms.

I think that this even this very thin conception of the difference between legal and non-legal governance can be used to tease out a view of the boundaries of law that will significantly improve upon the one advocated for by Giudice and Culver. To begin this process it is important to acknowledge that, at its very heart, the distinction between the rule of law and the rule of man turns on the existence of content independent peremptory norms. Unlike the rule of man where — on Locke's vivid description — the rulers govern according to "Decrees of their sudden thoughts, or unrestrain'd, and till that moment unknown Wills", legal governance is understood to essentially involve norms that demand certain specific actions from the governed and the gov-

[23] John Locke, "Constitutional Government" Second Treatise, §§ 89--94, 134--42, 212

erning. Thus, at least to this extent, the view of law espoused by Giudice and Culver finds support in the historical and contemporary discourse regarding the rule of law.

However, there is more to distinguishing the rule of law from the rule of man than just content independent peremptory norms. The conversation about the rule of law involves an additional supposition about the distinctive nature of legal governance that is so obvious that it sometimes escapes notice: namely, that the practice of law always involves the existence of normatively empowered rulers. It always involves persons who are allowed or required to execute the law's normative demands. As self-evident as this may seem, it really is a distinguishing trait of the rule of law as compared to the rule of man. After all, governance via the rule of man is not organized according to established norms. Hence, there can be no agent or body that is normatively empowered to execute them. There may be agents that give life to a ruler's wishes, but they would be fulfilling a purely social as opposed to a normative role. To appreciate this distinction, just consider difference between being someone's deputy-minister or just their right-hand-man.

With this observation, we arrive at an important moment in the current discussion: It is now clear that the rule of law discourse suggests that legal practice is always attended by the existence of persons who are empowered to execute the requirements of law's content independent peremptory norms. What this means, of course, is that the rule of law can also be distinguished from the rule of man via the existence of legal officials. This is significant for two reasons: First, it represents a clear point of departure from the view of law espoused by Giudice and Culver. Remember that on their stripped down understanding of law, the existence of legal officials was one of the first things to go. Second, and much more importantly, the existence of legal officials

as a distinctive element of legal practice entails the existence of a third distinguishing feature of law.

You see, if legal rule always involves norms and officials then it also promises an element of systematicity. The idea here is fairly straightforward: since legal governance involves the execution of norms by duly empowered agents, there must be conditions of their legal empowerment. Otherwise, everyone would always stand as an official, and the idea of normatively empowerment would be empty. Thus, wherever the law is practiced, there must be — at least in principle — a set of standards that identify certain agents as legal officials rather than persons who have simply taken governance into their own hands and are, therefore, manifesting the rule of law. Similarly, the legal rule must — at least in principle — include a set of standards that delimit its officials' powers such that their specific actions can be said to fall either under or outside of the aegis of law. Now, to be clear, these sorts of standards may just be contained in the primary rules of a legal order. So, for example, the rule: "Anyone may arrest a person they see robbing a bank", both identifies who counts as a legal official, for the purpose of the norm, and it defines the scope of their powers. On the other hand, a legal order might include a set of norms that is dedicated to laying out the rules about identifying and defining the identify and role of its officials. In either case, these sorts of standards represent the germ of legal systematicity. For, insofar as they determine whether a particular agent counts as an official or whether their behaviour counts as an act of law, these norms operate as criteria of validity and thereby represent a normative system according to which we can determine whether a community's governance is actually operating according to law's plan. Now, some might think that this form legal systematicity is something quite different from what is usually meant by the term. After all, when envisioning a

modern legal system, most people think of a collection of standards that are collected together under the umbrella of a shared normative identity. However, that form of systematicity is really just an elaboration of the sort being discussed here. The difference being that in the more complex case we are just dealing with a legal order that has moved on from delimiting the identity and powers of its agents to also explicitly delimiting the identity and scope of its own content. It goes without saying that the rule of man does not and cannot aspire to this form of systematicity (in either its gestative or its full blown form). For, again, the rule of man is the governance of tyranny — wholly unfettered by normative orientation or limit. Thus, by focusing our attention upon the fact that legal rule amounts to the official execution of content independent peremptory norms, we can see how the rule of law discourse suggests legal rule is also distinguishable from the rule of man insofar as it is an inherently systemic form of governance.[24]

With this last point in mind, we can see that the moral and political conversation surrounding the rule of law suggests that legal practice can be distinguished from the rule of man via a short list of traits: specifically, legal rule is a systemic form of governance wherein a set of norms is executed by a body of normatively empowered officials. Importantly, even with this very thin set of distinguishing features in mind, it is now easy to see why the rule of law is thought to hold so much more moral promise than the rule of man. The practice of law makes room for a form of governance that is constituted by something more than expressions of bared power. Law makes it so that our rulers and their actions can — at least in principle — be assessed according to criteria of institutional legitimacy. And, this creates the possibility of politi-

[24] Should anyone doubt whether the law's systematicity really is supposed by the rule of law literature, they need only observe how its discussion of law's intrinsic merits moved naturally from a focus on the way that rules, as such, limit legal officials to a discussion of the law's inherent connection to constitutionalism.

cal accountability. With all this in mind, I think that we have found a set of traits that can profitably be thought of as the hallmarks that collectively distinguish legal practice from other forms of human governance. To be very clear, this suggestion isn't meant to stand as anything like a fully formed theory of law. My aspiration for this view of legal governance — which I'll call the Rule of Law view (RoL), for convenience — is only that it parse out instances of legal from non-legal governance in a way that is respectful of pluralist sensibilities and which improves on the account forwarded by Giudice and Culver. In what remains of this paper, I will briefly consider how the RoL view fares, with regard to these two desiderata.

As we saw earlier, scholars of a pluralist bent tend to think that any viable conception of the scope of law would have to pass three basic tests: First, it must draw a fairly clear line between legal and non-legal forms of governance. Second, its understanding of law must turn on features that are actually shared across ostensibly and prospectively legal phenomena. Third, it must not re-entrench an unduly conservative or Eurocentric conception of legal practice. Let's see how the RoL performs with regard to these criteria.

With regard to the first task, it is obvious that the RoL offers a meaningful distinction between legal and non-legal governance. To reiterate, this position identifies instances of legal rule with those forms of social control that are oriented by content independent peremptory norms executed by a body of officials whose identity and powers can be identified via systemic tests of validity. As such, the RoL view makes law readily distinguishable from at least three non-legal forms of governance. First, insofar as this view was derived from the rule of law discourse, this view obviously supposes that legal rule is distinct from the rule of man. Second, the RoL view entails the practice of law is distinct from those instances of governance that operate purely on

the basis of rational assent. After all, it claims that legal rule is oriented by content-independent peremptory norms which make demands upon subjects and officials, and not just behavioural suggestions or recommendations. Third, the RoL view suggests that legal rule is distinct from those modes of social control that include content independent peremptory norms, but which are not attended by a group of normatively empowered executors.

So, the RoL view clearly identifies practice of law with a distinctive form of social governance. But how does it fare with regard to Tamanaha's requirement that conceptual accounts of legal governance be identified via a set of features that are shared across all ostensibly legal phenomena? Before offering a full answer to this question, its worth taking a moment to note that this test is somewhat question begging. After all, it assumes that ostensible instances of law actually are legal phenomena, such that their structural features must be accommodated by any conceptual account of legal governance. But what is the warrant for that belief? It seems to suppose the truth of some pre-existing account of the difference between legal and non-legal phenomena that is never disclosed, let alone defended.

Regardless, if we look at the list of supposedly disparate forms of legal phenomena that Tamanaha suggests, which include "international law; customary law; versions of religious law; the lex mercatoria; the ius commune; and natural law" it is clear that none of these operate without the limited set of features suggested by the RoL account. The *lex mercatoria*, for example, was a set of customary norms enforced through a system of merchant courts, while natural law always involves at least an element of human administration oriented by mandatory norms. Indeed, each and every example that Tamanaha lists is a form of governance that is constituted by content independent peremptory norms executed by a body of officials whose identity and pow-

ers can be identified via systemic tests of validity. Thus, even if it doesn't really need to be, the RoL account is grounded in features that would appear to be shared by all the ostensibly legal phenomena that Tamanaha is concerned with.

Let's move on to the third candidacy requirement that the RoL account must fulfill, which is that it must not proffer a conservative or Eurocentric a view of law. There is, I think, good reason to believe that the RoL view is not problematized on this front. As was just pointed out, this view identifies instances of legal rule with a set of features that are shared across many non-state forms of governance. In fact, the RoL view would accord legal standing to such a wide range of governmental practices that it would be unfitting to think it an overly conservative or Eurocentric manner of identifying the ambit of law. Let me provide some examples to make this point clear: First, the RoL view would obviously accord legality to a great many forms of religious and indigenous governance: again, it just requires that such groups organize their members via content independent peremptory norms that are executed by a normatively empowered group of officials. And, these traits are manifested by orders as diverse as Catholic Canon law and the 'Great Law of Peace' of the Haudenosaunee peoples of North America. The RoL view would also accord the 'dignity of legal standing' to many unofficial or hidden forms of governance — those that fulfill an important social function but which are not recognized or endorsed by state institutions. Here I am thinking of phenomena such as Boaventura de Sousa Santos's famous example of 'Pasagarda Law', which arose when a local 'Renters Association' came to settle property and commercial disputes within Rio de Janeiro's favelas, in contravention of Brazilian law. Pasagarda law would count as an instance of legal governance, under the RoL, because it was oriented by a constitution that contained both principles of settlement as well as norms that empowered a specific set

of officials to fulfill its requirements. Moving on, the RoL view would also speak to the legality of emergent and even revolutionary instances of governance, such as Somalia's Islamic Courts Union, which brought temporary order to the ungoverned city of Mogadishu by iterating and enforcing rigid rules of criminal law and commercial regulations. Finally, insofar as the RoL doesn't establish any moral restrictions on the existence of legal government, it can speak to the legality of politically neutral or even openly deviant forms of governance, such as large-scale corporate structures or certain instances of organized crime. American motorcycle gangs, for example, are notoriously regimented in their governance structure, in that they rely upon explicit club constitutions and clearly promulgated and rigidly enforced club norms to shape the behaviour of their members and associates. Thus, the RoL view would identify these 'outlaw' organizations as legal orders. With all these examples in mind, it is clear that while the RoL view does establish a conceptual boundary around the nature of legal governance, it is hard to think that it is an unduly conservative or Eurocentric one. Indeed, the sorts of religious, indigenous, unofficial, emergent, revolutionary, and immoral forms of governance that the RoL view speaks to, rather precisely tracks the forms of governance that first stimulated and continue to motivate pluralist inquiries and attitudes.

With this last conclusion in hand, it is clear that the RoL view can provide pluralist jurisprudence with a viable conceptual grounding. For, like Giudice and Culver's position, it draws a coherent line between legal and non-legal governance; it parses out law according to a set of features that seem to be shared by ostensibly legal phenomena; and, it is does not offer an unduly conservative or Westernized conception of legal governance. Yet — and this is the main point of the paper — the RoL view accomplishes all this without falling prey to the problem suffered by

Giudice and Culver's work. That is, it does not draw the conceptual boundary around law in a way that swallows an entire category of normative governance that we take to be fundamentally different from the practice of law. For unlike Giudice and Culver's position, the RoL does not identify legal practice with the mere existence of content independent peremptory norms. Thus, it does not suggest that ungoverned normative phenomena like the making of personal promises, unenforced acts of queuing, or the conventionally arrived at rules of language count as legal phenomena. Rather the RoL view requires that any set of content independent peremptory norms worthy of bearing the title 'law', must be also be attended by a body of duly empowered officials whose identify and actions can — at least in principle — be assessed for their legality. Thus, while the view of legal governance embedded in the Rule of Law discourse is decidedly pluralist in nature, it does not fall prey to Waluchow's worry about Giudice and Culver's view. Specifically, the conceptual boundary that it establishes around legal practice is not:

> …so stretched and indeterminate as to no longer allow us, usefully, to distinguish between law and the many other forms of social ordering—politics (international and domestic), positive morality, social agreements—found within the wider normative universe…[25]

Quite the opposite, to adopt the RoL understanding of law is to be able to see how forms of governance as seemingly disparate as an outlaw motorcycle club, a multi-national corporation, and a state-government all share in a set of features that cultures around the globe and throughout history have taken to be the hallmarks of legal governance.

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[25] WJ Waluchow, "Review: Legality's Frontier" (2010) 1(4) Transnational Legal Theory 575–585

Before I end, I should make it clear that none of this is to deny that the RoL account of law results in a very expansive understanding of law— especially when compared to traditional state-based accounts. Indeed, when discussing this idea with friends, some of us wondered whether seemingly non-legal phenomena like the rules of certain languages might actually be legal on the RoL view. After all, while the English language is not officially regulated, dozens of other languages — including Afrikaans, Chinese, Spanish, and Welsh — have language academies that officiate over disputes and establish authoritative rulings on the workings and content of their subject. But, even if the RoL account eventually leads to some surprising conclusions about where the line between legal and non-legal governance rests, we can always rest assured that it draws this boundary by reference to set of traits that people all over the globe and throughout history have been using to distinguish the practice of law from its alternatives. For my part, I can't think of a better way to ground a pluralist jurisprudence.