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Jorge Luis Fabra-Zamora

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Résumé de l'article

La tradition intellectuelle du pluralisme juridique se caractérise par son contraste avec la tradition du centralisme juridique ou du monisme. Les pluralistes auto-proclamés attribuent habituellement des idées centralistes ou monistes aux principales théories de droit, appelées ici « jurisprudence analytique ». La présente étude démontre que ce contraste fondamental entre pluralisme juridique et jurisprudence analytique souffre de trois lacunes. Tout d'abord, les arguments des pluralistes s'opposant à la jurisprudence analytique confondent des questions conceptuelles avec des réflexions empiriques, doctrinales et politico-morales. Ensuite, les pluralistes commettent l'erreur de considérer que les tenants de la jurisprudence analytique assimilent le droit à la prérogative étatique, alors que ces derniers ne défendent pas, et peuvent aisément rejeter, une telle position. Finalement, les pluralistes traitent les problématiques relatives à la théorie du droit en s'appuyant sur des définitions et des méthodologies réductives qui ont été rejetées par les tenants de la jurisprudence analytique depuis longtemps. La thèse centrale de cette étude est que ce trio de lacunes, qui a également été incorporé au processus de réconciliation nommé « jurisprudence pluraliste », devrait être écarté.

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Legal Pluralism and Analytical Jurisprudence: An Inapposite Contrast

*Jorge Luis Fabra-Zamora**

The intellectual tradition of legal pluralism characterizes itself by way of a contrast to legal centralism or monism. Self-styled pluralists typically attribute centralist and monist views to mainstream theories of law, which I call here analytical jurisprudence. This article argues that the pluralist foundational contrast with analytical jurisprudence suffers from three recurrent defects. First, the pluralist opposition to analytical jurisprudence conflates conceptual questions with empirical, doctrinal, and politico-moral inquiries. Second, pluralists misattribute to analytical jurisprudents an equation between law and state that they do not hold and have the resources to reject. Third, pluralists address the conceptual problems of legal theory by relying on definitions and other reductive methodologies long rejected by analytical jurisprudents. My central claim is that this trio of recurrent defects, which has also been incorporated into the reconciliatory project termed "pluralist jurisprudence," should be laid to rest.

La tradition intellectuelle du pluralisme juridique se caractérise par son contraste avec la tradition du centralisme juridique ou du monisme. Les pluralistes auto-proclamés attribuent habituellement des idées centralistes ou monistes aux principales théories de droit, appelées ici « jurisprudence analytique ». La présente étude démontre que ce contraste fondamental entre pluralisme juridique et jurisprudence analytique souffre de trois lacunes. Tout d'abord, les arguments des pluralistes s'opposant à la jurisprudence analytique confondent des questions conceptuelles avec des réflexions empiriques, doctrinales et politico-morales. Ensuite, les pluralistes commettent l'erreur de considérer que les tenants de la jurisprudence analytique assimilent le droit à la prérogative étatique, alors que ces derniers ne défendent pas, et peuvent aisément rejeter, une telle position. Finalement, les pluralistes traitent les problématiques relatives à la théorie du droit en s'appuyant sur des définitions et des méthodologies réductives qui ont été rejetées par les tenants de la jurisprudence analytique depuis longtemps. La thèse centrale de cette étude est que ce trio de lacunes, qui a également été incorporé au processus de réconciliation nommé « jurisprudence pluraliste », devrait être écarté.

* Associate Professor, University at Buffalo School of Law, State University of New York, jorgefab@buffalo.edu. I am thankful to Stefan Sciaraffa, Michael Giudice, Andrés Botero-Bernal, Enrique Cacéres-Nieto, Gonzalo Villa-Rosas, and Jorge Sánchez-Pérez for helpful discussions about the central ideas of this article. I also thank the anonymous reviewers and the *McGill Law Journal* editorial team for their insightful comments and recommendations.

https://orcid.org/0000-0002-6716-7193

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Introduction

Since the 1970s, much of the academic discussion regarding the existence, operation, and legitimacy of putative forms of non-state legal phenomena has been advanced under the heading "legal pluralism."[1] Empirical and legal scholars who self-identify with this label often characterize it by way of a contrast with "centralist" or "monist" views, which are chiefly attributed to "orthodox," "mainstream," or "established" theories of law. Below, I will more precisely identify the object of the pluralist opposition with one particular theoretical project widely known as "analytical jurisprudence."

This article criticizes the foundational pluralist opposition to analytical jurisprudence, which partly characterizes legal pluralism as an intellectual tradition. Part I clarifies the contested terms of the dispute by distinguishing between different understandings of legal pluralism and analytical jurisprudence. The article then identifies three primary defects in

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[1] See generally John Griffiths, "What Is Legal Pluralism?" (1986) 18:24 J Leg Pluralism & Unofficial L 1 [J Griffiths, "What Is Legal Pluralism?"]; Sally Engle Merry, "Legal Pluralism" (1988) 22:5 Law & Soc'y Rev 869 [Merry, "Legal Pluralism"]; Gordon R Woodman, "Ideological Combat and Social Observation: Recent Debate about Legal Pluralism" (1998) 30:42 J Leg Pluralism & Unofficial L 21 [Woodman, "Ideological Combat"]; Franz von Benda-Beckmann, "Who's Afraid of Legal Pluralism?" (2002) 34:47 J Leg Pluralism & Unofficial L 37 [F von Benda-Beckmann, "Who's Afraid of Legal Pluralism?"]; Anne Griffiths, "Legal Pluralism" in Reza Banakar & Max Travers, eds, *An Introduction to Law and Social Theory* (Oxford, UK: Hart Publishing, 2002) 289 [A Griffiths, "Legal Pluralism"]; Baudouin Dupret, "Legal Pluralism, Plurality of Laws, and Legal Practices: Theories, Critiques, and Praxiological Re-Specification" (2007) 1:1 European J Leg Studies 296 [Dupret, "Praxiological Re-Specification"]; Brian Z Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global" (2008) 30:3 Sydney L Rev 375 [Tamanaha, "Understanding Legal Pluralism"]; William Twining, "Normative and Legal Pluralism: A Global Perspective" (Hebert L Bernstein Memorial Lecture in International and Comparative Law delivered at Duke University School of Law, 07 April 2009), (2009) 20:3 Duke J Comp & Intl L 473 [Twining, "Normative and Legal Pluralism"]; Ralf Michaels, "Global Legal Pluralism" (2009) 5 Annual Rev L & Soc Science 243; Margaret Davies, "Legal Pluralism" in Peter Cane & Herbert M Kritzer, eds, *The Oxford Handbook of Empirical Legal Research* (Oxford, UK: Oxford University Press, 2010) 805 [Davies, "Legal Pluralism"]; Anne Griffiths, "Reviewing Legal Pluralism" in Reza Banakar & Max Travers, eds, *Law and Social Theory*, 2nd ed (Oxford, UK: Hart Publishing, 2013) 269 [A Griffiths, "Reviewing Legal Pluralism"]; John Griffiths, "Legal Pluralism" in James D Wright, ed, *International Encyclopedia of the Social & Behavioral Sciences*, 2nd ed, vol 13 (Amsterdam: Elsevier, 2015) 757 [J Griffiths, "Legal Pluralism"]; Keebet von Benda-Beckmann & Bertram Turner, "Legal Pluralism, Social Theory, and the State" (2018) 50:3 J Leg Pluralism & Unofficial L 255.

the pluralist charge. First, Part II describes how the pluralist opposition to analytical jurisprudence conflates conceptual questions of jurisprudence with doctrinal and politico-moral inquiries. Second, Part III explains that self-styled pluralists misattribute to jurisprudents an equation between law and state. Here, the article introduces the neglected distinction between the concepts of law and legal systems that allows for a more robust response to the pluralist charge. Third, Part IV claims that while self-styled pluralists recognize the need to resolve the storied conceptual question of analytical jurisprudence, many of them rely on reductive, long rejected definitional projects. Part V further argues that the recognition of these shortcomings influences the legal pluralist agenda and the reconciliatory project of "pluralist jurisprudence." In conclusion, the legal pluralist tradition should put this trio of recurrent defects to rest.

I. Preliminary Clarifications

I begin my argument by illuminating the terms of the dispute, legal pluralism and analytical jurisprudence, both of which have been subject to persistent confusion and controversy. For the sake of clarity, I shall distinguish between two understandings of each of these notions.

A. Legal Pluralism as a Fact

Legal pluralism is one of the central themes of contemporary legal studies. It has been described as "a central theme in the reconceptualization of the law/society relationship,"[2] "[a] key concept in [the] postmodern view of law,"[3] and a "new paradigm, as far as the social scientific study of law is concerned."[4] There were references to "plurality of legal systems" in Santi Romano's work,[5] and the expression "legal pluralism" was used by Georges Gurvitch to denote the possibility of several coexisting legal orders operating in a given jurisdiction.[6] However, the standard contempo-

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2 Merry, "Legal Pluralism", *supra* note 1 at 869.

3 Boaventura de Sousa Santos, "Law: A Map of Misreading. Toward a Postmodern Conception of Law" (1987) 14:3 JL & Soc'y 279 at 297 [Santos, "Law"].

4 John Griffiths, "Legal Pluralism and the Theory of Legislation - With Special Reference to the Regulation of Euthanasia" in Hanne Petersen & Henrik Zahle, eds, *Legal Polycentricity: Consequences of Pluralism in Law* (Aldershot: Dartmouth, 1995) 201 at 201 [J Griffiths, "Theory of Legislation"].

5 Santi Romano, *The Legal Order*, translated by Mariano Croce (Abingdon: Routledge, 2017) (first published in 1917–18).

6 Georges Gurvitch, *Le temps présent et l'idée du droit social* (Paris: Librairie Philosophique J Vrin, 1931); Georges Gurvitch, *L'expérience juridique et la philosophie pluraliste du droit* (Paris: Pedone, 1935). According to Keebet von Benda-Beckmann and

rary use of legal pluralism began in the 1970s in legal anthropology, legal sociology, and legal history. The work of Franz von Benda-Beckmann,[7] an influential collection of articles in French,[8] and Arthur Schiller's and M.B. Hooker's seminal publications in English[9] are often recorded as the starting point of the contemporary use.

Legal pluralism quickly became an established concept after the canonical formulations by John Griffiths and Sally Engle Merry,[10] and has since expanded beyond its original purview. Nowadays, legal pluralism is also regarded as the "standard fare" in comparative law, international law, and transnational law.[11] Despite its success, it is not easy to formulate an account of legal pluralism that satisfies all those who self-identify with the label. Legal pluralism has been called a "sensitizing concept,"[12] an "ethos,"[13] a "framework,"[14] a "tool,"[15] and a "conception of law."[16] How-

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Bertram Turner, Gurvitch was the first person who used the expression "legal pluralism" to denote the co-existence of legal orders (see K von Benda-Beckmann & Turner, *supra* note 1 at 262).

7 See generally Franz von Benda-Beckmann, *Rechtspluralismus in Malawi: Geschichtliche Entwicklung und heutige Problematik* (München: Weltforum Verlag, 1970) [F von Benda-Beckmann, *Rechtspluralismus in Malawi*]; Franz von Benda-Beckmann, *Legal Pluralism in Malawi: Historical Development 1858-1970 and Emerging Issues* (Zomba: Kachere Series, 2007).

8 See John Gilissen, *Le pluralisme juridique* (Brussels: Éditions de l'Université de Bruxelles, 1972); Jacques Vanderlinden, "Le pluralisme juridique: Essai de synthèse" in John Gilissen, ed, *Le pluralisme juridique* (Brussels: Éditions de l'Université de Bruxelles, 1972) 19 [Vanderlinden, "Le pluralisme juridique"]; Jean-Guy Belley, "Pluralisme juridique" in André-Jean Arnaud, ed, *Dictionnaire encyclopédique de théorie et de sociologie du droit*, 2nd ed (Paris: Librairie Générale de Droit et de Jurisprudence, 1993) at 446.

9 See Arthur Schiller, "Law" in Robert A Lystad, ed, *The African World: A Survey of Social Research* (New York: Frederick A Praeger, 1965); MB Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Oxford, UK: Clarendon Press, 1975).

10 See Merry, "Legal Pluralism", *supra* note 1; J Griffiths, "What Is Legal Pluralism?", *supra* note 1.

11 See Catherine Valcke, "Three Perils of Legal Pluralism" in Seán Patrick Donlan & Lukas Heckendorn Urscheler, eds, *Concepts of Law: Comparative, Jurisprudential, and Social Science Perspectives* (Farnham: Ashgate, 2014) 123 at 123.

12 K von Benda-Beckmann & Turner, *supra* note 1 at 264.

13 Margaret Davies, "The Ethos of Pluralism" (2005) 27:1 Sydney L Rev 87 [Davies, "Ethos of Pluralism"].

14 Sally Engle Merry, "Legal Pluralism in Practice" (2013) 59:1 McGill LJ 1 at 3 [Merry, "Legal Pluralism in Practice"]; Marieke Janne Hopman, "A New Model for the Legal Pluralist Study of Children's Rights, Illustrated by a Case Study on the Child's Right to Education in the Central African Republic" (2019) 51:1 J Leg Pluralism & Unofficial L 72.

15 Prakash Shah, *Legal Pluralism in Conflict; Coping with Cultural Diversity in Law* (London, UK: Glass House Press, 2005) at 1–10.

ever, like all other labels in the history of ideas (e.g., positivism, realism, naturalism, etc.), self-styled legal pluralists are united around a set of fundamental commitments. As far as I can see, the expression legal pluralism is most widely used to refer to a factual claim and an intellectual tradition.

In its standard contemporary use,[17] legal pluralism is most commonly understood as *a factual claim about the coexistence and interaction of legal phenomena*. For example, it has been defined as "the existence, in a certain society, of different legal mechanisms applicable to identical situations;"[18] "the situation in which two or more laws interact;"[19] a "state of affairs, for any social field, in which behavior pursuant to more than one legal order occurs;"[20] "a situation in which two or more legal systems coexist in the same social field;"[21] "the coexistence of a plurality of different legal orders with links between them;"[22] "the coexistence of different normative orders within one socio-political space;"[23] it "might come into being wherever two or more legal systems exists in the same social field;"[24] "the condition in which a population observes more than one law;"[25] "a situation in which two or more laws (or legal systems) coexist in (or are obeyed by) one social field (or a population or an individual);"[26] "the coexistence of two or more autonomous or semi-autonomous legal orders in the same time–space context;"[27] "the deceptively simple idea that in any one geographical space defined by the conventional boundaries of a nation state, there is

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16 J Griffiths, "What Is Legal Pluralism?", *supra* note 1 at 39, n 3.

17 See sources in notes 7–10, *above*.

18 Vanderlinden, "Le pluralisme juridique", *supra* note 8 at 19 [translated by author].

19 Hooker, *supra* note 9 at 6.

20 A Griffiths, "Legal Pluralism", *supra* note 1 at 289.

21 Merry, "Legal Pluralism", *supra* note 1 at 870. See also Sally Engle Merry, "Law: Anthropological Aspects" in Neil J Smelser & Paul B Baltes, eds, *International Encyclopedia of the Social & Behavioral Sciences* (Oxford, UK: Pergamon, 2001) 8489 at 8490 [Merry, "Law: Anthropological Aspects"].

22 André-Jean Arnaud, "Legal Pluralism and the Building of Europe" in Petersen & Zahle, *supra* note 4, 149 at 150 [Arnaud, "Building of Europe"].

23 Franz von Benda-Beckmann, "Citizens, Strangers and Indigenous Peoples: Conceptual Politics and Legal Pluralism" (1997) 9 Intl YB for Leg Anthropology 1 at 1 [F von Benda-Beckmann, "Citizens, Strangers and Indigenous Peoples"].

24 A Griffiths, "Reviewing Legal Pluralism", *supra* note 1 at 2.

25 Gordon R Woodman, "The Possibilities of Co-existence of Religious Laws with Other Laws" in Rubya Medhi et al, eds, *Law and Religion in Multicultural Societies* (Copenhagen: DJOF, 2008) 23 at 26 [Woodman, "Possibilities of Co-existence"].

26 Michaels, *supra* note 1 at 245.

27 Twining, "Normative and Legal Pluralism", *supra* note 1 at 489.

more than one 'law' or legal system;"[28] and "the proposition that more than one manifestation of law exists in many social arenas."[29]

Despite differences in language and theoretical details, most of these citations converge in referring to the coexistence of legal phenomena as the distinctive element of the factual understanding of legal pluralism. I shall capture the "wide consensus"[30] of this factual understanding of legal pluralism in the following proposition:

> LP: Scenario of coexistence and interaction between semi-autonomous legal orders in a certain context.

Some clarifications are in order. First, LP is not the simple existence of many normative orders with the capacity of changing reasons for action (social rules and conventions, religious norms, etc.), sometimes called "normative pluralism."[31] Nor does it merely assert the plurality of state legal systems (i.e., the fact that there are almost 200 state legal systems in the world), or the putative existence of different forms of non-state legal phenomena (i.e., that customary, unofficial, Indigenous, religious, international, and transnational norms are law, and not merely social norms). Instead, LP refers to the possibility that multiple legal orders different from state law coexist in the same place or community and engage in doctrinal relationships with state law and other forms of non-state legal phenomena (e.g., they coincide in regulating the same issues, they assert jurisdiction over the same agents, their norms interact, conflict, and combine, etc.). LP also assumes that the coexisting and interacting legal orders must be different from state law and claim some autonomy. Per this view, disputes internal to a normative order (e.g., the interactions between legislative and judicial powers of a state) or between a given normative order (e.g., conflicts between domestic criminal and tort law) do not typically fall within the purview of legal pluralism.

The scenarios of coexistence and interactions are illustrated in Anglo-American contexts using a linear yet reductive genealogy.[32] "Classical" legal pluralists studied the interactions between state law and different forms of customary, folk, religious, and Indigenous law in contexts of col-

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28 Davies, "Legal Pluralism", *supra* note 1 at 805.

29 Brian Z Tamanaha, "The Promise and Conundrums of Pluralist Jurisprudence" Book Review of *In Pursuit of Pluralist Jurisprudence* by Nicole Roughan & Andrew Halpin, eds, (2019) 82:1 Mod L Rev 159 at 159 [Tamanaha, "Pluralist Jurisprudence"].

30 Michaels, *supra* note 1 at 245.

31 Twining, "Normative and Legal Pluralism", *supra* note 1 at 475.

32 See Tamanaha, "Understanding Legal Pluralism", *supra* note 1; Michaels, *supra* note 1 at 245–46.

onization.[33] "New" legal pluralists studied situations of LP in non-colonial settings, such as the interaction between state law and unofficial laws created by associations, trade unions, marginalized groups, and religious minorities, among others.[34] A third stage comes with "global" legal pluralism, the emergence of new scenarios of coexistence with novel forms of non-state legal phenomena different from both state law and state-based international law, such as human rights law, *lex mercatoria* (transnational commercial law), the European Union, and multinational corporations.[35] However, situations of LP can be found in places different from those highlighted by this genealogy, even before the emergence of the label "legal pluralism." For example, there are instances of LP in Roman law, specifically in the interactions between patrician and plebeian law and between *jus civile* and *jus gentium*.[36] The fact of legal pluralism also existed in medieval European law, where different types of local, personal, and religious law intermingled,[37] and in the Ottoman Empire.[38] From a historical perspective, the state monopoly of coercion central to mainstream theories of law is a historical exception, whereas scenarios of legal pluralism have been the rule.[39] It is critical to note that, in this factual understanding, "[l]egal pluralism is not a theory of law or an explanation of how it functions, but a description ... [that] alerts observers to the fact that law takes many forms and can exist in parallel regimes."[40]

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33 See generally Hooker, *supra* note 9.

34 See Merry, "Legal Pluralism", *supra* note 1 (Merry distinguished between "classical" and "new" legal pluralists at 872–74).

35 See generally Michaels, *supra* note 1; Anne Griffiths, "Pursuing Legal Pluralism: The Power of Paradigms in a Global World" (2011) 43:64 J Leg Pluralism & Unofficial L 173. See also section V.B, *below*.

36 See GCJJ van den Bergh, "Legal Pluralism in Roman Law" (1969) 4:2 Ir Jur 338; Vanderlinden, "Le pluralisme juridique", *supra* note 8 at 20–21.

37 See Tamanaha, "Understanding Legal Pluralism", *supra* note 1 at 377–81; David B Goldman, *Globalisation and the Western Legal Tradition: Recurring Patterns of Law and Authority*, 1st ed (Cambridge, UK: Cambridge University Press, 2007) at 142–43. See also Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass: Harvard University Press, 1983); Paolo Grossi, *L'ordine giuridico medievale*, revised ed (Rome: Laterza, 2006) at 52–53.

38 See Karen Barkley, "Aspects of Legal Pluralism in the Ottoman Empire", in Lauren Benton & Richard J Ross, eds, *Legal Pluralism and Empires, 1500-1850* (New York: NYU Press, 2013) 83.

39 See Lauren Benton, "Historical Perspectives on Legal Pluralism" in Brian Z Tamanaha, Caroline Sage & Michael Woolcock, eds, *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (Cambridge, UK: Cambridge University Press, 2012) 21; Twining, "Normative and Legal Pluralism", *supra* note 1.

40 Merry, "Legal Pluralism in Practice", *supra* note 14 at 2. See also J Griffiths, "What Is Legal Pluralism?", *supra* note 1 at 4, 12.

B. Legal Pluralism as an Intellectual Tradition

The expression "legal pluralism" is also used to refer to a heterogeneous intellectual tradition that recognizes LP as an empirical reality and attempts to explain its various consequences. Some pluralists are primarily interested in *empirical inquiries*—also called "social scientific"[41] or "social-fact[ual]"[42]—that identify and describe putative forms of non-state legal phenomena and characterize how they operate, influence, and are influenced by their specific contexts. Others are occupied with *doctrinal inquiries*—also called "juridical"[43] or "normative"[44]—concerning the use and application of norms in specific instances. Examples of these doctrinal inquiries involve the conflicts between state and non-state regulations in issues such as marriage,[45] property,[46] or human rights;[47] the resolution of disputes when there is the possibility of choice between state and non-state norms[48] or forum shopping;[49] and discussions about the cultural defense in criminal law.[50] Other pluralists advance *politico-moral inquiries*—sometimes also called "normative"[51]—that explore questions concerning the recognition, legitimate authority, or justice of forms of non-state law neglected or belittled by state-centric theories.[52] While they are close-

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41 Brian Z Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism" (1993) 20:2 JL & Soc'y 192 [Tamanaha, "'Social Scientific' Concept"].

42 Twining, "Normative and Legal Pluralism", *supra* note 1 at 486.

43 J Griffiths, "What Is Legal Pluralism?", *supra* note 1 at 10.

44 Victor M Muñiz-Fraticelli, *The Structure of Pluralism: On the Authority of Associations* (New York: Oxford University Press, 2014) at 120, n 5.

45 See Anne MO Griffiths, *In the Shadow of Marriage: Gender and Justice in an African Community* (Chicago: University of Chicago Press, 1997) [A Griffiths, *Shadow of Marriage*].

46 See generally Franz von Benda-Beckmann, *Property in Social Continuity: Continuity and Change in the Maintenance of Property Relationships through Time in Minangkabau, West Sumatra* (Dordrecht: Springer Science & Business Media, 1979); Daniel Bonilla Maldonado, "Extralegal Property, Legal Monism, and Pluralism" (2009) 40:2 U Miami Inter-Am L Rev 213.

47 See generally René Provost & Colleen Sheppard, eds, *Dialogues on Human Rights and Legal Pluralism* (Dordrecht: Springer, 2013).

48 See Hooker, *supra* note 9 at 454–66.

49 See Keebet von Benda-Beckmann, *The Broken Stairways to Consensus: Village Justice and State Courts in Minangkabau* (Dordrecht: Foris Publications, 1984) at 37.

50 See Mitra Sharafi, "Justice in Many Rooms since Galanter: De-Romanticizing Legal Pluralism through the Cultural Defense" (2008) 71:2 Law & Contemp Probs 139 at 142–45; Twining, "Normative and Legal Pluralism", *supra* note 1 at 489–90.

51 Paul Schiff Berman, "Global Legal Pluralism as a Normative Project" (2018) 8:2 UC Irvine L Rev 149 [P Berman, "Normative Project"].

52 See e.g. *ibid*; Marc Galanter, "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law" (1981) 13:19 J Leg Pluralism & Unofficial L 1; PG Sack, "Legal Plu-

ly related and often combined, each inquiry in this trio is distinguishable: to characterize non-state norms as law is different from applying them to specific disputes and from assessing their legitimate authority or justice.[53]

However, many self-styled legal pluralists do not recognize as "pluralists" all of those who view LP as a factual reality and attempt to identify and explain its empirical, doctrinal, and politico-moral implications. Instead, according to a pervasive narrative present in the introductory paragraphs of most pluralist works, pluralism contrasts with an alternative view often labelled "legal centralism" or "monism" that reduces law to state law.[54] J. Griffiths influentially articulated this centralist defect as the view that:

> [L]aw is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions. To the extent that other, lesser normative orderings, such as the church, the family, the voluntary association and the economic organization exist, they ought to be and in fact are hierarchically subordinate to the law and institutions of the state.[55]

Per this view, the centralist or monist purview only recognizes as law norms emanating from, or recognized by, state officials and denies legal status to other putative normative phenomena, thereby denying LP.[56] In contrast, pluralists have identified a constellation of coexisting and interacting legal norms and orders different from state law and have studied their empirical, doctrinal, and politico-moral consequences. Pluralists of-

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ralism: Introductory Comments" in Peter Sack & Elizabeth Minchin, eds, *Legal Pluralism: Proceedings of the Canberra Law Workshop VII* (Canberra: Australian National University, 1986) 1; Martha-Marie Kleinhans & Roderick A Macdonald, "What Is a Critical Legal Pluralism?" (1997) 12:2 CJLS 25.

53 Since I focus on the empirical, politico-moral, and doctrinal inquiries related to LP, I will reserve for a different occasion some other accounts of "constitutional" and "radical pluralism" (see generally Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford, UK: Oxford University Press, 1999); Neil Walker, "Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders" (2008) 6:3/4 NYU Int J Cont L 373; Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford, UK: Oxford University Press, 2010)). In my view, despite sharing the pluralist label, they refer to a different problem concerning the structural arrangements among legal orders.

54 See e.g. Gilissen, *supra* note 8 at 7; Galanter, *supra* note 52 at 1, n 1, 20–21; J Griffiths, "What Is Legal Pluralism?", *supra* note 1 at 2; Merry, "Legal Pluralism", *supra* note 1 at 874; Roger Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Oxford, UK: Clarendon Press, 1995) at 244 [Cotterrell, *Law's Community*]; A Griffiths, *Shadow of Marriage*, *supra* note 45 at 29–31.

55 J Griffiths, "What Is Legal Pluralism?", *supra* note 1 at 3.

56 For additional discussion, see Part IV, *below*.

ten attach such views to views of "orthodox,"[57] "mainstream,"[58] or "dominant"[59] theories of law that develop comprehensive and foundational understandings of law that inform legal practice and academia. For pluralists, mainstream theories have not only set aside the normative phenomena that they should explain but their theoretical projects also incorporate centralist assumptions which render them fundamentally incapable of addressing the problems these phenomena generate. Due to this lack of awareness of normative diversity, some pluralists hold that the kind of work that mainstream legal theorists attempt "is simply out of date and can be safely ignored."[60] Others deny any explanatory value to centralist theoretical insights, for the constellation of non-state legal phenomena "can only be adequately explained by a theory of legal pluralism."[61] As an intellectual tradition, legal pluralism seeks to remedy the defects of standard legal theory and provide a new foundation for legal practice and academia.

The contrast with centralism is crucial to the characterization of the pluralist intellectual tradition. In this tradition, advocates of orthodox theories of law are not considered legal pluralists even if they explicitly recognize LP.[62] Hence, we can characterize the tradition of legal pluralism as defined by two commitments, namely, a factual claim (i.e., the recognition of LP) and a combative element (i.e., the opposition to mainstream theories of law). In my view, this double commitment is what unifies the heterogeneous projects of self-styled legal pluralists such as André-Jean

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57 See e.g. Sidney Richards, "Globalization as a Factor in General Jurisprudence" (2012) 42:1 Netherlands J Leg Philosophy 129 at 137, discussing J Griffiths, "What Is Legal Pluralism?", *supra* note 1. See also Sherman A Jackson, "Legal Pluralism between Islam and the Nation-State: Romantic Medievalism or Pragmatic Modernity?" (2006) 30:1 Fordham Intl LJ 158 at 163.

58 Mariano Croce, "What Is Legal Pluralism All About? The Disquieting Effect of Deconstructing Narratives" (2014) 11 Jura Gentium 164 at 165 [Croce, "What Is Legal Pluralism All About?"].

59 Kleinhans & Macdonald, *supra* note 52 at 25, 46.

60 J Griffiths, "Theory of Legislation", *supra* note 4 at 201.

61 Gunther Teubner, "'Global Bukowina': Legal Pluralism in the World Society" in Gunther Teubner, ed, *Global Law without a State* (Aldershot: Dartmouth, 1997) 3 at 4 [Teubner, "Global Bukowina"].

62 See e.g. Keith Culver & Michael Giudice, *Legality's Borders: An Essay in General Jurisprudence* (New York: Oxford University Press, 2010); Detlef von Daniels, *The Concept of Law from a Transnational Perspective* (Abingdon: Routledge, 2016); Thomas Schultz, *Transnational Legality: Stateless Law and International Arbitration* (Oxford, UK: Oxford University Press, 2014).

Arnaud,[63] Franz von Benda-Beckmann,[64] Keebet von Benda-Beckmann,[65] Paul Schiff Berman,[66] Masaji Chiba,[67] Margaret Davies,[68] Marc Galanter,[69] Anne Griffiths,[70] John Griffiths,[71] Roderick Macdonald,[72] Werner Menski,[73] Sally Engle Merry,[74] Boaventura de Sousa Santos,[75] Gunther

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63 See e.g. Arnaud, "Building of Europe", *supra* note 22; André-Jean Arnaud, "From Limited Realism to Plural Law. Normative Approach *versus* Cultural Perspective" (1998) 11:3 Ratio Juris 246 [Arnaud, "Limited Realism to Plural Law"].

64 See e.g. F von Benda-Beckmann, *Rechtspluralismus in Malawi*, *supra* note 7; F von Benda-Beckmann, "Citizens, Strangers and Indigenous Peoples", *supra* note 23; F von Benda-Beckmann, "Who's Afraid of Legal Pluralism?", *supra* note 1.

65 See e.g. Keebet von Benda-Beckmann, "Forum Shopping and Shopping Forums: Dispute Processing in a Minangkabau Village in West Sumatra" (1981) 13:19 J Leg Pluralism & Unofficial L 117; Keebet von Benda-Beckmann, "Transnational Dimensions of Legal Pluralism" in Wolfgang Fikentscher, ed, *Begegnung und Konflikt – eine kulturanthropologische Bestandsaufnahme* (Munchen: Verlag der Bayerischen Akademie der Wissenschaften, 2001); K von Benda-Beckmann & Turner, *supra* note 1.

66 See e.g. Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge, UK: Cambridge University Press, 2012) [P Berman, *Global Legal Pluralism*]; Paul Schiff Berman, "Jurisgenerative Constitutionalism: Procedural Principles for Managing Global Legal Pluralism" (2013) 20:2 Ind J Global Leg Stud 665.

67 See e.g. Masaji Chiba, *Legal Pluralism: Toward a General Theory through Japanese Legal Culture* (Tokyo: Tokai University Press, 1989) [Chiba, "Legal Pluralism"]; Masaji Chiba "Other Phases of Legal Pluralism in the Contemporary World" (1998) 11:3 Ratio Juris 228.

68 See e.g. Davies, "Ethos of Pluralism", *supra* note 13; Davies, "Legal Pluralism", *supra* note 1; Margaret Davies, "Plural Pluralities of Law" in Nicole Roughan & Andrew Halpin, eds, *In Pursuit of Pluralist Jurisprudence* (Cambridge, UK: Cambridge University Press, 2017) 239.

69 See e.g. Galanter, *supra* note 52.

70 See e.g. A Griffiths, *Shadow of Marriage*, *supra* note 45; A Griffiths, "Legal Pluralism", *supra* note 1; A Griffiths, "Reviewing Legal Pluralism", *supra* note 1.

71 See e.g. J Griffiths, "What Is Legal Pluralism?", *supra* note 1; J Griffiths, "Theory of Legislation", *supra* note 4; J Griffiths, "Legal Pluralism", *supra* note 1.

72 See e.g. Roderick A Macdonald, "Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism" (1998) 15:1 Ariz J Intl & Comp L 69; Roderick A Macdonald, "Pluralistic Human Rights? Universal Human Wrongs?" in Provost & Sheppard, *supra* note 47, 15 [Macdonald, "Pluralistic Human Rights?"].

73 See e.g. Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (New York: Cambridge University Press, 2006) at 82–128 [Menski, *Comparative Law in a Global Context*]; Werner Menski, "Remembering and Applying Legal Pluralism: Law as Kite Flying" in Donlan & Heckendorn Urscheler, *supra* note 11, 91 [Menski, "Remembering and Applying Legal Pluralism"].

74 See e.g. Merry, "Legal Pluralism", *supra* note 1; Merry, "Law: Anthropological Aspects", *supra* note 21.

75 See e.g. Santos, "Law", *supra* note 3; Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, 2nd ed (London, UK: Butterworths, 2002) [Santos, *New Legal Common Sense*].

Teubner, [76] Jacques Vanderlinden, [77] Gordon Woodman, [78] and Peer Zumbansen.[79] Despite significant differences in their approaches and specific projects, this set of authors is committed to the two previously identified tenets.[80] Critics of legal pluralism also seem to have these two commitments in mind when attacking the pluralist intellectual tradition.[81] Thus, these two elements together characterize the tradition of legal pluralism as "a broad space for discussion and exchange where scholars, practitioners and activists elaborate new theoretical instruments and conduct empirical studies in order to overhaul the concepts and devices produced by two centuries of Western jurisprudence, colonised by the haunting presence of the state."[82]

Furthermore, since self-identification does not define the legal pluralist tradition, its advocates have not hesitated to attach the label to scholars that did not explicitly identify as such. For example, most pluralists list authors who did not use the label, such as Eugen Ehrlich,[83] Bronislaw

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76 See e.g. Gunther Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism" (1992) 13:5 Cardozo L Rev 1443 [Teubner, "Two Faces of Janus"]; Teubner, "Global Bukowina", *supra* note 61.

77 See e.g. Vanderlinden, "Le pluralisme juridique", *supra* note 8; Jacques Vanderlinden, "Return to Legal Pluralism: Twenty Years Later" (1989) 28:1 J Leg Pluralism & Unofficial L 149.

78 See e.g. Gordon R Woodman, "Legal Pluralism and the Search for Justice" (1996) 40:2 J Afr L 152 [Woodman, "Search for Justice"]; Woodman, "Ideological Combat", *supra* note 1.

79 See e.g. Peer Zumbansen, "Transnational Legal Pluralism" (2010) 1:2 Transnational Leg Theory 141 [Zumbansen, "Transnational Legal Pluralism"]; Peer Zumbansen, "Manifestations and Arguments: The Everyday Operation of Transnational Legal Pluralism" in Paul Schiff Berman, ed, *The Oxford Handbook of Global Legal Pluralism* (New York: Oxford University Press, 2020) 231 [Zumbansen, "Manifestations and Arguments"].

80 As Paul Dresch suggests, while the bibliography of legal pluralism "is vast ... [n]early all of it is ... surprisingly alike" (Paul Dresch, "Introduction: Legalism, Anthropology, and History: A View from Part of Anthropology" in Paul Dresch & Hanna Skoda, eds, *Legalism: Anthropology and History* (Oxford, UK: Oxford University Press, 2012) 1 at 2, n 3).

81 See e.g. Tamanaha, "'Social Scientific' Concept", *supra* note 41; Chris Fuller, "Legal Anthropology, Legal Pluralism and Legal Thought" (1994) 10:3 Anthropology Today 9; Simon Roberts, "Against Legal Pluralism: Some Reflections on the Contemporary Enlargement of the Legal Domain" (1998) 42:1 J Leg Pluralism & Unofficial L 95; Simon Roberts, "After Government? On Representing Law without the State" (2005) 68:1 Mod L Rev 1 [Roberts, "After Government?"].

82 Croce, "What Is Legal Pluralism All About?", *supra* note 58 at 164–65.

83 See e.g. Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, translated by Walter L Moll (Cambridge, Mass: Harvard University Press, 1936) (first published in 1913).

Malinowski,[84] Karl Llewellyn and Edward Hoebel,[85] Lon Fuller,[86] Leopold Pospisil,[87] and Robert Cover[88] as forerunners or representatives of the tradition because their work studied LP and opposed the mainstream views of the legal theory of their times. Similarly, I will include William Twining[89] and Brian Tamanaha[90] as scholars of the intellectual tradition, despite being critical of the mainstream pluralist discourse. Henceforth, I shall refer to those that endorse this double commitment (recognition of LP and opposition to orthodox theories) as legal pluralists, irrespective of whether they self-identify as such.

C. Two Understandings of Analytical Jurisprudence

The intellectual tradition of legal pluralism defines itself in opposition to centralism, and in turn to orthodox or mainstream theories of law. The usual culprits that most pluralists[91] list include the most important legal theorists of the Western tradition in the twentieth century—Hans Kelsen,[92] H.L.A. Hart,[93] and Joseph Raz[94]—along with prior academic figures

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84 See e.g. Bronislaw Malinowski, *Crime and Custom in Savage Society* (New York: Harcourt, Brace & Company, 1926).

85 See generally KN Llewellyn & E Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman: University of Oklahoma Press, 1941).

86 See e.g. Lon L Fuller, "Human Interaction and the Law" (1969) 14:1 Am J Juris 1.

87 See e.g. Leopold Pospisil, *Anthropology of Law: A Comparative Theory* (New Haven: HRAF Press, 1974).

88 See e.g. Robert M Cover, "Foreword: *Nomos* and Narrative" (1983) 97:1 Harv L Rev 4.

89 See e.g. William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge, UK: Cambridge University Press, 2009) [Twining, *General Jurisprudence*]; Twining, "Normative and Legal Pluralism", *supra* note 1.

90 See e.g. Tamanaha, "'Social Scientific' Concept", *supra* note 41; Brian Z Tamanaha, *A General Jurisprudence of Law and Society* (Oxford, UK: Oxford University Press, 2001) at 171–205 [Tamanaha, *General Jurisprudence*]; Tamanaha, "Understanding Legal Pluralism", *supra* note 1.

91 See e.g. J Griffiths, "What Is Legal Pluralism?", *supra* note 1 at 2–3.

92 See generally Hans Kelsen, *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the "Reine Rechtslehre" or Pure Theory of Law*, translated by Bonnie Litschewski Paulson & Stanley L Paulson (Oxford, UK: Clarendon Press, 1992) [Kelsen, *Problems of Legal Theory*].

93 See e.g. HLA Hart, *The Concept of Law*, 3rd ed by Penelope A Bulloch & Joseph Raz (Oxford, UK: Oxford University Press, 2012) [Hart, *Concept of Law*].

94 See e.g. Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 2nd ed (Oxford, UK: Oxford University Press, 2009) [Raz, *Authority of Law*]; Joseph Raz, *Practical Reason and Norms*, revised ed (Oxford, UK: Oxford University Press, 1999) [Raz, *Practical Reason*].

such as Jean Bodin,[95] Thomas Hobbes,[96] Jeremy Bentham,[97] and John Austin.[98] Since there is no identifiable tradition here, some have suggested that legal positivism is the real enemy, for most of these authors endorse some form of separation between law and morality.[99] Yet, following Tamanaha and Twining, it is more accurate to identify the rival of legal pluralism as the Anglo-American tradition of analytical jurisprudence. Still, additional clarifications are necessary, for analytical jurisprudence is often conflated with legal positivism[100] or with the homonymous tradition of analytical philosophy.[101]

At the most general level, analytical or conceptual jurisprudence is a theoretical inquiry concerned with explaining the fundamental features of law and legal concepts. These explanations typically comprise a positive element elucidating what the concept under investigation is and a negative one explaining how a certain concept differs from related ones. The central conceptual inquiry about law involves a positive account of what law is and a negative account of how law differs from morality and social norms. As proposed by Austin, the analytical project contrasts with normative jurisprudence, which evaluates and criticizes existing or proposed legal practices. To borrow an Austinian expression, analytical jurisprudents are interested in clarifying and explaining the "existence" of a given legal phenomenon (i.e., what a legal system, a right, or a power is), whereas normative jurisprudents are interested in the study of its "merit" or "demerit" (i.e., whether a particular legal system, right, or power is legitimate, just, etc.).[102] This approach assumes that one can distinguish the development of a working understanding of a phenomenon from other

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95 See e.g. Jean Bodin, *On Sovereignty: Four Chapters from the Six Books of the Commonwealth*, translated by Julian H Franklin (Cambridge, UK: Cambridge University Press, 1992).

96 See e.g. Thomas Hobbes, *Leviathan*, revised ed by JCA Gaskin (Oxford, UK: Oxford University Press, 1996).

97 See e.g. Philip Schofield, ed, *The Collected Works of Jeremy Bentham: Of the Limits of the Penal Branch of Jurisprudence* (Oxford, UK: Oxford University Press, 2010) (first published in 1780).

98 See John Austin, *The Province of Jurisprudence Determined*, ed by Wilfrid E Rumble (Cambridge, UK: Cambridge University Press, 1995) at 157.

99 See Davies, "Ethos of Pluralism", *supra* note 13; Muñiz-Fraticelli, *supra* note 44 at 118–136; Croce, "What Is Legal Pluralism All About?", *supra* note 58.

100 See Brian Z Tamanaha, *A Realistic Theory of Law* (Cambridge, UK: Cambridge University Press, 2017) at 29 [Tamanaha, *Realistic Theory*]; Brian Z Tamanaha, "Necessary and Universal Truths about Law?" (2017) 30:1 Ratio Juris 3 at 14, n 8; Gad Barzilai, "Beyond Relativism: Where Is Political Power in Legal Pluralism?" (2008) 9:2 Theor Inq L 395.

101 See e.g. Twining, *General Jurisprudence*, *supra* note 89 at 35–37.

102 See Austin, *supra* note 98 at 137.

types of analyses of the phenomenon, such as a (first order) politico-moral analysis. For analytical jurisprudents, this working understanding also sets the stage for doctrinal accounts regarding the application of rules to specific cases, empirical inquiries concerning the identification and description of legal phenomena, and the accounts of particular jurisprudence, namely, the detailed theoretical study of specific legal practices.

The project of providing an explanatory account of legal phenomena should be distinguished from the Anglo-American tradition of analytical jurisprudence, a group of mostly English-speaking intellectuals that openly engaged with Austin's project. The "fairly consistent shortlist of individual authors who are widely read and studied"[103] includes Kelsen,[104] Hart, and Raz. In this second sense, Plato, Aristotle, Thomas Aquinas, Immanuel Kant, G.W.F. Hegel, Michel Foucault, and Jurgen Habermas are not part of the tradition, although they have contributed to the project of analytical jurisprudence. Critics of analytical jurisprudence often refer to this second, limited sense.[105] The influential Anglo-American tradition of analytical jurisprudence is a more precise characterization of the foe that the canonical Anglo-American formulations of legal pluralism, such as J. Griffiths' and Merry's, had in mind.[106] Still, two clarifications are necessary.

On the one hand, while most Anglo-American jurisprudents listed above are legal positivists in the sense that they separate law from morality, not all members of the tradition are. Other authors participate in the philosophical project of analytical jurisprudence while rejecting the tenets of legal positivism.[107] In this view, moral facts are relevant to develop a

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[103] Twining, *General Jurisprudence*, *supra* note 89 at 11. See also Gerald J Postema, *Legal Philosophy in the Twentieth Century: The Common Law World* (Dordrecht: Springer, 2011) at 3–42 (for a discussion on Austin, Dicey, and Salmond).

[104] As Tamanaha rightly notes, Kelsen deserves a place in this list—despite not being an Anglo-American and using slightly different terminology—since he distinctively addressed the Austinian concerns and has been studied in Anglo-American circles (see Hans Kelsen, "The Pure Theory of Law and Analytical Jurisprudence" (1941) 55:1 Harv L Rev 44; Tamanaha, *Realistic Theory*, *supra* note 100 at 31, n 135).

[105] See Julius Stone, "The Province of Jurisprudence Redetermined" (1944) 7:3 Mod L Rev 97; Julius Stone, "The Province of Jurisprudence Redetermined (Concluded)" (1944) 7:4 Mod L Rev 177; Edgar Bodenheimer, "Modern Analytical Jurisprudence and the Limits of Its Usefulness" (1956) 104:8 U Pa L Rev 1080; Tamanaha, *Realistic Theory*, *supra* note 100 at 30–32.

[106] *Cf* Cormac Mac Amhlaigh, "Does Legal Theory Have a Pluralism Problem?" in Paul Schiff Berman, ed, *The Oxford Handbook of Global Legal Pluralism* (New York: Oxford University Press, 2020) 268 at 272.

[107] See John Finnis, *Natural Law and Natural Rights*, 2nd ed (Oxford, UK: Oxford University Press, 2011) at 6–10; Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism*, translated by Stanley L Paulson & Bonnie L Paulson (Oxford, UK:

working understanding of law, but the use of moral considerations does not mean that the theorist have turned to the first order moral analyses typical of normative jurisprudence. That is, they aim to explain law, not to justify it, but hold that the foundational explanation demands moral facts in addition to social ones: moral facts play a role in selecting the relevant social facts that might count as law,[108] might qualify the facts that can constitute legal practices,[109] or might make legal practices lose their legal quality when they pass a threshold of injustice.[110] Thus, analytical jurisprudence is not equivalent to legal positivism.

On the other hand, we should distinguish analytical jurisprudence from the homonymous tradition of analytical philosophy. Analytic philosophy is a philosophical tradition led by Gottlob Frege, Bertrand Russell, G.E. Moore, and Ludwig Wittgenstein and is typically contrasted with the tradition of continental philosophy.[111] Although the tradition of analytical jurisprudence embraced analytical philosophy after Hart, the jurisprudential project is distinct from the philosophical tradition and can exist without it. In fact, Tamanaha's suggestion that the method or approach of analytical jurisprudence "is grounded" in analytical philosophy is anachronistic. [112] The philosophical tradition started with Frege's *Begriffsschrift,*[113] which was published almost fifty years after Austin's seminal work.[114] Thus, the project of analytical jurisprudence should not be confused with the application of a particular philosophical method (e.g., linguistic or conceptual analysis) or a philosophical tradition or area of inquiry (e.g., analytical philosophy or the philosophy of language) to the legal field.

Clarendon Press, 2002) at 3–4; Mark C Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge, UK: Cambridge University Press, 2006) at 20–24.

108 See Finnis, *supra* note 107 at 11–18.

109 See Mark C Murphy, "The Explanatory Role of the Weak Natural Law Thesis" in Wil Waluchow & Stefan Sciaraffa, eds, *Philosophical Foundations of the Nature of Law* (Oxford, UK: Oxford University Press, 2013) 3 at 17–20.

110 See Alexy, *supra* note 107 at 76–81.

111 See generally Michael Beaney, ed, *The Oxford Handbook of the History of Analytic Philosophy* (Oxford, UK: Oxford University Press, 2013).

112 Tamanaha, *Realistic Theory*, *supra* note 100 at 30.

113 See Gottlob Frege, "Conceptual Notation: A Formula Language of Pure Thought Modelled Upon the Formula Language of Arithmetic" in Terrell Ward Bynum, ed, *Conceptual Notation and Related Articles* (Oxford, UK: Clarendon Press, 1972) 101 (first published in 1879). *Cf* Michael Potter, "The Birth of Analytic Philosophy" in Dermot Moran, ed, *The Routledge Companion to Twentieth Century Philosophy* (Abingdon: Routledge, 2008) 43.

114 See Austin, *supra* note 98.

II. Changing the Subject

In opposing "centralism" and "monism," some pluralists focus on doctrinal and politico-moral inquiries that, I argue here, change the subject of investigation. These two alternative projects illustrate that the pluralist opposition is overly concerned with rejecting a package deal of views that pluralists collectively attach to analytical jurisprudents.

A. Doctrinal Opposition

LP leads to the recognition of new relationships between different kinds of normative orders (overlap, conflicts, coordination, adaptation, hybridity, mutual reinforcement, etc.) that need to be considered in both the resolution of cases and our doctrinal accounts of law. Some pluralists oppose analytical jurisprudence for its putative inability to explain and resolve doctrinal issues involving the application of norms to specific cases and the resolution of disputes.[115] This opposition is often on the assumption that centralists believe that only legal pronouncements by the state should be used to solve cases,[116] endorse formalist theories of adjudication,[117] and hold other views (e.g., that there is one correct solution to legal problems)[118] that are incompatible with the proper resolution of the doctrinal conflicts generated by LP.

However, contemporary jurisprudents do not claim that adjudication is a mechanical process in which judges should exclusively apply legal pronouncements by the state; nor do jurisprudents uniformly share the view that there is a right answer to legal questions.[119] More importantly, the pluralist doctrinal inquiries are different from the conceptual questions that interest jurisprudents. To be clear, there are connections between conceptual and doctrinal investigations, mainly because doctrinal legal conflicts exist only if the interacting orders are forms of law, so we need a working conception of law to establish the existence of LP.

The opposition to analytical jurisprudence seems to be based on the unstated assumption that identifying a particular practice as law assigns

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115 See e.g. Vanderlinden, "Le pluralisme juridique", *supra* note 8; Roel de Lange, "Divergence, Fragmentation and Pluralism" in Petersen & Zahle, *supra* note 4 at 103, 115 (on conflicts of obligations); Arnaud, "Building of Europe", *supra* note 22.

116 See J Griffiths, "What Is Legal Pluralism?", *supra* note 1 at 1–2.

117 See Hanisah Binte Abdullah Sani, "State Law and Legal Pluralism: Towards an Appraisal" (2020) 52:1 J Leg Pluralism & Unofficial L 82.

118 See Barzilai, *supra* note 100 at 408.

119 See Muñiz-Fraticelli, *supra* note 44 at 130–31; John Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford, UK: Oxford University Press, 2012) at 1–18 [Gardner, *Leap of Faith*].

it a special role in adjudication: when centralist jurisprudents deny the legal character of non-state law, it implies that these phenomena do not have a role in doctrinal discourse. However, while many practitioners and academics maintain the connection between doctrinal and conceptual inquiries, this is not the view of most contemporary jurisprudents. By contrast, mainstream legal theories typically separate theories of law from (doctrinal) theories of adjudication.[120] Thus, to determine whether something is law does not necessarily affect the resolution of cases. For example, a domestic judge might not consider a given norm as "legal" but only as a social or moral standard, and still might apply it as a relevant "extra-legal consideration" that resolves the case.[121] Similarly, one can determine that a normative practice is "law," but that does not mean that it needs to be applied in a legal case (e.g., judges recognize the norms of other states as law, but such recognition does not mean that the norms of other states will necessarily resolve domestic cases). In sum, even if jurisprudents claimed that state law is the only type of law, this would not necessarily suggest that non-state legal phenomena have no role in adjudication. The pluralist doctrinal opposition to analytical jurisprudence is thus unwarranted.

B. Politico-Moral Opposition

Other pluralists attack the undesirable politico-moral consequences of the views allegedly advanced by analytical jurisprudents, which, for some critics, combine descriptive assertions with assumptions about how the world should be, offer an unstated expression of political opinions, or show support for certain power structures. In advancing these claims, these pluralists often attribute to analytical jurisprudents defences of state superiority or monopoly of law-making over others forms of normativity[122] that neglect the critical role that religious, unofficial, Indigenous,

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[120] See HLA Hart, *Essays in Jurisprudence and Philosophy* (Oxford, UK: Clarendon Press, 1983) at 88; Raz, *Authority of Law*, *supra* note 94 at 180–209; Stefan Sciaraffa, "Explaining Theoretical Disagreement and Massive Decisional Agreement: The Justificatory View" (2012) 6:1 Problema Anuario de Filosofía y Teoría del Derecho 165.

[121] The theoretical debate about the role of morality in constitutional adjudication that has occupied a generation of legal theorists illustrates this possibility (see Joseph Raz, "Legal Principles and the Limits of Law" (1972) 81:5 Yale LJ 823; Wil Waluchow, "Four Concepts of Validity: Reflections on Inclusive and Exclusive Positivism" in Matthew D Adler & Kenneth Einar Himma, eds, *The Rule of Recognition and the U.S. Constitution* (New York: Oxford University Press, 2009) 123 at 125).

[122] See J Griffiths, "What Is Legal Pluralism?", *supra* note 1 at 2–5; Martin Chanock, *Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia* (London, UK: Pearson Education, 1998).

and customary norms have in the life of certain groups.[123] In response, some pluralists have positioned LP as a desirable situation that recognizes and legitimizes sources of normativity silenced under the hegemonic state narrative. In this vein, Peter G. Sack claims that legal pluralism is an "ideological commitment" that sees "plurality as a positive force to be utilized—and controlled—rather than eliminated."[124] Teubner, furthermore, holds that "legal pluralism rediscovers the subversive power of suppressed discourses,"[125] and Macdonald's "critical legal pluralism" allows law to become an "emancipatory practice."[126]

Some pluralists have criticized this focus on the politico-moral results of LP. "Empirical data on plural legal circumstances," K. von Benda-Beckmann and Turner wrote, "provide neither a positive nor negative content assessment of the respective legal regimes."[127] For these pluralist critics of the purely politico-moral readings of LP, such readings "can impede clarity of thought"[128] because "there is nothing inherently good, progressive or emancipatory about" LP,[129] or because the "idealistic" preference for plurality legitimizes abhorrent practices like gender differences.[130] However, this has not prevented the emergence of new politico-moral arguments for LP. Recently, for example, Turkuler Isiksel suggested that the core task of global legal pluralism "is not that of discerning multiplicity in the world, but of articulating the reasons as to why it is valuable, and when it ceases to be so;"[131] Nafay Choudhury tried to revi-

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123 See Galanter, *supra* note 52 at 20–21.

124 See Sack, *supra* note 52 at 1.

125 Teubner, "Two Faces of Janus", *supra* note 76 at 1443.

126 Kleinhans & Macdonald, *supra* note 52 at 46; Roderick A Macdonald, "Here, There ... and Everywhere: Theorizing Legal Pluralism; Theorizing Jacques Vanderlinden" in Lynne Castonguay & Nicholas Kasirer, eds, *Étudier et enseigner le droit: hier, aujourd'hui et demain* (Cowansville: Yvon Blais, 2006) 381 [Macdonald, "Theorizing Legal Pluralism"]; Roderick A Macdonald & David Sandomierski, "Against Nomopolies" (2006) 57:4 N Ir Leg Q 610 at 623–32. Macdonald's proposal includes an individualist perspective aptly criticized by Valcke (see Valcke, *supra* note 11 at 129–33).

127 K von Benda-Beckmann & Turner, *supra* note 1 at 262.

128 Woodman, "Ideological Combat", *supra* note 1 at 48–49.

129 Santos, *New Legal Common Sense*, *supra* note 75 at 89–90; Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York: Routledge, 1995) at 114–15.

130 See Sharafi, *supra* note 50; Seán Patrick Donlan, Book Review of *Ubiquitous Law: Legal Theory and the Space for Legal Pluralism* by Emmanuel Melissaris, (2012) 25:1 Can JL & Jur 177 at 181.

131 Turkuler Isiksel, "Global Legal Pluralism as Fact and Norm" (2013) 2:2 Global Constitutionalism 160 at 161.

talize Macdonald's critical legal pluralism;[132] Kirsten Anker used a critical approach to explore the recognition of Indigenous rights;[133] and P. Berman advocated global legal pluralism as a normative agenda.[134]

While there are relationships between jurisprudential and politico-moral claims, and some practitioners and academics strongly relate conceptual and politico-moral claims, the politico-moral opposition of the pluralist tradition to analytical jurisprudents is not warranted. There is nothing in the project of analytical jurisprudence or in the views of contemporary legal philosophers that asserts that state law is superior to other forms of legality, or that customary or Indigenous norms are inferior to or lesser than state law.[135] More importantly, in mounting their politico-moral opposition, pluralists often attack projects different from the ones of analytical jurisprudence. This type of opposition conflates politico-moral and conceptual inquiries. Pluralists seem to assume that referring to some phenomena as law is a form of politico-moral recognition that generates more robust obligations or grants the phenomena with legitimacy or power that non-legal belief systems, cultural norms, and social practices lack. However, this is not the prevalent view among jurisprudents, positivists, and non-positivists alike, which generally concur with the Austinian dictum that the "existence" of a given legal phenomenon is different from its politico-moral "merit" or "demerit."[136] In fact, the jurisprudential attitude toward law is generally "one of caution rather than celebration."[137] Thus, even if jurisprudents denied legal character to non-state legal phenomena, this does not imply views about their value, legitimacy, authority, or strength.

In sum, the politico-moral opposition of pluralists concerns "broad questions of general political theory"[138] separate from the project of ana-

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[132] See Nafay Choudhury, "Revisiting Critical Legal Pluralism: Normative Contestations in the Afghan Courtroom" (2017) 4:1 Asian JL & Society 229.

[133] See generally Kirsten Anker, *Declarations of Interdependence: A Legal Pluralist Approach to Indigenous Rights* (Farnham: Ashgate, 2014).

[134] See generally P Berman, "Normative Project", *supra* note 51; Paul Schiff Berman, "Understanding Global Legal Pluralism: From Local to Global, from Descriptive to Normative" in P Berman, *supra* note 79, 1 at 18 [P Berman, "Understanding Global Legal Pluralism"].

[135] See Muñiz-Fraticelli, *supra* note 44 at 127–29; Part III, *below*.

[136] See Austin, *supra* note 98 at 137.

[137] Leslie Green, "Introduction" in HLA Hart, *The Concept of Law*, 3rd ed (Oxford, UK: Oxford University Press, 2012) xv at xv [Green, "Introduction"].

[138] Twining, "Normative and Legal Pluralism", *supra* note 1 at 501.

lytical jurisprudents.[139] They are—as one pluralist critic of the politico-moral reading of LP put it—part of "a different profession."[140]

C. The Package-Deal Oppositions

Politico-moral and doctrinal oppositions illustrate a common feature of the pluralist interpretation of analytical jurisprudence. In general, by opposing orthodox or mainstream views, pluralists are more interested in attacking an "ideology"[141] or an "ethos,"[142] namely, a package of intrinsically related conceptual, doctrinal, and politico-moral views that jurisprudents hold as a whole. It is not uncommon that pluralists claim to criticize the "orthodox,"[143] "mainstream,"[144] or "dominant"[145] views, "Western theories of law and of justice,"[146] or Western "model jurisprudence."[147] This conflation of multiple ideas is best illustrated by Teubner's critique of what he regards as the "classical" theory of the sources of state law, which he attributes to Hart and Kelsen. He wrote:

> The distinction [between] law/nonlaw is based on law's hierarchy of rules where the higher rules legitimate the lower ones. Normative phenomena outside this hierarchy are not law, just facts. After the decline of natural law, the highest rule in our times is the constitution of the nation-state—whether written or unwritten—which in its turn refers to democratic political legislation as the ultimate legitimation of legal validity. In spite of recurrent doubts voiced by

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139 For these reasons, some pluralists have aligned with legal positivism (see e.g. Tamanaha, *General Jurisprudence*, *supra* note 90 at 133–170). However, there is ample room for non-positivist legal pluralism, namely, theories of law that can recognize both LP and infuse conceptual relevance to moral facts without failing into normative jurisprudence (see e.g. Emmanuel Melissaris, *Ubiquitous Law: Legal Theory and the Space for Legal Pluralism* (Farnham: Ashgate, 2009); Jonathan Crowe, "The Limits of Legal Pluralism" (2015) 24:2 Griffith L Rev 314; Alex Green & Jennifer Hendry, "Non-Positivist Legal Pluralism and Crises of Legitimacy in Settler-States" (2019) 14:2 J Comparative L 267).

140 F von Benda-Beckmann, "Who's Afraid of Legal Pluralism?", *supra* note 1 at 46.

141 J Griffiths, "What Is Legal Pluralism?", *supra* note 1 at 1–2.

142 Davies, "Ethos of Pluralism", *supra* note 13.

143 See e.g. Roderick A Macdonald, "Custom Made—For a Non-Chirographic Critical Legal Pluralism" (2011) 26:2 CJLS 301 at 309 [Macdonald, "Custom Made"].

144 Croce, "What Is Legal Pluralism All About?", *supra* note 58 at 165.

145 Kleinhans & Macdonald, *supra* note 52 at 25, 46.

146 Woodman, "Search for Justice", *supra* note 78 at 155.

147 Chiba, "Legal Pluralism", *supra* note 67.

> various movements in legal theory, judicial adjudication is still seen as subordinated to legislation.[148]

This passage suggests that analytical jurisprudents hold a hierarchical view of the legal system, which entails a politico-moral account of democratic legitimacy. Subsequently, this assumed hierarchy leads to a formalistic view of adjudication that obligates judges to apply legislative dictates representing people's general will. Many descriptions of the vice of centralism assume this triple commitment of conceptual, doctrinal, and politico-moral views.[149]

Although such a triple commitment might represent some views in legal scholarship and practice, it is unfair to uniformly attribute it to the project of analytical jurisprudence or contemporary legal theories. By contrast, analytical jurisprudents proceed in a piecemeal fashion, distinguishing between conceptual, empirical, doctrinal, and politico-moral concerns, each of which can be explored independently.[150] Thus, whereas mainstream pluralists ascribe to jurisprudents a synthesis and conflation of issues in an ambitious theoretical framework, analytical jurisprudents often call for the decomposition of concepts and the separation of questions. As a result, many of the pluralist opposition's claims do not address the same problems that interest analytical jurisprudents; instead, these claims represent a transparent change of subject.

III. The Equation between Law and State

We should now consider the claims of centralism and monism as conceptual views about law that can be contrasted with the project of analytical jurisprudence. J. Griffiths' formulation of legal centralism cited above continues as the standard articulation of the vice that analytical jurisprudents allegedly share.[151] In other cases, pluralists characterize the de-

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[148] Gunther Teubner, "The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy" (1997) 31:4 Law & Soc'y Rev 763 at 768. See also Teubner, "Global Bukowina", *supra* note 61 at 10–11.

[149] See e.g. J Griffiths, "What Is Legal Pluralism?", *supra* note 1 at 1–3; Merry, "Legal Pluralism", *supra* note 1 at 874; Norbert Rouland, *Legal Anthropology*, translated by Philippe G Planel (London, UK: Athlone Press, 1994) at 44; Macdonald & Sandomierski, *supra* note 126 at 615; Barzilai, *supra* note 100 at 398–400.

[150] See Gardner, *Leap of Faith*, *supra* note 119 at v, 23–25.

[151] See J Griffiths, "What Is Legal Pluralism?", *supra* note 1 at 2; Galanter, *supra* note 52 at 1, n 1, 20–21; Merry, "Legal Pluralism", *supra* note 1 at 874; Teubner, "Two Faces of Janus", *supra* note 76 at 1451; A Griffiths, *Shadow of Marriage*, *supra* note 45 at 29–31; Macdonald & Sandomierski, *supra* note 126 at 615; Michaels, *supra* note 1 at 251; Isiksel, *supra* note 131 at 163–64; Macdonald, "Pluralistic Human Rights?", *supra* note 72 at 23–24; Sani, *supra* note 117 at 83; Zumbansen, "Manifestations and Arguments", *supra* note 79 at 234.

fect that all mainstream jurisprudents share as legal monism, which is defined as the idea that "law [is] a single coherent structure of norms derived from a clearly located source—the state"[152] or "the idea that there must be one and only one centralized hierarchical legal system in each state."[153] Both centralism and monism attempt to capture the idea that analytical jurisprudents equate law with state.[154] Although the notion of state is seldom articulated in the pluralist critique, it seems fair to assume that pluralists have modern sovereign states in mind. Contemporary Anglo-American jurisprudents have developed a sophisticated account of state law, typically understood as a political organization capable of regulating all aspects within its jurisdiction free from external intervention, monopolizing coercion in a given territory, and claiming priority over all other normative orders in its territory (e.g., the norms of associations, games, clubs, universities, etc.).[155] Given some features of these de-

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[152] Davies, "Ethos of Pluralism", *supra* note 13 at 88.

[153] Bonilla Maldonado, *supra* note 46 at 213. See also Gilissen, *supra* note 8 at 7–8; Vanderlinden, "Le pluralisme juridique", *supra* note 8; J Griffiths, "Preface" in Baudouin Dupret, Maurits Berger & Laila al-Zwaini, eds, *Legal Pluralism in the Arab World* (The Hague: Kluwer Law International, 1999) vii at vii–viii; Cotterrell, *Law's Community*, *supra* note 54 at 244; Melissaris, *supra* note 139 at 25; Nicole Roughan & Andrew Halpin, "Introduction", in Nicole Roughan & Andrew Halpin, eds, *In Pursuit of Pluralist Jurisprudence* (Cambridge, UK: Cambridge University Press, 2017) 1 at 3.

[154] While centralism and monism are most often seen as synonymous, they are sometimes considered different ideas. Roderick Macdonald, for example, defines centralism as the "belief that law and state are coterminous," while monism is the "belief in the unity of legal normativity" (Macdonald & Sandomierski, *supra* note 126 at 615. See also Macdonald, "Theorizing Legal Pluralism", *supra* note 126; Derek McKee, Book Review of *Ubiquitous Law: Legal Theory and the Space for Legal Pluralism* by Emmanuel Melissaris, (2010) 11:5 German LJ 573 at 577). References to the "unity" of law are also present in some definitions of centralism and in other formulations of the pluralist dispute (J Griffiths, "What Is Legal Pluralism?", *supra* note 1 at 38; Tamanaha, "Understanding Legal Pluralism", *supra* note 1 at 376). In my view, the references to unity highlight a different problem from centralism's equation between law and state, namely, the question of what constitutes the unity of a plurality of norms, rather than viewing them as unrelated elements. For attempts to resolve the problem of the unity of state and non-state normative orders, see Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford, UK: Oxford University Press, 2013) at 77–113; Jorge Luis Fabra-Zamora, *Normative Political Communities: Foundations for a Hartian Account of State and Non-State Law* (PhD Dissertation, McMaster University, 2019) [unpublished] at 56–58, 108–11 [Fabra-Zamora, *Normative Political Communities*].

[155] This characterization of the state is influenced by positivist theories of analytical jurisprudence (*cf* Raz, *Practical Reason*, *supra* note 94 at 149–54; Raz, *Authority of Law*, *supra* note 94 at 115–21; Leslie Green, *The Authority of the State* (Oxford, UK: Oxford University Press, 1988)). However, its components are also accepted by non-positivist theories of law (see e.g. Finnis, *supra* note 107 at 148). Given that mainstream legal theorists share an account of the state, it is striking that Peer Zumbansen recently claimed that "while attracting ridicule ... the 'legal centralists' are themselves not nec-

scriptions, pluralists claim, centralism and monism entail the rejection of LP by suggesting that:

> [A] society has a single legal system, which controls the behaviour of all its members, and on two corollaries, that the subgroups of a society (associations and friendly societies, groups based on residence and kinship) do not have any legally independent status, and that societies which do not have a centralized political structure do not possess law.[156]

That is, per this reading, centralist and monist perspectives imply that Indigenous, customary, religious, international, and transnational norms are not legal phenomena if they are not recognized by the state, the only form of law. Therefore, jurisprudents inevitably deny LP; there is no possibility of coexistence and interaction between different types of law.

In response, defenders of analytical jurisprudence have claimed that centralism and monism might be fair descriptions of eighteenth and nineteen century theories of law (including Bentham's and Austin's imperative accounts[157]) and some twentieth century conceptions held by lawyers, law professors, government officials, and NGO agents. However, centralism and monism are not fair representations of the views held by most contemporary analytical jurisprudents.[158] Some have even claimed that pluralists have replaced jurisprudential ideas with "antonyms of their own choosing, which [analytical jurisprudents] either ignored or explicitly rejected,"[159] or that the pluralist position suffers from "straw man syndrome"—the "inclination to caricature competing visions so as to disman-

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essarily always going to be able to clearly pronounce which version of 'the state' they are referring to" (Zumbansen, "Manifestations and Arguments", *supra* note 79 at 233).

156 Rouland, *supra* note 149 at 46.

157 Some have suggested that centralism is not even a fair characterization of Bentham's conception of law. Like Austin, Bentham depicts law as a set of commands that can be traced to a sovereign and that are habitually obeyed by a community. However, Bentham recognized the possibility of non-state law, including customary law and religious laws (see Bentham, *supra* note 97 at 42, n b). Importantly, he recognized that a person "may be subject to multitudes at once" (*ibid* at 44, n a). For example, Bentham wrote that Catholics are subject to the laws of their nation and to the Pope, who has the power to inflict mental suffering on them (see *ibid*). For Brian Tamanaha, this passage displays an example of LP (see Tamanaha, "Pluralist Jurisprudence", *supra* note 29 at 161).

158 See Gardner, *Leap of Faith*, *supra* note 119 at 279–89, 292–301; John Gardner, "What Is Legal Pluralism?" (Ontario Legal Philosophy Partnership Graduate Student Conference delivered at the Jack & Mae Nathanson Centre on Transnational Human Rights, Crime, and Security, Osgoode Hall Law School, 8 May 2013), online (video): *YouTube* <www.youtube.com> [perma.cc/5TY2-2B2U]; Valcke, *supra* note 11 at 126–29; Muñiz-Fraticelli, *supra* note 44 at 127–29; Mac Amhlaigh, *supra* note 106 at 273, 277–78.

159 Muñiz-Fraticelli, *supra* note 44 at 125, citing Stephen Holmes, *The Anatomy of Antiliberalism* (Cambridge, Mass: Harvard University Press, 1993) at 253.

tle them more easily."[160] While I agree with the spirit of the response, I think this retort is too strong. Some analytical jurisprudents' work may support the pluralists' accusations, and their accounts rarely directly engage with the possibility of LP. This would explain why pluralists continue to attack "centralism" in recent publications—defined as "the idea that law was the sole province of the state and its formal institutions"[161] or that "only state-backed normative orders qualify as law"[162]—despite the clarifications of analytical jurisprudents.

Hence, the best course of action for defenders of analytical jurisprudence is to examine the textual evidence that might support pluralist critiques and to discuss how jurisprudents can recognize and explain LP. This is the primary argument of this section. I argue that the most important jurisprudents of the Western tradition in the twentieth century—Kelsen, Hart, and Raz—did not advocate for centralism or monism as pluralists understood it. Since this defence involves a debate about the centrality of the state in legal theory, I further outline an alternative conception of the role of the state in theoretical inquiries that allows for a more robust response to the pluralist charge.

A. Kelsen's Account

The main reason to associate Kelsen's account with centralism is his explicit defence of the "identity of law and state."[163] However, the identity thesis responds to a so-called two-sided theory of the state, represented by Georg Jellinek, that separates the state from the political collective.[164] In contrast, Kelsen claims that we could only impute acts to a political col-

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[160] Valcke, *supra* note 11 at 126. See also Otto Pfersmann, "Contre le pluralisme mondialisationnaliste: pour un monisme juridique ouvert et différencié" (Congrès de l'Association Suisse de Philosophie du Droit et de Philosophie Sociale delivered at the Université de Genève, 15–16 May 2009), Marcel Senn et al, eds, *Droit et Mondialisation* (Stuttgart: Franz Steiner Verlag, 2010) 131 at 138.

[161] P Berman, "Understanding Global Legal Pluralism", *supra* note 134 at 31.

[162] Gralf-Peter Calliess & Insa Stephanie Jarass, "Private Uniform Law and Global Legal Pluralism" in P Berman, *supra* note 79, 747 at 748.

[163] See Kelsen, *Problems of Legal Theory*, *supra* note 92 at 99–100. Another reason to associate Kelsen with centralism is his famous criticism of Eugen Ehrlich (see Hans Kelsen, "Eine Grundlegung der Rechtssoziologie" (1915) 39 Archiv für Sozialwissenschaft und Sozialpolitik 839). I do not address this second point here because it relies on exegetical disputes about Kelsen and Ehrlich's understandings of law, sociology, and the distinction between "is" and "ought." However, the considerations developed in the main text indirectly illuminate such dispute.

[164] Georg Jellinek, *Allgemeine Staatslehre*, 3rd ed (Berlin: O Haring, 1914) at 10–12, 136–39.

lective if such a collective constitutes a state, meaning that the two-sided theory is inaccurate.[165]

More importantly, the Kelsenian project does not reduce law to the law of the modern state, as the pluralist critique suggests. Instead, Kelsen argues that it is possible to characterize as law the norms of ancient Babylonians, African tribes (such as the Ashantis in West Africa), and contemporary states, despite the vast differences among them "in time, in place, and in culture" because they share "the social technique which consists in bringing about the desired social conduct of men through the threat of a measure of coercion which is to be applied in case of contrary conduct."[166] Despite some problematic language, Kelsen explicitly recognizes as law both modern state law and forms of "primitive, pre-state" legal phenomena that have not achieved the centralized coercion characteristic of states.[167] "State," in this context, is not the modern Westphalian arrangement, but any organized political collective (e.g., the Greek polis, the Roman Empire, etc.).

I should also note that, while Kelsen is the foremost advocate for monism, he used the term differently from the sense developed by pluralists. For him, monism and dualism are views on the relationship between international law and domestic law. Whereas dualism holds that they are independent objects, monism suggests that they are best conceived as forming some unity.[168] Thus understood, Kelsenian monism is a thesis about law as a normative entity, not an empirical claim. Recall that Kelsen accepts a radical division between the domains of the factual ("is") and the normative ("ought"), such as arguing that sociological facts cannot generate normative facts. As a result, for Kelsen, all legal phenomena (including international law and the law of the different political communities) must pertain to one overarching legal system. Therefore, Kelsenian monism does not contradict LP, for monism is a normative claim compatible with the coexistence of different kinds of legal phenomena as an empirical claim. However, for Kelsen, a proper theory of law as a system

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165 For similar defenses of Kelsen's position, see Mac Amhlaigh, *supra* note 106 at 280; Alexander Somek, "Stateless Law: Kelsen's Conception and Its Limits" (2006) 26:4 Oxford J Leg Stud 753.

166 Hans Kelsen, *General Theory of Law and State*, translated by Andrew Wedberg (Cambridge, Mass: Harvard University Press, 1945) at 19.

167 Kelsen, *Problems of Legal Theory*, *supra* note 92 at 99. Kelsen displayed a lot of interest in "primitive law," particularly in the ideas of retribution and punishment (see Hans Kelsen, *Society and Nature: A Sociological Inquiry* (London, UK: K Kegan Paul, Trench, Trubner & Co, 1946)).

168 See Hans Kelsen, *Pure Theory of Law*, translated by Max Knight (Berkeley: University of California Press, 1967) at 328–44; Hans Kelsen, *Principles of International Law* (New York: Rinehart & Company, 1952) at 403–38.

of norms shows that all the sociologically distinct legal systems are best conceived of as one for doctrinal purposes.[169]

B. Hart's Account

Certain statements in Hart's influential account of law justify a centralist interpretation. His account is based on a distinction between "primitive" or "pre-legal" societies ruled solely by custom, and societies ruled by "legal systems," consisting of the "union of primary and secondary rules."[170] Secondary rules comprise three social rules that the system's officials follow: rules of change that regulate the modification of rules, rules of adjudication that determine the application of norms to individual cases, and rules of recognition that identify the system's norms. Primary rules are those regulated by the secondary rules of change, adjudication, and recognition. Moreover, Hart claimed that the transition from the "pre-legal" to the "legal"—which occurs with the introduction of secondary rules that resolve the defects of inefficiency, uncertainty, and stagnancy characteristic of pre-legal communities—is a "step forward as important to society as the invention of the wheel."[171] He further claimed that international law is closer to the law of "primitive" societies due to its absence of secondary rules.[172] It has been suggested that these are endorsements of centralism, for Hart seems to deny the legal character of non-state legal phenomena, such as customary law, Indigenous laws, and international law.[173]

However, while Hart offered an account of state law, nothing precludes its application to non-state contexts. As Roger Cotterrell puts it:

> Nothing in Hart's book seems to indicate that 'officials' for this purpose must be state officials: certainly the judges of an international tribunal and perhaps the priests of a religious group, the elders of a cultural or ethnic group, the committee of an association, or the directors of a corporation could qualify. Each of these kinds of group or association could thus have a kind of law of its own according to

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169 For a defence of this reading, see Michael S Green, "Marmor's Kelsen" in DA Jeremy Telman, ed, *Hans Kelsen in America: Selective Affinities and the Mysteries of Academic Influence* (Cham: Springer, 2016) 31 at 41–44.

170 Hart, *Concept of Law*, *supra* note 93 at 79–99.

171 *Ibid* at 41–42.

172 See *ibid* at 213–16.

173 See e.g. Tamanaha, *General Jurisprudence*, *supra* note 90 at 138–39; Roberts, "After Government?", *supra* note 81 at 10; Menski, "Remembering and Applying Legal Pluralism", *supra* note 73 at 98–103; Roger Cotterrell, "What Is Transnational Law?" (2012) 37:2 Law & Soc Inquiry 500 at 506–07 [Cotterrell, "What Is Transnational Law?"].

> its members' concept of law. Hart's theory, does not, therefore, explicitly identify law with the law of the nation state.[174]

Other scholars concur that it is possible to identify officials and secondary rules, and thereby legal systems, beyond the state context even if Hart did not explicitly recognize this possibility.[175] As a result, forms of Indigenous, customary, religious, international, and transnational law could be considered legal systems according to Hart's account if the required trio of secondary rules is identified.

Hart's account is not at odds with LP since these forms of non-state legality can coexist and interact with one another and with state law. In this sense, Hart's notion of the legal system has been used by some self-styled pluralists to identify and explain LP.[176] However, this conception can objectionably incorporate associations, clubs, sports, universities, and legal practices with secondary rules, thereby excessively expanding the domain of legal pluralism.[177] Different responses to this problem have emerged. Some believe that the operation of Hart's framework presupposes hierarchical arrangements typical of state law, so it is ultimately unsatisfactory beyond the state.[178] Others attempt to rescue Hart's theory by incorporating elements of Raz's account of legal systems, discussed below. Specifically, it has been suggested that Hart's conceptions of the legal system should be complemented with the Razian idea that every legal sys-

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[174] Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Aldershot: Ashgate, 2006) at 37.

[175] See e.g. Neil MacCormick, "Beyond the Sovereign State" (1993) 56:1 Mod L Rev 1 at 5–6; Menski, "Remembering and Applying Legal Pluralism", *supra* note 73 at 98–99; Mehrdad Payandeh, "The Concept of International Law in the Jurisprudence of H.L.A. Hart" (2011) 21:4 Eur J Intl L 967; Jeremy Waldron, "Legal Pluralism and the Contrast between Hart's Jurisprudence and Fuller's" in Peter Cane, ed, *The Hart-Fuller Debate in the Twenty-First Century* (Oxford, UK: Hart, 2010) 135 at 140; von Daniels, *supra* note 62 at 105–21; Mariano Croce, "A Practice Theory of Legal Pluralism: Hart's (Inadvertent) Defence of the Indistinctiveness of Law" (2014) 27:1 Can JL & Jur 27; Muñiz-Fraticelli, *supra* note 44 at 137–60; Schultz, *supra* note 62 at 81–99; Michael A Helfand, "The Persistence of Sovereignty and the Rise of the Legal Subject" in Michael A Helfand, ed, *Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism* (New York: Cambridge University Press, 2015) 307; Anthony J Connolly, "Legal Pluralism and the Interpretive Limits of Law" in René Provost, ed, *Culture in the Domains of Law* (Cambridge, UK: Cambridge University Press, 2017) 23; Mac Amhlaigh, *supra* note 106 at 283–84.

[176] See e.g. Galanter, *supra* note 52 at 18–19, n 26.

[177] See e.g. Tamanaha, *Realistic Theory*, *supra* note 100 at 48–51.

[178] See Cotterrell, "What Is Transnational Law?", *supra* note 173 at 37–38; Culver & Giudice, *supra* note 62 at 41–78.

tem claims supremacy over others.[179] In any case, while Hart's theory might not provide the most illuminating account of LP, it does not deny the legal character of non-state legal phenomena and the possibility of co-existence and interaction between state and non-state law.

C. Raz's Account

Although Raz's account is based on a general theory of social practices,[180] he developed an avowedly state-centred account of the legal systems of contemporary states.[181] In his view, legal systems display three claims (which, for him, refer to self-understandings exhibited in the discourse of the system's participants about the norms that guide them): a claim of comprehensiveness (i.e., the capacity to regulate any behaviour); a claim of supremacy (i.e., the power to regulate the establishment and application of other institutionalized systems by their subject-community); and a claim of openness (i.e., the ability to give force to norms that do not belong to the legal system). The trio of Razian requirements explicitly attempts to explain how legal systems operate in modern nation-states, "the most important institutionalized system governing human society."[182] Still, the Razian theory does not fully equate law with state law since it can recognize non-state legal phenomena. That is, Indigenous legal orders, customary legal orders, or the European Union can count as Razian legal systems if they exhibit these claims. This explains Raz's recognition of non-state legal systems. For example, he claimed that legal systems are part of the normative orders of "complex forms of social life, such as religions, states, regimes, tribes, etc."[183]

The Razian claim of supremacy can be a central element to distinguish legal and non-legal orders in circumstances of legal pluralism. For Raz, a normative system is legal "only if it claims to be authoritative and *to occupy a position of supremacy within society*, i.e., it claims the right to legitimize or outlaw all other social institutions."[184] To be clear, it is sufficient for the Razian supremacy claim that officials exhibit such belief in

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[179] See Hart, *Concept of Law*, *supra* note 93 at 249 (Hart seems to have accepted this explanation); Gardner, *Leap of Faith*, *supra* note 119 at 278 (discussing Hart's endorsement of the "primacy" requirement).

[180] See e.g. Raz, *Authority of Law*, *supra* note 94 at 53.

[181] See *ibid* at 97–102, 116–20.

[182] *Ibid* at 116.

[183] Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of a Legal System*, 2nd ed (Oxford, UK: Oxford University Press, 1980) at 188. See also Raz, *Authority of Law*, *supra* note 94 at 101, n 41.

[184] Raz, *Authority of Law*, *supra* note 94 at 43 [emphasis added].

their behavior, but it is not necessary that one system is factually superior to all others.[185] As a result, the claim of supremacy allows a distinction between legal and non-legal practices. For example, the European Union asserts supremacy over the norms of member states (although there are different accounts for this phenomenon).[186] Similarly, some Indigenous communities also claim that the norms that have regulated them since time immemorial have supremacy over domestic and international law.[187] In this view, Indigenous and European Union norms are law, not social practices when their participants typically claim supremacy over other normative orders. Thus, LP occurs between interacting and coexisting systems that claim supremacy, while normative pluralism occurs when supremacy claims are not present.[188] Although the Razian account is far from an ideal understanding of LP,[189] it is not subject to the vice of centralism that pluralists attribute to analytical jurisprudents.

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185 Raz explicitly makes this point about the claim of legitimate authority, another claim that all legal systems make: "The claim made here that a normative standard, and a form of excellence, are part of the concept of the state does not entail that it is part of the necessary conditions for something being a state that it meets those standards. To be a state it needs to claim legitimate comprehensive authority, not to have it" (Joseph Raz, *The Practice of Value* (Oxford, UK: Oxford University Press, 2003) at 32, n 18). That is, Raz argues that all legal systems need to claim to be legitimate authorities, while recognizing that perhaps none of them meets the conditions established in his theory of legitimacy (i.e., the "service conception"). These considerations also apply to the claims of supremacy and comprehensiveness. For example, the state, the church and Indigenous communities are the legal systems of a certain community if they claim to be superior to the others and if they exhibit the ability to rule if they wish to do so. However, it is not required that one of them actually be superior.

186 See Paul Craig & Gráinne de Búrca, *EU Law: Text, Cases, and Materials*, 7th ed (Oxford, UK: Oxford University Press, 2020) at 303–52. For a theoretical discussion, see Keith Culver & Michael Giudice, "Not a System but an Order: An Inter-Institutional View of European Union Law" in Julie Dickson & Pavlos Eleftheriadis, eds, *Philosophical Foundations of European Union Law* (Oxford, UK: Oxford University Press, 2012) 54 at 54–76.

187 An excellent example of this claim are the claims made by U'Wa law (see Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford, UK: Oxford University Press, 2012) at 61–63).

188 See Gardner, *Leap of Faith*, *supra* note 119 at 287, n 49. See also Kleinhans & Macdonald, *supra* note 52 at 39 (suggesting that most pluralists implicitly endorse a claim of supremacy, similar to Raz's).

189 For objections to the Razian requirement of supremacy, see Andrei Marmor, *Positive Law and Objective Values* (Oxford, UK: Oxford University Press, 2001) at 40; Tamanaha, *General Jurisprudence*, *supra* note 90 at 140; Culver & Giudice, *supra* note 62 at 41–78; Julie Dickson, "Towards a Theory of European Union Legal Systems" in Dickson & Eleftheriadis, *supra* note 186, 25 at 40; Nicole Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (Oxford, UK: Oxford University Press, 2013) at 149–70; Jennifer W Primmer, "Beyond the Law-State: The Adequacy of

D. The Explanatory Centrality of the State

We can extract from the previous discussion the methodological strategy that has influenced most contemporary analytical philosophers: the explanatory centrality of the state. The most influential twentieth-century legal theories focused almost exclusively on state law, the legal system of sovereign nation-states, which they consider the central case of law. For example, Hart claims that "the clear standard cases" of law are "constituted by the legal systems of modern states, which no one in his senses doubts are legal systems."[190] Meanwhile, Raz embraces the "assumption of the importance of municipal law," the "intuitive perception that municipal legal systems are sufficiently important and sufficiently different from most other normative systems to deserve being studied for their own sake."[191] On this account, the norms that ruled over the Babylonian Empire, the Greek polis, the Roman Republic, or the Incan *Tawantinsuyu*, and several forms of contemporary non-state normative phenomena are law because they *resemble* contemporary states. Hence, Kelsen can identify "pre-state" forms of law without centralized coercion,[192] and Hart can characterize "primitive" law and the non-systematic practices of international law as peripheral or non-central forms of law.[193] Similarly, Raz recognizes that international law and church law are "borderline" cases of law.[194] More recently, he also acknowledged an array of non-state legal phenomena, including European Union law, Canon law, Sharia law, Indigenous laws, rules of corporations, voluntary associations, and—more controversially—neighbourhood gangs.[195] It is important to note that some members of the pluralist tradition endorse a similar position. For example, Cotterrell treats "state law as central to but not the exclusive concern of analysis of law in contemporary Western societies,"[196] Arnaud discusses a multiplicity of "juridical systems" while reserving the

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Raz's Account of Legal Systems in Explaining Intra-State and Supra-State Legality" (2015) 28:1 Ratio Juris 149.

190 Hart, *Concept of Law*, *supra* note 93 at 3.

191 Raz, *Authority of Law*, *supra* note 94 at 105.

192 Kelsen, *Problems of Legal Theory*, *supra* note 92 at 99–100.

193 See Hart, *Concept of Law*, *supra* note 93 at 4–5, 15–16.

194 See Raz, *Practical Reason*, *supra* note 94 at 150; Raz, *Authority of Law*, *supra* note 94 at 105.

195 See Joseph Raz, "Why the State?" in Nicole Roughan & Andrew Halpin, eds, *In Pursuit of Pluralist Jurisprudence* (Cambridge, UK: Cambridge University Press, 2017) 136 at 138.

196 Cotterrell, *Law's Community*, *supra* note 54 at 37.

term "law" for state law,[197] and Denis Galligan assigns a central role to the state over non-state phenomena.[198] These pluralists, as Sally Falk Moore suggests, attempt to distinguish between state and "other rule-making entities" for purposes of analysis and policy without "necessarily ... adopt[ing] a 'legal centralist' view."[199]

These considerations demonstrate that contemporary analytical jurisprudents can recognize and explain non-state legal phenomena, suggesting that they cannot be considered as centralists in the way pluralists define the term. Yet, a problematic implication remains. Some non-state legal phenomena are types of law lacking some elements of the state, which is considered as law's paradigmatic case. Since non-state legal phenomena lack some state features (i.e., centralized coercion, secondary rules, claims of comprehensiveness, legal officials, etc.), they are non-central, secondary, borderline, or incomplete forms of law. Thus, they are not sufficiently important and different to merit individual theoretical consideration (to borrow from Raz's expression) but an account of the central case can indirectly illuminate them. However, some so-called strong legal pluralists such as J. Griffiths,[200] Tamanaha,[201] and Twining,[202] who are joined by analytical jurisprudents such as Keith Culver and Michael Giudice, forcefully reject this positioning of state law "as the standard and measure of legality."[203] For these scholars, Indigenous, customary, religious, and international laws are not merely secondary, incomplete, or watered-down state laws; they are forms of law in their own and distinct way. That is, these non-state legal phenomena might lack some of the features of state law but are sufficiently important, unified in form, and distinctive vis-à-vis other phenomena to also merit theoretical attention.

As a result, there is a relevant theoretical debate, not between pluralists and centralist jurisprudents, but between two different camps that recognize the fact of LP. Using J. Griffiths' language,[204] the dispute is between "weak" and "strong" advocates of LP. The former—which includes both Kelsen, Hart, and Raz as well as the pluralists listed above—assign

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197 See Arnaud, "Building of Europe", *supra* note 22; Arnaud, "Limited Realism to Plural Law", *supra* note 63 at 250–51.

198 See DJ Galligan, *Law in Modern Society* (Oxford, UK: Oxford University Press, 2007) at 173–92.

199 Sally Falk Moore, "Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949-1999" (2001) 7:1 J Royal Anthropological Institute 95 at 106–07.

200 See J Griffiths, "What Is Legal Pluralism?", *supra* note 1 at 5–8.

201 See Tamanaha, *Realistic Theory*, *supra* note 100 at 63–64.

202 See Twining, *General Jurisprudence*, *supra* note 89 at 362–63.

203 Culver & Giudice, *supra* note 62 at xxiii.

204 J Griffiths, "What Is Legal Pluralism?", *supra* note 1 at 5–8.

explanatory centrality to the state, whereas the latter—which includes J. Griffiths, Tamanaha, Twining, Culver and Giudice, and my non-statist alternative outlined below—deny such centrality. The relevant question that results from the recognition of LP concerns the role of the state in legal theories, often called "methodological nationalism" in other disciplines.[205] We have thus shifted toward a new dispute which is very different from the accusations of centralism and monism that have partly defined legal pluralism as an academic tradition.

E. A Non-Statist Hartian Account

Finally, I believe there are resources in Hart's theory that allow for a non-statist response to the pluralist charge. Since it is not my intent to dwell here on disputes about the best interpretation of his work or legacy, I shall refer to this alternative interpretation as "Hartian" to differentiate it from Hart's own state-based formulation. Two central resources can be noted.

We should begin by noting that, while Hart did describe law "as the union of primary and secondary rules,"[206] which suggests that a systematic character is the mark of legal character, he also warned against conflating law and legal systems.[207] In his view, "law" is (i) a folk-concept animated by the views of educated citizens that (ii) does not allow for a definitional structure or an account in terms of necessary and sufficient conditions.[208] In turn, a "legal system" is (i) an "ancillary device"—a theoretically constructed tool—that illuminates the concept of law,[209] and (ii) has a structure in terms of necessary and sufficient conditions for its application.[210] In this view, educated individuals' concept of law included "primitive law" and international law, although they do not constitute systems. Meanwhile, this concept excluded associations, universities, and other

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[205] See e.g. Andreas Wimmer & Nina Glick Schiller, "Methodological Nationalism and Beyond: Nation–State Building, Migration and the Social Sciences" (2002) 2:4 Global Networks 301.

[206] Hart, *Concept of Law*, *supra* note 93 at 79–99.

[207] See *ibid* at 79. He wrote: "We shall not indeed claim that wherever the word 'law' is 'properly' used this combination of primary and secondary rules is to be found" (*ibid* at 81). He also claimed: "Though it would accord with usage to treat the existence of this characteristic union of [primary and secondary] rules as a sufficient condition for the application of the expression 'legal system', we have not claimed that the word 'law' must be defined in its terms" (*ibid* at 213).

[208] See *ibid* at 3, 13–17.

[209] *Ibid* at 80, 155. For a similar view on "constructed" concepts, see Raz, *Authority of Law*, *supra* note 94 at 78–79, 93–94.

[210] See Hart, *Concept of Law*, *supra* note 93 at 100, 116–17, 129–30.

complex arrangements that exhibit the hallmarks of normative systems. For these reasons, some writers have suggested that the Hartian folk-concept of law is structured as a cluster, namely, as a concept characterized by a weighted list of criteria so that no single one, or only a few, of these criteria are either necessary or sufficient for membership to the concept.[211]

This cluster structure explains why Hart's description of the concept of law of educated individuals includes "primitive law" and international law, although they are not legal systems in his view. While the justification for such inclusion is not explicitly provided, evidence suggests that Hart regarded as law the regulation of those communities that impose obligatory or non-optional behaviour by exercising "serious social pressure" (e.g., physical compulsion or deprivations of the subject's honour, resources, or liberty), as opposed to the "weak social pressure" that accompanies rules of social morality.[212]

To better capture these two insights, I have suggested recasting the Hartian view in terms of *normative political communities* or *polities*.[213] In my conception, a polity is a large-scale normative community that converges in following rules that regulate salient moral, political, or economic issues, where the group's compliance with such rules is effectively enforced by the exercise of intense forms of social pressure. Polities demand theoretical attention because of the prominent role they play in collective life. Thus construed, law or legal phenomena are sub-types of normative practices that constitute and regulate political communities. Legal systems of domestic states are prominent examples of polities. Furthermore, customary, religious, international, and transnational law are also law insofar as they create polities—that is, they comprise rules that regulate salient moral, political, or economic issues—and the community's compliance with such rules is effectively enforced by the exercise of intense forms of social pressure. While there are several gaps in this proposal,

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[211] See Rolf Sartorius, "Hart's Concept of Law" in Robert S Summers, ed, *More Essays in Legal Philosophy: General Assessments of Legal Philosophies* (Oxford, UK: Basil Blackwell, 1971) 131 at 142–44; Michael Payne, "Hart's Concept of a Legal System" (1976) 18:2 Wm & Mary L Rev 287; Michael D Bayles, *Hart's Legal Philosophy: An Examination* (Dordrecht: Springer Science+Business Media, 1992) at 75, 77, 121, 127, 137, 255; Frederick Schauer, "On the Nature of the Nature of Law" (2012) 98:4 Archives for Philosophy L & Soc Philosophy 457.

[212] Hart, *Concept of Law*, *supra* note 93 at 86–87, 179–80. See also HLA Hart, "Legal and Moral Obligation" in AI Melden, ed, *Essays in Moral Philosophy* (Seattle: University of Washington Press, 1958) 82 at 82; HLA Hart, "Answers to Eight Questions (1988)" in Luís Duarte d'Almeida, James Edwards & Andrea Dolcetti, eds, *Reading HLA Hart's "The Concept of Law"* (Oxford, UK: Hart Publishing, 2013) 279 at 283.

[213] For my formulation, see Fabra-Zamora, *Normative Political Communities*, *supra* note 154.

these considerations suffice to show that the centrality of the state suggested by major jurisprudents is questionable. The renewed reading can recognize LP in the coexistence and interaction among several forms of state and non-state legal phenomena, which could take systemic and non-systemic forms. In this view, the legal character of Indigenous, religious, customary, international, and transnational law does not depend on its systematic nature or resemblance with state law. We have identified the germ of a richer account of non-state legal phenomena that I develop elsewhere. Since this account openly recognizes LP, it does not fall into the vices of centralism, while also avoiding the defects of the familiar explanatory centrality of state that most analytical jurisprudents and so-called weak legal pluralists share.

Finally, this refined view also helps us dispel some additional misrepresentations that pluralists have advanced about analytical jurisprudence. For instance, some pluralists still claim that analytical jurisprudents fail to recognize custom as law[214] or that they regard customs as inferior to state law.[215] Others suggest that all analytical jurisprudents endorse a sovereigntist and territorialist conception of law,[216] in which law is the product of a rational entity, so all legal norms are written.[217] Not only does Hart not hold such claims, but his theory is also instrumental in their eradication.

The bedrock of Hart's theory is an account of social rules (i.e., customary norms) that exist when community members exhibit a pattern of conduct accompanied with an attitude of rule acceptance called the internal point of view.[218] Not only can this account recognize customs as one of the sources of law recognized by a rule of recognition, but since the trio of secondary rules are social rules, Hart's theory is custom-based.[219] Contrary to sovereigntist objections, Hart championed a formidable attack against

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[214] See e.g. AW Brian Simpson, *Reflections on "The Concept of Law"* (Oxford, UK: Oxford University Press, 2011) at 171–76; Basil Ugochukwu, "From Reaction to Agency: A 'Subaltern' Response to William Twining's Globalisation and Legal Scholarship" (2013) 4:4 Transnational Leg Theory 549 at 555–56.

[215] See e.g. J Griffiths, "What Is Legal Pluralism?", *supra* note 1 at 1–2; Nicholas Aroney & Jennifer Corrin, "Endemic Revolution: HLA Hart, Custom and the Constitution of the Fiji Islands" (2013) 45:3 J Leg Pluralism & Unofficial L 314 at 318.

[216] See P Berman, *Global Legal Pluralism*, *supra* note 66 at 97, 213–15. Similarly, Martti Koskenniemi claimed that the British school of analytical jurisprudence, of which Hart is the major representative, "found no room for a law beyond sovereignty" (Martti Koskenniemi, "The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960" (Cambridge, UK: Cambridge University Press, 2004) at 34).

[217] See e.g. Macdonald, "Custom Made", *supra* note 143 at 309–10, n 28, 321.

[218] See Hart, *Concept of Law*, *supra* note 93 at 57.

[219] See Gardner, *Leap of Faith*, *supra* note 119 at 65–74, 283.

Austin's conception of law, which requires the presence of a sovereign that issues directives.[220] As Leslie Green puts it, the Hartian objections have done a great deal in achieving the Foucauldian goal of "cutting the King's head" in practical philosophy.[221] Thus, there is nothing in Hart's account requiring laws to be enacted by a sovereign, let alone be written, or be the result of an intentional process. Further, contrary to the opinions of numerous critics,[222] it is also important to note that there is nothing in the views of analytical jurisprudence implying that state law or legal systems are an evolutionary achievement or that non-state forms of law are lesser or subordinate to the state, or worse, that cultures not ruled by legal systems are inferior or barbaric. While the label "primitive" in theory is unfortunate, the charge of ethnographic imperialism is false. For Hart, a form of regulation is primitive or rudimentary if it lacks efficacious secondary rules establishing the criteria for creating, identifying, and applying laws and agents in charge of such activities.[223] In this conception, Western forms of law, like transnational or international law are primitive since they lack such rules. In any case, the key point of the Hartian account is that "primitive" forms of regulation lacking hallmarks of a normative system still count as *legal* phenomena since they constitute and regulate political communities.

IV. The Conceptual Problem

The discourse of legal pluralism involves a conceptual problem since a working understanding of law is necessary to identify and explain LP. However, as I argue in this section, a substantial part of the pluralist tradition has tried to address conceptual inquiries by relying on reductive definitional projects long rejected by analytical jurisprudence. This reliance has in turn motivated forms of self-defeating skepticism against con-

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[220] See Hart, *Concept of Law*, *supra* note 93 at 50–78.

[221] Green, "Introduction", *supra* note 137 at xx; Michel Foucault, "Truth and Power" in Colin Gordon, ed, *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977* (New York: Vintage Books, 1980) 109 at 121.

[222] See e.g. Donald C Galloway, "The Axiology of Analytical Jurisprudence: A Study of the Underlying Sociological Assumptions and Ideological Predilections" in Thomas W Bechtler, ed, *Law in a Social Context: Liber Amicorum Honouring Professor Lon L Fuller* (Deventer: Kluwer BV, 1978) 49 at 85–88; Antony Allott, *The Limits of Law* (London, UK: Butterworths, 1980) at 49–51; Peter Fitzpatrick, *The Mythology of Modern Law* (London, UK: Routledge, 1992) at 192–210; Morton J Horwitz, "Why is Anglo-American Jurisprudence Unhistorical?" (1997) 17:4 Oxford J Leg Stud 551 at 582–83; Menski, "Remembering and Applying Legal Pluralism", *supra* note 73 at 102; Tamanaha, "Understanding Legal Pluralism", *supra* note 1 at 382.

[223] See Gardner, *Leap of Faith*, *supra* note 119 at 289–91; Green, "Introduction", *supra* note 137 at l–li.

ceptual investigations altogether My argument attacks a significant and influential reading within the pluralist tradition, but—as I note through my exposition—some pluralist views are immune to the objection and will be scrutinized in a different article.

A. The Priority of the Conceptual Question

The pluralist opposition to analytical jurisprudence often implicitly suggests that highlighting the existence of LP is in itself a decisive argument against not only the centralist tradition of analytical jurisprudence but also the project of providing a general account of law. A new theory is not necessary because, once we note the empirical reality of LP, we might be "tempted simply to declare victory on the thick description front and stop there."[224] However, this position is unsatisfactory. As F. von Benda-Beckmann has repeatedly argued, it is not possible to "disprove" centralism merely by noting the empirical reality of pluralism; for any talk of "intertwining, interaction or mutual constitution [among legal orders] presupposes distinguishing what is being intertwined."[225]

Moreover, since legal pluralists aim to challenge the adequacy of mainstream legal theories often without offering comprehensive alternatives, a serious discussion of LP requires returning to the storied conceptual question "what is law?"—the central concern that interests analytical jurisprudence. To determine whether there is a scenario of legal pluralism with more than one legal phenomenon in a given situation, and not merely normative pluralism, we must have first determined what the relevant phenomena are, whether they are legal objects, and how they differ from non-legal objects. In other words, to engage with LP without committing a *petitio principii* (i.e., without assuming LP is true), we need some resolution to the conceptual question of analytical jurisprudence (i.e., the features that explain the legal character of a given normative practice and the elements that illuminate how to distinguish between legal and non-legal phenomena). To be clear, however, the claim is neither that the questions of analytical jurisprudence always take priority above all other inquiries, nor that analytical jurisprudents have a monopoly over such questions. Instead, conceptual inquiries—that can be advanced by both analytical legal theorists and legal pluralists—develop an initial working impression that provides a starting point for further queries. This first elucidation is to be complemented and revised in light of the results of more specific empirical, doctrinal, and politico-moral inquiries.

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[224] P Berman, "Understanding Global Legal Pluralism", *supra* note 134 at 17.

[225] Franz von Benda-Beckmann, "Comment on Merry" (1988) 22:5 Law & Soc'y Rev 897 at 898. *Cf* F von Benda-Beckmann, "Who's Afraid of Legal Pluralism?", *supra* note 1 at 47.

The lack of an explicit positive account of law, in my view, has motivated some critiques against the legal pluralist tradition. For example, J. Griffiths' and Merry's canonical formulations of legal pluralism depart from Moore's account of "semi-autonomous social fields," namely, fields capable of creating rules to induce compliance, while remaining vulnerable to other normative forces that surround these social fields.[226] Nevertheless, Moore developed a theory of social structures in general, not an account of law that explains what the *legal* aspect of these social fields is, or how to distinguish between legal and non-legal social fields.[227] In other words, Moore provided an account of normative pluralism, without specifying the legal component. In this sense, a substantial part of the legal pluralist tradition started without a clear account of the conditions which determine whether LP is substantiated. Without such an account, critics have claimed, the discourse regarding legal pluralism is "banal" or "points to nothing distinctive" because "it merely reminds us that from the legal perspective (as from any other) isolated, homogeneous societies do not actually exist."[228]

B. Misguided Definitional Projects

Thus, the study of LP needs to tackle the conceptual question about law. When pluralists choose to do so, they do not engage in the debates of the allegedly centralist jurisprudents they criticize. Instead, save for important exceptions,[229] most representatives of the tradition attempt to address the conceptual question by providing renewed definitions of law— namely, linguistic formulas that differentiate between state and non-state normative objects appropriately marked by the word "law" from other phenomena marked by different words— without engaging in broader theoretical debates. The assumption seems to be that, in the same way that students of medicine or chemistry require only a few lines in the opening pages of an elementary textbook to characterize their disciplines, scholars interested in LP need only a formulaic account of law for the necessary theoretical and practical guidance.

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[226] Sally Falk Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study" (1973) 7:4 Law & Soc'y Rev 719 at 720–23; J Griffiths, "What Is Legal Pluralism?", *supra* note 1 at 29–39; Merry, "Legal Pluralism", *supra* note 1 at 878–80.

[227] Tamanaha noted this point (see Tamanaha, "Understanding Legal Pluralism", *supra* note 1 at 394; Tamanaha, "Pluralist Jurisprudence", *supra* note 29 at 171).

[228] C Fuller, *supra* note 81 at 10. *Cf* Tamanaha, *General Jurisprudence*, *supra* note 90 at 171; Michaels, *supra* note 1 at 252.

[229] See Jorge Luis Fabra-Zamora, "The Conceptual Problems Arising from Legal Pluralism" (2022) 37:1 CJLS 155 [Fabra-Zamora, "Conceptual Problems"].

The centrality of definitions is evident in the numerous *ad hoc* definitions of law and legal pluralism advanced by the tradition.[230] It is also apparent in the familiar pluralist strategy of formulating conceptual questions as definitional ones. For example, Menski searches for a "global definition of law;"[231] Davies argues that the critical problem of legal pluralism is its "inability ... to settle on a definition of law;"[232] Baudouin Dupret formulates the conceptual problem as a "definitional deadlock;"[233] Ralf Michaels claims that "a perennial topic within the legal pluralism discussion is how to define what should count as law;"[234] Zumbansen suggests that the conceptual problem of pluralism is that the "definition of law has become elusive;"[235] and P. Berman asserts that "pluralists are much less likely to insist on positivist definitions of law."[236] In fact, even writers who are wary of the limitations of definitions as explanations of complex social phenomena rely on this device: Twining discusses the problem created by LP as the lack of a "definitional stop,"[237] Tamanaha examines the problems associated with the inability to "define" law,[238] and Catherine Valcke's critique of the pluralist skepticism toward conceptual questions is framed in definitional terms.[239]

Although pluralists do not explicitly identify which conception of definition they have in mind, most of them seem to assume a classical *per genus et differentiam* strategy. Here, the theorist identifies a *genus* or category to which the term belongs and then explains the distinctive features of the species as a member of that *genus*. To use a familiar example often attributed to Aristotle, one can define humans as "rational animals" since they are part of the *genus* "animal," and they are further distinguished from other animals by their rationality. Hence, for pluralists, a definition of law would typically identify it as part of the *genus* of normative phe-

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230 For an extensive discussion of several definitions of both terms, see Woodman, "Ideological Combat", *supra* note 1.

231 Menski, *Comparative Law in a Global Context*, *supra* note 73 at 190.

232 Margaret Davies, "Pluralism and Legal Philosophy" (2006) 57:4 N Ir Leg Q 577 at 578.

233 Dupret, "Praxiological Re-Specification", *supra* note 1 at 302–03.

234 Michaels, *supra* note 1 at 250.

235 Peer Zumbansen, "Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism" (2012) 21:2 Transnat'l L & Contemp Probs 305 at 316.

236 P Berman, "Understanding Global Legal Pluralism", *supra* note 134 at 11.

237 Twining, *General Jurisprudence*, *supra* note 89 at 369.

238 See Tamanaha, "'Social Scientific' Concept", *supra* note 41 at 193–94; Tamanaha, *General Jurisprudence*, *supra* note 90 at 173–74; Tamanaha, "Understanding Legal Pluralism", *supra* note 1 at 390–96; Tamanaha, *Realistic Theory*, *supra* note 100 at 38.

239 See Valcke, *supra* note 11 at 123–26.

nomena and seek to identify law's distinctive features. However, the pluralist insistence on framing conceptual questions as definitional ones reflects a disconnect from broader philosophical discussions. It is widely accepted in analytical jurisprudence circles that the search for a real definition of law was largely put to rest by Hart. He argues that the search for definitions is based on the "tacit assumption that all the instances of what is to be defined ... have common characteristics which are signified by the expression defined."[240] The primary evidence heralded by Hart for the impossibility of a definition of law is the existence of several borderline cases of law. This criticism has been echoed by other scholars who are similarly skeptical about the possibility of defining law.[241]

A second common pluralist strategy is to derive a definition of law from semantic or lexicographical analyses of the meaning of the word "law" in common language. The key assumption of such a view is that there are some unstated linguistic rules about using that word that jurists and laymen employ in framing, accepting, and rejecting statements about what the law is. Hence, the theorist's role is to elucidate what these rules are through a careful study of how lawyers and citizens talk. This semantic definitional strategy is evident in Antony Allott's and Macdonald's attempts to differentiate between different meanings of "law,"[242] as well as in self-styled Wittgensteinian strategies that equate the meaning of the word "law" with its usage.[243] Mainstream jurisprudents have carefully rejected this strategy, primarily because Ronald Dworkin attributed it to them.[244] These responses hold that we use the word "law" in various situations (e.g., laws of nature, laws of logic, mathematical laws, divine law, etc.) that are not related to one another or to the particular phenom-

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[240] Hart, *Concept of Law*, *supra* note 93 at 15. See also HLA Hart, *Essays in Jurisprudence and Philosophy* (Oxford, UK: Clarendon Press, 1983) at 31–35.

[241] See Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford, UK: Clarendon Press, 1994) at 196 [Raz, *Ethics*]; Jules L Coleman & Ori Simchem, "'Law'" (2003) 9:1 Leg Theory 1 at 1–2; Twining, *General Jurisprudence*, *supra* note 89 at 65; Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford, UK: Oxford University Press, 2009) at 54–55 [Raz, *Between Authority*]; Raz, *Authority of Law*, *supra* note 94 at 316; Gardner, *Leap of Faith*, *supra* note 119 at 117.

[242] See Allott, *supra* note 222 at 1–44; Macdonald, "Theorizing Legal Pluralism", *supra* note 126 at 391–92.

[243] See Jaakko Husa, "The Truth Is Out There? Legal Pluralism and the Language-Game" in Donlan & Heckendorn Urscheler, *supra* note 11, 75; Baudouin Dupret, "The Concept of Law: A Wittgensteinian Approach with Some Ethnomethodological Specifications" in Donlan & Heckendorn Urscheler, *supra* note 11, 59.

[244] See Ronald Dworkin, *Law's Empire* (Cambridge, Mass: Harvard University Press, 1986) at 31–33.

enon that interests legal scholars.[245] Furthermore, given the pluralists' ambitious project of explaining diverse forms of normativity, the type of semantic analysis they perform leads to challenges when they attempt to compare the English word "law" with the term in other languages and traditions.

A third pluralist definitional strategy replaces the word "law" with a different noun, such as "law as a process," "law as power," "law as culture," and other combinations. Following William Ewald, I do not have in mind the weak claim that noun X is important to understand law but the stronger claims that the field or phenomenon of law is "nothing but X," "[l]aw is wholly explicable in terms of X," or, "[g]iven a knowledge of X, it is possible to calculate the rules of law that will hold in a given society."[246] Zumbansen has usefully listed some of these noun-replacing definitions, such as law as a means of oppression, as domination, as a promise of hope, as an instrument of liberation and emancipation, and others.[247] Some pluralists have even suggested accounts where law is replaced by a multiplicity of nouns. In Menski's model of law as "a flying kite," for example, law is the result of the ongoing negotiation of four "corners" (i.e., natural law, the living law of social orderings, state law, and international law).[248] It is not difficult to see that definition by noun-replacement introduces new elements without answering the conceptual question about law itself. The inquirer still needs to explain the "law" component of the equation and in what senses it resembles and differs from other nouns used in its place. As F. von Benda-Beckmann puts it, "if one wants to avoid the reductionist trap of identifying law with process, culture, or social control, one has to say what is this presupposed law that is *also* culture, process, power, social control, or what specific manifestation or kind of power, process, etc law is."[249] In other words, if we equate law with culture, we need to explain which aspect of law is culture and which parts of culture are legal and which are not. Those who use several replacing nouns multiply these problems. In this sense, Menski's account of law and similar efforts provide guides of possible sites of normativity, but they fall short as a solution to the conceptual question of analytical jurisprudence.

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[245] See Raz, *Ethics*, *supra* note 241 at 196–98; Raz, *Between Authority*, *supra* note 241 at 19–20, 53–54; Coleman & Simchem, *supra* note 241; Gardner, *Leap of Faith*, *supra* note 119 at 117.

[246] William Ewald, "Comparative Jurisprudence (II): The Logic of Legal Transplants" (1995) 43:4 Am J Comp L 489 at 493.

[247] See Zumbansen, "Transnational Legal Pluralism", *supra* note 79 at 154–56.

[248] See Menski, "Remembering and Applying Legal Pluralism", *supra* note 73.

[249] F von Benda-Beckmann, "Who's Afraid of Legal Pluralism?", *supra* note 1 at 48.

Finally, whatever strategy is chosen, formulaic definitions fail to provide the necessary elements to resolve the underlying disputes that motivate our puzzlement about law, to provide elements to distinguish between the legal and the social, and to offer sufficient guidance for empirical, practical, and normative inquiries. For example, the Oxford English Dictionary defines law as "[t]he body of rules, whether proceeding from formal enactment or from custom, which a particular state or community recognizes as binding on its members or subjects."[250] Still, many of the components of this definition need to be further explained to be useful to inquire about LP; that is, it is necessary to clarify which "bodies of rules" and "communities" count as legal ones and how they differ from non-legal rules and communities. These are, precisely, the questions that interest analytical jurisprudents in developing more sophisticated and comprehensive non-definitional accounts of law. Simple linguistic formulas might be starting points for this working understanding, but they need to be made more robust and complemented with additional theoretical building blocks to be illuminating and helpful.[251]

In sum, since they do not adequately address the conceptual questions in a way that serves as a useful point of departure for further inquiries, pluralists should join analytical jurisprudents in rejecting definitional projects.

C. Unwarranted Skepticism

The failure of the widespread definitional projects is, in my view, the primary motivation for another influential position among pluralists, which is skeptical of all sorts of conceptual inquiries. Due to the lack of practical results offered by centuries of arcane philosophical discussion, skeptics declare the intractability and futility of the questions that interest analytical jurisprudents. The attitude of skeptic pluralists is close to what international lawyer Thomas Franck aptly called a "post-ontological era:"[252] LP does not require a theory of law, the skeptic believes, since non-state legal phenomena have reached a situation in which their status as law can be confidently presumed, and we can directly turn to "more urgent and interesting" empirical, doctrinal, and politico-moral inquir-

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[250] Michael Proffitt, ed, *Oxford English Dictionary* (Oxford, UK: Oxford University Press, 2021) sub verbo "law, n.1".

[251] See Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford, UK: Oxford University Press, 2007) at 1–2, 281–85; Twining, *General Jurisprudence*, *supra* note 89 at 117.

[252] Thomas M Franck, *Fairness in International Law and Institutions* (Oxford, UK: Oxford University Press, 1995) at 5–6.

ies.[253] In other words, we can engage in these inquiries without addressing the conceptual question "what is law?"

Several examples illustrate the skeptic attitude in the pluralist tradition: Macdonald claims that "[l]egal pluralism invites us to reject questions like 'what is law?'"[254] and P. Berman claims that legal "pluralism frees scholars from needing an essentialist definition of law."[255] Other writers find it unnecessary to address conceptual questions to tackle LP. For example, Gralf-Peter Calliess and Zumbansen claim that "transnational legal pluralism" can proceed with confidence without examining "[w]hether transnational law ... should be regarded as 'law' in the traditional sense."[256] More radically, some believe that since we cannot get a proper account of law, we need to eliminate the concept altogether. For instance, J. Griffiths later in his career held that "the word 'law' could better be abandoned altogether for purposes of theory formation in sociology of law."[257] Similarly, Alessio Lo Giudice claimed that we should nonetheless be prepared to deal with "law without a concept of law ... with all the tools our imagination is able to create."[258] However, these sorts of arguments are seldom accompanied with a detailed argument for conceptual eliminativism in law, namely, the elimination of the concept of law.[259]

However, if our previous rejoinders to the definitional project are correct and law cannot be properly captured and illuminated by definitions, it is no surprise that the numerous attempts to provide one have been deemed unsatisfactory. Moreover, the existing pleas for skepticism, which commonly offer the strongest rhetoric against analytical jurisprudence, do not cohere with our common sense understanding of law, legal practice, and other fields of inquiry, where some working understanding of law still plays a key role. Finally, the skeptic's argument cannot resist

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253 *Ibid.*

254 Macdonald, "Pluralistic Human Rights?", *supra* note 72 at 27 .

255 Paul Schiff Berman, "The New Legal Pluralism" (2009) 5 Annual Rev L & Soc Science 225 at 237; Paul Schiff Berman, "Global Legal Pluralism" (2007) 80:6 S Cal L Rev 1155 at 1177–79; P Berman, *Global Legal Pluralism*, *supra* note 66 at 54–55.

256 Gralf-Peter Calliess & Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Oxford, UK: Hart Publishing, 2010) at 20.

257 John Griffiths, "The Idea of Sociology of Law and Its Relation to Law and to Sociology" in Michael Freeman, ed, *Law and Sociology: Current Legal Issues*, vol 8 (Oxford, UK: Oxford University Press, 2006) 49 at 63.

258 Alessio Lo Giudice, "The Concept of Law in Postnational Perspective" in Donlan & Heckendorn Urscheler, *supra* note 11, 209 at 221.

259 On conceptual eliminativism and its theoretical disputes, see Eric Margolis & Stephen Laurence, "Concepts" in Edward N Zalta, ed, *Stanford Encyclopedia of Philosophy*, Fall 2022 ed, online: *Stanford Encyclopedia of Philosophy* <plato.stanford.edu> [perma.cc/N735-MWK9], s. 2.5.

a compelling Socratic challenge: when pressed to explain why they selected some objects and excluded others, non-state legal scholars are forced to provide some account of law, though a non-definitional one. For example, Macdonald characterizes law as an "institutional actor,"[260] and P. Berman reduces law to those norms accepted as "authoritative" by a community.[261] In all these examples, skeptics end up developing a non-definitional understanding of law. We can suggest that skeptics are what Hart called "disappointed absolutists": skeptics hold that a definition is an appropriate answer to the conceptual question about law, and when they discover a definition of law cannot be attained, they express their disappointment by denying that there is, or can be, a valid answer to the conceptual question, definitional or otherwise.[262] However, as in a Platonic dialogue, their failure to answer a basic query shows that a non-definitional resolution to the underlying puzzle is still necessary for their empirical, politico-moral, and doctrinal inquiries.

This summary rejection does not entail the impossibility of arguments for skepticism about the concept of law. For instance, pluralist skeptics can propose an alternative philosophical model where questions about the nature of law are replaced by an inquiry about the ideas and concepts we currently have and the operation of these concepts.[263] Or pluralists might create forms of conceptual eliminativism that study some central cases of law directly without using the concept of law as the medium between language and our objects of study.[264] In any case, these unexplored alternatives create a more sophisticated philosophical discourse about law, and thus they will have the effect of sitting pluralists and analytical jurisprudents down at the same table. But until these more sophisticated alternatives are developed, we are entitled to conclude that skepticism is unfounded and that a refined, non-definitional resolution to the conceptual question is a prerequisite of any successful pluralist inquiry.

V. Main Consequences

This section argues that recognizing the trio of recurrent defects highlighted above affects the definition and agenda of the legal pluralist tradi-

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[260] Macdonald, "Theorizing Legal Pluralism", *supra* note 126 at 392.

[261] See P Berman, *Global Legal Pluralism*, *supra* note 66 at 56.

[262] Hart, *Concept of Law*, *supra* note 93 at 139 (Hart uses this expression in his discussion of formalism about rules).

[263] See e.g. Richard Rorty, *Philosophy and the Mirror of Nature* (Princeton: Princeton University Press, 1978).

[264] See e.g. Edouard Machery, *Doing without Concepts* (New York: Oxford University Press, 2009) at 230–42.

tion. The section also discusses the consequences of some cognates for the reconciliatory project between analytical jurisprudence and legal pluralism called pluralist jurisprudence.

A. The Legal Pluralist Tradition

In positioning itself in contrast to analytical jurisprudence, the tradition of legal pluralism has tried to highlight its distinctive approach and contribution by identifying its strongest rival. However, as we have seen here, such a foundational juxtaposition is mistaken. I do not think this entails that the notion of legal pluralism is trivial or that this label should be abandoned, as critics like Simon Roberts, Chris Fuller, and Tamanaha have suggested.[265] Instead, the main consequence is that the widely used combative element of the characterization (i.e., its contrast with centralism) should be abandoned. In my view, the label legal pluralism remains useful in the history of ideas to characterize a loosely connected set of intellectual projects that recognize LP and study its different empirical, doctrinal, and politico-moral consequences. In this characterization, the work of those analytical jurisprudents who recognize LP can and should be included as an integral part of this intellectual tradition.

Additionally, the legal pluralist tradition should acknowledge that empirical, doctrinal, and politico-moral inquiries about LP can be advanced individually. More importantly, all of these inquiries require a non-definitional working account of law as a starting point. As suggested above, to determine whether there is a scenario of legal pluralism with more than one legal phenomenon in a given situation, and not merely normative pluralism, the theorist must have first determined what the relevant phenomena are and whether they are legal objects. Thus, it is challenging to identify and describe norms, apply them to specific contexts, or assess their legitimacy or justice without a provisional understanding of what law is and how it differs from other phenomena. In advancing this working understanding, pluralists should be aware that any stipulation they provide can be subject to critical scrutiny and contrasted with the alternative accounts developed by analytical jurisprudents and other legal pluralists.

As a result, pluralists should overcome their skeptical attitudes toward the conceptual inquiries that interest analytical jurisprudents. As suggested here, analytical jurisprudence does not entail centralism, a certain disciplinary pedigree, method, or form of evidence. Instead, it is the project of providing a general answer to the conceptual question "what is law?," an answer not tied to any particular legal order or

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[265] See sources in note 81, *above*.

institution. The tradition of legal pluralism has contributed to the project of analytical jurisprudence by highlighting pre-theoretical data that might challenge well-established assumptions, and some pluralists have developed sophisticated non-definitional accounts of law.[266] In my opinion, those conceptual contributions should not be advanced covertly or inadvertently. It would be more effective if pluralists engaged in some of the debates of the mainstream jurisprudential tradition to clarify and contrast their conceptual claims and to uncover the assumptions on which they are based. In other words, instead of opposing the project of analytical jurisprudence, legal pluralists should embrace such project as a necessary and valuable component of their explanatory and normative agendas.

B. Pluralist Jurisprudence

Some writers have suggested that the traditions of analytical jurisprudence and legal pluralism can complement each other. "The analytical positivists and the empirical pluralists are not adversaries," Maksymilian Del Mar writes, "they are better thought of as partners, though so far they have been like different groups of blind persons pointing to different parts of the same elephant."[267] A cooperative project—sometimes called "pluralist jurisprudence"[268] or "positivist pluralism"[269]—that is sensitive to both the empirical facts and the methodological, doctrinal, and politico-moral concerns of the legal pluralist tradition, has emerged as a possible solution to the conflict between analytical jurisprudents and legal pluralists.

While this project can be praised for shifting the jurisprudential attention to LP, many reconciliatory attempts inherit the vices of the pluralist opposition to analytical jurisprudence. On the one hand, just as legal pluralism is defined by way of contrast with legal centralism, Nicole Roughan and Andrew Halpin defined the project of pluralist jurisprudence by a juxtaposition to its "predecessor," the so-called "monist" jurisprudence:

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[266] I develop this argument in Fabra-Zamora, "Conceptual Problems", *supra* note 229.

[267] Maksymilian Del Mar, "Beyond the State in and of Legal Theory" in Donlan & Heckendorn Urscheler, *supra* note 11, 19 at 34.

[268] See e.g. Nicole Roughan & Andrew Halpin, "Introduction" in Roughan & Halpin, *supra* note 195, 1 [Roughan & Halpin, "Introduction"]; Nicole Roughan & Andrew Halpin, "The Promises and Pursuits of Pluralist Jurisprudence" in Roughan & Halpin, *supra* note 195, 326 [Roughan & Halpin, "Promises and Pursuits"]; Roughan, *supra* note 189.

[269] Muñiz-Fraticelli, *supra* note 44 at 118–60.

> In these simple terms, traditional jurisprudence is municipal or state-centric jurisprudence. Even if it touches upon international law, it does so from a state-centric, Westphalian perspective of viewing international law through the agency or authority of states. It remains, in that sense, monist. By contrast, pluralist jurisprudence involves the recognition of non-state law in a way that is independent of both the agency and the authority of states.[270]

However, as we saw above, the tradition of analytical jurisprudence is not monist in the sense described, even if mainstream theories assign a central role to the state. Furthermore, some analytical jurisprudents recognize non-state law in a way that is independent of the agency and the authority of states. If there is no robust distinction between monist and pluralist jurisprudence, it is not easy to see the need for the second project. As Tamanaha puts it, "[i]f jurisprudence is not monist in any deep sense, then perhaps a distinctive pluralist jurisprudence is unnecessary."[271]

On the other hand, like the pluralist tradition and global legal pluralism, pluralist jurisprudents wish to incorporate different inquiries as part of a unified enterprise. Halpin and Roughan want to integrate the four "pursuits," namely: recognition of LP, or "the recognition of pluralism;" doctrinal inquiries, or the "practical outworking of pluralism;" politico-moral inquiries, or the "normative or aspirational basis for pluralism;" and the conceptual project, or "a theoretical account of pluralism."[272] They attempt to establish connections among these investigations to show that the four pursuits have a "collective importance" in delivering "an effective pluralist jurisprudence," so the failure to integrate them "would challenge the standing and worth of pluralist jurisprudence."[273] It is undeniable that these four inquiries are significant aspects that need to be addressed by any scholar interested in LP. However, if my objections to the package view are appropriate (section II.C), there is little reason to think these views are intrinsically connected, or that they determine the worth of pluralist jurisprudence as a whole.

Conclusion

For over fifty years, the academic tradition of legal pluralism has characterized itself in opposition to the centralism and monism that it attributes to the leading representatives of analytical jurisprudence. Here, I have argued that such a foundational contrast is unsound for three rea-

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[270] Roughan & Halpin, "Introduction", *supra* note 268 at 3.

[271] Tamanaha, "Pluralist Jurisprudence", *supra* note 29 at 161.

[272] Roughan & Halpin, "Promises and Pursuits", *supra* note 268 at 341–51.

[273] *Ibid* at 350.

sons. First, it conflates conceptual, politico-moral, and doctrinal inquiries. Second, it misattributes to analytical jurisprudents an equation between law and state that they do not hold and have the resources to reject. And third, it relies on reductive and unsatisfactory definitional projects, long rejected by the mainstream tradition of legal theory, which in turn have motivated an unwarranted skepticism toward conceptual questions. This trio of recurrent defects, also incorporated into global legal pluralism agendas and the reconciliatory project of pluralist jurisprudence, should be laid to rest.

These clarifications lead us to an improved understanding of the intellectual tradition of legal pluralism. Such tradition should not be depicted as the challenger to allegedly centralist jurisprudents, but as a loosely connected set of projects that recognize LP and investigate its empirical, doctrinal, and politico-moral consequences. With this conception, analytical jurisprudents can be part of the pluralist tradition. Furthermore, since self-styled legal pluralists attempt to develop a broader understanding of law which encompasses non-state legal phenomena, it is critical that they make explicit working, non-definitional understandings of law. Moreover, it is critical that pluralists openly participate in some broader jurisprudential disputes. This positive characterization sets the stage for more fruitful engagement between the traditions of analytical jurisprudence and legal pluralism that I advance in the next stage of my research.[274]

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[274] See Fabra-Zamora, *Normative Political Communities*, *supra* note 154.