AUTHORITY AND THE GLOBALISATION OF INCLUSION AND EXCLUSION: CONCEPTUAL AND NORMATIVE CONSIDERATIONS

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It is a rare privilege to receive such a perceptive set of comments to Authority and the Globalisation of Inclusion and Exclusion (henceforth Authority, in italics) by Paul S. Berman, Ralf Michaels, Nicole Roughan, and Alexander Somek. I am grateful to all of them for their probing questions, which open up a space for renewed reflection about key issues broached in this book. Their concerns and suggestions will continue to command my attention well beyond this initial, tentative response.

I. ALEXANDER SOMEK

I appreciate the generous praise that introduces Alexander Somek’s comments on Authority. Making sense of globalization processes indeed offers an excellent opportunity for developing a general theory of law, albeit that this book only offers a partial contribution thereto, given its focus on emergent global legal orders and resistance thereto by alter- and anti-globalization movements. But his enthusiasm quickly ebbs. After Somek’s initial words of encouragement, he challenges the entire model of law outlined in Authority and, as a consequence, my attempt to articulate the concept of authority in terms of asymmetrical recognition. If correct, Somek’s critique cannot but lead to the conclusion that the Queen Mary University of London symposium was an occasion to mourn and swiftly inter a stillborn book. Arguing hereinafter that his critique is groundless, I hope to contribute to bringing back the book, like Lazarus, to the world of the living!

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Somek’s first and most serious challenge concerns my proposal to view law as institutionalized and authoritatively mediated collective action: the IACA model of law. He dismisses it as “utterly implausible” with regards to its presuppositions and diagnostic potential, recommending that I “draw out more clearly the authoritarian deep structures of global regulation and adjudication.” This potentially devastating critique turns on the relation between collective action and representation, an issue that collective action theorists of analytical provenance fail to address adequately and that Somek gets wrong.

It is a central thesis of Authority that if collectivity expresses the idea of a manifold of individuals acting as a group, this unity is always and necessarily a represented unity. To borrow Bernhard Waldenfels’ formulation, no we can say “we”; someone must speak and act on behalf of us. While the English grammar favors the active verbal form, e.g. we* the people enact a constitution, the passive verbal form expresses more accurately the nature of collective agency: we* the people are deemed to have enacted a constitution. Collective acts are acts by individuals or groups of individuals ascribed to a collective as its own acts. Representations are representational claims.

The representational acts that originate a collective seek to empower individuals as members of a community, summoning them to become subjects who ought to act in certain ways, at certain times, and in certain places. These are, in my reading, modalities of what Kelsen calls Ermächtigung. The references to a community and to the empowerment of its members point to the two dimensions of representational acts, which are representations of a collective and its representation as this or that group, e.g. as a collective of states oriented to realizing a global market or as a group of farmers oriented to realizing food sovereignty. This would-be empowerment only gives rise to a collective if the addressees of the summons retroactively identify themselves as participants in joint action by exercising the powers granted to them. Representation deploys a paradoxical temporality because such acts can only originate a collective to the extent that they succeed—and as long as they succeed—in representing an original collective.

The caveat, “to the extent that they succeed,” betrays the ambiguousness of representational acts. No collective can emerge absent acts that seize the initiative to speak and act on behalf of a collective,

1. **Bernhard Waldenfels**, Verfremdung der Moderne: Phänomenologische Grenzgänge 140 (2001). Hereinafter, I add an asterisk to we and us—we*, us*—whenever the subjective and objective cases of the pronoun refer to the first-person plural perspective.

representing us* as this or as that, often in creative, quite unexpected ways. Yet for this very reason they also expose collectives to the cry, “Not in our name!” Thus, representation ensures that what we* are as a collective (representation as) and that we* are a collective (representation of) is irreducibly contingent. We* are never fully a collective; “we each” and “we other” are ensconced in “we together.” Accordingly, there is no collective unity, properly speaking, but rather a process of unification, and no plurality but rather a process of pluralization. Unification and pluralization are the two faces of the single process of representation. In terms of social ontology, this means that collectives exist in the mode of an ineradicable questionability and responsiveness. 

The foregoing is a highly abridged presentation of materials developed much more extensively in Authority. But they suffice to address Somek’s critique of the IACA model of law, to which I now turn. 

I begin with his reconstruction of representation. Drawing and adapting work on the first-person plural perspective by my colleague, Bert van Roermund, Authority distinguishes between three we* positions: we* speaker, we* at stake, and we* author. Let us focus, for the moment, on we* speaker and we* at stake. The basic idea is fairly straightforward: individuals or collegial organs who occupy the we* speaker position engage in representational acts by enacting rules on behalf of those in whose interest they claim to speak and act: the we* at stake in rule-making. 

In his reconstruction of this three-way distinction, Somek refers to the we* speaker position as “we* agent,” drawing, perhaps, on the well-known relation between principal and agent. While the legal doctrine views this as a representational relationship, it is not the concept of representation I have in mind. What is represented is a collective unity, which is always and necessarily absent: the we* at stake is only given indirectly, as this or as that unity. This concept of representation undercuts the hackneyed distinction between participation and representation. Participation is an institutional vehicle for representing collective unity because the we* at stake is never present, not even in participatory acts. The simple disjunction between representation and participation is an example of a metaphysics of presence, namely, the assumption that collective self-rule means that the people as a whole is or can be immediately present to itself in participatory rule-making, unmediated by representational acts. 

The post-metaphysical concept of representation I embrace carries forward the concept of intentionality initially developed by Husserl and later reconfigured by Heidegger in terms of what one might call “practical intentionality”: something appears as something to someone. As such, representation concerns the indirect or mediate relation of human beings to
reality as manifested, amongst others, in art, science, technology, politics, law, economic behavior, philosophy, and religion, all of which are representational practices. Waldenfels speaks, in this context, of a “significative difference” that emerges when something is intended as this (rather than as that).3 My contribution to a theory of collective intentionality amounts to thinking through the ambiguity of what might be called a “representational difference”: A represents X as Y (rather than as Z). On the one hand, the representational difference involves empowerment and unification; on the other, disempowerment and pluralization. If representational acts condition the possibility of the first-person plural perspective of a we* by creatively opening up new possibilities for living in common, the difference they introduce between the represented and its representations also calls forth the possibility of denying that there is a we* or what the we* is about: “Not in our name!” Representation always involves a variable degree of misrepresentation.

Accordingly, Somek entirely misses the mark when comparing the concept of representation I endorse to that of Eric Voegelin. Putting aside what he has to say about Voegelin, I’ll simply note that insisting on the difference between the represented and its representations does not amount to “naively” overlooking the authoritarian moment involved in representation, as Somek claims. To the contrary, it is to assert that representation is never an innocent undertaking because it always marginalizes in the process of claiming to unify a manifold into a whole.

As concerns emergent global legal orders, the concept of representation I advocate by no means entails that all those in whose interest spokespersons claim to act by enacting rules actually identify with those rules as expressing their own interest. The opposite may be the case: for many, perhaps even most, addressees of rules issued by global governance networks and the like, the unity claimed on behalf of a global we* at stake may appear as the articulation of a particular interest. In part, this is due to the institutional fragility of representational processes in global governance, which lack the relative robustness of representational venues prevalent in states. More fundamentally, however, it attests to the logic of representation, which cannot include some interests, positing them as the common or joint interest, without also excluding other interests. For those who resist representational claims by emergent global legal orders such as the WTO, or networks of global governance such as the Basel Committee for Banking Supervision, the rules enacted by these bodies will appear as forms of domination and

alienation, as I have been at pains to document and analyze throughout Authority.

Thus, Somek’s reproach that I champion an “organicist” reading of collective action because the IACA-model of law “does not examine the ontologically precarious status of the ‘we* at stake’” is baseless. By the same token, the entire thrust of my analysis of representation militates against the “almost naïve” assumption “that the link connecting the acts of the regulators and the regulated is intact.” Moreover, that representational practices pluralize in the process of unifying holds for emergent global legal orders because they are legal orders, not because they are global in reach. States, too, are exposed to the (radical) contestation of claims to commonality, a point that escapes the purview of Somek’s critique, which focuses on exposing the “authoritarian deep structure of global regulation.”

In fact, I think Somek too easily accepts the distinction between authoritarian and authoritative rule. For representation deploys intransitive and transitive forms of power, as I phrase it in Authority. Somek, who appeals here to a long tradition of thinking about power, is certainly right in that representation introduces a cleavage between those who rule and those who are ruled: transitive power. But it is too simple to assume that power can be reduced to the rule by some over others. Representation has an intransitive or reflexive purport. The intransitivity of power is built into the thesis that representation is necessary because someone must say “we” on behalf of we*—not of they. Taken together, the transitive and intransitive dimensions of authority evince its irreducibly ambiguous status, for there can be no authoritative representation of a we* without an element of forceful, even violent, marginalization. To assert that authority is representational authority is to introduce an irreducible indeterminacy into the exercise of power, destabilizing the hard and fast distinction between authoritativeness and authoritarianism.

It would seem that by defending the ambiguity of representation I have played straight into Somek’s hand. For in what sense can one still speak of collective action if representation cannot unify without pluralizing? Are we not better off accepting the tenet of methodological individualism, as propounded by Somek, according to which “the folks on the ground exist for each other only as ‘we each’”? No. Remember, for starters, that the logic of representation undercuts the clear cut disjunction between “we together” and “we each” proposed by Gilbert (and adopted by Somek): “we each” and “we other” are enounced in “we together.” So for which interpretation of “we together,” of collective

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action, does Somek take me to be advocating when I assert that legal orders are a species of collective action? He attributes to me the view that participants “need to comply with the intent to contribute to the success of what ‘we*’ are doing.” As I understand this somewhat cryptic formulation, Somek has me endorsing the strong sense of collective action that Michael Bratman calls “shared cooperative activity.”

I find this puzzling because Authority explicitly and emphatically agrees with Scott Shapiro that this strong form of identification with, and allegiance to, a group is untenable as an account of the kind of collective action deployed by legal orders. Some, many, or even most of the addressees of representational acts may well refuse to identify with a legal order as expressing their own interests. A less demanding form of participant identification with collective action is required. It suffices, as espoused by the IACA-model of law, that rule-addressees are prepared to exercise the powers granted to them by the legal order, whatever their reasons for doing so. To belabor the point, this weak sense of identification accounts for the fact that participant agents may not be committed to the success of joint action, and will not engage in the strong forms of mutual responsiveness oriented to ensuring its success predicated of shared cooperative activity. Described thus, collective action embraces what Somek calls “legality,” namely, that “[l]aw leaves it to the addressees to comply in any manner, and with any attitude, they see fit.” To “comply” means, here, to participate in joint action, that is, to act in accordance with the first-person plural perspective of a we* as mediated by authorities.

These considerations bring us to the problem of reflexivity and the third we* position: we* author. Somek finds it “remarkable” that I caution my readers against equating collective self-rule with democratic legitimacy. There is nothing remarkable about this, in light of the foregoing considerations. If rule-addressees act, by and large, in accordance with the rules laid down by authorities, whatever their reasons for doing so, it is warranted to assert that a collective self has emerged, hence group autonomy in the form of collective self-rule. Again, this is not to assert that rule-addressees identify with those rules as the expression of their own interests, such that they view or can view themselves as the joint authors of said rules—the strong understanding of collective self-rule enjoined by mainstream theories of democratic legitimacy. Instead, by parsing “we together” into three we* positions, I show that it is possible to meaningfully refer to legal orders as a species of collective action, while also rejecting an

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organicist interpretation of collectivity and opening up a space for the
democratic contestation of representational claims.

A final word about the IACA model of law before turning to Somek’s
second critique. He suggests that my account remains “somewhat idyllic”
because by “embracing the Heideggerian account of ‘space’ and ‘world,’
[Lindahl] locates the law principally in the life-world as the ‘transcendental
place’ at which we are jointly planning our actions and using reasons in order
to explain or justify our doings.” By so doing, I would have reduced law to
a form of communicative action, in the Habermasian sense, eliding its
systemic function in which law functions, Habermas notes, as a medium of
strategic action oriented towards influencing behavior through incentives or
coercion.

It is correct that I embed collective action in a world, arguing that there
is no such thing as stand-alone, self-contained action. Acting jointly
presupposes a variable range of practices, skills, and assumptions shared by
participant agents in the form of a knowing-how that can never be rendered
fully explicit as a knowing-that. But I refer to this as an Umwelt, a
circumambient world, not as the life-world, and for good reason: when the
strange irrupts into collective action, what had been taken to be the world
recedes, giving way to the distinction between a limited home world and a
strange world. In other words, representation enworlds and deworlds: it
gathers together things, persons, and events into a common world, while also
marginalizing other worlds more or less forcefully. In fact, Authority argues
that a great deal of what goes by the name of globalization amounts to the
loss of a world. Nothing “idyllic” here. And I nowhere mention Habermas’s
reading of the life-world, because, as should be clear, I reject his move to
distinguish between law as communicative and as strategic action.

In brief, Somek’s critique of the IACA model of law misses the target
entirely. He fundamentally misinterprets how this model understands the
relation between representation and collective action, and therewith its
potential to lay bare what he calls the “authoritarian deep structures” of
emergent global legal orders.

Now I will address Somek’s second critique, which takes aim at
asymmetrical recognition as the normative core of a concept of authority.
The critique has three steps. The first holds that integrity, not identity, is the
proper concept to make sense of legal order. Focusing on personal identity,
Somek asks: “[i]s it really the case that my identity as a person is at stake
when I commit a single act that is not consistent with my practical identity?”
The obvious answer is: of course not. Nowhere do I suggest as much. To see
why, it is necessary to operate a transition from unity/plurality to
identity/difference. I draw here, in a drastically abridged form, on Ricœur’s
discussion of identity, in which he distinguishes between the poles of sameness and selfhood, *idem*- and *ipse*-identity.6 Sameness manifests itself in the form of behavior that lives up to what are deemed to be mutual expectations about who ought to do what, where, and when, as expressed in the rules that articulate the point of joint action. A collective remains the same or becomes different over time depending on the constancy or transformation of those mutual expectations and their attendant behavior. Collective self-identity, by contrast, is that pole of identity in which group participants stick to their mutual commitments over time, such that the group is fit to be held responsible for its acts. The link between collective identity and unity is as follows: we* will hold firm together, which means that we* remain the selfsame collective over time insofar as we are and remain committed to continue acting as a group, even though, along the way, challenges to our joint action may require making exceptions or changing the rules of what we* take to be the point of joint action. In turn, the link between other-than-self and plurality is assured by representation, which folds other-than-self into selfhood: we are deemed to entertain these mutual expectations of each other, a representational claim that is challenged by the other in ourselves: “I/we am/are not the same as you: Not in my/our name!” As follows from this account, what is decisive to collective identity is overall commitment to acting jointly, which on occasion can demand either disapplying a rule or transforming its meaning. What Dworkin calls coherence or integrity is identity over time in the aforementioned sense.

In a second step, Somek objects that I collapse the reinvention of collective identity into a quotidian affair, and that I endorse a “romantic view of selfhood that renders individual and collective selves as devoid of content.” As concerns the first objection, I indeed argue that there is no identity, properly speaking, but rather an ongoing process of identification, and no difference but rather an ongoing process of differentiation. Legal order is always a legal order-ing, where the “anew” of representation hovers between “again” and “new.” But this does not mean that the “beat” of identification processes, if I can put it that way, is always quotidian. Under normal or quotidian conditions, collective self-identification seems to unfold more or less unproblematically. In abnormal conditions, which I refer to as the irruption of a-legal behavior into a legal order, the question about our identity—who are we*?—bursts into full view, calling for explicit acts of self-identification. Nothing in this account of representational practices suggests, as Somek wrongly attributes to me, that “any adjustment that is

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made in light of the ‘questionability’ and ‘responsiveness’ of joint action gives rise to ruptures from which new legal systems emerge.”

As to the second objection, I cannot help but express my bewilderment at the claim that I defend a concept of selfhood devoid of content. After all, the whole thrust of the concepts of representation and recognition I endorse is that there can be no self-identification other than through self-representations and self-recognitions as this or as that. Moreover, a-legal challenges to our putative unity/identity include a more or less unordered dimension, which expose a fault line of collective selfhood and not only a transformable limit thereof. What more “content” does Somek want?

The third and allegedly decisive step is to reject the double asymmetry that holds sway in struggles for recognition. As concerns the asymmetry that stems from demands for recognition, these speak to a “reserve army of difference” that “is bound to remain forever excluded,” giving rise to “the perspective of universal victimhood.” Moreover, the responses by collectives to such demands announce “the perspective of authoritarian orderings.” As a result, “if there is no way of avoiding misrecognition then there is indeed nothing to recognize.”

My conceptualization of asymmetrical recognition is much more modest than what Somek’s hyperbolic account suggests. A theory of asymmetrical recognition builds on the insight that the difference between the represented and its representations reappears as a “recognitive difference” between the recognized and its recognitions. This recognitive difference gives the lie to theories of reciprocal recognition which seek to understand an authoritative politics of boundaries as progressively overcoming contingency by generating an ever more inclusive legal order. By contrast, asymmetrical recognition acknowledges that responses to demands for recognition can be situationally fitting, while also showing that all such responses remain irreducibly contingent. The linkage between question and response that plays out in struggles for recognition is open in a twofold sense: the question remains open because the response does not exhaust it; the response remains open because another response was possible. Nothing here resembling a “reserve army of difference” or “universal victimhood.” Nothing here about a simply “authoritarian ordering” of the other. Nothing here about “conflating conflicts of interests with conflicts of weltanschauungen.” Instead, by defending an asymmetrical reading of recognition I aver that the irreducible tension between unity and plurality, and between identity and difference, which appears in struggles for representation and recognition is neither a simple opposition nor an opposition to be overcome through a Hegelian dialectic of the particular and the universal.
Somek may be right to argue that *Authority* verges on the “naïve”; that it defends “utterly implausible” and “misleading” assumptions; that it presents an “idyllic” and “poetic” understanding of our political world; that it endorses a “vain and empty” concept of subjectivity. He may be right about all of this. But not on the basis of the arguments he presents. No “global flock.” No “beautiful soul.”

II. PAUL SCHIFF BERMAN

Paul S. Berman’s paper seeks to highlight the contribution that *Authority* makes to the controversy surrounding the notion of “global legal pluralism.” In particular, he points to a conundrum that is at its core: “How can any theory of law be focused on pluralism and multiplicity and at the same time claim to be a “global” theory?” For if, on the face of it, globality posits unity, then it would appear that the notion of global legal pluralism is oxymoronic, opening it up to critique from both flanks, namely, from those who champion unity and those who endorse plurality.

This is a fundamental question, and I am grateful for the opportunity to clarify how I have sought to account for the relation between unity and plurality, and what light this might shed on the notion of global legal pluralism. While the IACA model of law joins forces with some of the ideas espoused by Berman and other legal pluralists, it also differs from them regarding methodological, conceptual, and normative issues.

Notice, to get started, that it makes no sense to simply oppose plurality to unity. In a seminal essay, John Griffiths defines legal pluralism as “that state of affairs, for any social field, in which behavior pursuant to more than one legal order occurs.”7 As his definition shows, it would not be possible to refer to a plurality of legal orders without also positing a plurality of unities of some sort. It is not otherwise with Sally Engle Merry’s panoramic survey of legal pluralism, when she notes that the new legal pluralism “sees plural forms of ordering as participating in the same social field.”8 While this passage operates a subtle shift from order to ordering, clearly ordering is unifying. A third prominent legal pluralist, Brian Tamanaha, asserts that legal pluralism is everywhere because “[t]here is, in every social arena one examines, a seeming multiplicity of legal orders, from the lowest local level to the most expansive global level.”9 Each of these three authors works from the assumption that legal pluralism involves a plurality of unities.

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The first question that arises is how to make descriptive sense of the relation between unity and plurality. Each of the aforementioned authors yields the same cue: unity/unification is thematized as an order/ordering process. Here we stand shoulder to shoulder. But there is a crucial difference which separates my approach to those of these three authors and all other legal pluralism theorists I am aware of. The difference is neatly captured by Tamanaha’s citation. He adopts the perspective of an observer when referring to social arenas that “one examines” as a social theorist. The observer’s perspective resonates in the detachment of “examining” something and in the use of the indeterminate pronoun “one.” By contrast, Authority adopts the involved, first-person perspective of an actor, both singular and plural, when seeking to describe unity and plurality. In other words, the methodological move that separates the IACA model of law from other theories of legal pluralism consists in its attempt to clarify how we concretely experience the unity and plurality of legal orders. And this means to describe how unity and plurality manifest themselves to us in the course of our practical involvement with legal orders. Not describing the stance of “one” who “examines” a legal order, but rather of we who experience how a legal order empowers and disempowers us to act, and in the course of these experiences become privy to the basic structures of unification and pluralization that hold sway in legal ordering; such is the basic methodological tenet guiding my approach to legal pluralism, and a fortiori to global legal pluralism. In brief, Authority aspires to offer a phenomenology of legal unity and plurality, where phenomenology stands for a strand of philosophical inquiry which describes the structures, dynamic, and conditions of possibility of what appears and of appearance as such, that is, of the phenomenon and of phenomenality.10

How, then, does a legal order appear as a unity from the perspective of those actors who it engages? In the modes of (il)legality, or so I argue: as an inconspicuous unity in legal behavior; as a conspicuous unity in illegal behavior. If a group of friends pitches a tent in a camping ground, in line with the regulations issued by the municipality, and if the group hews to those regulations during their stay, the threefold unity of a legal order remains largely inconspicuous. That (1) we are members of a group who entertain mutual expectations about how we* ought to act, and that (2) a legal order is as system of rules correlative to (3) a pragmatic order that determines who ought to do what, where, and when, remains in the background as

10. Steven Crowell, Normativity and Phenomenology in Husserl and Heidegger, 30 HUSSERL STUD. 283 (2014) (“Phenomenology is a reflective inquiry . . . committed to the view that descriptive clarification of the essential conditions for being X cannot be achieved by abstracting from our experience of X but only by attending to how X is given in that experience”).
something to which we pay no attention in the course of legal behavior. But suppose that the group of friends pitches the tent outside the designated area and carouses late into the night. The threefold unity of the legal order becomes obtrusive in the form of disorder—illegality. (1) The carousers’ behavior cannot be attributed to us* as behavior that we*, the collective at stake, are prepared to call our own. (2) Other camping guests call the rowdy group’s attention to the camping regulations, which have become conspicuous as regulations which they have breached. (3) The unity of the pragmatic order becomes manifest in the form of acts that breach the boundaries that establish who ought to do what, where, and when in a camping ground. Importantly, who experiences and qualifies behavior as illegal, such as other angry campers, reaffirms the unity of the legal order, demanding of those who breach it that they respect its threefold unity.

So much for (il)legality as the experiential mode of legal unity. My further claim is that the primordial mode of appearance of plurality is a-legality. I introduce this technical term to designate behavior that registers in the legal order as either legal or illegal, yet which resists qualification as either legal or illegal because it challenges how the legal order draws the distinction itself, by dint of evincing another order: a strange order. In 1972, a group of Aborigine activists pitched what they dubbed the Aboriginal Tent Embassy on the lawns contiguous to the House of Parliament in Canberra. Their grievance: “The government [has] declared us aliens in our land and so . . . we need an Embassy just like all other aliens.” Their demand: “LAND RIGHTS NOW OR ELSE. LEGALLY THIS LAND IS OUR LAND. WE SHALL TAKE IT IF NEED BE. LAND NOW NOT LEASE TOMORROW.” On the face of it, their act is legal: there is no municipal ordinance prohibiting individuals from pitching a tent on those lawns. Yet the Australian legal order becomes obtrusive or conspicuous because the Aborigines challenge its unity by calling into question how it draws the distinction between legality and illegality. They seek to deplete its binding character by showing that legal order can be structured otherwise. More pointedly, the Tent Embassy seeks to show that Aboriginal peoples are excluded from their lands by being included in Australia. The Tent Embassy is an example of a-legality, the legal mode of appearance of strangeness, which Edmund Husserl, the founder of phenomenological philosophy,

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12. Id.
describes thus: “accessibility in its genuine inaccessibility, in the mode of incomprehensibility.”

A-legality, to repeat my key thesis, is the primordial manifestation of pluralism. More precisely, the Aboriginal Tent Embassy illustrates the primordial experience of pluralization that strikes at what initially appeared as the threefold unity of a legal order. First, what had been taken to be one group, we* the Australian collective, gives way to intersubjective estrangement. Second, what had been taken to be the unity of a pragmatic order that establishes who ought to do what, where, and when, gives way to a plurality of pragmatic orders in the strong sense of mutually interfering ways of organizing the time, space, subjectivity, and content of joint action under law. Third, what had been taken to be the unity of a system of norms gives way to a plurality of partially incompatible systems of norms. As a result, what our joint action is/ought to be about, as stipulated in a set of rules and its correlative pragmatic order, loses its straightforwardness, giving way, to a lesser or greater degree, to disorientation that is interpersonal as much as it is spatial and temporal.

The pluralization of joint action, so described, characterizes the experience whereby the boundaries of a legal order manifest themselves as a limit beyond which other legal orders are possible or actual. As concerns the Aboriginal Tent Embassy, notice that it was not only the Australian legal order which appeared as limited, as having a strange outside; the entire order of international law appears as having an outside, as the result of violent acts of dispossession of the lands of indigenous peoples. Returning to Berman, a phenomenology of legal pluralism indeed exposes the ideological character of what he calls the “triumphalism” of the advocates of the hierarchically superior status of international law. By basing the superiority of international law on its unifying function with respect to a plurality of legal orders, its champions conceal the pluralization and marginalization to which such unification gives rise, not least by colonization.

But a phenomenology of a-legality also points to something that is largely overlooked by other theories of legal pluralism. The IACA model of law purports to show that legal pluralism, when defined from the observer’s perspective of a social theorist as the co-existence of legal orders in the same spatio-temporal context, is derivative with respect to the primordial experience of legal pluralization. Plurality is the outcome of pluralization,

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which, from the first-person perspective of involved actors, has its origins in the experience of a-legality.

There is a second way in which the IACA model of law goes beyond other theories of legal pluralism. Look again at the characterizations of legal pluralism espoused by Griffiths, Merry, and Tamanaha. In each case, legal pluralism is portrayed as a plurality of orders, that is, as a plurality of unities. This assumption is then qualified by noting that legal orders are “hybrid,” that they mutually “interpenetrate,” that they stand in a “dialectical” relation to each other. Fine. But plurality cuts deeper. The IACA model of law argues that unification and pluralization are co-original faces of acts that claim to represent a collective as a whole. That representation cannot but pluralize because it unifies entails that if the foreign need not be strange, so also the strange need not be foreign. From the first-person plural perspective of the Australian legal order, other states are foreign but need not be strange because all states are joined together within the unity of international law. By contrast, while the Aboriginal Tent Embassy is not foreign, it is strange to the Australian legal order: it intimates a legal order that is both inside and outside Australia. So, revisiting my response to Somek, “we each” and “we other” are ensconced in “we together.” References to hybridity, interpenetration, and a dialectic are insufficient to capture this radical sense of plurality. The representation of collective unity, absent which no legal order can emerge, ensures that there is a plurality in unity which is far more radical than what Gilbert calls a “plural subject”: nous sont des autres, to paraphrase Rimbaud’s paradoxical “je est un autre.”

In sum, the IACA model of law argues that the concepts of unity and plurality available to theories of legal pluralism presuppose and are derivative with respect to unity and plurality as first-person, hence experiential concepts.

Operating the shift, both methodological and conceptual, from the stance of an observer to the involved stance of actors engaged by legal orders has an additional and considerable advantage: it welcomes the passage to an inquiry into unity and plurality as normative phenomena, an inquiry which social theorists are often loath to engage in. It is from the engaged, first-person perspective of actors that the question about unity and plurality is inseparable from the question, “What ought we* to do?” For pluralization—the experience of a-legality—manifests itself as the demand for recognition of an identity/difference threatened or violated by how a legal order qualifies behavior as legal or illegal.

Here we arrive at a normative crossroads of Modernity. The concept of practical rationality that takes its point of departure in the modern principle of self-assertion understands the normativity of boundary-setting as a process of unification in the face of an initial situation of conflicted plurality. Because Modernity foresees any transcendent principle that could govern how the unity of a legal order should be constructed, self-assertion posits an immanent principle of unification: reciprocal recognition. John Rawls is exemplary in this respect, when he equates justice with reciprocity:

【T】he question of reciprocity arises when free persons, who have no moral authority over one another and who are engaging in or who find themselves participating in a joint activity, are among themselves settling upon or acknowledging the rules which define it and which determine their respective shares in its benefits and burdens.15

As he sees it, a legal order is just if and only if its members can reciprocally “acknowledge” the rules which determine their joint action; in turn, this reciprocal acknowledgment by the participants of a collective of the validity of rules has its counterpart in their recognition of each other as free and equal persons. Certainly, the principle of reciprocal recognition does not relinquish plurality; but it does assert that the criterion of how the distinction between legality and illegality ought to be drawn turns on progressively integrating plurality within an ever more inclusive unity: e pluribus unum. On this view, globalization amounts, normatively speaking, to unification in the mode of universalization: a legal order that is fully united because it is an order in which all human beings can reciprocally recognize each other as free and equal beings.16

Authority contests this interpretation of normativity, arguing that unification goes hand in hand with pluralization, that the representation and recognition of collective self and other are always also, to a lesser or greater extent, the misrepresentation and misrecognition of both self and other. As a result, the IACA model of law interprets the normativity of legal ordering in


16. Worried about the assimilatory tendencies of social contract theories of justice, Iris Marion Young tables the notion of asymmetrical reciprocity as the core of a politics that is mindful of difference. Closer consideration shows, however, that she also ends up endorsing reciprocal recognition, hence plurality within the unity of a single order. See IRIS MARION YOUNG, Asymmetrical Reciprocity: On Moral Respect, Wonder and Enlarged Thought, in INTERSECTING VOICES: DILEMMAS OF GENDER, POLITICAL PHILOSOPHY AND POLICY 38, 46 (1997). For a critique of Young’s politics of difference, see HANS LINDAHL, FAULT LINES OF GLOBALIZATION: LEGAL ORDER AND THE POLITICS OF A-LEGALITY 232–33 (2013).
terms of asymmetrical recognition, hence restrained collective self-assertion.¹⁷

I reserve a more detailed discussion of this principle for my responses to Michaels and Roughan, as I take it to be a first-order question about normativity. What I find interesting in Berman’s comment is whether restrained collective self-assertion falls prey to the critique leveled by Galán and Patterson against Berman’s global legal pluralism, namely, that it ends up sacrificing normative plurality to normative unity. I take this to be a second-order, reflective question about normativity: does restrained collective self-assertion consist in a normative principle that is global in the strong sense of a principle that all legal orders ought to adopt as governing their interaction?

It bears noting that although I refer frequently to global legal pluralism in Authority, I do so in the descriptive sense ably captured by Tamanaha in the aforementioned citation: “legal pluralism is everywhere . . . from the lowest local level to the most expansive global level.” Berman, by contrast, argues that global legal pluralism has a normative purport, which he interprets, along the lines of Habermas’ discourse theory, in terms of the proceduralization of the encounter between collective self and other.

Does restrained collective self-assertion endorse such a procedural reading of normativity, as Berman suggests in his comments? Although Chapter 7 of Authority seeks to reconstruct the normative significance of a range of institutional venues and techniques for dealing with conflict in terms of restrained collective self-assertion, it does not characterize those venues as elements of a procedural understanding of how legal pluralism “manages” struggles for recognition. For the proceduralization of conflict comes too late and too early to pacify the encounter between collective self and other that unfolds in struggles for recognition. Too late, because in the same way that a practical discourse begins with representational claims that are not themselves discursive, so also the proceduralization of conflict presupposes representational acts that are not procedurally framed because they put into

¹⁷. Martin Heidegger and Carl Schmitt argue that the principle of self-preservation or self-conservation is a secularization of divine omnipotence. Against both, Hans Blumenberg argues that self-assertion (rather than self-preservation) is the principle of modern rationality and that it does not rest on the secularization of theological concepts but rather on the “reoccupation” of a problem, namely, the experience of radical contingency inherited by Modernity. “[T]he rationality of the [modern] epoch is conceived as self-assertion, not as self-empowerment.” I agree with Blumenberg that self-assertion is not a secularized concept; but I submit that it retains a residual self-empowerment insofar as it conceives of representation and recognition as the vehicles for overcoming the radical contingency of normative orders. For this reason the IACA model of law posits restrained collective self-assertion as an alternative reading of the modern principle of rationality. See HANS BLUMENBERG, THE LEGITIMACY OF THE MODERN AGE 97 (Robert M. Wallace trans., MIT Press 1985) (1966).
place a procedural framework—a constitution, in the broad sense of the term—in which struggles are to take place. Too early, because any procedure claims to be the framework within which struggles may play out, whereas such struggles are always also, to a greater or lesser extent, about the procedure within which conflict is framed. Here again, the Aboriginal Tent Embassy is a case in point: the activists contest not only the Australian common law of property but also the authority of Australian courts to decide about their demand for recognition within the procedures determined by the Australian constitution.

This is not, mind you, a philippic against procedures; I am well aware that they open up significant spaces for struggle and the transformation of collective action. My point is, instead, that the proceduralization of struggles for recognition, as envisaged by Habermas and other discourse theorists, ends up reducing conflict to conflict within a constitutional order, hence within a presupposed collective unity. A defense of legal pluralism based on (constitutionalized) procedures that “manage” struggles for recognition risks morphing into a defense of legal monism. For this reason, Authority argues that none of the institutional venues and techniques for dealing with struggles for recognition explored in Chapter 7 can exhaust the politics of a-legality which animates restrained collective self-assertion.

But, as Berman acknowledges, the objection raised by Galán and Patterson cuts deeper: can restrained collective self-assertion avoid the charge of presenting itself as a universal principle, hence as collapsing normative plurality into unity?

The Introduction to Authority notes that the IACA model of law is situated within the horizon of the modern experience of contingency, even though it seeks to interrogate certain features of this horizon and its interpretation of legal order, both conceptual and normative. In particular, I argue that restrained collective self-assertion articulates what I take to be the democratic ethos, an ethos premised on the irreducibility of political and normative plurality to the unity of a legal order. But the experience of radical contingency is itself contingent. This is, perhaps, the root condition of radical normative plurality, which reveals not only normative fault lines but also the fault line of what the democratic ethos calls normativity. So restrained collective self-assertion does not stand above the fray as a principle that could overcome radical normative plurality. It articulates the normativity of an authoritative politics of boundaries if one moves within the historical horizon of the irreducible contingency of legal orders. Crucially, however, radical normative plurality is not absolute normative plurality, as the heralds of the “clash of civilizations” are prone to trumpet. No less than legal orders, so also normative orders in general are entwined, as a result of which no
normative order is simply identical to itself or entirely different from other normative orders. I return to discuss entwinement at greater length in my responses to Michaels and Roughan.

For analogous reasons, acknowledging that radical normative plurality is the primordial and irreducible condition in which an authoritative politics of boundaries must operate does not demand either relativizing or conditioning the principle of restrained collective self-assertion. Recognition of the other (in ourselves) as one of us* and as other than us* is the ethos of responsibility by which a democratic collective takes responsibility for its radical contingency, a contingency which includes being exposed to demands for recognition that reject the contingency of normative orders. This is this spirit in which I would like to read and endorse Berman’s thesis that “it is the self-recognition of our own limitations as authorities that encourages us to act in a self-restrained manner and in deference to other perspectives and points-of-view, at least to the extent we can.”

III. RALF MICHAELS

Ralf Michaels has written a perspicacious and helpful commentary on Authority. I would like to concentrate on three strands thereof. The first is his proposal to reconstruct my account of asymmetrical recognition in terms of private international law (PIL, hereinafter); the second, his suggestion to interpret the structure of boundaries as yielding what he calls “symmetrical asymmetry”; the third, whether and how PIL and the IACA-model of law could collaborate in dealing with the asymmetries of power relations in contemporary processes of globalization. As I read him, Michaels is not defending PIL as a form of interaction between states; the more interesting reading of PIL, which I take him to promote, is as a paradigm for the interaction between legal orders in general.

As to the first of these strands, Michaels rightly chides me for having underestimated PIL’s significance for a theory of authority that focuses on the normativity of boundary-setting processes, even though, as he notes, I do refer, albeit in passing, to both the recognition of foreign judgments and jurisdiction as examples of what I call restrained collective self-assertion. By contrast, choice of law—namely, which law is to be applied when legal relationships are connected to more than one legal order—does not receive any attention in Authority. According to Michaels, this is no mere omission: PIL deploys a form of interaction between legal orders which the IACA-model of law has difficulties accommodating, and that exposes a residual “solipsism” or “unilateralism.” In his words, “the private international law response to a foreign demand for recognition is not to change its own law. It is, instead, the application of foreign law [as foreign law].”
To assess this objection it is first necessary to sketch out the contours of restrained collective self-assertion, a composite formulation that points to both aspects of asymmetrical recognition. Collective self-assertion speaks to the recognition of the other (in ourselves) as one of us* by transforming what counts as legal or illegal behavior; collective self-restraint, to the recognition of the other as other through deferral of and deferral to. Deferral of concerns the postponement of a decision as to what counts as the unity of a legal order. Deferral involves relinquishing a domain of regulation to the other, whether for a specific case or in general, with a view to preserving the strange as strange. Michaels’ objection is that the application of foreign law falls neither within collective self-assertion, as this would collapse foreign law into the law of the forum, nor is it simply non-application of the law of the forum, as in collective self-restraint. PIL’s unique contribution to a normative theory of boundary-setting is to facilitate the application of foreign law in the host country, but as foreign law.

Are we here in the presence of a third form of interaction which restrained collective self-assertion has difficulties in accommodating? I think not. If foreign law were applied only by virtue of being foreign law, as Michaels asserts, then this would be an inverted form of unilateralism: not the unilateralism deployed by a legal order that only applies its own law, but rather unilateralism to the benefit of the foreign order. Michaels takes issue with this kind of unilateralism when discussing a recent essay by Horatia Muir Watt, in which she defends a reinterpretation of conflict of law rules whereby “[t]he host no longer imposes conditions, but accepts foreign law on its own terms.”18 As Michaels rightly retorts, “unilateralism is too powerful: by ceding to the other entirely, we give foreign law more force than domestic law.”19 Strictly speaking, this inverted unilateralism would not give foreign law too much force; instead, it would dissolve the very distinction between forum law and foreign law by dint of effacing the boundary between collective self and its other. Muir Watt recoils from this implication, invoking public policy as an exception to unilateralism, that is, by conditioning the application of foreign law in the host country.

As is well known, the public policy exception involves an assessment by the forum authorities of the substance of foreign law, even if there are no hard and fast ex ante rules that can establish what counts as public policy. As Benjamin Cardozo famously posited, if, on the one hand, “[t]he courts

are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness,” so also, on the other, “[t]hey do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of moral goods, some deep-rooted tradition of the common weal.”20 In the same vein, Michaels summarizes his critique of Muir Watt by noting that the application of foreign law is a form of “limited deference.”21 I fully agree. But then limited deference can mean nothing other than restrained collective self-assertion. On the one hand, we*, the forum order, recognize—and include—the other as one of us* by dint of applying those of their norms that pass the test of our public policy. Moreover, by applying their norms, not ours, we* transform what counts as (il)legal in our order for the case at hand: collective self-assertion. On the other, we* recognize the other as other than us* by suspending the application of our norms and applying theirs for the case at hand: collective self-restraint. There can be no simple recognition of the other as other absent a form of collective self-recognition, an insight that is at the heart of Authority, even if I pursue this insight in a direction different to theories of reciprocal recognition.

I repeat my initial point: I am grateful to Michaels for pointing out that I have underestimated the significance of PIL for a theory of authority based on asymmetrical recognition. But instead of reconstructing my model of law in terms of PIL, I would argue the other way around: the normative significance of PIL can best be understood as a specific and partial illustration of the IACA model of law and its attendant theory of authority as restrained collective self-assertion.

Where does this leave the objection of solipsism or unilateralism? According to Michaels, the IACA model of law can only account for a legal order insofar as the order “remains focused on itself in a solipsistic way: the other is relevant only insofar as it matters to the self.” As a result, it neglects PIL’s contribution to the “dynamic between the self and the other: that of providing space for the other as other.” He offers the example of the WTO, which “can assign a space for the KRRS (an exception) in which it holds the KRRS rules applicable.” Yet Authority explicitly refers to the notion of an exception, qua suspension of the application of a norm belonging to a legal order, as paradigmatic for collective self-restraint. Along these lines, Chapter 7 asserts that the WTO could well accept the application of KRRS rules in what amounts to a regime of limited autonomy. I don’t see where this differs from Michael’s view that granting an exception to the WTO amounts to

“mak[ing] it possible for the WTO to maintain its own rules, and yet at the same time to accept the rules of the KRRS, as far as they go.” I italicize the caveat because I take Michaels to be making the very same point I want to make when referring to restrained collective self-assertion: from the perspective of the forum order, autonomy regimes are limited autonomy regimes (remember Michaels’ “limited deferral”). The other is recognized as other “as far as that goes,” even though, as the KRRS themselves show, plurality is never only plurality within the unity of a legal order. In line with what I have argued regarding restrained collective self-assertion, PIL deals with the tension between unity and plurality through techniques of deferral, but it does not, pace Michaels, “resolve” this tension because political plurality cannot be contained in legal unity.

Consider, now, the second strand of Michaels’ comments, namely, the proposal to “generalize” and thereby to “move beyond” the IACA model of law by reinterpreting asymmetrical recognition in terms of a “symmetrical asymmetry.” He notes that conflict between legal orders pluralizes the first-person plural perspective, calling for a reversal of perspectives: from the KRRS’s perspective, the WTO is the outsider demanding recognition, a demand to which, normatively speaking, the KRRS responds in its own terms. This reversal of perspectives entails that “a border not only has two sides—inside and outside; it is also viewed from two perspectives.” As a result, I would have lost sight of the fact that there are two boundaries, not one, and that “these two boundaries . . . need not match each other,” giving rise to a “symmetry of asymmetries.”

I acknowledge that, in general, I approach the concept of authority from the perspective of emergent global legal orders, such as the WTO. As a result, Authority engages with struggles for recognition in a way that focuses primarily on demands for recognition raised against such orders by alter- and anti-globalization movements. My aim, when assuming the perspective of such orders, is twofold. I seek, on the one hand, to debunk whatever claims those emergent global legal orders might make that they are able to deploy a process of universalization, as enjoined by theories of reciprocal recognition, while also, on the other, to hold open a space for situationally fitting responses to such demands for recognition.

Does shifting from the first-person perspective of the WTO or any other emergent global legal order to that of the KRRS or other alter- and anti-globalization movements demand transforming how I have conceptualized struggles for recognition? In particular, does this change of perspectives enjoin modifying the concept of boundaries and of struggles for recognition endorsed by the IACA model of law?
Notice, to begin with, that my analysis of the representational dynamic at work in the emergence of legal orders, global or otherwise, fully accounts for the fact that individuals or groups who demand recognition of a collective are also in a position to confer or withhold it with regard to that very collective. Indeed, as Authority argues, because collective action only gets off the ground through unauthorized representational acts that seize the initiative to posit us* as a bounded unity, such acts only succeed as representational acts to the extent that their addressees recognize themselves as members of the collective. The WTO not only recognizes its addressees, e.g. the KRRS, as participants in a global market, but also demands and is dependent on their recognition, which can be either granted or withheld. Conversely, the refusal of the KRRS and a host of other alter- and anti-globalization movements to recognize themselves as members of the WTO goes hand in hand with their demand for recognition by the WTO of their collective identity, which, they hold, is jeopardized by “free” global trade. As Chapter 1 puts it, “the WTO’s configuration of space as a global market irrupts into what the KRRS view as its own space . . . To resist the commodification of seed production and distribution is to assert a space as its own against its redefinition in a way that is alien—strange—to the KRRS’ understanding of what constitutes its community as a common place.” No less than the WTO, so also the KRRS organize themselves as an inside vis-à-vis an outside. If the KRRS is inside and outside the WTO, so also the WTO is inside and outside what the KRRS call their common land.

Moreover, Chapter 6 discusses how the KRRS responds to the challenge of the WTO through acts of collective self-assertion that determine what the group wants to take on board and what not from the array of novel technological developments promoted by the WTO. While rebuffing chemical agriculture and biotechnologies in a bid to assert their collective identity in terms of what they call “traditional agriculture,” the KRRS’ response to the WTO does not resile from other new technologies, thereby opening up a channel for them to recognize the WTO, and vice versa. So, while it is certainly the case, as Michaels notes, that I largely focus on boundaries from the first-person perspective of emergent global legal orders, I see nothing in the IACA model of law that justifies his assertion that “what Lindahl neglects is that the boundary between WTO and KRRS as drawn by the WTO is not the boundary between WTO and KRRS as drawn by KRRS.”

The example of the struggle for recognition between the KRRS and the WTO suggests, furthermore, that it is not enough to argue that a boundary has two sides. At the outset of his comments, Michaels notes that “a simple version of an important part of [the book’s] thesis is [that] all legal orders necessarily exclude.” This assessment is doubly correct. First, I am indeed
concerned to show that no legal order is or can become universal because no legal order can include without excluding. But, second, this is merely the simple version of how boundaries do their work of including and excluding. Part of the heavy-duty philosophical work of Authority is dedicated to developing a far more complex reading of boundaries, according to which boundaries include what they exclude and exclude what they include, thereby giving rise to what I call a condition of entwinement of orders and worlds. For this reason, Chapter 6 of Authority avers that no collective is either identical to itself or simply different from its other. Accordingly, entwinement precludes both a simple plurality of unities, as in communitarianism, and an all-encompassing unity in plurality, as in universalism. It is the primordial condition of pluralism, and a fortiori of global legal pluralism. This, precisely, is what I mean when asserting that boundaries are “in-between”: entwinement concerns an in-between—an interaction—that eludes the definitive control by either collective self or its others because boundaries never simply “belong” to a collective, even though authorities claim that boundaries are a collective’s “own” boundaries when responding to challenges thereto.22

By conceptualizing legal boundaries as modes of entwinement, the IACA model of law can argue for a first-person concept of legal order, while also parrying the charges of “solipsism” and “pure agonism” which Michaels levels against it. I believe he would agree that entwinement is operative in PIL, and also endorse its corollary, namely, that while there are situationally fitting forms of recognition, every settlement of a struggle for recognition remains irreducibly contingent and, therefore, provisional. If he agrees, then I respectfully submit that PIL neither “generalizes” nor “moves beyond” the IACA model of law and its attendant interpretation of the chiasmatic structure of boundaries. Instead, PIL is an apt—albeit limited—illustration thereof.

I turn, briefly, to the third and final strand of Michaels’ commentary: the asymmetries of power deployed in conflicts between legal orders, as illustrated by the struggles for recognition waged between emergent global legal orders, such as the WTO, and alter- and anti-globalization movements, such as the KRRS. As Michaels notes, even if the KRRS is free, in abstracto, to decide how it wants to recognize the WTO, its power to assert itself vis-à-vis the WTO is “severely hampered” in light of the WTO’s superior power.

22. My interpretation of entwinement is inspired by Merleau-Ponty’s notion of a chiasm. One of the final working notes of The Visible and the Invisible, with the heading “Chiasm me – the world; me – the other,” reads as follows: “Begin with this: there is no identity, nor non-identity, nor non-coincidence, there is an inside and an outside that turn around each other.” Maurice Merleau-Ponty, Le visible et l’invisible 317 (1964).
to assert itself vis-à-vis the KRRS. Finding an “ethically defensible response” to this power imbalance remains a problem, Michaels asserts, both for the IACA model of law and for PIL.

I agree that this problem is both urgent and fundamental; but is it only a matter of an “ethically defensible response” by powerful legal orders to those who they marginalize? I would argue that no less at stake is finding politically authoritative ways of countering the hegemonic claims of emergent global legal orders. This brings me to what Michaels calls the “added value” of PIL with respect to the IACA-model of law. He points out that my skepticism about PIL when writing Authority was motivated in large part by what I took to be its technical, apolitical character. Against this skepticism, he avers that “[p]rivate international law as technique is not an alternative to a political understanding of conflicts; instead, it becomes the language with which these political conflicts are not only expressed but also made soluble, if only for the concrete case, and if only in an always preliminary, incomplete manner.” I stand corrected for uncritically embracing this cliché about PIL, and gladly embrace Michaels’ insight. I also agree, in hindsight, that the technical mechanisms marshalled by PIL allow it to deal with conflict by reducing it to its concrete manifestation in individual cases. When interpreted in this way, technique is indeed a form of politics, not its abdication, as I had wrongly assumed.

Yet notice that this form of politics focuses primarily on collective self-restraint, as borne out by Michaels’ claim that “the more powerful a legal order is, the stronger the ethical claim on it to take into account its negative impact on its outside, its risk of hegemony.” While essential, collective self-restraint is not enough. Insofar as it involves collective self-assertion by powerful legal orders, the techniques of deferral available to PIL only transform the terms of (il)legality in the host state for the case at hand. Such techniques fall far short of the politics needed to address the structural imbalances attendant on much of contemporary globalization processes, including (but not limited to) what Chimni calls “an imperial global state in the making,” namely, “a network of economic, social and political [institutions] . . . whose function is to realize the interests of transnational capital and powerful states in the international system to the disadvantage of third world states and peoples.”

Authority offers two clues about the way to go. First, it highlights the creative potential of representation and recognition. Authoritative responses to challenges to collective unity can retroactively create practical

possibilities for acting together of which we* were nescient. Hence, it is important to stress that the “as” of representing a collective and its other “as” this or “as” that is not only a tale of loss; it is also the story of unexpected possibilities and new opportunities. Because a collective or its other are never given directly, representational and recognitive practices allow for and even elicit innovation and ruptures which, retroactively, can tell us who we* really are in ways that offer a situationally fitting response to the other’s demand for recognition. Secondly, a collective’s power has a no less fundamental powerlessness as its counterpart, which is precisely why asymmetric forms of resistance are possible that exploit the vulnerabilities of powerful legal orders. A good example of this is what I would like to call a subversive variation of “dépouillant le pouvoir,” an expression coined by French administrative law to describe the use by a public authority of one of its powers for another purpose than that for which it had been conferred.24 By rendering strange what had been the familiar exercise of powers, the representation of what we* are and the referent of the representation—the us* to which the act is imputed or attributed—can change, giving rise to a collective that branches off in a new direction. In sum, taking up Michaels’ invitation, I would like to explore how delving concretely into global entwinements might yield fresh insights into authoritative strategies of resistance to and the structural transformation of contemporary forms of domination.

Doesn’t such an endeavor amount, at the end of the day, to embracing reciprocal recognition and an all-inclusive legal order as the regulative idea guiding emancipatory practices? Not at all. Like the emergent global legal orders they resist, the politics of boundaries through which alter- and anti-globalization movements endeavor to assert themselves against domination is authoritative if and only if they too exercise collective self-restraint. Insofar as alter- and anti-globalization movements must seize the initiative to represent us* otherwise, the dynamic of inclusion and exclusion is already at work in their resistance. Like the emergent global legal orders they resist, so also these movements cannot but take up a first-person plural perspective on humanity; the all-encompassing perspective of humanity necessarily eludes them. This argument does not militate against emancipation, against resistance to and the transformation of contemporary patterns of global inclusion and exclusion. Instead, the IACA-model of law holds that while we urgently need to find new forms of collective self-assertion in the face of globalizing forms of domination, emancipatory practices must also engage

24. Carys Hughes has made a related point, when arguing that empowerment, as conceptualized by Kelsen, is a distinct point of entry into legal orders by a-legal behavior. See Carys Hughes, *Action Between the Legal and the Illegal: A-Legality as a Political-Legal Strategy*, 20 SOC. & LEGAL STUD. 1, 1 (2018).
in forms of collective self-restraint. For the dynamic of unification and pluralization at work in representational practices entails that there is no emancipation of humanity in the singular; there are only human emancipations in the plural.

IV. NICOLE ROUGHAN

Nicole Roughan’s is a dense and probing set of comments. It is also a very long commentary, too long for me to be able to address in all its facets here. Contenting myself for the time being with a preliminary response, I look forward to writing a far fuller response on another occasion.

Roughan’s first objection holds that there are at least two forms of interaction or exchange between legal orders which cannot be accommodated by the notion of restrained collective assertion, yet which fall within the scope of a theory of authority that focuses on boundary-setting. The first is an “invitational” form of authority that resists assimilation to the full assertion of the self over the other, to full deferral to or disinterest in the other. The second refers to a middle in which “there are people who are not straightforwardly only included or excluded, rather they may be doubly included, being subjected to (and not merely affected by) the inclusive claims of more than one collective.” I argue hereinafter that this first objection misinterprets the concept of authority as restrained collective self-assertion, and that, when properly construed, the two forms of interaction she introduces fall within its scope.

Roughan presents her argument for an invitational form of authority in rather abstract terms, so it may be helpful to briefly refer to the New Zealand context she herself draws on to illustrate her objection, before considering her more abstract conceptual argument. Roughan argues, in an important paper, that the legal relation between Māori and state law in New Zealand can best be characterized as associational, meaning by such an inter-systemic relationship that is “deliberate, involving the integrations, incorporations or other formal interactions that occur between legal systems.” A distinctive feature of the New Zealand association is that state law not only includes

references to Māori law in its statutes and judge-made law, but that these
“Māori legal concepts are . . . enforced over Māori and non-Māori alike; they
are not confined to legal acts that settle matters specific to Māori.”

At issue, then, is not merely a limited autonomy regime, as discussed in Chapter 7 of
Authority, nor imposing state law on the Māori, but rather the recognition
that “some aspects of tikanga [should] be applied as rules for the whole
community – not just Māori – to live by.”

New Zealand state law thereby “expresses an acceptance that these rules and the value they embody are
desirable standards of conduct for everybody.” This form of association
illustrates, or so I take Roughan to argue, that there is “a difference between
an interaction driven by assertion, and an association involving invitation.”

I readily accept that Authority doesn’t discuss the legal associations
Roughan has in mind, given that the book’s focus is on struggles for
recognition between emergent global legal orders and anti- and alter-
globalization movements. But this need not entail that those struggles
exhaust the compass of the conceptual framework it lays out. Does the New
Zealand legal association, as described by Roughan, bear out the assumption
that associations and restrained collective self-assertion are different?

I think not. Roughan assumes that collective self-assertion amounts to
the assertion of a collective self against or over the individuals or groups
who question what counts as its unity, seeking to impose its standards on the
other. Yet Authority explicitly states that the recognition of the other (in
ourselves) as one of us involves a transformation of joint action, of what
counts as our collective self. The other’s demand for recognition opens up a
range of practical possibilities of who we are/ought to be as a group that
can be incorporated into joint action, through acts of collective self-assertion,
by redefining the terms of (il)legality, that is, the terms of what is deemed
common to us*. This is what the New Zealand association illustrates: state
law recognizes “the desirability of . . . specific rules within tikanga as rules
for all society.”

But the reference to “specific rules” shows that this is not the end of the
story. Indeed, as Roughan notes, the association between tikanga Māori and
state law is hierarchical: state law “retains a type of gatekeeper role in
determining which ideas join the contest to qualify as best.”

Drawing on Roughan’s notion of legal association, Nathalie Coates points out that while there is considerable potential for the recognition of Māori law in the New

26. Roughan, supra note 26, at 137.
27. Id. at 166.
28. Id.
29. Id. at 167.
30. Id. at 168.
Zealand state system, the capacity of the common law to provide for the recognition of Māori law is limited. In particular, the courts have introduced the test of reasonableness for the incorporation of Māori law into state law, which means that “if the [Māori] custom was repugnant and in conflict with the fundamental principles of the state legal system, a judge is unlikely to recognize it.”31 We are back, therefore, at what is effectively a common law variation on the public policy exception I discussed in Authority and in my response to Michaels. Recognition of the other (in ourselves) as one of us* is selective because it must be compatible with collective self-recognition, as a result of which recognition of the other through acts of collective self-assertion is always paired, to a greater or lesser extent, to misrecognition of the other. So both aspects of collective self-assertion are present in the example of legal association favored by Roughan. And it is precisely for this reason that I have argued that collective self-assertion needs to be complemented with collective self-restraint, opening up a space for deferring to the other as other than us*—as far as that goes.

Roughan is keenly aware of the problem of selectivity, contrasting hierarchical forms of association, such as the current legal association in New Zealand, to dialogical ones. Whereas hierarchy involves one legal order claiming authority over another, “dialogue is a two-way interaction wherein neither side has complete control over the other or over their association,”32 and in which “the two systems are interacting each on its own terms.”33 So described, dialogue (and legal association) may involve two independent legal orders. Inasmuch as each order engages with the other in its own terms, the ambiguity of asymmetrical recognition plays out in both directions. Roughan refers to a second form of dialogue as “dialogical deference,” in which “the expression and exercise of the sovereignty of each [order] is constrained by the powers of the other,” albeit within one legal order,34 a modality she favors for the New Zealand association.35 Here also, the back-and-forth of asymmetrical recognition holds sway. But what happens in those situations in which dialogical deference leads to irreconcilable conflict between the two orders? If there is to be one order, as Roughan pleads, then, ultimately, there will have to be an authoritative decision about what counts as the unity of the legal order in the event of irreducible conflict, which reintroduces the problem of hierarchy, in one way or another, and entails that

32. Roughan, supra note 26, at 154.
33. Id. at 154 n.67.
34. Id. at 171.
35. Id. at 173.
there is one sovereign order, not two. Once again, the ambiguities of asymmetrical recognition crop up.

In short, I submit that the dynamic of asymmetrical recognition I have sought to develop covers both forms of dialogue that Roughan links to legal associations. *Authority* and my earlier book, *Fault Lines of Globalization*, are concerned to defend the notion of *dia-logos*, in “a reading that does not make of dialogue an attempt to reinstate or establish a monologue that has been interrupted.” Dialogue, as it plays out in the to-and-fro of asymmetrical recognition between associated legal orders, is at the core of what I call restrained collective self-assertion. Like all representational and cognitive acts, invitations and counter-invitations have a referent (the invitee), who they reveal in a certain way (we* invite you to meet us* in this way, rather than that). An invitation to engage in a dialogue is recognition of and recognition as.

I can be much briefer with what Roughan calls the “overlapping middle,” the second kind of interaction that allegedly falls beyond the purview of restrained collective self-assertion. As she understands it, the overlapping middle concerns those situations in which a person subject to a plurality of legal orders “appeals to . . . ‘her’ authorities to sort themselves out, to meet in the middle, so as not to misrecognize her by including her in their assertions of collective and putative unity *without regard to her inclusion in the other.*” The reference to ‘her’ is not fortuitous. By neglecting “representational and cognitive practices for women” in the examples I discuss, I would have lost sight of the fact that “any effort to represent women as a putative collective, and to authoritatively set limits or default settings for joint action, runs up against the diversity of ‘things that ‘we’ care about.’”

I beg to differ. To begin with, Chapter 2 of *Authority* (and so also Chapter 2 of *Fault Lines*) explicitly indicates that and how the IACA model of law accounts for the possibility and structure of overlapping legal orders, a feature that De Sousa Santos refers to as “inter-legality.” Second, as far as I can see this is not a different kind of interaction that requires separate analysis. After all, as Roughan herself points out, at issue is a demand for recognition raised by a person which exposes a conflict between legal orders that they need to “sort out themselves.” Everything that has been said about asymmetrical recognition and restrained collective self-assertion returns, including my discussion of the dynamic between collective self and other unfolded by PIL (see my response to Michaels).

As to representational and recognitive practices by women, it is indeed the case that I have not discussed these, as Authority privileges struggles for recognition between emergent global legal orders and alter- and anti-globalization movements. But I am confident that the IACA model of law can easily accommodate such forms of struggle. Moreover, Roughan misinterprets the model when assuming that it entails representing women as a “putative collective.” What a-legality does is to challenge the terms of (il)legality stipulated by a legal order, hence the terms in which a legal order empowers and disempowers categories of individuals—e.g. women—to act in one way or another. This interpretation of a-legality, and of the struggles for recognition it sparks, is perfectly compatible with—in fact elicits—differentiated demands for recognition of “the diversity of things that ‘we’ care about.”

In sum, I submit that the concept of authority endorsed by the IACA-model of law accommodates the two kinds of interaction that, according to Roughan, fall beyond its compass. Moreover, the example of legal associations shows that to interpret the invitation to “meeting in the middle” as an alternative to processes of inclusion and exclusion amounts to a reductive reading of the encounter between collective self and other that plays out in struggles for recognition. Referring to this encounter as a meeting elides the moment of misrecognition which, to a lesser or greater extent, accrues to all authoritative acts of boundary setting. Entwinement ensures that in the course of dealing with their differences, the parties engaged in struggles for recognition can meet each other—sometimes in surprising and innovative ways; but it also ensures that, to a lesser or greater extent, they don’t meet each other. Co-incidence is not simply coincidence. Which is why Authority systematically refers to the encounter, not a meeting, of collective self and other.

Acknowledging this ambiguity neither gives up on a robust normative interpretation of authority nor surrenders to pessimism or realism, the antipodes of the optimism and idealism Roughan defends so vigorously. For, as I mentioned in my responses to Somek and Michaels, the representational and recognitive difference deployed in the to-and-fro of question and response has a creative potential that opens up unexpected practical possibilities for settling struggles for recognition, even if only provisionally. The treaty that grants legal personhood to Te Urewera, land comprising part of a former natural park in New Zealand, is a wonderful example of the creative empowerment available to asymmetrical recognition.38

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38. In my reading, the attribution of legal personhood to Te Urewera amounted to a form of asymmetrical recognition between state law and indigenous peoples. Its core consists in a settlement whereby fundamentally different readings of legal personhood allow both parties to both assert
emphatically: there is no reason to reduce asymmetrical recognition to a story of disempowerment of the other. But I do want to argue that a robust normative concept of authority must squarely address the *irreducible ambiguity* of authority: there can be no authoritative representation of commonality, of what joins us together, without an element of forceful, even violent marginalization. Roughan’s plea for an invitational concept of authority doesn’t, in my view, adequately address this ambiguity.

This is a good moment to turn to her second objection. In a nutshell, Roughan argues that the IACA model falls short of offering “full normativity because it rejects any imposition of conditions laying claim to ‘the right or the good’”. Full-blown normativity would have required a theory of the criteria of *legitimate* authority. I welcome this fundamental question, as it allows me to step back to reflect more generally on what the book sets out to do and how its endeavor to conceptualize authority as a normative concept might be carried forward. Accordingly, these concluding reflections have a prospective as much as a retrospective character.

To begin with, I will not follow Roughan in restricting the scope of “full” normativity to a theory of legitimate authority. While this is certainly the mainstream approach to authority, one she endorses, *Authority* hints at its broader scope.

First, Chapter 6 argues that the normativity of authority resists the simple disjunction between theoretical and practical authority. The hoary Greek notion of *phronesis*, inadequately translated as prudence, captures an essential feature of what authority is about as a practical concept. Authority, I argued, must respond to the question “What is/ought our joint action to be about?” Authoritative responses to challenges to collective unity must size up what are *real* possibilities available for joint action in the context of struggles for recognition. At issue here is not merely the distinction between ideal and non-ideal normative theory; instead, it involves a form of engagement with reality that eludes the hard and fast distinction between theoretical and practical authority. The sharp distinction between theory and practice presupposed by theories of legitimate authority involves an impoverished reading of the normativity of authority. For this reason I have introduced the Heideggerian notion of *Umsicht* as a way of capturing the hybrid character of authority’s normativity, a hybridity which is neatly grasped by the French expression *savoir faire*, and which is recalcitrant to anything like a list of legitimacy criteria.39

themselves while also deferring, for the time being, a definitive decision about what counts as the unity of each order. See generally Katherine Sanders, “Beyond Human Ownership? Property, Power and Legal Personality for Nature in Aotearoa New Zealand,” *30 J. of Env’t L.* 207 (2018).

39. Lefort’s reflections about “the good and the bad, the stable and the unstable, the real and the
A second aspect of the scope of a “full”—or in any case fuller—normative theory of authority concerns one of the foundational principles of Western thinking about law, namely, the distinction between culture and nature, *nomos* and *physis*. The proper domain of normativity, according to this principle, is social relations, interpreted as inter-human relations; nature is the domain of all other relations, as described in natural laws and some such. *Authority* takes a first, cautious step towards destabilizing this category distinction. In Chapter 6 I suggest extending the scope of asymmetrical recognition to the relationship between human and other animal forms of life. “The enactment of ‘animal rights’ signals that non-human animals can summon us to protect their vulnerable existence, even if it manifests itself in a fleeting gaze of pain, fear or hunger, and to which we cannot but respond, in one way or another.”

I go even further, arguing that environmental degradation is already a normative summons to care for an identity/difference that we* threaten.

Third, and most importantly, theories of legitimate authority systematically ignore a discussion of the emergence of normativity: under what conditions can something come to appear as an appeal to which we* must respond? The destabilization of the nature/culture divide is a particularly pregnant illustration of the genesis of normativity. In effect, the enactment of animal rights in response to the suffering visited upon non-human animal life, and the granting of legal personhood to nature, raise the question about the conditions under which the normative can emerge in nature.

While important, this is but an illustration of a more general problem, for the question about the genesis of normativity encompasses the entire domain of authority. Earlier than the question about what might qualify a response to a demand for recognition as legitimate or illegitimate comes the question how what had fallen within what I have called the zone of normative indifference of a given legal order can at all come to manifest itself as an appeal which we* cannot walk away from because it engages our responsibility and our respons-a-bility.

I don’t claim to have exhausted the scope of a “full” theory of authority as a normative concept with these three issues. Nor was I able to do much more in *Authority*, given its focus, than hint at their importance and relevance. But they do show why I have wanted to cast a wider net than what unreal,” and about “the present and the possible,” as developed by Machiavelli, offer a range of penetrating insights which escape the purview of theories of legitimate authority. See generally CLAUDE LEFORT, LE TRAVAIL DE L’ŒUVRE MACHIAVEL 399–450 (1972).


There is, however, a second sense of “fullness,” and it is this one which I think Roughan has in mind when averring that my account falls short of “full normativity because it rejects any imposition of conditions laying claim to ‘the right or the good’.” Allow me to formulate this objection more precisely and forcefully. As I understand it, an inquiry into “full” normativity seeks to establish whether there is an unconditional norm or set of norms to which authorities must submit when setting the boundaries of legal orders. As unconditional, it is a norm of action that holds under all circumstances, a norm which offers an unquestionable standard by which to judge authoritative acts as legitimate or illegitimate. Does or can the interpretation of authority along the lines of restrained collective self-assertion yield such a norm?

As noted earlier, when discussing Berman’s contribution, the question is all the more urgent in light of the context in which it arises: the modern experience of the contingency of legal orders and, therewith, of the legal norms and correlative boundaries that establish who ought to do what, where, and when. Theories of reciprocal recognition, whether of Kantian or Hegelian signature, have a ready answer to the question about an unconditional norm of authoritative acts, one which, in light of its universality, is purified of all subjectivity and contingency. The norm reads as follows: set the boundaries of a legal order in such a way that all those human beings who are subject to or affected by those boundaries can recognize each other as free and equal beings. This is an a priori norm: it prescribes, prior to all extant legal orders, and without any possible exception, what ought to guide acts of boundary-setting if they are to be authoritative. It is, in fact, the principle of democratic identity, which reappears in somewhat different modulations in just about all contemporary normative theories of democracy of which I am aware. This, surely, is a norm of action by which to assess the legitimacy or illegitimacy of authority, one which meets Roughan’s request of “full normativity” in the rigorous sense of the unconditional. It amounts to understanding the normativity of authority as the ongoing process of overcoming the contingency of legal orders, even if the realization of a fully legitimate legal order must be postponed sine die.

If this concept of legitimacy was so obviously at hand, why didn’t I embrace it? Because it doesn’t work. Section 5.3.4 of Authority engages in detail with the principle of democratic identity to explain why it cannot function as an independent and unconditional criterion of legitimacy that could settle struggles for recognition. Look again at the principle: set the
boundaries of a legal order in such a way that all those human beings who are affected by, or subject to, those boundaries can recognize each other as free and equal beings. The question it raises is the following: who counts as “affected” by or “subject” to a legal order? Nancy Fraser points out that the all-affected principle is unworkable because it falls prey to the “butterfly effect,” namely, that any given act can ultimately affect any and every individual anywhere in the world. It is necessary to circumscribe which ways of being affected by a legal order are relevant and call for the consent of those affected. To solve this problem, she introduces the all-subjected principle; but, as I show in Authority, it fares no better than the all-affected principle. Who counts as affected by or subject to a legal order is itself sub judice in struggles for recognition, not a pre-given criterion that stands above the fray and allows of settling it authoritatively for all parties involved. Determining who is relevantly affected or subjected amounts to settling what counts as a justified demand for recognition. This issue plays out in the to-and-fro of question and response, whereby a demand for and a subject of recognition emerges from what had been the domain of the unordered in ways which may appear to us* as an appeal that engages our responsibility and respons-a-bility, but which we had not heeded. The all-affected principle encapsulates the problem and the paradoxical emergence of normativity deployed in asymmetrical recognition, not its solution. Roughan’s objection that I don’t engage in a theory of legitimate authority overlooks this issue, which is effectual in the normative theory of legal associations she endorses.42

Whereas the all-affected principle is at the heart of theories which understand normativity in terms of the attempt to overcome contingency, my point of departure is different: the contingency of legal orders cannot be surmounted. As noted earlier, normative plurality cannot be reduced to the unity of a legal order, not even in the indefinitely long run. Asymmetrical, not reciprocal, recognition is the name of the game. Does this mean giving up on the possibility of articulating an unconditional norm for action? Is it the expression of fatalism or resignation? Not at all. If contingency is unsurmountable, then it forms the basis for an unconditional postulate of an authoritative politics of boundaries. On two occasions, Authority formulates its content. I take the liberty of quoting them in full:

The political and philosophical gambit to refuse the quality predicate of rationality to agents whose challenges to a collective don’t aspire to reach consensus (which, for authorities, invariably means integration into the—

42. In effect, Roughan approvingly invokes this criterion in the passage I quoted when summarizing her objection about the overlapping middle: “… being subjected to (but not merely affected by) the inclusive claims of more than one collective …”
transformed—putative unity of a legal order) justifies situations in which someone, claiming to be the representative of universality and rationality, disqualifies such challenges as either being in bad faith or not worthy of being taken seriously. The imperative that ought to govern politics has to be this: set collective boundaries in such a way that politics is not brought to an end. Which means: hold open the hiatus that joins and separates collective self and other.\(^{43}\)

Here is the second:

Against the charge of relativism directed against it by legal universalism, the IACA model of law argues for a concept of authority in which collective self-assertion is tempered by the injunction to preserve the strange as strange, hence to preserve the ‘inter’ of intersubjectivity as beyond our control. It is the way in which a collective acknowledges that it has an outside—a domain of the strange—that eludes the collective’s self-assertion and which ought to be preserved as its outside, including the outside within ourselves, if collective recognition of the other (in ourselves) is not to collapse into a process of totalisation and therewith of domination.\(^{44}\)

I respectfully submit that if a “full” theory of normativity aims to posit an unconditional norm of action on the basis of which to judge the legitimacy or illegitimacy of authoritative acts, then Authority, contrary to Roughan’s claim, does meet this demand. It is what I call restrained collective self-assertion.

Admittedly, the postulate is negative in character; it offers no positive set of criteria that must be met for the recognition of the other, going no further than averring that recognitive acts can be situationally fitting. But this is surely not enough. Here, Roughan’s objection hits home. For what does it mean, normatively speaking, to be able to qualify a recognitive act as “situationally fitting”? Is it possible to articulate in more general normative terms what is meant by a “situation” and what counts as a “fitting” response, even if such recognitive acts resist judgments about their legitimacy in terms of a pre-given chart or list of rules? Yet more profoundly, what sense are we to make of the other’s demand for recognition, such that it can manifest itself to us\(^*\) as an appeal which we had not heeded, yet ought to heed? And what is the nature of this appeal as such?

At issue here, once again, is the problem of the emergence of normativity, a problem I would like to explore by way of an enquiry into asymmetrical recognition that focuses on vulnerability and care as the key existential dimensions accruing to the irreducible contingency of legal orders. I am indebted to Roughan for challenging me to go further than what

\(^{43}\) LINDAHL, \textit{supra} note 40, at 310.

\(^{44}\) \textit{Id.} at 345.
I have done thus far when thinking about the normativity of an authoritative politics of boundaries.