TO HYBRIDITY AND BEYOND:

REFLECTIONS ON LEGAL AND NORMATIVE COMPLEXITY

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There are ... no *pure* individuals, no *pure* cultures, no *pure* genres. All things are of necessity *hybrid*. Of course we can construct them to be relatively *pure*, and in fact we do so, which is precisely how we manage to get (new) hybrids from purebreds that are (former) hybrids.

- Brian Stross, 'The hybrid metaphor: from biology to culture' (1999) 112 *Journal of American Folklore* 254, 266–267.

Introduction

I've referred to my recent research on legal and normative complexity as the study of *hybridity and diffusion*, the modest investigation of the mixtures and movements of laws and norms, past and present and around the globe.[1] This research must, I argue, be comparative across both space and time, involving comparative law and legal history, among other disciplines and sub-disciplines. The social sciences, especially anthropology and sociology, are particularly important. Because the *concept of law*—as the debate is normally phrased in Anglophone scholarship—is also implicated, legal philosophy is also essential. I don't claim that my approach is entirely novel, but suggest that it might prove a useful perspective from which to better understand the role that laws and norms play in the daily lives of ordinary people around the world.[2] This short article attempts to briefly lay out the broad outlines of this approach and to encourage similar research through inter-disciplinary and trans-disciplinary collaboration.[3] It also takes a brief detour to discuss the

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[1] Eg, SP Donlan, 'Comparative law and hybrid legal traditions: an introduction' in E Cashin-Ritaine, Donlan, and M Sychold (eds), *Comparative law and hybrid legal traditions* (2010), 10-11. The article and book are available at http://www.e-collection.isdc.ch/# (volume 67).

[2] Cf, eg, I Shahar, 'State, society and the relations between them: implications for the study of legal pluralism' (2008) 9 *Theoretical Inquiries in Law* 417.

[3] These themes are explored in greater detail in Donlan, 'The Mediterranean Hybridity

Western *folk concept* of law. My intention is *not* to erect a new terminology or taxonomy, but to sketch a rough, conceptual map that allows scholars to better understand *both* legal and normative practices. I want to create a kind of descriptive, critical and constructive, *deep focus*, as that term is used in photography and cinema, where clarity in depth is achieved through significant light and sustained focus.[4]

As I define it, *hybridity* relates to two related axes of investigation. The first axis is a distinction, whether seen as practical or philosophical, between *normativity* and *legality*. While making a practical distinction rooted in contemporary convention dividing *state law* from *non-state norms* may be a prudent approach to legal-normative scholarship, a deeper investigation shows that an earlier, more well-established convention separates laws and norms on the basis, in significant part, of institutional form. The result is that a meaningful definition of *non-state laws* is available without applying *law* to all forms of normative ordering. A second axis divides the examination of normative and legal orders of various types on the basis of their respective *titular principles* and *actual practice*. This is far from revolutionary, but the investigation of both principles and practice must obviously go hand-and-hand if the subject of investigation is to be fully understood. For me, this approach has already proven useful in research on the present and the past. I've written, for example, on legal hybridity in Malta and proposed a wider project on legal and normative hybridity in the Mediterranean.[5] For the past, I've proposed the generation of *histories of hybridity*, 'histories that take as their focus the plurality of past laws' informed by comparative analysis and the social sciences.[6] I've written on eighteenth-century Britain and Ireland and the wider movement of Western legal history, from hybridity to comparative unity.[7] Recent research applies this approach to early nineteenth-century

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Project: at the boundaries of law and culture' (2011) 4 *Journal of Civil Law Studies* 355, available at www.law.lsu.edu/globals/sitelibraries/jcls/home/V4%20n2%2010%20Donlan.pdf.

[4] This is not meant to be mere conceptualism, Where as I use concepts, including law, they are (i) actual conventions, past or present (*as an empirical fact*, *x* was or is used in this way), (ii) clarification of my own use of words (*so that you understand me*, *y* will be used in this way), or (iii) '*ideal types*' that might allow us to grasp the otherwise ineffable (*in the hope of promoting intellectual progress*, *z* will be used in this way). I treat definitions seriously, though provisionally, because the available terms are already freighted with alternative meanings, especially along disciplinary and linguistic borders.

[5] See Donlan, B Andò, and D Zammit, '"A happy union": Malta's legal hybridity' (2012) 27 *Tulane European and Civil Law Forum* (*forthcoming*) and, more generally, Donlan 'The Mediterranean Hybridity Project'.

[6] Donlan, 'Histories of hybridity: a problem, a primer, a plea, and a plan (of sorts)' in Cashin-Ritaine et al, *Comparative law and hybrid legal traditions* (2010), 22.

[7] See Donlan, '"All this together make up our Common Law": legal hybridity in England and Ireland, 1704-1804' in E Örücü (ed), *Mixed legal systems at new frontiers* (2010), M Brown and Donlan, 'The laws in Ireland, 1689-1850: a brief introduction' in Brown and Donlan (eds), *The law and other legalities of Ireland, 1689-1850* (2011), available at

Spanish West Florida and to a wider project on *Jurisdictional complexity in Western legal history, c1600-1900*.[8] *Hybridity and diffusion* points towards an historical, comparative, and institutional theory that explores normative complexity by setting research on legality within the wider matrix of normativity.

As this suggests, comparative and historical scholarship is important to my approach.[9] Hybridity is not merely an element of the contemporary, formally colonized global *East* or *South*. Throughout Western history, a unified system of national state common laws is the historical exception rather than the rule. Before the rise of the state, *laws*, largely defined in institutional terms, already existed and competed both with rival legal regimes as well as with other forms of normativity. When it arises, the law of the state was parasitic on an established, conventional concept of law as well as, more importantly in practice, pre-existing legal institutions.[10] Recognizing this has real benefits. Indeed, I've argued that 'remembering' the hybridity of our own past 'better prepare[s us] to understand and address the pluralism of the present'.[11] It does so, as António Manuel Hespanha wrote in relation to legal history and legal education, by 'deep[ing] the sense of complexity'.[12] Indeed,

> the mission of legal history is to render problematic the implicit assumptions of dogmatics, namely, the rational, necessary, ultimate nature of our law. Legal history accomplishes this mission stressing the fact that law is necessarily bound to a cultural (in the deepest sense of the word) environment and, furthermore, that legal knowledge is also a 'local knowledge' … whose categories are deeply rooted in historical *epistemes*.[13]

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www.ashgate.com/pdf/SamplePages/Laws_and_Other_Legalities_of_Ireland_1689_1850_Intro.pdf, and Donlan, 'Remembering: legal hybridity and legal history' (2011) 2 *Comparative Law Review* 1, at www.comparativelawreview.com/ojs/index.php/CoLR/article/view/13/17.

[8] See Donlan, 'Hybridity and diffusion in Spanish West Florida, c1803-1810' in *Entanglements in legal history: conceptual approaches to global legal history* (*forthcoming*). The project, organized with Dirk Heirbaut, is funded by the *Gerda Henkel Stiftung* (Germany); a collection will be published with Duncker & Humblot (Germany).

[9] Cf the mission statement of *Comparative legal history: an international and comparative review of law and history* at www.hartjournals.co.uk/clh/index.html.

[10] *Juris Diversitas*, with the *Swiss Institute of Comparative Law*, held a conference (October 2011) on the theme of *The Concept of "Law" in Context: Comparative Law, Legal Philosophy, & the Social Sciences*.' A collection of essays from that conference will be published in 2012.

[11] Donlan, 'Remembering', 3.

[12] 'Legal history and legal education' (2004) 4 *Rechtsgeschichte* 41, 45. 'Historical jurisprudence can show, in other words, that there are no right answers in law as such'. G Samuel, 'Science, law and history: historical jurisprudence and modern legal theory' (1990) 41 *Northern Ireland Legal Quarterly* 1, 21.

[13] Hespanha, 'Legal history and legal education' 41 (citing C Geertz, *Local knowledge: further essays in interpretive anthropology* (1983)).

Acknowledging complexity has consequences for comparative law and legal history, but also for legal philosophy, the very sense of what law means. Hybridity challenges, for example, the dissection of plural and dynamic traditions into discrete, closed *families* or *systems*. More critically, it undermines commonly-held and conjoined beliefs in legal nationalism and positivism, legal centralism and monism. It points, in fact, towards a more plural jurisprudence.[14]

In sum, I suggest that jurists must take general normativity, beyond legality, seriously.[15] But social scientists, on the other hand, must also respect legality's unique normative position. Both have much to gain from the other and, indeed, from active collaboration with those others. As Baudouin Dupret has written in a different context, '[l]aw must be stripped of its conceptual status and returned to the fold of general normativity'.[16] Legality, inherently conventional, must be set within normativity. Non-state normativity must be understood not as a mere, minor add-on to provide context for state law, but as fundamental to the lives of people around the world, both in the West and beyond. And the scholarly ability to generate an accurate, if static image of normative and legal traditions remains insufficient without attention to the degree to which its principles are implemented in practice and alter over time.[17] I am not interested merely in legal and normative *fixité*, but in the complex and ongoing process of *mixité*.[18] In this sense, the *diffusion* or movement of laws and norms that generate, over time, different legal-normative mixes is an essential aspect of the study of *hybridity*.[19]

Hybridity and diffusion

In its origins, *hybrid* had a very narrow meaning. The Latin *hibrida* was 'the offspring of a (female) domestic sow and a (male) wild boar.'[20] In fact, a

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[14] Cf the efforts of N Roughan, 'The relative authority of law: a contribution to *pluralist jurisprudence*' in M del Mar (ed), *New Waves in philosophy of law* (2011).

[15] This has been recognized by some juriprudes, not least Brian Tamanaha and William Twining in their respective approaches to *general jurisprudence*. See especially Tamanaha, *A general jurisprudence of law and society* (2001) and Twining, *General jurisprudence: understanding law from a global perspective* (2009).

[16] 'Legal pluralism, normative plurality, and the Arab world' in Dupret, M Berger, and L al-Zwaini (eds), *Legal pluralism in the Arab world* (1999), 31.

[17] See J-L Halpérin, 'Law in books and law in action: the problem of legal change' (2011) 64 *Maine Law Review* 46.

[18] S Drummond, 'Dishing up Israel: rethinking the potential of legal mixité' (2008) 26 *Windsor Yearbook of Access to Justice* 163, 169. See also Drummond, 'Prolegomenon to a pedestrian cartography of mixed legal jurisdictions: the case of Israel/Palestine' (2005) 50 *McGill Law Journal* 899.

[19] See Donlan, 'Mediterranean Hybridity Project', 10-12.

[20] B Stross, 'The hybrid metaphor: from biology to culture' (1999) 112 *Journal of American Folklore* 254.

hybrid is still commonly seen as a complex individual entity, a singularity, from two parents. More recently, however, it has become far broader in application. In state building discussions, for example, 'hybrid political orders' relate to complex '[g]overnance … carried out by an ensemble of local, national, and international actors and agencies.'[21] Indeed, the word in its current usage is arguably, 'a slippery, ambiguous term, at once literal and metaphorical, descriptive and explanatory.'[22] This more elastic meaning is, however, occasionally productive. In *post-colonial studies*, for example, *hybridity* serves as a critique of binary, reified thinking about cultures and their members. Instead, it emphasizes a very deep and dynamic complexity, 'the ambivalent in-between space created by the interaction of the colonizers and the colonized.'[23] Until the last few years, however, *hybridity* was only very rarely used in legal and normative scholarship. When employed by comparatists, it was largely synonymous with *mixity*, ie the coexistence of diverse, discrete state legal traditions within a jurisdiction. It is a common, but minor usage, often little more than a rhetorical relief from *mixed*.[24] Less commonly, *legal hybridity* has been used in a manner equivalent to so-called *legal pluralism*.[25] *Hybridization* is almost unheard of.[26] When *hybrid* and its variants appear, then, there is little precision in its employment.[27] In recent years, I've tried to suggest how we might use *hybridity* as a term-of-art, in more constructive, nuanced ways to cover the fluid complexity of both laws and norms at the level of both principle and practice.

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[21] KP Clements, V Boege, A Brown, W Foley, and A Nolan, 'State building reconsidered: the role of hybridity in the formation of political order' (2007) 59 *Political Science* 45, 50. This is linked, too, to 'legal pluralism' See the diagram at ibid, 53.

[22] P Burke, *Cultural Hybridity* (2009), 54.

[23] A Roy, 'Postcolonial Theory and Law: a Critical Introduction' (2008) 29 *Adelaide Law Review* 317, 340.

[24] Eg, KD Anthony, 'The identification and classification of mixed systems of law' in G Kodilinye and PK Menon (eds), *Commonwealth Caribbean legal studies: a volume of essays to commemorate the 21st anniversary of the Faculty of Law of the University of the West Indies* (1992), 217.

[25] Eg, J Holbrook, 'Legal Hybridity in the Philippines: lessons in legal pluralism from Mindanao and the Sulu Archipelago' (2010) 18 *Tulane Journal of International and Comparative Law* 1, 3n8.

[26] But compare the more limited use in M Delmas-Marty, *Ordering pluralism: a conceptual framework for understanding the transnational legal world* (2009), tr N Norberg.

[27] Following Iza Hussin, Salvatore Mancuso uses *legal hybridity* for the power relationships that affect the practices of *legal pluralism*. 'Creating mixed (?) jurisdictions: some methodological reflections on legal integration in the *Southern African Development Community* (SADC) Region' (2012) *Journal of Comparative Law* (*forthcoming*). While Hussin's emphasis on power is also important here, her use of *hybridity* and *mixed legal system* (as synonymous with *legal pluralism*) is unusual. 'The pursuit of the Perak Regalia: Islam, law, and the politics of authority in the Colonial State' (2007) 32 *Law & Social Inquiry* 759. Of course, so is my use of *hybridity*.

My use of *hybridity* is related, in this general sense, to the *post-colonial* scholars mentioned above. While their focus has been on individual identities, the same sense of hybridity can meaningfully be applied to the complexity of legal and normative institutions. This is especially true as both are themselves very deeply marked by colonial encounters and the diffusion of Western laws and norms. In description terms, this is also closely linked to the scholarship of *radical*, *critical*, or *post-modern legal pluralists*.[28] In different ways, these scholars argue, in a critique of the reification of laws or norms into discrete and closed systems, that *law* and *plurality* are best seen as products of *individuals* rather than *institutions*. This is, as Jacques Vanderlinden phrased it, 'not centered upon a given legal system but upon the *sujet de droit* … who can be subjected to many legal orders as a member of many networks.'[29] Individuals are the constant, if incremental, creators of laws in a complex and fluid normative web. While he could have been writing about the Western past as much as the present, Boaventura de Sousa Santos has noted that:

> We live in a time of porous legality or of legal porosity, multiple networks of legal orders forcing us to constant transitions and trespassing. Our legal life is constituted by an intersection of different legal orders, that is, by *interlegality*[30]

While this neatly captures this dynamism and ubiquity of *normativity*, I'll argue that he, with many moderate legal pluralists, adopts an overbroad, unconventional use of *legality*.[31] And even if we accept the descriptive account of post-modern legal pluralists, we must be careful not to exaggerate the liberating potential of legal-normative hybridity. We must be careful, that is, to attend to the larger forces that drive subjects in their choices. Individuals may be genuine norm-creators and the nexus of normative activity, but they don't generate norms *ex nihilo*. They may be little more than flotsam and jetsam in a hurricane.[32] More generally, hybridity, as defined here may be seen as a *jurisprudence of normativity*; it is not, however, intended to be a normative jurisprudence with prescriptive lessons for social life.[33] Returning

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[28] See, eg, J Vanderlinden, 'Return to legal pluralism: twenty years later' (1989) *Journal of Legal Pluralism* 149; M-M Kleinhans & Roderick Macdonald, 'What is a critical legal pluralism?' (1997) 12 *Canadian Journal of Law & Society* 25; B de Sousa Santos, *Towards a new legal common sense: law, globalization, and emancipation* ((2nd ed) 2002).

[29] Vanderlinden, 'Return to legal pluralism', 152.

[30] *Towards a new legal common sense*, 437, 437.

[31] Given the *iura* and *legis* distinction, with the latter linked to formally enacted law of an authority, *jurality* might be a better choice. Cf the 'multiple sites of legal normativity (*polyjuralism*)' discussed in RA Macdonald and J MacLean, 'No toilets in park' (2005) 50 *McGill Law Journal* 721, 727n14. See Ibid, 732n32. Jean Carbonnier also uses *inter-normativity*. 'Les phénomènes d'internormativité' (1977) 1 *European Yearbook in Law and Sociology* 42.

[32] See Donlan, 'E[mmanuel] Melissaris, *Ubiquitous law: legal theory and the space for legal pluralism* (2009)' in (2012) 25 *Canadian Journal of Law and Jurisprudence* 177.

[33] PS Berman, 'Towards a jurisprudence of hybridity' (2010) 1 *Utah Law Review* 11.

to de Sousa Santos, 'there is nothing inherently good, progressive, or emancipatory about *legal pluralism*'.[34]

Similar to these theorists of, as I would phrase it, radical normative hybridity, my approach stresses that laws and norms always exist in a complex and fluid web that can only very roughly be captured in the language of pan-national legal and normative movements. Hybridity doesn't emphasize, as, for example, in most discussions of *mixed legal systems*, the marriage of two relatively discreet and self-contained sections, but the deeper complexity shot through every aspect of legal and normative ordering. Assigning labels to the different fragments of an order, no less than the order itself, is always an approximation that will fail to capture the nuances of actual practice. Orders, including more institutionalized legal regimes and state legal systems, are never closed, never static. Norms, legal or non-legal, are always in flux, stabilized only—though profoundly, in fact—by the weight and inertia of convention, of traditions and practices, as well as by the purposes served by the norms. Still, the *aggregative normativity and legality* of corporate *communities* and their *institutions* must be taken seriously. This is, of course, the natural concentration of much legal and social science. Accepted as working generalizations, as useful shorthands, that allow us to get work done, this communal or institutional focus needn't involve reification, deny individual possibility, or ignore complexity. They offer, however, a manageable viewpoint from which to understand legal-normative creation and negotiation. Indeed, an individual focus can blind us to these wider patterns of normative influence.

Finally, it should be noted that hybridity, understood in this way, has gone hand-in-hand with *diffusion*, the movements that generate legal-normative complexity.[35] The discussion of diffusion is, in fact, common among comparatists, in a bewildering and occasionally enlightening vocabulary of *receptions*, *transplants*, *transfers*, *contaminations*, *irritants*, *migrations*, and *transfrontier mobility of law*.[36] Michele Graziadei has even suggested, reflecting a rich vein of Italian comparative scholarship that explores law in context, that we can see '[c]omparative law as the study of transplants and receptions.'[37] Even more clearly extending beyond the law is the study of diffusion by the jurisprude William Twining. In what deserves to quoted at length, he suggests how complex these processes are:

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[34] *Towards a new legal common sense*, 89.

[35] Cf JM Blaut, *The colonizer's model of the world: geographical diffusionism and Eurocentric history* (1993) (where more advanced Western forms are seen to diffuse around the world).

[36] For additional citations, see Donlan, 'Mediterranean Hybridity Project', 368-370.

[37] 'Comparative law as the study of transplants and receptions' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2008).

(i) *Relations between exporters and importers are not necessarily bipolar, involving only one exporter and one importer. The sources of a reception are often diverse.*

(ii) *Diffusion may take place between many kinds of legal orders at and across different geographical levels, not just horizontally between municipal legal systems.*

(iii) *The pathways of diffusion may be complex and indirect and influences may be reciprocal.*

(iv) *Diffusion may take place through informal interaction without involving formal adoption or enactment.*

(v) *Legal rules and concepts are not the only or even the main objects of diffusion.*

(vi) *Governments are not the only, and may not be the main, agents of diffusion.*

(vii) *Do not assume one or more specific reception dates. Diffusion often involves a long drawn out process, which, even if there were some critical moments, cannot be understood without reference to events prior and subsequent to such moments.*

(viii) *Diffusion of law often involves movement from an imperial or other powerful centre to a colonial, dependent, or less developed periphery. But there are also other patterns.*

(ix) *The idea that transplants retain their identity without significant change is widely recognized to be outmoded.*

(x) *Imported law rarely fills a vacuum or wholly replaces prior local law.*

(xi) *Diffusion of law is often assumed to be instrumental, technological, and modernising. But there is a constant tensions between technological, contextual-expressive, and ideological perspectives on law.*

(xii) *There is a tendency in the diffusion literature to talk of receptions 'working' or 'failing'. Only recently have attempts been made to evaluate and measure impact empirically. Many of the instruments that have been developed are suspect, but this is an area that needs serious academic attention.*[38]

Normative diffusion is obviously still more complex, but Twining's sophisticated understanding of its complex relation to law parallels similar discussions within the social sciences and suggests how we might better understand the processes that give us '(new) hybrids from purebreds that are (former) hybrids.'[39]

Normativity and legality

The first axis of *hybridity*, at least as understood here, is a distinction between *normativity* and *legality*. This may be seen as merely practical, allowing us to get on with research on various normative forms by accepting modern conventional distinctions between *non-state norms* and *state laws.* At a deeper philosophical and conceptual level, however, social norms (*norms*) and legal norms (*laws*) should be seen to be conceptually distinct, though without any necessary reference to the state, a very late and specific institutional normative form. According to the *Oxford English Dictionary*, which effectively

[38] Twining, 'Diffusion of law: a global perspective' (2004) *49 Journal of Legal Pluralism* 1, 34–35. See also Twining, 'Diffusion and globalization discourse' (2006) 47 *Harvard International Law Journal* 507, 512; 'Globalisation and comparative law' in E Örücü and D Nelken (eds), *Comparative law: a handbook* (2007), and; 'Social science and diffusion of law' (2005) 32 *Journal of Law & Society* 203.

[39] Stross, 'The hybrid metaphor', 267

records the cumulative, conventional usage of terms and the concepts to which they're assigned in practice, a *norm* 'is a model or a pattern; a type, a standard'.[40] This usage is long-established, but originally grew out of the Latin *norma,* a craftman's tool used to create right angles. Such norms—and related normative communities of various sorts—appear a universal aspect of human existence. We are normative animals, expressing evaluative judgements of appropriate claims and conduct. Normativity is thus universal. Legality isn't. Laws, as defined by centuries of Western convention, are points on a normative continuum and always rest within the wider matrix of less-institutionalized normativity. Legal norms are a subset of social norms. But if laws and norms may be distinguished in this way, they cannot be divorced. For this reason, jurists must take general normativity seriously and social scientists must respect legality's unique normative position.

As I suggested, the state may be used, for convenience, to mark the border between the *legal* and the *non-legal*. This largely reflects juristic practice and more general modern understandings of non-jurists across the West for much of the last two centuries. In this sense, such a distinction is meaningful, defensible, and accepted in practice by jurists, many social scientists, and the public. And state laws are distinct, at least in practice, from other norms. For much, though admittedly not all, of the world, the modern state and state legal systems play a critical role that should not be ignored.[41] This simple law/norm division, largely accepting a central defining role for the state, is the approach taken in the *Mediterranean Hybridity Project*.[42] An initiative of *Juris Diversitas,* that project is developing a collaborative trans-disciplinary network of experts to produce national reports and cross-cultural analyses of the legal and normative complexity of the region. The project marries conceptual and empirical models from the legal and social sciences to investigate the principles and practices of (i) diverse *state laws* (including those of customary and religious origin) and (ii) lived *non-state norms* (especially *non-state justice systems*).[43] This information will assist the work of academics, practitioners, policy-makers, and civil society organizations as well as the wider community. But the choice, in effect, of state ratification as establishing the law/non-law boundary is a merely practical maneuver. Accepting this simple—perhaps simplistic—division is an attempt to bracket or set aside deeper and passionate philosophical debates in the interests of

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[40] *Oxford English Dictionary* (*OED*, (3rd edn) 2003), at www.oed.com/view/Entry/128266.

[41] S Roberts, 'After government?: on representing law without the state' (2005) 68 *Modern Law Review* 1.

[42] See especially, 'Mediterranean Hybridity Project', 364-367. As noted above, *juralities* might be a better choice.

[43] On *non-state justice systems*, see M Forsyth, *A bird that flies with two wings: kastom and state justice systems in Vanuatu* (2009), chapter seven ('A typology of relationships between state and non-state justice systems').

generating useful data.[44] Indeed, this definitional fiat has not limited the range of our study. If minor non-state norms, eg the rules and principles of *etiquette* (though even social mores may extend to significant *taboos*), are not included, others, especially so-called *non-state justice systems* may be quite significant in practice. While we may find that norms are encircled and hemmed in by the state, we may also find that laws act 'in the shadow of' very meaningful non-state norms.[45]

Defined in this manner, *legal hybridity* obviously includes the study of *mixed legal systems*, Western or non-Western, where the diverse origins of state laws lie in reasonably visible and frequently discreet, identifiable sections.[46] This category is already quite large, including my native Louisiana, as well as Malta, Turkey, and much of the world.[47] These mixed systems, including some quite exotic hybrids, were often the result of Western political expansionism and the diffusion of its laws. Especially through colonialism, Western laws came into contact with numerous other legal and normative traditions: Asian, Hindu, Islamic, a wider variety of customary traditions, etc. Some of these were already complex hybrids, but the addition of Western laws—either by imposition or through borrowing under Western hegemony—further complicated the normative spaces of much of the world. The result, globally, are a number of coherent, if not closed, legal traditions. These are both national and meaningfully pan-national. Far-flung jurisdictions, including many post-colonial states, continue to look to the mother traditions for guidance. But, as will be discussed below in relation to the practice of legal and normative principles, context is everything. While it may be necessary to make simplistic taxonomic classifications for pedagogical and professional purpose, it is mistaken and deeply Eurocentric to assume, for example, that India is best classified as an Anglo-American system or that China is best classified as belonging to the continental legal traditions without recognizing the practical importance of the different contexts (eg, Chelsea and

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[44] While it is something of a fudge, referring to laws and other norms collectively as *legalities* or some similar neologism can usefully underline their similarities without ignoring their differences. Donlan, 'Mediterranean Hybridity Project', 366-367. See also Brown and Donlan, *The law and other legalities of Ireland, 1689-1850*.

[45] Cf R Coorter and S Marks with R Mnookin, 'Bargaining in the shadow of the law: a testable model of strategic behavior' (1982) 11 *Journal of Legal Studies* 225.

[46] I've explored the conventional terminology of what I call *legal hybridity— mixed systems*, *mixed jurisdictions*, *classical mixed jurisdictions*, and the *third legal family*—in several articles. See, most recently, Donlan, 'Mediterranean Hybridity Project', 374-83.

[47] Cf the very rough count and classification by the University of Ottawa, including 98 'civil law monosystems', 47 'common law monosystems', and 95 'mixed systems' (at www.juriglobe.ca/eng/sys-juri/class-poli/sys-mixtes.php).

Kolkata) and the presence of additional, competing traditions, Western and non-Western, within law and without.[48]

Indeed, drawing deeply on comparative legal history and the extensive comparative literature on the processes of diffusion, the recognition of legal hybridity extends much further. Legal 'hybridity is', as Vernon Palmer notes, 'a universal fact'.[49] All state laws are examples of what social scientists call *state or weak legal pluralism*. The legal *system* remains, at least in theory, unified. Jurisdictional conflict is handled, either formally or informally, by state institutions whose recognition or ratification, where it comes, effectively converts the rules and decisions of other orders (including state-sanctioned customary orders) into state laws. This needn't happen explicitly; the complex and varied ingredients of a legal tradition may lie hidden below state law's superficial surface. This applies even to England:

> Europe's multifarious legal traditions were forever in motion towards new permutations and equilibria. If the triumphalist dominance of its *common law* often obscures English legal hybridity and diffusions, this kaleidoscopic motion was, and is, no less true of the Anglo-American legal traditions.[50]

Indeed, in an article that is especially important to the approach taken here, Esin Örücü has proposed a *family trees* approach that 'regards all legal systems as mixed and overlapping, overtly or covertly, and groups them according to the proportionate mixture of the ingredients.'[51] This genealogical method combines both *top-down* and *bottom-up* perspectives, the formal codes and informal contexts of the law, to explore the 'various degrees of hybridity' found around the globe.[52] While these ancestors may have little continuing control over their progeny, the recognition of historical hybridity, alerts us to the complexity of even the most ordinary, and apparently autochthonous,

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[48] See, eg, I Castellucci, 'Legal hybridity in Hong Kong and Macau' (2012) 57 *McGill Law Journal/Revue de droit de McGill* 1.

[49] 'Mixed legal systems … and the myth of pure laws' (2006-7) 67 *Louisiana Law Review* 1205, 1210.

[50] Donlan, 'All this together make up our Common Law' in Örücü, *Mixed legal systems at new frontiers*, 290-291.

[51] 'Family trees for legal systems: towards a contemporary approach' in M van Hoecke, *Epistemology and methodology in comparative law* (2004), 363. See also Örücü, 'A general view of *legal families* and of *mixed systems*' in Örücü and Nelken, *Comparative law*, 169-87.

[52] Örücü, 'Family trees for legal systems', 367.

system.[53] Indeed, as Örücü stressed in an earlier article, change is necessarily change over time. We must take both 'mixed and mixing systems' seriously.[54]

Just as importantly, neither the state nor those laws that preceded the state have ever had *normative* exclusivity.[55] There has been no—and is now no—unified and pure legal or normative space, controlled respectively by either an all-embracing state or society. Instead, laws and norms always rest within the wider web of *strong* or *deep legal pluralism*, the totality of normative orders and more diffuse normative influences. What I call *normative hybridity* is often referred to in contemporary social science as *legal* or, more recently, *normative pluralism*, usually the interaction of state laws and semi-autonomous non-state normative orders that lack the sanction of the state.[56] Indeed, the focus of such analysis is still often on non-state norms beyond the West, often in the shadow of a failed and imported state. The lessons of normative hybridity are also obviously relevant in the West. For example, in a well-known study, Julio L Ruffini wrote thirty-five years ago about norms and practices among Sardinian shepards that, though an alternative to the state, was meaningful to those within it.[57] With the laudable aim of insisting on value parity between Western and non-Western forms, legal pluralists have attacked the jurist's narrow focus on the state and the politics of colonialism and hegemony they saw linked to it. This has often succeeded in making scholars sensitive to similarities between law and norms, but the blurring of these categories has also often confused jurists, arguably dissuading many from engagement.[58] Against an 'ideology of legal centralism', the sociologist John Griffiths argued that state law was but one type of *law* and *legal* pluralism was 'the presence in a social field of more than one *legal* order.'[59]

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[53] Such descriptions must also be clearly distinguished from more prescriptive purposes. Some scholarship on mixed jurisdictions, especially those related to the prospect of a *novum ius commune Europaeum*, have been influence by wider political and cultural purposes. Cf the aggressive and entertaining critique of Douglas J Osler, emphasizing '*ius diversum*', in 'The fantasy men' (2007) 10 *Rechtsgeschichte* 169, 185.

[54] 'Mixed and mixing systems: a conceptual search' in Örücü, E Attwooll, and S Coyle eds), *Studies in legal systems: mixed and mixing* (1996).

[55] N Jansen and R Michaels, 'Private law and the state: comparative perceptions and historical observations' (2007) 71 *RabelsZ Bd* 345.

[56] See generally Donlan, 'Mediterranean Hybridity Project', 383-395. See especially W Twining, 'Normative and legal pluralism: a global perspective' (2010) *Duke Journal of Comparative & International Law* 473

[57] 'Disputing over livestock in Sardinia' in L Nadar and HF Todd (eds), *The disputing process: law in ten societies* (1976).

[58] Understandably perhaps, jurists are often more interested in legal norms than social norms. In fact, both comparative lawyers and legal historians, reflecting their disciplinary training and a more general conventional use of *law*, use *legal pluralism* as a synonym for what I call *legal hybridity*.

[59] 'What is legal pluralism?' (1986) 39 *Journal of Legal Pluralism* 1, 1, 1 (*italics added*). But Griffith later recanted, switching to *normative legal pluralism*. See 'The idea of sociology of law and its

But the suggestion that *any normative* order is a *legal* order is overbroad, indiscriminate, and, ultimately unhelpful. Or so I suggest. The language of legal pluralists and their allies—*everyday law, living law, implicit law, unofficial law, ubiquitous law,* and even *law in brief encounters*—seem to jumble enlightening metaphors with established meanings.[60] This undermines, along with an occasional, totalitizing cultural essentialism, pluralist insights.

A folk concept of *law*

Adopting the contemporary convention dividing laws and norms by their relationship to the state and bracketing wider debates about the concept of law are reasonable, practically productive moves. This fits very well, too, with my sense of *hybridity and diffusion*. I also slip easily, if often accidentally, into that vocabulary myself. But if questions are asked about law's meaning, this *entente cordiale* is insufficient. A general theory of normativity, or even legality, cannot center on the state and its laws. Even in the West, *state law* is a relatively recent normative form, though one that is particularly colonizing and domineering. Indeed, in most contemporary conceptions of *law*, state law is seen, explicitly or implicitly, as the yardstick by which others are measured. Such concepts, reflecting government forms with which we are most familiar, have impoverished our professional discourse for much of the last two centuries. It has also distracted us from a deeper, more public, past convention that might be more useful for the present and, indeed, for the future. I suggest, and it's not surprising that an historian would make such a proposal, that if our sense of law is not to be a mere neologism for what we find interesting in the fleeting present, the etymology of law must be taken far more seriously. Too often, jurisprudes have concocted concepts to be applied to reality rather than looking to existing public meanings. If a look at our conventional use of law will lack philosophical precision, or preciosity, they are meaningful precisely because identification of different forms of normativity isn't a matter of *a priori* necessity but of rough, *a posteriori* classification and abstraction. It's, to coin a phrase, complicated.

The relationship between words and the world around us is always bridged by meanings that are conventional, the product of specific experiences, times, and places. This is no less true for *law*. It has no fixed,

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relation to law and society' in M Freeman (ed), *Law and sociology: current legal issues* (2005).

[60] See respectively, R Macdonald, *Lessons of Everyday Law/Le droit du quotidien* (2002); E Ehrlich, *Fundamental principles of the sociology of law* (2002 [1936]), tr WL Moll (from the German edition of 1913); L Fuller, *The anatomy of law* (1968); M Chiba, 'Other phases of legal pluralism in the contemporary world' (1998) 11 *Ratio Juris* 228; E Melissaris, *Ubiquitous law: legal theory and the space for legal pluralism* (2009); WM Reisman, *Law in brief encounters* (1999). I should note that I'm aware that, at least in some cases, these usages reflect a translation from a more nuanced word—eg, *ius*—to the English *law*.

perennial meaning or essence, a lesson that comparative analysis, in either time or space, can provide without the need of jurisprudential scrutiny. But because law has no essence, convention matters. *Law* is not a scientific concept, but a necessarily parochial and shifting *folk concept* rooted in our experiences *in the West*, the *communis opinio* of both legal literati and lay-people, though similar forms were and are known around the globe.[61] While this shouldn't be seen to be univocal, *law* and its cognate forms were applied to norms of specific institutions structured in specific ways in specific times and places.[62] The wider linguistic practice over the *longue durée* of Western history has defined *law*, generally speaking, as an *institutional normative order*, subject to some minimal accepted authority and external substantive metrics (distinguishing laws from the rules and sanctions of, for example, banditti).[63] To repeat, the state isn't part of this definition. It couldn't be. Laws and legal institutions preceded the state. This non- or pre-state institutional form is arguably *law*'s *focal*—though not sole—*meaning*, distinguishing it both from later state law as well as from other, less organized—but no less valuable—instances of social normativity.[64] Law, as defined here, isn't superior to other normative orderings; a place without *law* simply manages its norms differently. And, of course, the meanings of the term *law* can be consciously changed. If our individual invention is collectively embraced, it may become the new convention. But then *law* will have been transformed and we'll no longer be discussing the same underlying concept.

A rough and revisable genealogy of *law*, rooted in historical and comparative research, requires us to sketch a basic typology of normative institutionalization. As will be clear, the focus throughout is not on the state, a late and particularly abstract and artificial community, but on normative communities more generally, as well as the individuals who populate them.[65]

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[61] As an historical fact, state legal regimes and systems have often been diffused through Western colonialism and hegemony. Cf J-L Halpérin, 'The concept of law: a Western transplant?' (2009) 10 *Theoretical Inquiries in Law* 333. On the 'internal colonization' or diffusion of Mediterranean law throughout Europe, see JQ Whitman, 'Western legal imperialism: thinking about the deep historical roots' (2009) 10 *Theoretical Inquiries in Law* 305.

[62] Non-institutionalized norms were also recognized and analyzed. The lawyer's distinction, from scholarship on custom, might be that between norms *intra* or *praeter legem* (within or consistent with the enacted law) and *contra legem* (against the enacted law).

[63] This external measure would be quite vague, part of the wider European culture, not least Christianity. For a modern Anglophone institutional theory, see N MacCormick, *Institutions of law: an essay in legal theory* (2006). But cf Twining, 'Institutions of law from a global perspective: standpoint, pluralism and non-state law' in M del Mar and Z Bankowski (eds), *Law as institutional normative order* (2009), especially 18 (among other things, criticizing the presentist bias of MacCormick's institutional theory).

[64] On *focal meaning*, see J Finnis, *Natural law and natural rights* (1980), 276-281.

[65] R Cotterrell, 'Community as a legal concept? Some uses of a Law-and-Community approach in legal theory' in Cotterrell, *Living law: studies in legal and social theory* (2008).

Grossly simplifying a very complex past, a spectrum of more-or-less institutionalized normative forms in the West might be characterized as:

1. *Normative practices and orders*, eg social customs, the *moral economy*, natural law (*ius naturale*), informal mediation (priests, neighbors, the *pater familias*), etc
2. *Normative regimes*, eg, moderately institutionalized custom (chthonic customs), the *internal jurisdiction* of non-state corporate bodies (like guilds), some arbitration, perhaps dueling, etc
3. *Legal regimes*, eg overlapping customary laws, canon law, royal law, urban law, etc[66]
4. *State legal regimes*, eg the early modern Western state
5. *State legal systems*, eg the modern, Western state

While this represents, in general, a movement in time, it needn't be seen as progressive or unidirectional.[67] The pattern isn't universal, but analogous forms and developments occurred beyond the West both before and after European colonialism and hegemony. Even as the later forms arise, the older ones persist and may thrive. These types represent the fact that social norms may be rationalized through language to general *principles* or more specific *rules*. These are further instantiated in tradition, from a large variety of implicit and non-institutionalized normative *practices* and *orders* (an interrelated assemblage of norms) to ever-more institutionalized forms.[68] All are dedicated to channeling or clarifying certain ends. At least in the origins of these orders, the ends will determine the institution's aims; over time, the institution will usually develop some autonomy and alter the ends accordingly.[69] And while a bright-line can't be established, the creation of a

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[66] *Ius gentium* (the *law of nations*) or, in modern parlance, *international law*, would also qualify as a legal regime, though admittedly a weak regime, under this scheme. See K Culver and M Giudicie, *Legality's borders: an essay in general jurisprudence* (2010).

[67] Similarly, the mere provision of a mediator or adjudicator (whether lay or law-trained) with the sanction of a legal regime or system (with or without a discrete body of substantive norms) in summary and discretionary jurisdictions can effectively allow a normative regime to boot-strap on the recognised parent regime or system. Cf, eg, the discretionary jurisdictions of Anglo-American Justices of the Peace, often lay people.

[68] What may appear to be an isolated or floating norm will typically turn out to be part of a wider order. Holding a door open or tipping a hat, eg, may be necessary for a *gentlemen*.

[69] Evaluating these developments, I suggest that the order's reference to justice is only relative. Cf D von Daniels, *The concept of law from a transnational perspective* (2010), 99 and JM Donovan, *Legal anthropology: an introduction* (2008), 251 (on law as fairness). That is, *justice* may be best seen as *aretaic*, ie largely an order-specific belief rather than a meaningful universal claim. Indeed, this approach allows a differentiation of institutionalized laws and norms from *etiquette* and *morality*. The latter two are the residual aspiration of normative ordering, minor and more significant respectively, left outside of the order. More generally, this leaves us with a soft legal-normative relativism that emphasizes the conventional nature of justice itself. *Rightness*, and perhaps even *justice*, might be best seen as a system-specific sense of *excellence*, as acting according to ends instantiated in *the particular normative tradition*. While some *minimal human goods* may exist across time and space on the basis of generally common human inclinations, these values are so extraordinarily plastic and so profoundly

normative regime can be seen as the inclusion of a minimal level of specialization—perhaps largely in personnel—in normative creation, consciously or inadvertently, and/or decision-making, whatever its content. The further shift to a *legal regime* is obviously significant. The formalities that historically led to recognition as law included additional specialization in personnel, training, and language, assisted by the introduction of writing and archives permitting an institutional memory of authorized or authentic norms to be maintained over time and space.[70] As a practical matter, these normative and legal regimes will, if they are to survive, perform basic jobs.[71] While this might provide some sense of social order, was often be backed by more-or-less positive incentives or negative sanctions, and generally seek resolutions or settlements in fact, none of these are—at least according to this wider convention—essential elements.[72]

Simplifying grossly, we might say that Western legal history since the fall of Rome is a movement from *ius* (a sense of rightness, closely associated to the meaning of *norm*, often with respect to social *mores*) to *lex* (the posited rule of an authority), though the latter is often created to ensure the former and has frequently operated behind the veil of custom. But until relatively recently, law required no claim to dominance. Legality, like normativity, took plural forms. In the period after the fall of the Roman Empire, for example, there were multiple contemporaneous normative and legal regimes co-existing and overlapping in the same geographical space and at the same time, though often affecting different individuals. These included multifarious folk-laws, local and particular *iura propria*, the romano-canonical *learned laws* or *ius commune*, and other trans-territorial *iura communia* (including feudal law and, perhaps the *lex mercatoria*). To these must also be added numerous summary and discretionary jurisdictions of *low* justice, arbitration of different sorts, the internal jurisdiction of non-state corporate bodies like guilds, and a wide variety of other alternative methods of dispute resolution. These arguably affected more people more of the time than did

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altered in different normative contexts that nominally common elements are invariably thin. This includes law, though its institutionalization results in a greater level of autonomy *vis-à-vis* both other norms and the order from which the legal regime developed. This argument will be developed in a future publication.

[70] See Mariano Croce's more nuanced understanding of the 'distinctiveness of law'. 'Is there a place for legal theory today?: the distinctiveness of law in the age of pluralism' in U de Vries and L Francot (eds), *Law's environment: critical legal perspectives* (2011), 42. See also Croce, *Self-sufficiency of law: a critical-institutional theory of social order* (2012).

[71] Cf Karl N Llewellyn's *law-jobs* theory in 'The normative, the legal, and the law-jobs: the problem of juristic method' (1940) 49 *Yale Law Journal* 1355. Note, however, that the 'element of *supremacy*' he suggests for legal authorities is inconsistent with the historical record.

[72] The concept offered here does not 'characterize law in terms of social order, … state law, [or] in terms of justice and right'. B Tamanaha, 'Law' in S Katz (ed), *Oxford International Encyclopedia of Legal History* (2009), 6.

royal or common laws. Normative and legal ordering was multi-centric, with disparate competing centers of power and persuasion. Legal regimes only rarely sought, and still less often expected, to govern their rivals. The ability to legislate or adjudicate authoritatively was contested for centuries. One searches in vain for a *Grundnorm*, though practicalities could determine the dominance of different institutions at different times and different places. When they finally develop late in Western history, states are more formally institutionalized. *State legal regimes* make the novel claim to sovereign dominance or exclusivity. Other normative orders and regimes were seen, at least in increasingly important theories of state sovereignty, as reliant on the sufferance of the state. Finally, the modern Western *legal systems* of the nineteenth century make these claims meaningful while also threading together the diverse legal regimes into a single common law, though still without displacing its rivals. Earlier ideas and institutions might, of course, continue to exist within reformed structures.[73] While the last half-century has brought many changes and the future promises more, this modern legal world persists.[74]

Because law has no essence, various conceptions are possible and different concepts may prove useful in diverse contexts. While it's unnecessary to my approach to *hybridity and diffusion* to accept the convention discussed here, there are strong reasons to employ it. This Western concept of law as an institutionalized normative order can serve as an *ideal type*, a working model or metric, for analysis. This conception isn't merely less arbitrary than its rivals, but provides a meaningful *via media* between the jurist's equation of law with the state and the novel use of *law* among legal pluralists.[75] This institutional definition separates the *legal regimes*—or regimes of *law*—that meet its conditions, including *state legal regimes*, from non-systematic norms and other normative orders. It provides a meaningful *non-state law*. It does so on the basis of established, if sometimes forgotten, conceptual characteristics. Like any such conception, this is an admittedly limited, operational concept. It is rebuttable and revisable. Like any such

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[73] Even as different laws are swallowed up by the unitary institutions of the state, they may not be entirely digested and can continue to exist semi-independently. *Equity*, eg, is still a unique substantive part of English—now *common*—law although its structures no longer exist since the fusion of law and equity in the nineteenth century.

[74] This type of historical analysis can generate many of the same conclusions as contemporary social science. But, as our own, comparative legal history may have more purchase in conceptual debates and in legal education. See Donlan, 'Days of future past?: stateless law, the state of the law schools, and comparative legal history', for the *Stateless law: the future of the discipline* (*forthcoming*). Indeed, legal pluralist literature, so often premised in fact on a state/non-state distinction, often neglects normative and legal hybridity without a state.

[75] Concern that the adoption of a Western concept by scholars inevitably creates real-world repressive is unconvincing. Cf B Tamanaha, 'What is *general* jurisprudence: a critique of universalistic claims by philosophical concepts of law' (2011) 2 *Transnational Legal Theory* 287.

model, some bias and evaluation in inevitable in my description. But there is no neutral vantage point. Like any such theory, it is a generalization from practice, leaving a gap, however small, between its general terms and actual multifarious uses. But, by being rooted in the practice of centuries, this sense of non-state law may allow us to clearly and honestly engage in conversation from within our own unavoidably conventional conceptual language towards those with other folk expressions of normativity.[76] It, and the spectrum of normative forms around it, also provides rich conceptual resources for the study of other normative orderings, past and present. We can abandon the search for a singular concept of law without giving up on meaningful debates rooted in established meanings and still remain alert to both new usages and new challenges.[77]

Principle and Practice

To return to my central theme, *all* contemporary normative and legal traditions are hybrid creations, an ongoing gumbo of (nominally) native elements and new, often borrowed, features. But in addition to this division of laws and norms, *hybridity* also involves another crucial distinction. The second axis of hybridity mentioned above divides the examination of normative and legal orders of various types on the basis of their titular principles and actual practice.[78] That is, discussions of hybridity often focus on the *origins and organization* of the rules and principles of an order, regime, or system. In this sense, the image presented will often appear static and coherent. Complexity will seem an aspect of the order's past and, however unintentional, an impression of unity will be suggested. But hybridity also involves, indeed is still more concerned with, the varying *interpretations and applications* of such rules and principles and their effects on these standards over time. It reveals that these approximations, or reifications, are never the whole story. With respect to both normative and legal orders, there may be a significant divide between its overt understanding or self-understanding and the often covert, unarticulated realities of its practice. That said, this is not to deny that principle and practice influence each other in dialectical form. The 'feedback loop' between formal doctrine and actual outcomes, as David

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[76] My defense of a single convention as an ideal type differs from Tamanaha's suggestion that '*[l]aw is whatever people identify and treat through their social practices as "law" (or recht, or droit, and so on).*' 'A non-essentialist version of legal pluralism' (2000) 27 *Journal of Law and Society* 296, 313 (*italics in original*). In addition, his analysis of Western law is ironically limited to legal *theorists* rather than to 'people' more generally.

[77] Cf A Halpin, 'Conceptual collisions' (2011) 2 *Jurisprudence* 507, 519.

[78] Cf EJ Eberle's use of *internal law* in 'Comparative law' (2007) 13 *Annual Survey of International and Comparative Law* 93, 97–99.

Ibbetson referred to in respect to comparative legal history, is no less relevant here.[79]

But this analysis of legal and normative practice shouldn't focus only on *internal* considerations and professional activities. Internal decision-making is increasingly affected by all manner of global norms, a fact with which legal theory is struggling to come to grips with.[80] And these are external both to national state laws, but also to law itself. The public interpretation and application, or obstruction to application, is critical to my approach. *Legal consciousness*, 'the understandings and meanings of law circulating in social relations', and *normative consciousness* are as important as codes or case law.[81] Indeed, because the influences on legislation, adjudication, and legal consciousness go beyond considerations merely internal to an order, it's necessary to include *still more diffuse normative and practical influences.* Dominant political, economic, and ideological forces inevitably impact on legal and normative practices of norm-generation and interpretation. While these may be seen as external, such influences are 'secreted in the interstices' of internal practices.[82] The explicit recognition of these forces, of 'power relationships between actors in the law and between legal [normative] orders', is essential in providing a deep focus on the normative whole.[83] Indeed, it is often better to see hybridity less as involving questions of governing (including legislating, adjudicating and administering), but of Michel Foucault's g*overnmentality*, where social regulation aren't centered in the state—or, presumably, its normative proxies—but is rooted in the practical play of power.[84] This can be both local and global, as diffusion, for example, occurs, not on the basis of rational choice, but under the influence of cultural prejudice and political, economic, and ideological hegemony.[85]

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[79] 'Comparative legal history: a methodology' in A Musson and C Stebbings (eds), *Making legal history: approaches and methodologies* (2012), 140.

[80] See 'A Framework for surveying global legal phenomena' in Halpin and V Roebern, 'Concluding reflections' in Halpin and Roeben (eds), *Theorising the global legal order* (2009), 275.

[81] S Silbey, 'Legal consciousness' in P Cane and J Conaghan (eds), *The new Oxford companion to law* (2008). See also P Ewick and S Silbey, *The common place of law: stories from everyday life* (1998).

[82] Maine wrote that '[s]o great is the ascendancy of the Law of Actions [ie, writs] in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure.' *Early law and custom* (1883), 389.

[83] Hussin, 'The pursuit of the Perak Regalia', 759.

[84] N Rose, P O'Maley, and M Valverde, 'Governmentality' (2006) 2 *Annual Review of Law and Social Science* 83.

[85] See, eg, U Mattei, 'A theory of imperial law: a study on US hegemony and the Latin resistance' (2003) 10 *Indiana Journal of Global Legal Studies* 383.

This focus on practice is obviously able to draw on numerous, well-established approaches to law that underline the complexity of the most ordinary law and legal system. Roscoe Pound famously formulated the gap between the *law in books* and the *law in action*, 'between the rules that purport to govern the relations of man and man and those that in fact govern them'.[86] As part of a critique of legal formalism begun over a century ago, on both sides of the Atlantic, similar statements can be found in other American realists.[87] If this is now a standard—indeed tired—bromide in legal scholarship, it should be remembered that if *law in action* is not merely meant to be a vulgar behaviorialism, it must actually concern itself with what William Ewald called the *law in minds*.[88] Similarly, Rodolfo Sacco's theory of *legal formants* goes beyond the inevitable slippage of legal interpretation. Instead, he underscores the considerable diversity in the interpretation of state laws, a complexity frequently rooted in practical, professional differences among those interpreting the law (especially judges, jurists, and legislators).[89] There is, contrary to appearances, no single legal norm in a coherent and neatly hierarchical system, not even in the most apparently monolithic tradition. A number of other modern schools of legal philosophy—perhaps especially post-modern legal theory, critical legal studies, and different schools of hermeneutics—provide many of the same conclusions. In each of these instances, the insistence on context significantly problematizes the concept of closed and discrete systems of rules.

These theories are primarily rooted in law and legal practice. They understandingly focus their attention on the role of legal actors expounding on doctrine or interpreting enacted laws and the jurisprudence (case law) produced in adjudication. Indeed, law reports, whatever their formal status as sources of law, are central to this scholarship, functioning as (unscientific)

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[86] 'Law in books and law in action' (1910) 44 *American Law Review* 12, 15. *Law in action* and *living law* are frequently confused. But *law in action* is the law as applied, in contrast to the *law in books* whereas the *living law* includes social norms in contrast to legal norms. D Nelken, 'Law in action or living law?: back to the beginning in sociology of law' (1984) 4 *Legal Studies* 157. See also M Hertogh, 'A *European* conception of a legal consciousness: rediscovering Eugen Ehrlich' (2004) 31 *Journal of Law and Society* 457.

[87] Eg, J Frank, *Law and the modern mind* (1930) and Llewellyn, *The bramble bush: on our law and its study* (1930).

[88] 'Comparative jurisprudence (I): what was it like to try a rat?' (1995) 143 *University of Pennsylvania Law Review* 1889. See also Ewald, 'The jurisprudential approach to comparative law: a field guide to *Rats*' (1998) 46 *American Journal of Comparative Law* 701 and C Valcke, 'Comparative law as comparative jurisprudence: the comparability of legal systems' (2004) 52 *American Journal of Comparative Law* 713.

[89] 'Legal formants: a dynamic approach to comparative law' (1991) 39 *American Journal of Comparative Law* 1 and (1991) 39 *American Journal of Comparative Law* 343. Similarly, the study of *legal polycentricity* stresses legal diversity within or internal to state law, especially with regard to sources. H Petersen and H Zahle, *Legal polycentricity: consequences of pluralism in law* (1995) and A Hirovonen (ed), *Polycentricity: the multiple scenes of law* (1998).

case studies of normative application. The analysis of texts is a large part of this type of legal study, though isn't the whole of it. But the complexities of interpretation and application are often less obvious in normative traditions that are more oral than written. Failing to redact these norms may disguise the variable content, or indeed vacuity, of a normative order. And where it's appropriate to talk of sustained development in any direction, this occurs *sub silentio*, without individual intention or explicit acknowledgement. The absence of texts, and often the multiplication of applicable languages and cultures, significantly complicates an understanding of the tradition. Of course, all of these considerations are relevant for much of Western legal history.[90] On the other hand, the process of writing down norms, whether social or legal, has often significantly altered their meaning and application. This was true both in the European past as well as in the Europe's colonial encounters with other legal and normative traditions. And, in both cases, redaction has often had the effect of placing elites, both juristic and legislative redactors and adjudicators, in a more powerful position. All of this is vital to my approach to hybridity. But actual public practices and legal and normative consciousness is still more important. Elaborating on his own praxiological perspective, Dupret has similarly underscored the importance of replacing grand theory with 'the close investigation of actual data reflecting the ways (methods) in which people (the members of any social group) make sense of, orient to, and practice their daily world.'[91] While the challenges here—historiographical, comparative, and social scientific—are significant, a 'close investigation' of normativities in action and in the minds is at the heart of *hybridity and diffusion*.[92]

Conclusion

Hybridity and diffusion is a promising method for examining legal and non-legal normative complexity by a deep, descriptive focus on lived normativity in all its forms. It can achieve this by taking seriously both general normativity and legality and by recognizing the gap between the principles of an order and its actual practice. *Hybridity* may be characterized as providing a

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[90] In the context of eighteenth-century Ireland, see Donlan '"They put to the torture all the ancient monuments": glib reflections on making eighteenth-century Irish legal history and the proceedings of some writers on Ireland relative to that subject' in Musson and Stebbings, *Making legal history*, 157-158.

[91] 'Legal pluralism, plurality of laws, and legal practices: theories, critiques, and praxiological re-specification' (2007) 1 *European Journal of Legal Studies* 1, in the conclusion (no pagination, available at http://www.ejls.eu/1/14UK.pdf).

[92] This was the focus of a meeting of historians, jurists, and social scientists at the *Doing justice: official & unofficial 'legalities' in practice* conference, held in Rabat, Morocco on 18-19 June 2012. A collection of articles from that event may be edited over the next year by me, Baudouin Dupret, and Ignazio Castellucci.

blurry snapshot of this complexity, or perhaps as a short sequence of frames that attempt to record normative movement. *Diffusion* relates to larger movements, the ongoing creation and revision of normative practices more generally. Both may concentrate on the individual, but, as a practical matter, this is typically done by recognizing individual actions as instantiations of wider, porous and overlapping, institutions. Understood in this way, *hybridity and diffusion* joins the social and legal sciences, not least legal history and legal philosophy. It's complicated. Perhaps too complicated for the ordinary jurist, like myself. But collaborative inter-disciplinary and trans-disciplinary research could make *hybridity and diffusion* invaluable to investigating the intersections and interplay, the complex *interjurality*, of East and West, North and South, and past and present.