

Reply to Critics

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ABSTRACT

In my reply to critics I address a raft of issues raised by the commentators to *Fault Lines of Globalization*. These issues include: the radicalization of the Husserlian concept of intentionality as differance; the irreducibility of a-legality to (il)legality; the relation between legal orders and society; legal pluralism; the relation between power and place; contingency and modernity; fear and terrorism; differences and similarities between a discourse theory of law and the approach developed in the book; the incorporation of the findings of social theory into an account of law as authoritative collective action.

KEYWORDS

A-legality, representation, contingency, asymmetrical recognition, authority

It is a rare privilege to be the recipient of such a wide and profound range of comments on *Fault Lines of Globalization* (FLG). Each of the commentators has read the book carefully and sympathetically, although by no means sparing in their criticism, and I am deeply grateful to all of them for pointing out issues that call for much further thinking. When going about writing my reply to their comments, I had initially thought of selecting a number of key thematic issues raised by the contributions and dealing with them in a systematic fashion, rather than trying to respond on an individual basis. But I have decided, in hindsight, to respond individually to the contributions. While there are some recurrent themes, any selection would have been more or less arbitrary, and would have blunted the critical edge of individual contributions. I would like to thank Ferdinando Menga very specially for having taken the initiative of putting together this special issue, and for the dialogue which introduces it. Our numerous conversations leading up the special issue, in which Menga's work on representation, constituent power, and human rights figured prominently, have been a source of great inspiration to me.

Emilios Christodoulidis' response to FLG deploys two main questions. The first concerns my appropriation of the phenomenological notion of intentionality in the course of accounting for the structure and dynamic of legal ordering. If phenomenology as method aims to let things speak for themselves as given to con-

sciousness in all their fullness and immediacy, then intentionality cannot make good on this promise: always yielding a partial and incomplete appearance of things, intentionality can only aspire to an incremental or progressive—self-correcting—process of signification of what is intended. To redress this problem, or so Christodoulidis argues, Husserl turns to intersubjectivity and the promise of an (indefinite) progress of Reason. But why, then, insist on holding on to the notion of collective intentionality when accounting for the structure and dynamic of legal ordering?

It is indeed the case that I have taken my cue from the guiding insight of phenomenology, namely, that human relations to reality are intentional in that something appears—is given—as something *to* someone. And this indeed implies that intentional acts are always impartial and incomplete. But I develop this insight in a direction that is orthogonal to Christodoulidis' interpretation of how intentionality and intersubjectivity play a role in Husserl's thinking.

That something appears *as* this or *as* that, whether in perception, practical involvement with things, the interpretation of texts, or the manifold other intentional relations human beings entertain with reality, has two decisive implications which Waldenfels summarizes with the expression “significant difference.” The first is that all (legal) relations to reality are mediated by meanings: (legal) relations are indirect: the real is not a pure given, something given immediately. The second is that the real is not exhausted by the meaning with which it is disclosed; it is not a pure construct. The significant difference introduced by intentionality is important because it calls attention to the problem of the *contingency* of orders in general, and legal orders in particular: why is something disclosed as *this*, rather than as *that*? The interruption of legal intentionality wrought by a-legality calls forth just this question. By raising a normative challenge to a collective, something resists its disclosure as (il)legal, opening up other possible (legal) qualifications thereof and calling attention to the contingency of how the legal order would disclose it. How, then, to deal with the contingency of a collective's qualification of something as (il)legal?

FLG discusses what I take to be two unsuccessful attempts at dealing with the experience of contingency called forth by a-legality. The first takes its cue from the temporal structure of legal intentionality as a *reiteration* that leads (il)legality back to its source in an immediate experience: the original unity of a bounded We which is immediately present to itself as a collective, whether at the moment of its self-constitution or later, and which is to be reiterated thenceforth by all future acts of boundary-setting. The return to this primordial We, in all its immediacy and fullness, would be the measure that allows of dispelling doubts about whether something should be qualified as legal or illegal in the course of boundary-setting. This is, in a sense, the *communitarian* move, which understands legal intentionality as the recovery of an original unity which is to be rearticulated and reaffirmed when

a legal collective is challenged by a-legality. In its own way, communitarianism endorses the phenomenological injunction—“to the things themselves!”— as a return to the We itself, which, in its primordial self-givenness, is the origin and measure of all boundary-setting. What I have sought to do in Chapter 4 of FLG is to radicalize the temporal structure of reiteration, showing that legal intentionality *begins* as the *reiteration* of a primordial We, which is presupposed in the representational closure which gives rise to (il)legality, yet to which there is no direct access. A We is originated in the representation of an original We, foreclosing that it could provide the measure that overcomes the contingency of how boundaries are to be drawn. In other words, the representation of a We as this We’ or that We’ introduces *difference into identity*.

There is a second way of attempting to overcome the contingency introduced by the significative difference, one which pins its hopes on the *anticipative* dimension of collective intentionality. Accepting the partiality and incompleteness of collective intentionality, it understands the history of a collective as a “self-correcting process,” to borrow Christodoulidis’ expression. On this reading, when the anticipations of behavior as (il)legal are questioned by a-legality, the task of boundary-setting is to reconfigure (il)legality at a higher level of generality, to integrate the normative claim which has been excluded from (il)legality, such that the anticipative structure of legal intentionality becomes ever less partial and incomplete. This is, in a nutshell, the way in which *universalism* attempts to overcome the contingency introduced by the significative difference. Eschewing the communitarian return to a primordial identity that demands reaffirmation, universalism instead projects this identity into the future, such that an ever more inclusive legal intentionality has its terminus, however long in the making, in the full and immediate presence of a manifold of individuals to themselves as a We. FLG argues that this second attempt to defuse or neutralize the contingency of legal orders will not work either: collective intentionality must frame normative challenges to (il)legality in a way that permits the reiteration of collective intentionality, i.e. that permits the re-identification of the collective as a self and as the same. To posit the boundaries of (il)legality, in response to a-legality, is to represent other-than-We as this or that other-than-We’, once again introducing *difference into identity*.

In short, while I take my cue from Husserl’s notion of intentionality, I have sought to radicalize it in a way that refuses either the communitarian or the universalistic moves to neutralize the contingency of legal boundaries which arises from the fact that something appears as (il)legal to us. The key to this radicalization lies in the temporal difference introduced by representation, a “temporal difference” which representation folds into the “significative difference”. This twofold difference in identity is what Derrida has in mind when coining the term *differance*, and which comes to a head in the objection to Husserl at the end of *La voix et le*

phénomène: “*la chose même se dérobe toujours*” (Derrida 1967, 117). So also the We and what would be qualified, in its name, as legal or illegal.

Christodoulidis’ second question concerns a-legality and constituent power. Drawing on systems theory, he argues that FLG offers an ambivalent account of a-legality, which hovers uncomfortably between normative claims that can be accommodated by the legal order and those that cannot. In the first case, the interruption is temporary; in the second, definitive. In the first case, a-legality is no more than the occasion for the exercise of constituted power, which contains what challenges a legal order; in the second, a-legality is properly ruptural: it acts against the order it challenges in the form of constituent power. In short, I understand Christodoulidis’ objection as stating that a-legality is an unstable category that collapses into one of its two terms. If it can be contained, then a-legality amounts to (il)legality, hence is no longer *a*-legal; if it cannot be contained, then its proper semantic field is that of politics, of being-against, but then it is no longer *a*-legal. Christodoulidis’ own sympathies are clear: go for constituent power, not for constituted power; for revolution, not for reform.

Let me say, straightaway, that this is not the occasion to engage in a grand debate between systems theoretical and phenomenological accounts of legal order, although it would certainly be of considerable interest to try and pinpoint what it is that systems theory can say about law which cannot be grasped by phenomenology, and vice versa. I limit myself here to approaching Christodoulidis’ objection as an objection immanent to the phenomenology of a-legality developed in FLG.

The first point I want to insist on is that there is no such thing as a-legality “in general.” Behavior is a-legal in relation to a given legal collective, such that what is at stake is clarifying the mode of appearance of a-legality, not a series of features that could identify a-legality “as such,” independently of the order which is challenged. Now, the core insight about a-legality defended by FLG concerns its normative complexity: the a-legal manifests itself as a normative challenge that *conjoins* a range of practical possibilities going from those which could be actualized in a legal order as falling within the domain of its own possibilities to those which are in excess thereof. In other words, the normative claim raised by a-legality conjoins what is practically possible and impossible for a collective. To the extent that a-legality remains within the range of a collective’s own practical possibilities, it manifests itself as the “orderable,” and boundaries as variable limits. To the extent that a-legality raises a normative claim that exceeds the range of the collective’s own possibilities, it manifests itself as “unordered,” and boundaries as fault lines. My argument is that these are *dimensions* of a single, complex phenomenon, rather than different *modes* of a-legality. Accordingly, a normative claim that appears as unordered but entirely orderable (as (il)legal), or as unordered and entirely unordered (as (il)legal), are phenomenal extremes which can be approximated

but not reached. A-legality reveals the boundaries of a legal order as limits *and* as fault lines.

But how can a normative claim appear as *normative* to a collective to the extent that it exceeds the range of practical possibilities available to it? I have argued in FLG that it does so in the form of an exception. Schmitt describes an exception as “that which cannot be subsumed” in a legal order, where the English word “subsumes” fails to capture the phenomenal complexity of the exception as captured by the German expression “*sie entzieht sich,*” which means that the exception is what defies, eludes, and exceeds a legal order, all at once. Crucially, however, an exception remains an exception *to* a given legal order, and in this sense registers in it as a normative claim. How? *Indirectly*, precisely through its connection to what is normatively orderable for a collective. The a-legal defies, eludes, and exceeds a legal order, it manifests itself as an exception, to the extent that it conjoins the normative claim which a collective can order to what remains unorderable for the collective. Far from containing constituent power by constituted power, and politics by law, the phenomenology of a-legality acknowledges the *finite* questionability and *finite* responsiveness of legal orders. No attempt here to collapse revolution into reform, or constituent power into constituted power!

If a phenomenology of a-legality confirms that constituted power cannot contain constituent power, it also poses a challenge to a theory that, taking up the banner of revolutionary emancipation, would simply invert the order of priority between constituent power and constituted power, and between politics and law. For a phenomenology of a-legality shows that the revolutionary exercise of constituent power cannot empower, enabling a domain of freedom as a realm of practical possibilities, without also disempowering, thereby marginalizing other ways in which joint action might be the expression of freedom. The initiative to found a collective has, on the reading defended in FLG, an irreducibly ambiguous status: it is *the expression of constituent power and of constituent powerlessness*, of a primordial “we can” and a no less primordial “we cannot.” The strong dimension of a-legality confronts a collective with its powerlessness, i.e. with what cannot be said or done in the framework of a given collective because it intimates possibilities that lie beyond the variable scope of that collective’s own possibilities. The im/possibility that gives rise to practical possibilities under authoritative collective action (ACA) catches up with a given collective from ahead in the form of practical im/possibilities intimated by strange behavior. Constituent power lies *behind* a legal order and *ahead* of it, as a-legal behavior which anticipates the emergence of another first-person plural perspective. The task of legal ordering as concerns a-legality, in the strong sense of what refuses normative integration into a given collective, is to respond to it by exercising collective self-restraint. Legal collectives acknowledge in this indirect way that they exist in the mode of a finite questionability and a finite responsiveness. (See Lindahl 2015).

Fabio Ciaramelli's comments focus, amongst others, on the phenomenological delimitation of the legal order as a normative order. In particular, he notes that legal norms bestow a legal meaning on facts that have a social and cultural significance of their own, hence which already possess a pre-judicial normativity which constitutes the extra-judicial limit of legal orders and whence these orders draw their sustenance. Primary norms, to borrow Hart's terminology, exist in all societies; but law emerges as a distinct normative order with the emergence of secondary norms, i.e. with the explicit, regulated, and controllable institutionalization of the production of primary norms.

Ciaramelli's considerations point to an important issue which FLG discusses only tangentially, namely, the relation between legal orders and society. Significantly, Rummens also broaches this problem in his comments to FLG, pointing to similarities between my very brief comments on this issue and Habermas' extended analysis thereof. The issue is also indirectly raised by Walker, when he calls for a more sociologically informed development of the first person plural account of law outlined in FLG, especially in a global context. While an extended discussion of the relation between legal orders and society will have to wait for another occasion, I would like to take the opportunity to clarify in a bit more detail what I take to be the issue at hand.

In effect, Section 1.2 of FLG notes in passing that legal orders draw on and come to stand out against the background of a more or less anonymous form of normativity, one which is both anterior and posterior to the reflexive operation whereby a manifold of individuals refer to themselves as a *We*. The section refers to this pre- and post-reflexive interaction as social, and to the manifold of individuals who interact in this way as society. The precedence of social interaction to the reflexive operation whereby a manifold of individuals refer to themselves as a *We* is not merely chronological; it concerns, instead, a relation of dependency: the point of legal orders, hence who ought to do what, where, and when in the course of ACA, does not emerge from the void; ACA leads back to patterns of social interaction, which are themselves already spatial, material, temporal, and subjective, and whence a given legal collective emerges as a distinctive normative order. This contributes to explaining what it means that representational acts must *presuppose* legal unity in the very process of creating it. Unless representation can latch on, as it were, to existing patterns of social interaction, revealing them as patterns with a point, and which characterize *us* as a group, representation would be a wheel that spins in empty air; it could secure no perlocutionary uptake among its addressees. Kant understood this very well, as Castoriadis points out, because "the organization of a 'world' beginning from the *Mannigfaltigkeit* (diversity) of sensible givens [*données*] presupposes that this *Mannigfaltigkeit* already possesses a minimum of intrinsic organization; because it at least has to be *organizable*. No category of cau-

sality would be capable of legislating a *Mannigfaltigkeit* that would conform to this law.” (Castoriadis 1986, 335) But this is not the whole story about how a legal order comes to stand out against the background of social interaction. For representation, as FLG insists time and again, is, paradoxically, *the creation of what is given*. Representation cuts through what is an entangled web of social relations, *demarcating* a range of social interaction as a distinctive form of collective action and assigning to it a normative point in the very act of claiming that it does no more than reflect what we already understand ourselves as doing together in the course of our everyday lives. In short, the passage from the anonymity of “one” who acts to the first-person plural perspective of the We which acts comes about through a representational act that draws the boundaries of a collective. That a legal collective emerges from and comes to stand out against the background of anonymous social relations means, therefore, that representation *includes* and *excludes*: it draws the boundaries that include certain social relations, differentiating and stabilizing them, as Ciaramelli puts it, in the form of authoritatively mediated collective action, while also excluding all other social relations, which are pushed into the background as the anonymous domain of what remains *unordered* for that We in joint action.

But, as indicated in Section 1.5, anonymity does not only precede the emergence of a legal order; it also *follows* it. By this I mean two things. The first is that social interaction not only informs legal orders but is also informed by these. The patterns of behavior deployed in social interaction are always already permeated by law, such that it is impossible to separate social and legal interactions as, respectively, a substructure and a superstructure. The second is that anonymity follows up the first-person plural perspective in the sense that acting in conformity with the law need not require taking up the perspective of a legal We: this is simply how “one” does things, how things are done—after law has done its work. Individuals don’t typically live through their everyday lives in the reflexive stance of a properly *legal* agent, as the Lafayette examples of Chapter 1 make clear. The measure of law’s success in structuring social interaction lies in its capacity to become habitual, anonymous behavior.

It is tempting to think that there is a more or less peaceful continuity leading from the social to the legal and back, and from the anonymous normativity of societal interaction to the first-person plural normativity of legal interaction and back. This temptation should be resisted. Because the inclusion which gives rise to a legal collective is paired to the exclusion of what thereby becomes, from its perspective, the unordered domain of societal interaction, the latter is the domain whence a-legality irrupts into that legal order, interrupting the flow of collective action by calling into question the boundaries that establish who ought to do what, where, and when. In such irruptions or immergences, as I called them, the social manifests itself not only as what is *more* than a legal order, to the extent that

it contains a surfeit of practical possibilities which have been excluded, but also as what is *other* than it, or more precisely, as what is *strange* to a legal collective, hence as what is *discontinuous*—even radically discontinuous—with a given legal order. It is in this deeper sense that the social precedes a legal order, as that which a legal order could not anticipate and reaches it “too early.” The discontinuity also operates in the passage from legal interaction back to societal interaction. To the extent that a legal collective frames the normative challenge raised from the social domain as the question about what *our* joint action ought to be about, its incorporation of the social, through a transformed configuration of ACA, goes hand in hand with its exclusion.

This has a fundamental implication which I can only begin to spell out here in a very preliminary fashion, reserving its fuller discussion for another occasion: the relation between a legal order and society is not the relation between, respectively, a particular and a general normativity; the normativity at work in social relations is not the domain of a *common* normativity shared by all members of society, of which legal orders are merely so many particular manifestations. In other words, the normativity of the social is not the normativity, however “thin,” shared by all members of an all-encompassing moral “We,” and which admits of particularization in diverse legal orders, such that, in the case of conflict about a legal order, this shared normative bedrock must already have been presupposed by all parties in conflict and to which they must recur if sorting out their differences is to be a rational process. That the social domain is anonymous means, as I understand it, that it is always in excess of what is or can be deemed common. A phenomenology of a-legality suggests, against discourse theories of law, that distinguishing between the “moral” and the “ethical” in legal orders, between the universal and the particular in law, will not domesticate or neutralize the social as the domain which manifests itself to a given legal order as orderable *and* as unorderedable: as *magma*, to recall Castoriadis’ magnificent expression (Castoriadis 1986, 286).

Martin Loughlin’s commentary raises an objection that has a negative and a positive face. Negatively speaking, the ACA-model of law does not support the defense of overlapping legal orders, and more broadly of legal pluralism, which it is supposed to justify. From “a legal perspective,” as he puts it, the relation between a state and a multinational such as Shell, no matter how economically powerful, is not one of overlap but rather of dependency. Not surprisingly, therefore, the examples of legal ordering outlined in Part II of FLG are all examples which have a-legality challenging states and their boundaries. Positively speaking, or so Loughlin argues, FLG is in fact a reformulation of *jus politicum* or *droit politique*; the book offers an extended philosophical analysis of what is specific to the political domain in which modern public law is located.

Notice, to begin with, that I use the term pluralism and plurality in two distinct ways. There is pluralism in the sense of overlapping legal orders, namely, the existence of two or more legal orders in “the same spatio-temporal domain,” to repeat the formulation typically used by defenders of legal pluralism, and there is the pluralism, or more precisely pluralization, called forth by a-legality, such that, by challenging the boundaries of (il)legality drawn by a given legal order, a-legality intimates another possible legal order. While FLG indeed argues for legal pluralism in the first sense, it avers that plurality or pluralization in the second sense is fundamental: one could, on the face of it, imagine the emergence of a single global polity that covered all aspects of law, thereby precluding legal pluralism in the first sense. But even this extreme example of legal monism would be vulnerable to pluralization in the second sense, thereby paving the way for the emergence of a novel legal order, hence of legal pluralism in the first sense.

Loughlin singles out one of the examples I proposed of non-state legal orders, a large multinational such as Shell, in making his case against legal pluralism as overlapping legal orders. It strikes me, however, before turning to examine this case, that he doesn't mention the other examples I marshal, such as the legal order of the U'wa, *lex mercatoria*, and cyber-law. These examples, in his view, would no doubt also fall prey to objection. But would they? Take the case of the U'wa: from the perspective of the Colombian collective they no doubt are part of Colombia and are entirely subordinate to its legal order. The point is, however, that they have never accepted the authority of that legal order, viewing it as the continuation of colonization. They view themselves as a distinctive collective, with laws of their own which do not draw their binding character from their authorization by the Colombian legal order. Theirs is a first-person plural perspective irreducible to that of the Colombian collective. To speak of overlap here is not to engage in legal sociology; it is to argue that a first-person plural perspective is crucial to the very concept of legal order, and that once this is acknowledged a host of legal orders become visible which are concealed when the state/international law tandem is taken to be exhaustive of legal order. These are orders which, from the perspective of the state, may be dependent on it, yet which lay claim to a distinctive first-person plural perspective, irreducible to that of states and their claim to authority. Certainly, whether or not this distinctive first-person plural perspective actually manages to consolidate itself is not only a question about validity; it is also a question about *effectiveness*. Loughlin's seemingly unambiguous reference to “a legal perspective” is in fact the reference to the first-person plural perspective of a collective that claims authority over behavior that may well understand itself as authorized from another “legal perspective.”

These considerations cast new light, I think, on why there is a case to be made for viewing large multinationals such as Shell as laying claim to a distinctive first-person plural perspective of their own. While Loughlin is no doubt right in arguing

that they must needs incorporate themselves somewhere, and are subject to the laws of the states in which they operate, they take up a first-person plural perspective, when issuing their internal regulations, which is irreducible to that of any of the states in which they operate, and which commands a high measure of effectiveness even when those internal regulations are shown to be in breach of the law of a given state. It is significant that the occupation of the Brent Spar rig, and the extraordinarily wide public support which this action called forth, was directed at *Shell itself*, not against the UK or Norway, and precisely because Shell displayed a level of autonomous decision-making in the pursuit of its global interests in a way that neither the UK or Norway could adequately authorize or contain by way of legislation enacted from their state-centered first-person plural perspectives.

Loughlin would certainly want to add that these multinationals rely on state law for the enforcement of their internal regulations; to that extent, at least, they remain thoroughly dependent on states. Yet even this claim may be contested, to the extent that a variety of multinational companies apparently use the services of private military contractors to enforce at least some of their internal regulations in certain parts of the world. More importantly, however, the concept of legal authority enjoined by the ACA-model of law does not entail that the monitoring and enforcement functions of authority have to be coordinated from a single first-person plural perspective. As argued in FLG, whereas there is an emergent first-person plural perspective of *lex mercatoria* monitored by arbitration tribunals, the enforcement of arbitration awards requires state intervention. This suggests that the emergence of novel legal orders in a global context does not simply replicate the authority structures of states; Neil Walker has pointed out, correctly to my mind, that what is distinctive about the current constellation is that a variety of legal orders, including *state* orders, institutionalize a reference to another legal order and its own interests in the ongoing process of engaging in collective self-identification (Walker 2008). The ACA-model of law can accommodate and make conceptual and normative sense of this institutional innovation in ways that are not available to state-centered accounts of law.

The second half of Loughlin's *ex negativo* objection concerns my examples of a-legality in Part II of FLG. He points out that these examples are all examples drawn from the contestation of state boundaries, thereby confirming his claim that a-legality only makes sense from a state perspective. It is indeed the case that these examples are state-centered. But, for the reasons indicated heretofore, the Brent Spar case is not, or in any case not only, a challenge to state boundaries: first and foremost it is the challenge to how *Shell* draws spatial, temporal, subjective, and material boundaries in the course of its global activities. In the same way, the a-legal challenge of the U'wa is not only addressed to Colombian state-law: it is also a challenge to international law and, crucially, to *lex constructionis*. Finally, the

example explored in Section 2.5 of FLG is not merely a challenge to state law: it is also a challenge to cyber-law itself.

It would not have been difficult to offer other examples of a-legality which are not state-centered. Consider the WTO. Like a state, the WTO configures itself as a spatial unity, even if in a way very different thereto, namely as a global market. Unlike a state, however, the spatial unity of the WTO is irreducible to territoriality. Indeed, the WTO organizes itself as a unity of legal places—a global market—in a way that supersedes the domestic/foreign distinction associated with states, regional orders such as the EU, or even classical international law, to the extent that the latter regulates relations between states. Yet this does not mean that the WTO has moved beyond the inside/outside distinction in the fundamental sense envisaged in FLG. Indeed, global activists continuously challenge it as being highly exclusionary in its operation, inasmuch as the enactment of a world market marginalizes other kinds of places as unimportant and irrelevant, yet places that activists deem important and relevant, and that are intimated by forms of behavior which contest the normative criteria governing how the WTO organizes itself as a global market. Think, for example, of direct action by India's Karnataka State Farmers' Association (KRRS) against measures of trade liberalization under the aegis of the WTO. By mobilizing to occupy and destroy fields of GMOs in the effort to preserve and revalorize "traditional" Indian peasant ways of life, the KRRS's direct action intimates a place that is *outside* the WTO, even though not in the sense of a "foreign" place. Instead, their direct action intimates a *strange* place, a place that, from the KRRS's perspective, refuses normative integration into the differentiation and interconnection of places that the WTO calls its *own* space: a global market.

Nonetheless, I would like to reconstruct Loughlin's objection in a way that, to my mind, *does* points to an important problem which FLG has not addressed. Even if state law does not exhaust ACA in a global context, should state law enjoy a certain *priority* in an account of a-legality? At one level, the question concerns why the state will continue to play an indispensable role in our understanding of legal orders in a global context. At another level, the question directly engages a phenomenology of a-legality. Indeed, even if a wide array of examples can be mustered to show why state boundaries do not exhaust the scope of a-legality, it may well be that any a-legal challenge to non-state legal boundaries must *also* involve a challenge, direct or indirect, to state boundaries. This issue can only be settled on the basis of an answer to a yet more fundamental problem. In effect, I view Loughlin's objection as the invitation to radicalize a phenomenology of a-legality by way of an inquiry into the *constitutive relation between legal place and political power*. Does the relation between territoriality and state power reveal structural features which are constitutive for the possibility of drawing the inside/outside distinction in the fundamental sense indicated in FLG, and on which all other legal

orders must rely in one way or another? Or is the internal connection between territoriality and state power but *one* of the possible permutations of that general relation? I am in principle happy with Loughlin's characterization of the inquiry outlined in FLG as an attempt to carry further thinking about *droit politique*, but in the understanding that at its core is an inquiry into the constitutive relation between legal place and political power that doesn't take for granted that this is only or even ultimately an inquiry about that "special type of (compulsory) association that we know as the state."

Sofia Näsström raises two questions about FLG. The first is whether the concept of a-legality depends on a certain "form of historical consciousness" or a certain "form of government." I take it, for starters, that the "or" is not disjunctive, inasmuch as forms of government arguably have forms of consciousness (I would speak of a metaphysics) as one of their preconditions. Lefort, for example, never tires of reminding his readers that democracy and totalitarianism, as manifestations of politics (*la politique*), presuppose the specific understanding of the political (*le politique*) which emerges with modernity. In this context, I would argue that the notion of a-legality is preconditioned by the experience of contingency proper to modernity. The a-legal registers in a given legal order as legal or illegal, while also raising a normative claim that challenges *both* poles of the distinction, thereby intimating another possible structuring of the legal/illegal distinction. The challenge of a-legality opens up a range of other possible ways of positing (il)legality, going from possibilities available to that legal order to possibilities which surpass the range of its own possibilities, requiring another first-person plural perspective be realized. The experience of the contingency of a certain way of drawing the distinction between legality and illegality is, precisely, what the "a" of a-legality seeks to capture.

Now, this experience of the contingency of legal orders presupposes a historical mutation of the concept of order, and of the human relation to order, which can be tracked quite precisely in terms of the concept of change and of the relation between actuality and possibility which goes from Antiquity to modernity. If philosophical thinking about order articulates the most elemental presuppositions of an era about the structure and transformation of being, then, arguably, Aristotle's theory of change, and the passage from potentiality (*dynamis*) to actuality (*energeia*), suggests that, for the Greeks, actual order exhausts possible order. In such a context, the experience of a-legality is not available, which collapses into the extant distinction between legality and illegality. The *kosmos* is an order with an inside but no outside. Thomas Aquinas' reflections on the relation between actuality and possibility deployed by divine power illustrate the profound transformation in the concept of order ushered in by the Middle Ages. Divine power not only implies bringing into being in the radical sense of substituting *esse* for the

nihil, but also bestowing the world with a determinate order that, while binding on human beings, God could have created otherwise. Thus Medieval thinking introduced the problem of contingency by recognizing that the actual doesn't exhaust the possible. But here also there is no room for a-legality: whereas the extant world order is contingent for God, it appears as obligatory—necessary—for human being. A-legality collapses, once again, into (il)legality.

Hans Blumenberg has traced the dramatic sharpening of the experience of contingency in late Medieval thinking about order, and which he summarizes with the expression “*Ordnungsschwund*” (loss of order). The modern reaction to this loss of order obtains one of its most momentous manifestations in the 11th Thesis of Feuerbach: “Philosophers have hitherto only *interpreted* the world in various ways; the point is to *change* it.” If, for Scholastic philosophy, the extant world is one of the possible worlds that meets the condition of non-contradiction, modernity is premised on the idea that, in the face of an extant world rife with internal contradictions, human action can call into being a world that meets the condition of non-contradiction. As human being finds itself in a world given to it as the condition for its action, its productive relation to the world is necessarily *immanent* rather than transcendent. We are always already in-the-world, a world that, having forfeited its binding character for us to the extent that it is self-contradictory, is also the world we can act upon, *ordering it in a new way*. It is this historical constellation, a constellation in which the actual does not exhaust the possible for human beings, that the experience of a-legality can emerge, and precisely because it articulates the experience of the contingency of how legal orders structure (il)legality. (See Lindahl 2008; Lindahl 2015)

The crucial question, however, is how to deal with the contingency of legal orders, hence with a-legality. Here, philosophical thinking encounters a fork in the path. There is one approach to the human relation to contingent legal orders which has practical rationality, in a broad sense of the term, *overcome* contingency: emancipation, in the singular. History becomes the story of human emancipation from contingency. This is, I daresay, the mainstream approach to practical rationality, an approach that commands the allegiance of some of the most influential contemporary philosophical accounts of legal order and legal ordering, including hermeneutics and discourse theories of practical reason. There is, however, a second approach to the problem of contingency, and to which I subscribe in FLG. For this approach, (legal) rationality is about *dealing* with contingency. It acknowledges, as does the mainstream account, that (il)legality, as posited by any given legal order, is contingent, such that other ways of drawing this distinction are possible. But it takes issue with the assumption that contingency can be overcome. This is what is at stake in the defense of a complex logic of boundaries, which don't simply include what they exclude, but also always exclude what they include. This insight by no

means proscribes emancipation from a politics of boundaries; but it does entail that there are emancipations in the plural, not emancipation in the singular.

This brings me to the second part of the first question posed by Näsström, namely, whether a-legality epitomizes a specific mode of political organization: democratic self-government. This is a topic FLG doesn't develop, or at least not directly, as it is primarily concerned to outline the general conceptual and normative framework of a politics of boundaries. I would argue, however, that a-legality and its attendant politics of boundaries need not be limited to modern democracy. There are several indications to this effect in the book, most notably the analysis of the relation between a constitution and collective self-empowerment in Section 3.5.

Yet I would like to take up Näsström's question in the following way: how should we understand a democratic politics of boundaries in light of a-legality? Most abstractly, it seems to me that the two interpretations of modernity outlined above suggest two different interpretations of democracy: one which views it as a politics of boundaries aimed at overcoming a-legality; the other, as a politics of boundaries that would deal with a-legality. The first is a politics of boundaries oriented to *totalization*. The normative core of this version of a democratic politics of boundaries is the ideal of mutual or reciprocal recognition. The second version of a democratic politics of boundaries is oriented to what might be called the *entwinement* of the own and the strange. Negatively, the notion of entwinement rejects totalization as the *telos* of a democratic politics of boundaries. Positively, the notion of entwinement argues that the normative core of an alternative version of a democratic politics of boundaries is what I would call the *asymmetrical* recognition of the strange(r), that is, a politics of boundaries whereby the response to the challenge of a-legality recognizes the strange(r) as one of us *and* as irreducibly strange. This reading of recognition interprets democracy as *restrained* collective self-rule; it is the interpretation of democracy that follows from FLG, even though the book doesn't directly address this set of issues.

These considerations lead to Näsström's second question, namely, the basis for the claim that collective self-restraint is the appropriate normative response to a-legality, in the face of experience of fear that the a-legal can call forth. This question impinges directly on the problem of security, both individual and collective. The fear (and, in varying degrees, fascination) sparked by a-legal behavior points to two dimensions of insecurity. On the one hand, there is the insecurity propitiated by illegality; a-legal acts, to the extent that they are illegal, generate insecurity by imperiling the capacity of a group of individuals to order their interpersonal relations in accordance with the normative point of joint action. I call this a "secondary" form of insecurity. On the other hand, a-legal acts, to the extent that they open up other ways of ordering interpersonal relations, generate insecurity in its "primary" form: *that* we are a collective and *what* we are a collective is called into question. The most extreme manifestation of the relation between a-legality and

insecurity is terrorism. By qualifying an act as terrorist, the authorities of a polity deny that this act can be the index of another legality, claiming, instead, that it is the expression of sheer illegality, hence that it is the acute manifestation of what I called a secondary form of collective insecurity. Paradoxically, an a-legal act which definitively eludes the distinction between legality and illegality, as posited by a polity, is qualified as the definitive confirmation thereof, such that there is no option—or so authorities claim—but to enforce legality. In this sense, terrorism is an *absolute* concept. Why, then, exercise collective self-restraint in the face of terrorism? FLG suggests two arguments to this effect. The first turns on the retroactivity of legal responses to a-legality: that an act is an act of terrorism is never entirely independent of its *responsive framing* as such. Self-restraint in the face of terrorism is the way in which a collective indirectly acknowledges that there is an inevitable framing effect in its qualification of an act as terrorist. The second follows from the first: terrorism, like all manifestations of a-legality, is a *relational* concept insofar as it presupposes the first person plural perspective of a given We. The failure of the Bush Administration to obtain worldwide consensus on an univocal definition of terrorism shows that there is no bird's eye view of what counts as terrorism, no “universal,” subject-independent definition thereof. Self-restraint is the way in which a collective indirectly acknowledges the relational character of what manifests itself to it as absolute.

Stefan Rummens offers an extended critique of FLG along two fronts. On the one hand, he argues that FLG's objections to Habermas' discourse theory of law misconstrue it in important ways, thereby underestimating its capacity to accommodate the contingency of legal order. On the other, Rummens raises questions about the relation between normativity and contingency espoused by a theory of a-legality. He develops these two sets of objections in considerable detail; I can only address here what I take to be the most important issues.¹

Let me begin by immediately acknowledging that FLG is long on conceptualizing the relation between legal orders and their boundaries, and short on working out the normative implications thereof. Whereas the first six chapters are broadly conceptual in character, only chapter seven—the last of the chapters—engages directly with normative issues. There are two excellent reasons for this imbalance. The first is the absence of a sustained and systematic analysis in contemporary legal theory of how boundaries structure legal orders and of the peculiar dynamic governing how boundaries are set. The second is that normative accounts of legal order and ordering nonetheless *do* rely on a more or less implicit interpretation of

¹ In particular, I would have wanted to respond to his concern about my reading of Benhabib's discussion of immigrant rights. I refer the reader to (Lindahl 2009) for the full-blown development of the argument against Benhabib, which could only be presented in highly abridged form in FLG.

how boundaries do their work of including and excluding. By concentrating largely on conceptual analysis, I have sought to fill a theoretical lacuna in contemporary legal and political theory and to prepare the ground for an alternative normative theory, showing how the way in which boundaries are conceptualized is of crucial importance to developing a viable account of legal normativity. The price to be paid for this approach is that the normative account of chapter seven remains unsatisfactory in at least two ways. On the one hand, the chapter goes no further than sketching out the boldest lines of a normative theory of legal order alternative to particularism and universalism; what normative light it could shed on, say, the concepts of justice, freedom, (in)equality, and security are issues which remain pending. On the other hand, the chapter does not engage in a full-blown discussion of the normative positions it critiques, thereby running the risk of being unfair in its critique. Rummens' objections ably illustrate these shortcomings, and I would like to take this opportunity to further clarify areas of convergence and divergence between Habermas' evolving discourse theory of law, as interpreted by Rummens, and the normative approach to legal ordering suggested by FLG.

Rummens' first objection is that I misconstrue the nature of legal discourse in Habermas, for whom, "just like moral discourse, [legal discourse] is a 'constructive' and 'bottom up' process whereby people start from real situations and real problems in their actual society and try to come up with 'local' solutions." My own account of legal orders as standing out against and emerging from the background normativity of social interaction is very much in line with, and confirms, the continuity between moral and legal discourses, or so he argues, such that the legal discourse "allows for the proper institutionalization of moral discourse" aimed at the "construction of a moral 'we-perspective'," an expression that I would presumably be only too keen to use.

I respectfully submit that the critical thrust of FLG is oriented to rejecting each of the key presuppositions that inform this account of legal discourse. FLG nowhere refers to a "moral 'we-perspective'" as the *telos* of a legal discursive process oriented to reaching agreement in the face of boundary-challenges; moreover, FLG rejects the assumption that law allows for the proper institutionalization of a moral discourse; finally, it takes issue, as a matter of principle and not merely in fact, with the assumption that legal discourse can ever be a merely "bottom up" process.

The critical thrust of FLG is directed against the *continuity* between law and morality presupposed by a theory of legal discourse. The ACA-model of law entails that the institutional character of legal ordering highlights a crucial *discontinuity* between law and morality. The first-person plural perspective of a We in legal action involves the authoritative monitoring of joint action, which includes the monitoring of conflict about joint action. Crucially, authorities claim for themselves the right to settle, in the last instance, which normative challenges to a legal order

are *admissible* in a legal discourse oriented to resolving conflict and what is the *appropriate response* thereto. Again: legal authorities claim for themselves the right to ultimately determine the bounds within which the transformation of a legal order is permissible, and precisely because what is at stake is maintaining the unity of a collective, that is, ensuring that the transformation of a legal order, in response to a-legal challenges, allows for the collective's continued self-identification. The relation to the other deployed by a legal discourse is and remains essentially *asymmetrical*. I by no means assume, as Rummens suggests, that Habermas favors a "top-down," substantively determined concept of legal order. Instead, what FLG seeks to point out, *contra* Habermas and *contra* Rummens, is that legal discourse does not start "as soon as someone says 'no' to given practices and challenges existing norms because he or she feels that they are no longer justifiable." A legal discourse has already begun *earlier*, with a *non-discursive closure* which, although more or less transformable, frames in advance the terms in which a collective can acknowledge and respond to normative challenges, and which ruins any attempt to reconstruct the normative content of a politics of boundaries in terms of an "ideal" speech situation, regardless of whether it is construed transcendently or otherwise.

It is for this very reason that I have insisted, at the outset of this Reply to Critics, that the relation between a legal order and societal interaction is not the relation between a particular and a general normativity, such that the parties to legal conflict dip into the normative resources of the latter to "restore agreement" in the former. While societal normativity certainly provides normative material for justifications of the normative stances defended by parties in conflict, it attests to normative impossibilities as much as it does to joint possibilities in the form of agreement. The point, then, is not, as Rummens argues, that the legal discourse draws on societal normativity to reach agreement on "local problems" because it makes no sense to think that the legal discourse could rationalize the social world as a whole. The point is, rather, that it is at the *local* level in which societal interaction manifests itself as orderable and unorderable to a given legal order, as the *location* and irreducible *dis-location* of normative claims and counterclaims. This by no means entails an endorsement of the "separation" of law and morality in the spirit of legal positivism; it means that we need to understand their relation otherwise than in the terms postulated by the discourse theory of law. As argued in chapter seven of FLG, albeit in a very tentative way that requires far more detailed elaboration, the morality of law would not reside in legal obligations being a particular instantiation of relations of reciprocity between human beings as humans, but rather in the collective's disposition to restrain from neutralizing or destroying the bearers of normative claims which *resist* inclusion into the circle of legal reciprocity.

These considerations lead over into the second of Rummens' objections: discourse theory is not oriented to the elimination of the "strangeness" of the other: the whole thrust of Habermas' thinking is oriented, as Rummens puts it, to "the inclusion of the other *as a stranger*," an injunction which I would surely want to endorse. The fundamental question here is this: what concept of strangeness is available to the Habermasian injunction to include the other as a *stranger*?

The core of an answer is to be found in a passage in the introduction to Habermas' late work, *The Inclusion of the Other*: "solidarity with the other *as one of us* refers to the flexible 'we' of a community that resists all substantial determinations and extends its permeable boundaries ever further." (Habermas 2005, xxxv-xxxvi) Notice the shift: the inclusion of the other "as a stranger" means the inclusion of the other "as one of us." For Habermas and for Rummens there need be no loss, no assimilation involved in this passage. This is exactly where I part ways with both Habermas and Rummens. The strange, in its strong dimension discussed in FLG, is what raises a normative claim that *resists* inclusion "as one of us," that *resists* equalization as a particular under a general norm.

The reductive reading of strangeness I reject is connected to an ambiguity of the German term *Inklusion*, which means both inclusion (*Einschließung*) and integration (*Einbeziehung*). Whereas Habermas opposes the first term to exclusion (*Ausschließung*), he introduces no oppositional term for the second. (Habermas 1998, 139) The idea behind this conceptual distinction is to sketch out an alternative to forms of democracy that include by excluding, as reflected in the disjunction announced in the title of the article which develops the distinction: *Inklusion—Einbeziehen oder Einschließen?* For a discourse theory of law, the strange is strange to the extent that it can be "integrated" without loss or assimilation into a collective "as one of us" because it is a form of strangeness that, by way of a dialectic of the particular and general, can come to be seen as a particular instantiation of a norm which is deemed common to all members of a collective: *e pluribus unum*. Habermas has this derivative sense of strangeness in mind when stating that "[t]he 'inclusion of the other' means rather that the boundaries of the community are open for all, also and most especially for those who are strangers to one another and want to remain strangers'." By contrast, for a phenomenology of a-legality the strong dimension of the strange is the normative remainder that resists inclusion as one of us because there can be no "integration" (*Einbeziehung*) other than as an act that excludes in the very process of including. *Einbeziehung* is quite simply always an *Einschließung*, hence also an *Ausschließung*. If *Einbeziehung* means a bringing into relation (*Bezug*), the strange is what withdraws in the very process of being brought into a normative relation: an *Entzug*. (Waldenfels 1994, 201 ff.) No "struggling for words" here, as Rummens thinks, other than the attempt to find a vocabulary for illuminating what cannot be said in a theory of legal discourse.

In short, the concepts of the strange and of inclusion which a discourse theory of law is prepared to accept are those which facilitate a rational process the end state of which Habermas, in a late text, qualifies as “complete inclusion” (Habermas 2001, 148). The *telos* of the legal discourse by which “a flexible ‘we’ . . . resists all substantial determinations and extends its permeable boundaries ever further,” is to progressively overcome strangeness, to progressively overcome contingency, even if the realization of “the ideal of an intact intersubjectivity” (Habermas), i.e. of “full reconciliation and full reciprocity” (Rummens), must be postponed infinitely in time. This is the “dogmatic core” of the concept of autonomy defended by a discourse theory of law. And it is in this sense that, all claims to the contrary (Habermas 1992, 144-145; Benhabib 2006, 20), a discourse theory of law is “open-ended”: open to *totality* as the end of reason.

That one must commit to this understanding of reason if one is to be the advocate of a discourse theory of law is to acknowledge, in Rummens’ words, that “there is a moment of choice—albeit a choice without alternatives—involved in our commitment to the possibility of normative justification and the idea of freedom.” Strictly speaking, there is of course an alternative: the choice for irrationality, for the self-destruction of reason, rather than its self-preservation. For discourse theory, whoever refuses to engage in justifying her/his a-legal challenge to a given legal order is irrational and walks away from freedom, hence needn’t be taken seriously. The problem is, however, that freedom, in all its concreteness, is not about the resolve to engage in justificatory practices in the legal discourse, in the singular: there are legal discourses in the plural, each of which opens up a range of normative claims that can be justified therein, while closing down a range of other possible justifications. Whoever raises a normative challenge to a given legal order, yet refuses to justify it to participants therein, is not necessarily walking away from justification altogether: s/he may well be walking away from justification in *that* legal order and because of the kinds of justifications it makes available and those it shuts down. Legal orders do not bring forth “the” domain of freedom in the singular, not even if its realization must be postponed *ad infinitum*; they bring forth domains of freedom in the plural, which allow for limited transformation and for variable intertwinements with other domains of freedom, but not for their totalization in “complete inclusion.” This understanding of a politics of boundaries does more justice, I think, to the open-endedness of a politics of boundaries than the totalizing model of legal rationality championed by Habermas *cum suis*.

I conclude with some brief comments concerning Rummens’ critical questions about the normative position outlined in FLG. A first question concerns the source of an obligation of forbearance towards what resists inclusion in a legal order. In other words, the question is what could justify an obligation to preserve the strange by way of self-restraint, especially if, as Schmitt argues, the strange is what can and should be destroyed. I can do no more here than offer some indica-

tions of the direction in which I would want to address this important question. I take my cue from Habermas' thesis, as cited by Rummens: "Each must be able to recognize him- or herself in all that wears a human face." Habermas stands shoulder to shoulder here with Jeremy Waldron, who, in defense of cosmopolitanism, appeals to Terence's famous dictum, "I am a man, I consider nothing that is human alien to me." FLG argues, against Waldron, that because the experience of the alien or strange is an irreducible feature of social life, whoever endorses this dictum ends up endorsing its inverted form: what is strange or alien is inhuman (or subhuman). Against the claims that nothing human is strange, and that the strange is in-or subhuman, FLG defends the humanity of the strange. It seems to me that a comparable shift is required with respect to Habermas' thesis: each can *and cannot* recognize him- or herself in all that wears a human face. It is in this way that I would like to draw on the Levinasian motive of the "face"—a face, incidentally, which is not only the face of the human but also of other sentient, and perhaps even non-sentient, beings—to make sense of a non-relational obligation to preserve the strange as a constitutive feature of the morality of law. Instead of interpreting justice as mutual or reciprocal recognition, as endorsed by Habermas' thesis, the shift I propose suggests that justice should be understood as *asymmetrical recognition*, that is, a politics of boundaries which recognizes the stranger as one of us and as irreducibly strange.

The second of Rummens' critical questions follows up on the first, and concerns the viability of a normative theory that would link together relational and non-relational obligations: don't the latter necessarily collapse into the former? And if they do, isn't the strange that which can be recognized—and included—as one of us because it brings to our attention a practical possibility we can recognize as one of our own possibilities? This is also Christodoulidis' question, but raised from the opposite direction, as it were: whereas Christodoulidis would invite me to resolutely push a-legality into the incommensurability of the absolutely strange, which does not register at all in a given legal order, Rummens would have me pull a-legality back in from the cold, into the safe fold of what is commensurable for a given legal order, such that, once the dialectic has done its work, the strange becomes a particular instance of a (transformed) general rule. From opposing directions, both would collapse a-legality into (il)legality. I decline their invitations, for the reasons indicated in my responses to Christodoulidis and Rummens, but gratefully concede to both that the task for a phenomenology of a-legality is to clarify what it means that asymmetrical recognition is the normative core of just a politics of boundaries.

Neil Walker's response invites me to consider what further lines of research follow from the ideas set out in FLG, as regards general legal theory as well as law in a global setting. In both cases, he notes, the challenge that must be met by a theo-

ry that focuses so emphatically on a reconstruction of legal order from a first-person plural perspective is to incorporate the “objective” side of social theory into its account of law. I welcome the opportunity to indicate, albeit very sketchily, how I plan to further pursue the line of inquiry outlined in FLG, and how this inquiry could address at least some of his concerns with regard to general legal theory and to law under globalization. In a nutshell, fleshing out more fully the ACA-model of legal order is pivotal to dealing with both concerns.

With respect to general legal theory, the main challenge is to more fully develop the notion of authority at issue in the ACA-model of legal order. Chapter 3 of FLG outlines a *functional* concept of authority, defining it in terms of what authorities do: monitoring and enforcing joint action. Yet a functional approach sidelines the practical question to which collectives must respond when drawing boundaries: what *ought* our joint action to be about? Chapter 7 goes part of the way in articulating the normative conception of authority which is presupposed by its functional characterization in the ACA-model of legal order. But the question that remains unanswered in FLG is what, under these conditions, could be a *positive* characterization of authority. My hunch, as mentioned earlier, is that, given the responsive nature of a politics of boundaries, a response that sets boundaries is authoritative, normatively speaking, to the extent that it deploys an *asymmetrical recognition* of the normative claim raised by the strange(r). In fact, it seems to me that asymmetrical recognition is the core of the concept of *justice*. In short, the problem of authority offers the opportunity for carrying further the line of inquiry opened up by FLG in a way that highlights its continuities and discontinuities with contemporary political and legal theory, while also drawing on social theory to test its capacity to reconstruct the normative import of a wide range of societal “struggles for recognition.”

This is, however, only part of the theory of legal authority I would want to develop more fully. The other part turns on the insight that *recognition is also always cognition*. Indeed, FLG indicates on several occasions that the strange appears as what is unintelligible, as what cannot be understood, in contrast to the domain of the familiar. Yet it leaves unexplored how this cognitive dimension fits in with the normative resistance of a-legality. The question, “How do you *know* whether someone’s behavior is a-legal?”, which has often been put to me in the aftermath of FLG, is interesting not so much because there could be a point of Archimedes from which it would be possible to decide whether an act is simply (il)legal or a-legal—there isn’t—but rather because it points to the cognitive dimension that is always involved in the normative qualification of behavior, both of ourselves, as a group, and of those who call us into question. In this sense, “is” and “ought” are entwined in the exercise of legal authority, such that a response to the normative question—“Who *ought* we to be?”—is also a response to the factual question—“Who *are* we?” This is the way, I believe, that Walker’s invitation to

take account of the “objective” side of social theory can and should be embraced by a first-person plural approach to legal order. On the one hand, what ought to be rendered to each as their own cannot be settled on merely normative grounds; doing justice demands appropriate knowledge of the factual context in which legal boundaries are to be posited. The exercise of legal authority involves an epistemic dimension that opens it up to social theorizing in a broad sense of the term. On the other hand, it would seem that the “objective” side of social theory involves a first-person plural perspective to the extent that *cognition is also always recognition*. Normative and epistemic authority are connected to each other in the process of setting the legal boundaries of collective action, and it should be a main concern of the ACA-model of legal order to understand how this takes place.

Certainly, these considerations do no more than suggest what might be the systematic locus of the “objective” side of social theory in a first-person plural account of the concept of authority apposite to legal order in general. The further question, however, is how social theory could enrich a first-person plural account of legal order in the context of *globalization*. In this respect Twining notes that, in addition to the “identity” and “individuation” questions, there is a third question which informs contemporary legal theory. This is the “taxonomy” question: what significant classifications allow of distinguishing between legal orders? (Twining 2009, 64 ff) I take this question, in a broad and sociologically rich sense of the term, to be the second of Walker’s concerns about where FLG could take us.

Here again, I believe that ACA offers a blueprint for further inquiry that could address this concern. FLG avers that the ACA-model of law is sufficiently capacious to accommodate a wide range of putative legal orders, while also sufficiently flexible to permit differentiating them in meaningful ways. Arguably, FLG makes a strong case for the former; but, as Walker correctly notes, it falls short of mapping the specific features which positively characterize legal orders in a global context. I see two axes along which to integrate social theory, in particular sociologies of globalization, into a positive account of law in a globalizing context. The first focuses on the structural components of ACA itself: action; collective action; authority. The idea would be to show that the transformations leading from the state-centered paradigm of law to the emergence of transnational and global law can be understood as transformations of each of these structural components.

So, for example, if legal orders structure *action* by determining its spatial, temporal, subjective, and material boundaries, the question is how globalization processes give rise to new kinds of boundaries. What would be required is to put into place a conceptual framework that could show how different kinds of ACA give rise to different ways of drawing boundaries, each with their own kind of “precision” and “fixity.” Indeed, depending on their normative point and institutional form, different kinds of ACA call forth altogether different sorts of scales of preciseness and impreciseness. To chart these differences, drawing on the findings of sociolo-

gies of globalization, should be an important task for the ACA-model of law in a global context.

If we turn to the second structural component of ACA, *collective* action, a similar picture emerges. There are at least two kinds of transformations germane to collective action, and which should be accounted for by the ACA-model of law. The first concerns the point of collective action, which should operate as the focus of an inquiry into the *functional differentiation* of legal orders typical of the contemporary legal context. Secondly, the notion of collective action serves as the point of departure for an inquiry into the emergence of what the contemporary literature calls *regimes, networks, and rhizomes*.

Finally, parallel transformations are visible with respect to authority. As concerns the monitoring of joint action, the ACA-model of legal order should be able to integrate a host of new normative instruments, such as model contracts as deployed in certain sectors of *lex mercatoria*, the regulations drawn up by international accounting organizations, and technical regulations and standards. Importantly, I envisage broadening the concept of authoritative monitoring of collective action to accommodate the distinctive contribution of *scholarship* and *legal practice* to the development of global law (Walker 2014). The ACA-model also welcomes an inquiry into the *dédoublement* of the monitoring and enforcement functions of authority, as in *lex mercatoria*, where arbitration tribunals will monitor joint action, while states will be entrusted with the enforcement of awards handed down by those tribunals. Finally, the enforcement component of authority also opens up space for discussing the emergence of “soft law,” in contrast to “hard law.”

If these are some of the ways in which the ACA-model of law makes for a sociologically informed taxonomy of legal orders in a global setting, there is also a second axis along which it can be developed more fully. This axis concerns what I would call the political, technological, and economic circumstances of ACA in a global setting. In particular, the crisis and partial reconfiguration of the public/private distinction (politics), the compression of space and time (technology), and the marketization (economy) that characterize emergent global legal orders can and should be reconstructed in terms of the ACA-model of law. Admittedly, this approach involves a decisive methodological constraint, which determines how the “objective” side of social theory can be rendered fruitful for a theory of legal order as a first-person plural concept. To the extent that law in a global setting, like all law, does not exist in isolation from politics, the economy, and technoscience, each of these domains of action needs to be integrated into an analysis that tries to pin down the distinctive features of ACA in a global setting. Nevertheless, the integration this requires would not take place in the spirit of a theory of “law and (global) society,” which privileges political, economic, or techno-scientific approaches to law. Instead, what would interest me is to explore how these domains

of action play a role in making sense of law *as ACA*, that is, as a specific way of organizing the first-person plural perspective of a We in authoritatively mediated joint action. It is for this reason that I refer to these domains as the *circumstances* of ACA in a global setting.

From the point of view of the central problem of FLG, namely, the boundaries, limits, and fault lines of legal orders, this sociologically informed approach to law in a global setting calls forth a final and fundamental problem. Somewhat provocatively, FLG notes in passing that, from the perspective of the fundamental form of the inside/outside distinction, globalization is a distraction. While I think this assertion still holds, it nonetheless invites an inquiry at the intersection between the sociology of *globalization* and a phenomenology of legal *worlds*. This inquiry remains largely untrammelled ground for FLG, which goes no further, in the Conclusion, than introducing, in a rudimentary and preliminary fashion, the central problem of the world, in a phenomenological sense, as the horizon of all theorizing about law in a global setting. It seems to me that the task for a sociologically informed phenomenology of law that aspires to carry further the ideas developed in FLG would be to understand how and why globalization is an enworlding (*Verweltlichung*), and precisely because not all legal enworlding is a globalization. At issue in this further inquiry is, ultimately, what it could mean, both normatively and conceptually, that legal orders in a global setting speak to globalization as the emergent intertwinement of home- and strange worlds.

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