'REMEMBERING: LEGAL HYBRIDITY AND LEGAL HISTORY'

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'Legal anthropologists have well excavated the terrain of competing legalities. To date, however, legal pluralism has tended to focus on the exotic … or the pathological …. Only slowly is the historical pedigree of legal pluralism being rediscovered; only slowly is the age of the new being appreciated. So, in exploring legal pluralism as a so-called paradigm shift, one is not engaged in any polemical post-modern project; one is, rather, remembering as much as constructing.'

- Roderick Macdonald, *Metaphors of multiplicity: civil society, regimes and legal pluralism*, in 15 Arizona Journal of International and Comparative Law 69, 75-76 (1998)

An interest in contemporary, comparative legal and normative hybridity—or 'legal pluralism'—around the globe has become increasingly common. But the hybridity of our own Western past, and the significance of this fact, is too often ignored. As part of a wider project on 'hybridity and diffusion', the mixtures and movements of state law and other norms, this article contributes to the process of 'remembering' this past. It does so to better prepare comparatists for the challenges of the present.

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I. INTRODUCTION

An interest in contemporary legal and normative hybridity or 'legal pluralism' has become increasingly widespread in Western legal scholarship. This is sometimes driven by prescriptive ends, as part of a wider critique of the Western state. Among social scientists, this 'ethos of pluralism' 'is not only theoretical, but is also ethical and political.'[1] But this 'ethos' also reflects significant practical changes in law across the globe, the fact that, 'as a purely descriptive matter, hybridity cannot be wished away.'[2] Both within states and without, it is difficult to ignore the proliferation of laws and other norms over the course of the last half-century. It remains much less common, especially among comparativists, to acknowledge the legal and normative hybridity of the past. This is the consequence, in significant part, of the continuing acceptance across the West of 'whiggish' national and pan-European narratives of legal development. But, as Roderick Macdonald noted a decade ago, 'in exploring legal pluralism as a so-called paradigm shift, one is not engaged in any polemical post-modern project; one is, rather, remembering as much as constructing.'[3] Echoing this, the comparatist and social geographer Werner Menski has written that

Recent comparative law scholarship indicates that maybe the Euro-centric perspective that privileged the state (lego-centrism) and territoriality (nationalist concerns) is not only quite parochial, but an idiom based on lost memory which does not lead towards a globally acceptable method of understanding law and its many pluralities, mixed manifestations, and commonalities.[4]

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[1] M. Davies, *The ethos of pluralism*, in Sydney Law Review, 87 (27, 2005). Cf. S. Roberts, *Against legal pluralism: some reflections on the contemporary enlargement of the legal domain*, in Journal of Legal Pluralism, 95 (42, 1998) and *After government?: on representing law without the state*, in Modern Law Review, 1 (68, 2005).

[2] P.S. Berman, *Global legal pluralism,* in Southern California Law Review, 1155 (80, 2007). See Berman, *The new legal pluralism*, in Annual Review of Law and Social Science. 226 (5, 2009).

[3] R. Macdonald, *Metaphors of multiplicity: civil society, regimes and legal pluralism*, in Arizona Journal of International and Comparative Law, 76 (15, 1998). For a recent overview of legal pluralism, see A. Griffiths, *Legal pluralism*, in R. Banakar and M. Travers (eds), *An introduction to law and social theory* (2002).

[4] W. Menski, *Beyond Europe*, in E. Örücü and D. Nelken (eds), *Comparative law: a handbook*, 198 (2007). Menski cites William Twining's *Globalisation and legal theory* (2000) and Patrick Glenn's *On common laws* (2005).

This article contributes to the process of 'remembering' this past and recapturing this 'lost memory' to better prepare Western jurists to understand and address the pluralism of the present, not least within modern legal traditions designated as 'mixed legal systems'.

The paper begins with a brief survey of 'legal pluralism' as the term is used by social scientists, comparatists, and legal historians. It reviews, all too quickly, legal hybridity from the twelfth to the nineteenth century. It is a reminder that legal and normative hybridity is the rule; unified, national state law is the exception. As Patrick Glenn, the jurist who perhaps best combines the roles of comparatist and legal historian, has put it, both in Western history and around the contemporary world, 'law … precedes the State and continues to surround it.'[5] This article also suggests that appreciating this fact allows us to better contextualize contemporary 'mixed legal systems' and that 'mixed jurists' are particularly well-placed to pursue research on hybridity, past and present and around the globe. Finally, this article is part of a wider project on 'hybridity and diffusion'.[6] That project aims to contribute to the study of legal and normative mixtures and movements and to encourage interdisciplinary dialogue between jurists and others (especially anthropologists, geographers, historians, philosophers, sociologists, etc).[7]

II. THE ETHOS OF PLURALISM

Neither the 'ethos' nor the fact of pluralism is new. Almost a century ago, Eugen Ehrlich stressed the importance of the 'living law' of society. This dominates life itself even though it has not been posited in legal propositions. The source of our knowledge of this law is, first, the modern legal document; secondly, direct observation of life, of commerce, of customs and usages, and of all associations, not only those that the law has recognised but also of those

[5] P. Glenn, *Persuasive authority*, in McGill Law Journal/Revue de Droit de McGill, 289 (32 1987).

[6] Note the suggestion, by cultural historian Peter Burke, that 'hybridity … is a slippery, ambiguous term, at once literal and metaphorical, descriptive and explanatory.' *Cultural hybridity*, 54 (2009). Cf J Holbrook, *Legal hybridity in the Philippines: lessons in legal pluralism from Mindanao and the Sulu Archipelago*, in Tulane Journal of International & Comparative Law, 1, 3 n8 (18, 2010).

[7] See *Juris Diversitas* at www.jurisdiversitas.blogsot.com (last visited 30 November 2010) for additional information.

that it has overlooked and passed by, indeed even of those that it has disapproved.[8]

Modern hybridity reflects the complexity of contemporary law and legal systems at the global, national, and sub-national levels. The study of hybridity is especially pronounced at the boundaries between the legal and social sciences. Anthropologists and sociologists, in particular, have noted the frequently fuzzy divisions between (i) state or 'official' laws and (ii) other non-state social norms or 'unofficial' *laws*.[9] The coexistence of both is, it is argued, 'the omnipresent, normal situation in human society'.[10] Social scientists and their allies in the legal academy have provided very sophisticated analyses, often rooted in empirical study, of the relationship of both 'laws'. These are 'semi-autonomous social field[s]' that have 'rule-making capacities, and the means to induce or coerce compliance; but [are] simultaneously set in a larger social matrix which can, and does, affect and invade it'.[11] If this broad understanding of '*legal*' pluralism has sometimes dismayed jurists, dissuading them from engagement, it has arguably been 'a useful sensitising and analytical tool' in contemporary analysis.[12] More recently, it has been suggested that 'normative pluralism' better captures this idea.[13] In this analysis, the uniqueness of the law of the state is recognised at the same time that that it is set within wider patterns of normative ordering. Normative pluralism is

[8] E. Ehrlich, *Fundamental principles of the sociology of law*, 493 (2002 [1936]), tr. W.L. Moll. The original German edition was published in 1913. Ehrlich argued that '[a]t the present as well as at any other time, the center of gravity of legal development lies not in legislation, nor in juristic science, nor in juridical decision, but in society itself.' *Ibid*., 'Foreword'.

[9] M. Chiba, *Other phases of legal pluralism in the contemporary world*, in Ratio Juris, 228 (11, 1998). See Chiba's 'three dichotomies of law under the identity postulate of a legal culture' ('official law'/'unofficial law', 'indigenous law'/'transplanted law', 'legal rules'/'legal postulates') and the 'identity postulate of a legal culture'. *Ibid*., 240-2.

[10] J. Griffiths, *What is legal pluralism*, in Journal of Legal Pluralism, 39 (24, 1986).

[11] S.F. Moore, *Law and social change: the semi-autonomous social field as an appropriate subject of study*, in Law & Society Review, 54, 56 (7, 1973).

[12] F. von Benda-Beckmann, *Who's afraid of legal pluralism?*, in Journal of Legal Pluralism, 40 (47, 2002).

[13] J. Griffiths, *The idea of sociology of law and its relation to law and society*, in M. Freeman (ed), *Law and sociology: current legal issues – volume 8*, 63-4 (2005). Cf B. Dupret, *Legal pluralism, normative plurality, and the Arab world* in Dupret, M. Berger, and L. al-Zwaini (eds), *Legal pluralism in the Arab world* (1999) and W. Twining, *Globalisation and legal theory*, especially 82-8 (2000).

simply a social fact with which jurists must contend.[14] This includes, as David Nelken has usefully written, 'law beyond the law', 'law without the state', and 'order without law'.[15]

Scholarship on legal or normative hybridity has gradually expanded in the last few decades. The same is true of an ever-expanding catalogue of 'pluralist' terminology. The first wave of social science research, the so-called '*classical* legal pluralism', focused on non-Western, post-colonial communities. It often served as a critique of Western colonialism. An important distinction is also made between '*state* legal pluralism' in which plural legal orders are a part of the wider state systems and '*deep* legal pluralism' in which the focus in on both state laws and non-state norms.[16] More recently, research in '*new* legal pluralism' has included case studies within the West, suggesting the continuing importance of non-state norms here.[17] This has sometimes been linked to research on 'social norms' linked both to political science and to law and economics.[18] These works have suggested, that '[i]n most contexts, law is not central to the maintenance of social order'.[19] And, while the 'specifics are not yet clear', one element of a third pluralist paradigm—after 'classical' and 'new' legal pluralism—is '*global* legal pluralism'.[20] This encompasses international law, human rights, and, more problematically, involves the assertion of an increasingly important commercial law or *lex mercatoria* created by non-state actors.[21]

Especially among the advocates of 'global legal pluralism', the study of legal and normative hybridity extends beyond empirical social science research to more critical analyses. These are often linked to debates on the character of

[14] On a 'Social Fact Conception of Legal Pluralism', see W. Twining, *Normative and legal pluralism: a global perspective*, in Duke Journal of Comparative & International Law, 488-9 (20, 2010).

[15] D. Nelken, *Eugen Ehrlich, living law, and plural legalities*, in Theoretical Inquiries in Law, 443 (9 2008).

[16] G. Woodman, *The idea of legal pluralism* in Dupret, Berger, and al-Zwaini, *Legal pluralism in the Arab world*, 5. These may also be characterised as 'weak' and 'strong' legal pluralism. See also M.B. Hooker, *Legal pluralism: an introduction to colonial and neo-colonial law* (1975).

[17] S.E. Merry, *Legal pluralism*, in Law & Society Review, 872 ff. (22 1988).

[18] W.K. Jones, *A theory of social norms*, in University of Illinois Law Review, 545 (1994).

[19] R. Ellickson, *Order without law: how neighbours settle disputes*, 280 (1991).

[20] R. Michaels, *Global legal pluralism*, in Annual Review of Law and Social Science, 243 (5, 2009).

[21] C. Wasserstein Fassberg, *Lex mercatoria: hoist with its own petard?*, in Chicago Journal of International Law, 67 (5, 2004).

'globalisation'.[22] Gunther Teubner defines legal pluralism 'as a multiplicity of diverse communicative processes in a given social field that observe social action under the binary code of legal/illegal.'[23] Intentionally blurring the lines between law and other norms, Boaventura de Sousa Santos has written 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*. Interlegality is the phenomenological counterpart of legal plurality, and a key concept in an oppositional postmodern conception of law.[24]

For de Sousa Santos, the recognition of 'interlegality' is not merely descriptive, but a prescriptive element in a critical and emancipatory jurisprudence. And, in parallel to Jacques Vanderlinden, Macdonald has made an eloquent case for a '*critical* legal pluralism'. In this approach, rather than 'reify[ing] "norm-generating communities" as surrogates for the State', as the social sciences do, a 'critical legal pluralism' focuses upon the role of individuals in 'generating normativity.'[25] In this approach, law is not limited to legislation or legislators or even to communities and customs. Instead, individuals are themselves law makers.[26]

Alongside these developments has come a critique of state- and state law-centred analytical models. Much of the empirical social science scholarship was intentionally 'destructive', targeting legal monism, centralism, and positivism.[27] John Griffiths wrote, for example, of an 'ideology of legal

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[22] For the importance of geography to legal pluralism, see F. von Benda-Beckmann, K. von Benda-Beckmann, and A. Griffiths, *Space and legal pluralism: an introduction,* in von Benda-Beckmann, von Benda-Beckmann, and Griffiths (eds), *Spatilizing law: an anthropological geography of law in society* (2009).

[23] G. Teubner, *Global Bukowina: legal pluralism in the world society* in G. Teubner (ed), *Global law without a state*, 10 (1996). See Teubner, *The two faces of Janus: rethinking legal pluralism*, in Cardozo Law Review, 1443 (13, 1991-92).

[24] B. de Sousa Santos, *Towards a new legal common sense: law, globalization, and emancipation*, 437 (2nd ed. 2002).

[25] M.-M. Kleinhans and R. Macdonald, *What is a critical legal pluralism*, in Canadian Journal of Law and Society, 25, 35, 38 (12, 1997). See also Macdonald, *Unitary law re-form, pluralistic law re-substance: illuminating legal change*, in Louisiana Law Review, 1113 (67, 2007).

[26] See J. Vanderlinden, *Return to legal pluralism: twenty years later*, in Journal of Legal Pluralism, 149, 151-2 (26, 1989). Cf R. Cover's wok on 'jurisgenesis'. *Nomos and narrative*, in Harvard Law Review, 4 (97, 1983).

[27] Macdonald and D. Sandomiershi extend this critique to 'prescriptivism', ie 'the belief that law is a social fact existing outside and apart from those whose conduct it claims to

centralism, law 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.'[28] This critique has too often been ignored. Recently, however, a number of jurisprudes have recognised the value, or necessity, of incorporating multiple sources of legal and normative authority into their analysis. Most notably, William Twining has stressed the importance of moving beyond Euro-centric and state-centred legal theory in an age of globalisation.[29] In demanding a less parochial 'general jurisprudence' he noted that

A reasonably inclusive cosmopolitan discipline of law needs to encompass all levels of relations and of ordering, relations between these levels, and all important forms of law including supra-state (eg international, regional) and non-state law (eg religious, transnational law, chthonic law, ie tradition/custom) and various forms of 'soft law'[30]

This acknowledgement 'that normative and legal orders can co-exist in the same time-space context', he notes, 'greatly complicates the tasks of comparative law.'[31] Brian Tamanaha has made a similar argument both with respect to jurisprudence and comparative law.[32] He is keen to stress the diverse instantiation of law, both historically and (more often in his work) comparatively.[33] For both Twining and Tamanaha, state law is but one manifestation of law and the study of legal theory is closely linked to comparative law and socio-legal studies.[34]

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regulate'. R.A. Macdonald and D. Sandomiershi, *Against monopolies*, in Northern Ireland Legal Quarterly, 610, 615 (57, 2006).

[28] A. Griffiths, *What is legal pluralism*, 39.

[29] See D.B. Goldman, *Globalisation and the Western legal tradition: recurring patterns of law and authority* (2007).

[30] W. Twining, *Globalisation and comparative law*, in E. Örücü and D. Nelken, *Comparative law*, 71 (2007). See generally W. Twining, *General jurisprudence: understanding law from a global perspective* (2009).

[31] W. Twining, *Globalisation and comparative law* in E. Örücü and D. Nelken, *Comparative law*, 71.

[32] B.Z. Tamanaha, *A general jurisprudence of law and society* (2001). See also B.Z. Tamanaha, *Understanding legal pluralism: past to present, local to global*, in Sydney Law Review, 375 (30, 2008).

[33] It may be important, or at least interesting, to note that Twining was born, raised, and taught for some time in Africa; Tamanaha is a native of Hawaii and practiced law there and in Miconesia.

[34] Tamanaha is critical of some approaches to legal pluralism. See B.Z. Tamanaha, *A non-essentialist version of legal pluralism*, in Journal of Law & Society, 296 (27, 2000). See also B.

While all of this research would appear to be at least useful, if not essential, to comparative law, it has not yet received the attention it deserves.[35] One aspect of this is merely terminological. Confusingly, both comparatists and legal historians typically use 'legal pluralism' in a much more limited manner than their counterparts in the social sciences. The former generally use the phrase to refer to the 'plurality of laws', those traditions generally recognised as laws by lawyers without necessarily including non-state or unofficial norms.[36] These traditions are distinguished from custom or other normative orders by their level of formality and institutionalisation, including, over time, the state itself. It is a distinction between legal and normative hybridity. This terminological difference can sometimes mask the fascination of comparative lawyers, verging at times on obsession, with taxonomy. The classifications serve a purpose, of course, if only in short-handing the complexities of mixity by creating useful ideal types for comparative teaching, scholarship, and dialogue. Taken too seriously, however, they suggest closed and harmonious legal systems and traditions rather than more complex 'amalgam[s] of solutions to problems faced in the past.'[37] Acknowledging a far more subtle and complex legal hybridity creates problems for any neat division of legal traditions into discrete legal families; the incorporation of normative hybridity into comparative analysis is still more difficult.[38] It may, however, be necessary to understand the complex normative orderings of past and present.

Dupret, *Legal pluralism, plurality of laws, and legal practices: theories, critiques, and praxiological re-specification*, in European Journal of Legal Studies (1, 2007) (available at http://www.ejls.eu/1/14UK.pdf (last visited 30 November 2010)).

[35] But cf. T.W. Bennett, *Legal anthropology and comparative law: a disciplinary compromise*, in Stellenbosch Law Review, 4 (21, 2010).

[36] This is similar to 'state legal pluralism', though with the rather significant qualification that the state has not always been involved, as institutionalised normative orders preceded the state.

[37] J. Gordley, *Comparative law and legal history*, in M. Reimann and R. Zimmermann (eds), *The Oxford handbook of comparative law*, 762 (2006). The best-known classifications remain those of R. David, *Major legal systems of the world today* (3rd ed. 1985) and K. Zweigert and H. Kötz, *An introduction to comparative and European Law* (3rd ed. 1998).

[38] J. Husa, *Legal families*, in J. Smits, *Elgar encyclopedia of comparative law* (2006). Cf. U. Mattei, *Three patterns of law: taxonomy and change in the world's legal systems*, in American Journal of Comparative Law, 5 (45, 1997).

There are some exceptions to this narrow disciplinary focus and the 'lost memory' of past legal and normative hybridity.[39] Menski, for example, has explicitly placed law in a plural and global context. He has written that 'it is evident that a narrow approach to law as state law leads neither to appropriate understanding of non-European societies and cultures nor to satisfactory analysis of the phenomenon of law even in its European manifestations.'[40] A decade ago, Nora Demleitner wrote that

[a]t bottom, all legal systems are mixed—derived from imported structures, concepts and ideas but also emanating from different normative systems which are based on customs, religions and languages, habitat and natural resources, families, geography and climate, conceptions of morality, and other features.[41]

Other comparatists, especially mixed jurists, have also made explicit the fact that all legal traditions are mixed or impure.[42] It has even been suggested that legal pluralism is contributing to a 'new rapproachement' between comparatists and socio-legal jurists.[43] It 'provided an early point of dialogue … because it made room for each of their respective areas of expertise: both state law and customary law deserved exploration.'[44] If this is a somewhat optimistic appraisal of the current state of comparative law, it points to exciting possibilities. It may be too much to ask that comparatists grasp both

[39] W.F. Menski, *Beyond Europe*, in E. Örücü and D. Nelken, *Comparative law*, 198 (2007). See also U. Mattei, T. Ruskola, and A. Gidi (eds), *Schlesinger's comparative law: cases - texts - materials* (7th ed. 2009).
[40] W.F. Menski, *Comparative law in a global context: the legal systems of Asia and Africa*, 185-86 (2nd ed. 2006). He has explicitly linked this to legal theory in *Ibid*., chapter three. See also E. Örücü, *Developing comparative law*, in E. Örücü and D. Nelken, *Comparative law,* 61.
[41] N.V. Demleitner, *Combating legal ethnocentrism: comparative law sets boundaries,* in Arizona State Law Journal, 737, 748-9 (31, 1999). 'In the future, mixed legal systems will become ever more important and predominant'. *Ibid*., 749.
[42] E. Örücü, *A general view of "legal families" and of "mixing systems"* in E. Örücü and D. Nelken, *Comparative law*, 177 (2007). See also V. Palmer, *Mixed legal systems … and the myth of pure laws*, in Louisiana Law Review, 1205 (67, 2006-7).
[43] A. Riles, *Comparative law and socio-legal studies,* in M. Reimann and R. Zimmermann, *The Oxford handbook of comparative law*, 777 (2006). See also R. Cotterrell, *Comparatists and sociology*, in P. Legrand and R. Munday (eds), *Comparative legal studies: traditions and transitions*, 134 (2003). For an earlier attempt see J. Hall, *Comparative law and social theory* (1963).
[44] A. Riles, 'Comparative law and socio-legal studies' in M. Reimann and R. Zimmermann, *The Oxford handbook of comparative law*, 805-6 (2006).

(i) the theoretical work of jurisprudes and both empirical and critical legal pluralists and (ii) the detailed case studies of legal historians, social sciences, and others. But a genuine rapproachment might make possible interdisciplinary studies that successfully combine theoretical breath and practical detail to produce new insights and information on legal and normative hybridity.[45] The same may be said of the diffusion of laws in European history and in the process of transplanting European law around the world. 'Scholars who study the one could learn from those who study the other, and vice versa.'[46]

Legal and normative hybridity is, in fact, closely linked to the 'diffusion' of laws and norms. Indeed, '[l]aws, like people, migrate. Legal borders, like physical ones, are permeable, and seepage is everywhere.'[47] Comparatists have, of course, frequently acknowledged the role of 'transplants' and 'receptions' of law, though not without debate.[48] Alan Watson's 'transplant' thesis is especially important and influential.[49] The Scot's focus has been, for several decades, to suggest that the transplantation of discrete legal ideas and institutions is extremely common.[50] This has displeased those who want to

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[45] Scholarship on comparative law and legal culture is especially promising. See R. Cotterrell, *Comparative law and legal culture*, in M. Reimann and R. Zimmermann, *The Oxford handbook of comparative law* (2006); D. Nelken, *Using the concept of legal culture*, in Australian Journal of Legal Philosophy, 1 (29, 2004); M. Van Hoecke and M. Warrington, *Legal cultures, legal paradigms and legal doctrine: towards a new model for comparative law*, in International and Comparative Law Quarterly, 495 (47, 1998).

[46] D. Heirbaut, *Europe and the people without legal history: on the need for a general history of non-European law*, in Tijdschrift voor Rechtsgeschiendenis, 269, 277 (68, 2008). See also G. Frankenberg, *Critical comparisons: re-thinking comparative law*, in Harvard International Law Journal, 411 (26, 1985).

[47] J. Resnik, *Foreign as domestic affairs: rethinking horizontal federalism and foreign affairs pre-emption in light of translocal internationalism*, in Emory Law Journal, 31, 63-4 (57, 2008).

[48] In addition to the few jurists mentioned here, see R. Cotterrell, *Is there a logic of legal transplants*, in D. Nelken and J Feest (eds), *Adapting legal cultures* (2001); D. Nelken, *Beyond the metaphor of legal transplants? some consequences of autopoiesis theory for the study of cross cultural legal adaptation*, in J. Priban and D. Nelken (eds), *The Consequences of Autopoeisis* (2001); D. Nelken, *Legal transplants and beyond: of disciplines and metaphors*, in A Harding and E. Örücü, *Comparative law in the 21st Century* (2002).

[49] A. Watson, *Legal transplants: an approach to comparative law* (2nd ed. 1993) and *Legal transplants again* (2000). See also J.M. Miller, *A typology of legal transplants: using sociology, legal history and Argentine examples to explain the transplant process*, in American Journal of Comparative Law, 839 (51, 2003).

[50] This is inevitably a question of history and Watson has also been a strong advocate of comparative legal history. See A. Watson, *Legal history and a common law for Europe* (2001) and *Legal cultures v legal traditions*, in M. van Hoecke, *Epistemology and methodology in comparative law* (2004).

insist on particularly close, arguably romantic, connections between law and culture.[51] The idea of 'receptions' of law is less contentious, at least for the specific receptions most often discussed.[52] The importance of the *ius commune* especially can be exaggerated. It cannot be denied. These concepts are so important to modern comparative analysis that Michele Graziadei has even suggested comparative law can be characterised as the 'study of legal transplants and receptions'.[53] Similarly, Pierguiseppe Monateri has suggested the (unfortunately pejorative) term 'contaminations' to capture this idea.[54] Teubner has spoken of 'irritants'.[55] Esin Örücü has offered a number of ways in which to characterise the movement of laws, including the 'transfrontier mobility of law'.[56] Consistent with scholarship in the social sciences, Twining uses 'diffusion'.[57] He has noted that

There are many other concepts, hypotheses and models to be found in the much more developed social science literature on diffusion that might be

[51] Cf. P. Legrand, *The impossibility of legal transplants*, in Maastricht Journal of European and Comparative Law, 111 (4, 1997) and *European legal systems are not converging*, in International and Comparative Legal Quarterly, 52 (45, 1996). Watson's 'greatest complaint with … Legrand is that he neglects comparative legal history.' A. Watson, *Legal transplants and European private law,* in J. Smits (ed), *The contribution of mixed legal systems to European private law*, 18 (2001). See also J.Q. Whitman, *The new-Romantic turn*, in P. Legrand and R. Munday, *Comparative legal studies* (2003).

[52] A. Watson, *Aspects of reception of law*, in American Journal of Comparative Law, 345 (44, 1996). See also A. Kocourek, *Factors in the reception of law*, in Tulane Law Review, 209 (10, 1935-36).

[53] *Comparative law as the study of transplants and receptions*, in M. Reimann and R. Zimmermann, *The Oxford handbook of comparative law*.

[54] P.G. Monateri, *The "weak" law: contaminations and legal cultures'*, in Italian national reports to the XVth International Congress of Comparative Law Bristol 1998, 107 (1998).

[55] G. Teubner, *Legal irritants: good faith in British law or how unifying law ends up in new divergences*, in Modern Law Review, 11 (61, 1998).

[56] She has also spoken of 'law as transposition', the 'tree model', and the 'wave theory', the last two both borrowed from linguistics. See 'A theoretical framework for transfrontier mobility of law' in R. Jagtenberg, Örücü, and A.J. de Roo, *Transfrontier mobility of law* (1995) and E. Örücü, *Law as transposition*, in International and Comparative Law Quarterly, 205 (51, 2002).

[57] W. Twining, *Diffusion and globalization discourse*, in Harvard International Law Journal, 507, 512 (47, 2006). In fact, his use of the term effectively envelopes the study of both (i) legal and normative hybridity and (ii) legal culture. See W. Twining, *Globalisation and comparative law*, in E. Örücü and D. Nelken, *Comparative law*; *Diffusion of law: a global perspective* , in Journal of Legal Pluralism, 1 (49, 2004); *Social science and diffusion of law*, in Journal of Law and Sociology, 203 (32, 2005).

usefully transplanted, imitated, adapted or plagiarized for the modest purposes of legal scholarship and socio-legal studies.[58]
This is true and again suggests the benefits of greater interdisciplinary dialogue. Legal diffusion, whether in piecemeal transplants or wider receptions, is the counterpart and creator of legal hybridity. The mixtures and movements of law are very closely connected.

III. HYBRIDITY AND HISTORIOGRAPHY

Legal historians are increasingly adept at research on legal, if not necessarily normative, hybridity.[59] But there remain important limitations. These include the wider and comparative picture of historical hybridity (rather than narrow case studies of individual jurisdictions) and the relatively limited dialogue and engagement between legal historians and comparatists.[60] The creation of genuinely common or general national laws, a legal 'system' centred on the state, and the elimination of competing jurisdictions was a very long historical process throughout the West.[61] Both legal and normative hybridity was the norm before the nineteenth century. There were multiple—often transnational or rather, pre-national and trans-territorial—contemporaneous legal orders co-existing in the same geographical space and at the same time, though often affecting different individuals. For much of our history, law was

[58] W. Twining, *Diffusion and globalization discourse*, quoted, 513.
[59] American legal historians have been particularly good at this. See C. Tomlins, *The many legalities of colonialization: a manifesto of destiny for early American legal history*, in Tomlins and B.H. Mann (eds), *The many legalities of early America* (2001). See also S. Hadden, *New directions in the study of legal cultures*, in Cambrian Law Review, 1 (33, 2002).
[60] S. Donlan, *Histories of hybridity: a problem, a primer, a plea, and a plan (of sorts)*, in E. Cashin-Ritaine, S. Donlan, and M. Sychold (eds), *Hybrid legal traditions and comparative law* (2010). On interdisciplinarity, see also J. Rose, *English legal history and interdisciplinary studies*, in A. Musson, *Boundaries of the law: geography, gender and jurisdiction in medieval and early modern Europe* (2005).
[61] On European legal history generally, see O.F. Robinson, T.D. Fergus, and W.M. Gordon, *European legal history* (3rd ed. 2001) and R. Lesaffer, *European legal history: a cultural and political perspective* (2009). See also J.H. Baker, *An introduction to English legal history* (4th ed. 2002); P. Brand, *The making of the common law* (2003); P. Stein, *Roman law in European legal history* (1999); R.C. van Caenegem, *The birth of the English common law* (2nd ed. 1988); R.C. van Caenegem, *An historical introduction to private law* (1992); T.G. Watkin, *An historical introduction to the civil law* (1999); A. Watson, *The making of the civil law* (1981); F. Wieacker, *A history of private law in Europe with particular reference to Germany* (1995 [1967]), tr. T. Weir.

multi- or poly-centric, with multiple, competing centres.[62] This fragmented plurality of laws blurred seamlessly into the less formally institutionalised, but meaningful, normative pluralism from which more formal laws often emerged and with which they would continue to compete. [63] Especially in the period before modern nationalism and positivism, legal monism or centralisation, such normative traditions may appropriately be included within the public or popular juridical sphere.[64] The boundaries between these formal and informal legalities were especially porous. As Rodolfo Sacco has written, 'the "Lawgiver" is a recent entry into the domain of Law and … law may live, and lived, even without a lawgiver.'[65]

All legal traditions or systems were—and indeed are—hybrids created in significant part by the diffusion of laws. As HD Hazeltine wrote, somewhat colourfully, eighty years ago:

Law is continually moving, changing, in response to the pressure of the forces that arise in the inner life of the community or that penetrate from outside; and one of the most important of these external forces is the introduction of foreign legal influence. Whenever a body of law comes into contact with other systems, it ceases to preserve its native character intact; it takes on new colours of form and content derived from foreign law. In all of the periods of legal history, from early antiquity to the present day, the play of these foreign influences and counter-influences has produced systems of mixed origin; and it would seem, indeed, that no system of civilised law known to history has ever been strictly pure, in the sense of being based solely on indigenous growths.[66]

Modern national legal traditions in the West are each unique mixtures broadly borrowing from the multifarious folk-laws of the past, the romano-canonical

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[62] See L. Benton, *Law and colonial cultures: legal regimes in world history, 1400-1900* (2002), 11. Cf H. Petersen and H Zahle, *Legal polycentricity: consequences of pluralism in law* (1995) and A. Hirovonen (ed), *Polycentricity: the multiple scenes of law* (1998).

[63] P. Stein, *Legal institutions: the development of dispute settlement* (1984).

[64] D. Millon, *Positivism in the historiography of the common law*, in Wisconsin Law Review 669 (1989) and J. Rose, *Doctrinal development: legal history, law, and legal theory*, in Oxford Journal of Legal Studies, 323 (22, 2002).

[65] R. Sacco, *Mute law*, in American Journal of Comparative Law, 455, 456 (43, 1995). See also R. Sacco, *Legal formants: a dynamic approach to comparative law (installment I of II)*, in American Journal of Comparative Law, 1 (39, 1991) and *Legal formants: a dynamic approach to comparative law (installment II of II)*, in American Journal of Comparative Law, 343 (39, 1991).

[66] H.D. Hazeltine, *The study of comparative legal history*, in Journal of the Society of Public Teachers of Law, 27, 33 (1927).

'learned laws' or *ius commune*, and other trans-territorial *iura communia* (including feudal law and *lex mercatoria*). Over time, these various laws were linked to public institutions coupled with increasingly meaningful and centralised powers of enforcement. This was, however, a very long process. The laws only slowly came under the control of early modern states and were, subsequently, unified with the creation, especially from the nineteenth century, of modern Western states and legal systems, and dominant common national laws. Indeed, the various local and particular *iura propria*, the discretionary jurisdictions of 'low' justice, and other normative, non-legal orders arguably affected more people more of the time than did Europe's state laws. These jurisdictions, both official and unofficial, contributed much to the substance and survival of the latter. Their authoritativeness did not rest on political authority.

Over two decades ago, Norbert Rouland wrote that '[a]t present, it requires a measure of intellectual laziness to believe in the monistic legal myth …'.[67] Such intellectual laziness is, however, all too common. Historical hybridity is too infrequently taken seriously by many Western jurists. With the exception perhaps of 'mixed jurists' working within or on explicitly 'mixed legal systems', this seems to be especially true in the Anglophonic legal world.[68] The fact of hybridity has been obscured by the comparative independence of Anglo-American law from European *iura communia* and a more general belief in Anglo-exceptionalism. English law was, in fact, always part of a wider European jurisprudential-juridical legal culture.[69] This blindness to the pluralism of the past obscures our understanding of the pluralism, both Western and global, of the present. What follows is painted in very broad brushstrokes, occasionally discussing Anglo-American law in greater detail. It is also largely concerned with legal, rather than normative, hybridity. That the latter is mentioned only in passing reflects the state of current research and

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[67] N. Rouland, *Legal anthropology* (1994 [1988]), tr. P.G Planel, 46.

[68] 'However mixed his system is in fact the English lawyer does not think of it as such.' J. McKnight, *Some historical observations on mixed systems of law*, in Juridical Review (n.s.), 177, 178 (22, 1977).

[69] S. 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). This article grew out of S. Donlan, *"Our laws are as mixed as our language: commentaries on the laws of England and Ireland, 1704-1804*, in Journal of Comparative Law, 178 (3, 2008) (also available as 12 Electronic Journal of Comparative law (2008) at www.ecjl.org/121/abs121-6.html (last visited 30 November 2010)). See both articles for additional footnotes discussing the links between Anglo-American and continental law.

the historiographical difficulties involved in the study of non-state normative orders. But this wider hybridity, the study of formal and informal legalities, is vital as both source and context of ever-widening official law. Indeed, the pluralist perspective requires a shift away from an essentialist definition of law to an historical understanding since any situation of legal pluralism develops over time through the dialectic between legal systems, each of which both constitutes and reconstitutes the other in some way. Defining the essence of law or custom is less valuable than situating these concepts in particular sets of relations between particular legal orders in particular historical contexts.[70]
To be clear, the social sciences cannot simply serve as a substitute for careful historiography, whether narrowly 'internal' to legal ideas and institutions or setting law in a wider 'external' context.[71] But treated with an appreciation for their different strengths and weaknesses, anthropological and sociological models have proven useful and point to the utility of dialogue beyond the boundaries of legal science.[72]

IV. LEGAL HYBRIDITY IN HISTORY

The long period between Roman ruin and subsequent legal revival saw a great many local, largely unwritten, folk-laws across Europe.[73] These varied considerably, but emphasised a customary origin to popular traditions. Law was not seen as made in legislation or adjudication, but was instead declaratory of customary practices. In fact, the resulting law was, at least over time, far from the actual lived customs and practices of the community at large. They are better seen as 'legal customs' than 'customary law'.[74] Especially through the process of redaction, it was brought under the interpretive

[70] *Legal pluralism*, 889. On similar comments on '[h]istorical and comparative study', see also M. Galanter, *Justice in many rooms: courts, private ordering, and indigenous law*, in Journal of Legal Pluralism, 1, 28 (19, 1981).
[71] D.L. Donham, *Thinking temporally or modernizing anthropology*, in American Anthropologist, 134 (103, 2001).
[72] See, eg, J. Bossy (ed), *Disputes and settlements: law and human relations in the West* (1983) and T. Kuehn, *Law, family, and women: towards a legal anthropology of renaissance Italy* (1991). For a use of literary sources, see P. Hyams, *Norms and legal argument before 1150*, in A. Lewis and M. Lobban (eds), *Law and history: current legal issues – volume 6* (2004).
[73] What follows is only a broad survey and citations are comparatively limited.
[74] D. Heirbaut, *An unknown treasure for historians of early medieval Europe: the debate of German legal historians on the nature of medieval law*, in Rechtsgeschichte, 1 (27, 2010).

control of literate and legal elites: jurists, judges, and legislators.[75] Their interpretation, rather than popular opinion, determined its justiciable contours and often moved it far from its origins.[76] Genuine custom and its norms never disappeared, of course, and 'in the interstices of the society, customary practises continued to hold their appeal'.[77] Folk-laws were subsequently supplemented by 'vulgar' Roman laws redacted by the 'Germanic' tribes that succeeded Rome, the Romanised laws of the church, and feudal law. As Roman political administration had atrophied, the church provided an important link, both institutionally and intellectually, with the classical past and the Latin language. Into the modern period, its responsibilities extended into secular or non-theological matters, including Romano-canonical procedures. Canon law was an essential to medieval law and, as a consequence, to that of today.[78] The legal aspects of feudalism, too, served as an important common source for law throughout Europe.[79] This was not merely substantive, but linked to jurisdiction, the ability to speak or declare the law authoritatively. More generally, but no less importantly, modern constitutional thought owes much to the legal and political division of powers inherent in medieval hybridity.[80]

These were pan-European developments, part of a wider Western legal tradition.[81] Britain and Ireland were not unaffected. England weathered invasion and settlement by, in turn, the Romans, the Anglo-Saxons, and Norseman. As a result of the latter two, England created a monarchy more centralized and effective than its continental contemporaries. With the eleventh-century arrival of the Normans, this was married to considerable administrative efficiency. If Norman folk-law was not significantly different from England's, they brought a more mature feudalism and established

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[75] D. Kelley, *"Second nature": the idea of custom in European law, society, and culture*, in A. Grafton and A. Blair (eds), *The transmission of culture in early modern Europe* (1990). See also Glenn, *The capture, reconstruction and marginalization of "custom"*, in American Journal of Comparative Law, 613 (45, 1997).

[76] A. Cromartie, *The idea of common law as custom*, in A. Perreau-Saussine and J.B. Murphy (eds), *The nature of customary law: legal, historical and philosophical perspectives*, 203 (2007).

[77] L. Sheleff, *The future of tradition: customary law, common law and legal pluralism*, 5 (1999).

[78] J. Brundage, *Medieval canon law* (1995).

[79] D. Heirbaut, *Feudal law: the real ius commune of property in Europe, or: should we reintroduce duplex dominium?*, in European Review of Private Law, 321 (3, 2003).

[80] R.C. Van Caenegem, *An historical introduction to Western constitutional law* (1995).

[81] H.J. Berman, *Law and revolution [I]: the formation of the Western legal tradition* (1983). See also F. Wieacker, *Foundations of European legal culture*, in American Journal of Comparative Law, 1 (38, 1990).

ecclesiastical courts on a continental model. The resulting "'English" law owed much to its own folk-law, broadly similar to that of the continent, and continental feudal law.[82] England's royal courts would create, over the course of centuries, a law geographically common across the English kingdom. But the English 'common law' as it developed competed with pan-European common laws, other English common laws (eg, Equity), and numerous local, particular jurisdictions.[83] These jurisdictions spoke not only in English, but in Law French and Latin as well.[84] The effectiveness of the royal courts as a forum for adjudication, its greater guarantee of enforcement, and later political developments, would eventually allow it to dominate England's other laws. It was 'not the sole source of English law, though in the long run it turned out to be its principal unifying factor.'[85] This eventual hegemony resulted, in large part, by borrowing from or absorbing its rivals, foreign and domestic, in a pattern that was mirrored on the continent. And if it drew on local customs, as elsewhere across Europe, it 'was not a popular but a professional custom'.[86]

Contemporaneous with the beginnings of the English common law was the emergence of a European *ius commune* in the revived, revised, and subsequently received 'law' of Justinian's *Digest*. A casuistic collage of doctrine, its rediscovery in the twelfth century encouraged the growth of a body of professional jurists and an explosion of Roman—or Romanesque—legal scholarship. Legal study brought the rise of European universities and the development of legal science. With the other redactions ordered centuries earlier by Justinian, the *Digest* provided a central text on which legal interpretation could focus in much the same way the Bible did for theology; legal and theological hermeneutics were, in fact, closely connected for

[82] R.C. Van Caenegem, *The birth of the English common law*, 110 (2nd ed. 1988).

[83] P. Glenn, *On common laws* and *The common laws of Europe and Louisiana*, in Tulane Law Review, 1041 (79, 2005). See P. Glenn, *A transnational concept of law* in P. Cane and M. Tushnet (eds), *The Oxford Handbook of Legal Studies* (2003) and *Transnational common laws*, in Fordham International Law Journal, 457 (29, 2005-6).

[84] Each would remain important to England's laws and legal doctrine for centuries. J.H. Baker, *The three languages of English law*, in McGill Law Journal/Revue de Droit de McGill, 5 (43, 1998).

[85] J. Martinez-Torrón, *Anglo-American law and canon law: canonical roots of the common law tradition*, 183 (1998).

[86] A. Kiralfy, *Custom in mediaeval English law*, in Journal of Legal History, 26, 27 (9, 1988). See also D. Lieberman, *Law/custom/tradition: perspectives from the common law*, in M. Salber Phillips and G. Schochet (eds), *Questions of tradition* (2004).

centuries. The *Concordia Discordantium Canonum* (aka the *Decretum*, c1140), compiled by the monk Gratian (twelfth century), provided a comparable text for the study of canon law. These 'learned laws' of the universities, the conjoined Roman and canon law as well as feudal law, stood in contrast to the plural folk-laws that dominated Europe legal practices throughout the medieval period. This revival was for some time only a scholarly movement with little impact on Europe's numerous jurisdictions. Slowly, however, those trained in the romano-canonical hybrid would serve as advisors, administrators, ambassadors, and adjudicators across Europe. As a result, they contributed, formally and informally, to the transplants and receptions—doctrinal, legislative, and judicial—of the learned laws.[87] They created the *ius commune*, a common body of (usually supplementary) doctrine, in contrast to the *iura propria*. Both common and local laws were important for the Western legal tradition. 'Plurality was … part of the "system," and the system itself was inconceivable and would never have existed without the innumerable *iura propria* linked to the unity of the *ius commune*.'[88]

Henry II (1133-89), the French-speaking king of England and ruler of much of Northern France, is generally credited with establishing the writ and the jury, the most distinctive features of England's common law. But, as noted, there was more to English law. 'Medieval England was graced not simply with a single, monolithic form of law, but several distinct types of law, sometimes competing, occasionally overlapping, invariably invoking different traditions, jurisdictions and modes of operation.'[89] Strong central courts would, it is true, allow it to remain comparatively insulated from continental common laws.[90] But the most important legal literature of the early common law, the so-called *Glanvill* (late twelfth century) and *Bracton* (c1256), both showed considerable Roman erudition. Canon law, too, was important to English law. Continental

[87] On the 'Great Northward Shift', the 'internal colonization' or diffusion of the law of the Mediterranean city-states above the Alps and into the European countryside, see J.Q. Whitman, *Western legal imperialism: thinking about the deep historical roots*, in Theoretical Inquiries in Law, 305, 309 (10, 2009).

[88] M. Bellomo, *The common legal past of Europe, 1000-1800*, xiii (1995). Just as in the present, labelling the legal orders of the past as 'systems' may exaggerate their coherence and unity. The law was not 'systematic', but was 'a patchwork of accommodations'. T. Kuehn, *A late medieval conflict of laws: inheritance by illegitimates in ius commune and ius proprium*, in Law and History Review, 243, 271, 272 (15, 1997).

[89] A. Musson, *Medieval law in context: the growth of legal consciousness from Magna Carta to the Peasants' Revolt*, 9 (2001).

[90] D. Ibbetson, *Common law and ius commune* (2001).

influence may be seen in so fundamental a document as Magna Carta.[91] Sharing the same broad legal culture, English law would continue to be influenced by continental and canonical legal methods, maxims, courts and procedures, as well as specific doctrines.[92] As on the continent, the legal education provided in the universities in England was in the learned laws. Around the end of the thirteenth century, however, London's Inns of Court and of Chancery provided practical vocational training in its common law. Taught by judge-jurists, the Inns largely focused on procedure, the writs and pleadings. This created additional novelty in English law. It also underscored the importance of doctrine in the early centuries of the English common law. Indeed, the 'common learning' or oral doctrine of these judge-jurists had equivalent standing to the law reports of previous judicial decisions. As John Baker has written, 'in the time of Henry VII and Henry VIII what was said as law in the inns was as noteworthy as what was said in court.'[93]

In general, Europe would remain a place of considerable political and legal diversity for centuries 'in which hundreds of legal systems were competing.'[94] National royal law was limited, often restricted to creating new courts rather than substantive law. In addition to European and nascent national common laws, there were a wide variety of local and customary courts that would only very slowly be absorbed into and altered by the former. This means first that unity of law in the modern sense is absent. There are different rules for different cities and territories and different rules for the individual professional groups like merchants, nobility, peasants, etc. But Pluralism of legal sources also means that a judge who has to decide a specific case, has to look for rules not only in the orders of the sovereign, but can apply rules which he finds in any book of authority, whether this has been expressly recognised by the sovereign or not. It is more important for him to find an

[91] 'The Magna Carta was by no means a unique document.' R.H. Helmholz, *Magna Charta and the ius commune*, University of Chicago Law Review, 297, 363-4 (66, 1997).

[92] See, e.g., K. Pennington, *Innocent until proven guilty: the origins of a legal maxim*, in D. Maffei (ed.), A Ennio Cotese: tomo III (2001).

[93] J.H. Baker, *English Law and the Renaissance*, in Cambridge Law Journal, 46, 53 (44, 1985). See J.H. Baker, *The law's two bodies* (2001) and *The Inns of Court and legal doctrine*, in J.H. Baker, *The common law tradition: lawyers, books and the law* (2000). Cf. P.G. Monateri, *"Legal doctrine" as a source of law: a transnational factor and a historical paradox*, in Italian National Reports to the XII International Congress of comparative law (1986).

[94] D. Heirbaut, *Rules for solving conflicts of law in the middle ages: part of the solution, part of the problem*, in A. Musson, *Boundaries of the law*, 118 (2005).

appropriate rule than to be sure to confine himself to following the orders the sovereign has given.[95]

Indeed, lawyers throughout Europe 'applied a mixed legal system whose components were on the one hand local statutes and customs and on the other hand the law books of Justinian and the Canon Law.'[96] There was also the recognition of other competing and meaningful normative systems, eg arbitration and the internal jurisdiction of non-state corporate bodies like the guilds.[97]

These multifarious, overlapping jurisdictions were open to the use of plural, often comparative, sources in adjudication. As noted, customary law—or legal customs—remained dominant for some time. There was little legislation. The open nature of adjudication meant, however, that the *communis opinio* of learned doctrine was a meaningful source of law throughout Europe. Romano-canonical thought was influential as a method, as a model, and as a subsidiary source of law.[98] But this should not be exaggerated in a world of competing persuasive, rather than simply binding, authorities.[99] A common European juridical culture prevailed.[100] Judges and law reports were important throughout Europe. 'The practice of courts was therefore a source of law on the Continent as in England'.[101] But such reports were seldom of much use anywhere for future adjudication. Especially before printing, there were few authentic texts of either legislation or jurisprudence. Reports also generally lacked an explanation of the court's motives or reasoning and previous decisions were merely persuasive rather than binding. Without the texts and elaborate written commentaries of the learned laws, English common lawyers would, over time, rely more heavily on the decisions of the courts and the law

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[95] H. Coing, *The Roman law as ius commune on the continent*, Law Quarterly Review, 505, 513 (89,1973). See P. Stein, *The sources of law in Europe: an English perspective*, in *Philosophie juridique européenne les institutions: receuil préparé sous la direction de Jean-Marc Trigeud* (1988).

[96] H. Coing, *The Roman law as ius commune on the continent*, in Law Quarterly Review, 505, (89, 1973).

[97] E. Powell, *Settlement of disputes by arbitration in fifteenth-century England*, in Law and History Review, 21 (2, 1984).

[98] D.J. Ibbetson and A.D.E. Lewis, *The Roman law tradition*, in D.J. Ibbetson and A.D.E. Lewis (eds), *The Roman law tradition*, 3-4 (1994).

[99] See generally Glenn, *Persuasive authority*.

[100] L. Moccia, *Historical overview on the origins and attitudes of comparative law*, in B. de Witte and C. Forder (eds), *The common law of Europe and the future of legal education*, 611 (1992).

[101] J.H. Baker, *Case-law in England and continental Europe*, in J.H. Baker, *The common law tradition*, 108 (2000). See J.H. Baker, *Preface* and *Records, reports and the origins of case-law in England*, in J.H. Baker (ed), *Judicial records, law reports, and the growth of case law*, 6 (1989).

reports they generated.[102] And in England, as in other parts of Europe, there continued 'the pretence that law was still fundamentally customary'.[103]
Only very slowly would this plurality of laws give way to common national laws. As noted, there were numerous competing jurisdictions within England. The rigidity of the common law led to the creation, in the fifteenth century, of the 'Equity' courts. Originally staffed by clerics trained in the learned laws, the substance and procedure of Chancery showed Romano-canonical sources. They would create a separate but important law common to England. Numerous other courts arose out of the king's prerogative powers: Admiralty, Constable and Marshall, Chivalry, Requests, the University Courts, and Star Chamber. Indeed, '[c]ommon lawyers seem to have regarded canon law and civil law as comparable bodies of law maintained and passed down by their counterpart professions in much the same way.'[104] Many of these jurisdictions ensured that Anglophone lawyers were in constant communication with continental legal developments.[105] Over time, however, rivalry developed between common lawyers on the one hand and Equity and the Anglo-'civilians' on the other. There were also England's numerous *iura propria*, its commercial, urban, manorial, sessions of the justices of the peace or sheriffs, small-claim 'courts of requests', and other local jurisdictions. There were still other numerous, lesser, summary sites of 'low justice' where formal law meant little and much was left to the discretion of lay judges. Here especially, competing normative traditions could easily trespass on the ephemeral decisions and equitable motivations of the courts.

V. TOWARDS LEGAL UNITY

Significant changes in the state, and consequently the law, occurred between the fifteenth- and seventeenth-centuries. Reception, redaction, and religious

[102] D.J. Ibbetson and A. Wijffels, *Case law in the making: the techniques and methods of judicial records and law reports*, in A. Wijffels (ed), *Case law in the making: the techniques and methods of judicial records and law reports*, 29 (1997).
[103] J.Q. Whitman, *Why did the revolutionary lawyers confuse custom and reason?*, in University of Chicago Law Review, 1321, 1366 (58, 1991).
[104] D.J. Siepp, *The reception of canon law and civil law in the common law courts before 1600*, in Oxford Journal of Legal Studies, 388, 411-12 (13, 1993). See also L. Moccia, *English law attitudes to the "Civil Law"*, in Journal of Legal History, 157 (2,1981).
[105] R.H. Helmholz, *Continental law and common law: historical strangers or companions?*, in Duke Law Journal, 1207 (6, 1990) and C. Donahue, Jr, *Ius commune, canon law, and common law in England*, in Tulane Law Review, 1745 (66, 1992).

Reformation were vital to the creation of legal and political centralism across Europe. The *ius commune*, could promote a more unitary law against local and regional custom.[106] It provided a sophisticated, ready model for reception, whether piecemeal or wholesale. Similarly, redactions or 'codifications' of custom, giving control to jurists and judges, reduced, to a degree, the complex diversity of custom. As such, they were a step towards regional and national common laws through a sort of quasi-legislative act. In France, this occurred 'by preserving the main elements of the customary systems and by supplying a more tractable material for the skilled legal technicians of the intervening centuries.'[107] By eliminating links to the Roman church, the Reformation also considerably enhanced the power of monarchy and strengthened the concept of state sovereignty, serving as a model for both state absolutism and legal positivism.[108] In more practical terms, it led over time, and assisted by the demands of colonial expansion, to a greater concentration of political power. It contributed, both practically and philosophically, to an emphasis on law-making and, more indirectly, to the recognition of nation-states after the confessional wars of the sixteenth- and seventeenth-centuries and to the elaboration of a more complex 'law of nations'. Both external and internal sovereignty began to shift to the metropolitan centre.[109] This accelerated the movement from '[m]ulticentric legal orders – those in which the state is one among many legal authorities' to 'state-centered legal orders in which the state has at least made, if not sustained, a claim to dominance over other legal authorities.'[110]

There were also significant seventeenth-century developments influencing legal practice and legal sources. Changes in natural law theory and the contemporaneous growth of 'institutional' writings—based on the simple, comprehensive student-oriented structure of Justinian's *Institutes*—were both important.[111] The 'modern natural law' of the period was, or appeared to its advocates to be, less reliant on revelation and unconnected to one faith. Many

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[106] C.C. Turpin, *The reception of Roman law*, in Irish Jurist, 162 (1968).

[107] J.P. Dawson, *The codification of the French Customs*, in Michigan Law Review, 765, 800 (38, 1940).

[108] Catholic thought remained important, both within canon law, which continued almost without alteration in protestant kingdoms, and in the Counter-Reformation scholastics who contributed much to the law of nations and to the language of 'natural rights'.

[109] D. Osler, *The myth of European legal history*, Rechtshistorisches Journal, 393, 409-10 (16, 1997).

[110] L. Benton, *Law and colonial cultures*, 11 (2002).

[111] K. Luig, *The institutes of national law in the seventeenth and eighteenth centuries*, in Juridical Review, 193 (1972). On Scotland, see J. Cairns, *Institutional writings in Scotland reconsidered*, in A. Kiralfy and H.L. Macqueen (eds), *New perspectives in Scottish legal history* (1984).

suggested the possibility of constructing a rational system of law on the basis of deduction. This was linked to, among other things, changes in the natural sciences, especially the rejection of Aristotelianism, and theological positivism. It suggested, in effect, that natural law could be redacted—or transformed—into positive law. The learned laws, as 'written reason', frequently provided the substance of these ideal laws that, in turn, served as model codes for state laws. This dovetailed with the development of 'institutional' writings. These were generally written in the vernacular and were frequently used to rationalise or harmonise existing laws. They were, in effect, selective digests of existing laws, usually lacking the force of law. They were also important models. Throughout Europe and America, both seventeenth-century natural law and institutional writings provided a standard by which laws could be reformed and unified and a common law extended.[112] Both made possible university education, again in the vernacular, of the burgeoning national laws. At once, they also weakened the *ius commune* and prepared the way for later national codifications.

With the growth of state power, the expansion of national common laws continued with, as Antonio Padoa-Schioppa put it, 'a progressive appropriation by the state of the task of administering the law in its various manifestations.'[113] This was true again of Britain and Ireland.[114] English law displaced Welsh law in the sixteenth century and Irish Brehon law in the next. Scotland, long independent and drawing heavily on the *ius commune*, united with England first through their respective crowns (1605) and later their respective parliaments (1707). While distinct, Scottish laws would increasingly come under the influence of English laws.[115] Within England, Wales, and Ireland, the relationship between common lawyers on the one hand and prerogative lawyers and the Anglo-civilians, on the other, deteriorated in the seventeenth century.[116] The internal hegemony of common lawyers was confirmed in significant part by their association with the rise of parliamentary

[112] A. Watson, *Justinian Institutes and some English counterparts*, in P. Stein and A.D.E. Lewis (eds), *Studies in Justinian's Institutes in memory of JAC Thomas* (1983).
[113] A. Padoa-Schioppa, *Conclusions: models, instruments, principles*, in A. Padoa-Schioppa (ed), Legislation and justice, 337 (1997).
[114] For a look at Ireland's very long eighteenth century, see M. Brown and Donlan (eds), *Law and the Irish, 1689-1848: power, privilege and practice* (forthcoming, 2011).
[115] Scotland remains a distinctive 'mixed jurisdiction', in significant part as a result of its own seventeenth-century institutional writings. But see B.P. Levack, *The proposed union of English law and Scots law in the seventeenth century*, in Juridical Review, 97 (20, 1975).
[116] H.F. Jolowicz, *Some English civilians*, in Current Legal Problems, 139 (2, 1949).

power. Throughout the century, the English common law began to accelerate its limitations on, or absorption of, other jurisdictions. The procedural and substantive laws of the courts of common law and Equity converged. At century's end, England had taken important steps towards the establishment of a limited, constitutional monarchy. Legal hybridity persisted, however, both in Europe and in its colonies. 'Jurisdictional jockeying' was important for both.[117] In Britain's colonies, various English laws, colonial charters, and simplified legal codes based on scripture were all important before the reception—again doctrinal, judicial, and legislative—of the English common law over the course of the seventeenth- and eighteenth-centuries.

The move towards legal unity, towards monism and centralism, continued in the eighteenth century alongside increasing criticism of legal inequality and restraints, of crown interference, and of religious influence and intolerance. In law, this more enlightened view meant a pan-European effort to teach the national common laws in the universities and usually in the vernacular. In England, William Blackstone's lectures and *Commentaries on the laws of England* (1765-9), both doctrine, borrowed from the 'institutional' form and served a code-like function.[118] Throughout Europe there was a shift towards legislation, to clearer and more systematic law, and to reforms in criminal law. The progressive formalisation of law satisfied in some measure a more general demand for greater levels of equality before the law and for clearer laws that might promote both political stability and economic growth. On the continent, there were early codes or restatements of the maturing common laws. Growing out of natural law and institutional writings, these provided a more unitary digest of the law, though without abrogating existing laws. [119] The mediating institutions of the old regimes and its myriad, hybrid jurisdictions were slowly giving way. As Tamanaha has written, Customary norms and religious law were, in effect, banished to the private realm. They did not

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[117] L. Benton, *Making order out of trouble: jurisdictional politics in the Spanish colonial borderlands*, in Law and Social Inquiry, 373, 375 (26, 2001). See generally L. Benton, *Law and colonial cultures*. See also P. Karsten, *Between law and custom: 'high' and 'low' legal cultures in the lands of the British diaspora-the United States, Canada, Australia, and New Zealand, 1600-1900* (2002).

[118] J.W. Cairns, *Blackstone: an English institutist: legal literature and the rise of the nation state*, in Oxford Journal of Legal Studies, 318 (4, 1984) and A. Watson, *The structure of Blackstone's Commentaries*, in Yale Law Journal 795 (97, 1988). See also S. Donlan, *"The places most fit for this purpose": Francis Stoughton Sullivan and legal study at the University of Dublin (1761-6)*, in Eighteenth-Century Ireland/Iris an dá chultúr, 140 (18, 2005).

[119] D. Lieberman, *Codification, consolidation and parliamentary statute*, in J. Brewer and E. Hellmuth (eds), *Rethinking Leviathan: the eighteenth-century state in Britain and Germany* (1999).

disappear, but a transformation in their status cam about. Some of these norms and institutions continued to obtain recognition and sanction from state legal systems; other norms continued to be observed and enforced in strictly social or religious contexts. The key characteristic they lost over time was their former, equal standing and autonomous *legal* status. Once considered independently applicable bodies of *law*, owing to the takeover of state law they rather became *norms*, still socially influential, but now carrying a different status from that of official state law.[120]

Alongside this state legalism, considerable hybridity remained, the 'often contradictory systems of normative ordering' and judicial discretion that intruded on legal rules.[121] But normative pluralism, or rather its recognition by political and legal authorities, was being transformed.

The movement towards legal unity and centralisation quickened with the revolutions which rocked the intellectual and institutional foundations of Europe's *ancien régimes* in the aftermath of the revolution in France. The plurality of laws that had characterised Europe for centuries was largely eliminated:

The earlier dialectics without synthesis, the on-going interpretative process and co-existence of the ius commune and ius proprium in its many forms, was superseded by purely national legal systems that did not acknowledge any competitors. The idea of unlimited state sovereignty did not allow for the pluralistic and fragmented interplay of various legal orders within the borders of a state…. All law was now state law ….[122]

The focus on legal positivism, on law-making and legal clarity, was linked to both the new powers of the state and demands for popular accountability. In continental law, this was expressed in legislation, often codal, and subsequently in exegetical interpretation.[123] Many nineteenth-century codes

[120] B.Z. Tamanaha, *Understanding legal pluralism: past to present, local to global*, in Sydney Law Review, 375, 381 (30, 2008).

[121] P. King, *Gleaners, Farmers and the Failure of Legal Sanctions in England 1750-1850*, in Past and Present, 116, 146 (125, 1989). See E.P. Thompson, *Custom, common law and right*, in E.P. Thompson, *Customs in common: studies in traditional popular culture* (1993). See also R. Mc Mahon (ed), *Crime, law and popular culture in Europe, 1500-1900* (2008).

[122] J. Tontti, *European legal pluralism as a rebirth of Ius commune*, Retfaerd (94, 2001, online at www.jarkkotontti.net/blog/tieteilya-ja-filosofiaa/european-legal-pluralism-as-a-rebirth-of-ius-commune-retfaerd-942001/ (last visited 30 November 2010)). See M.A. Sammut, *The place of the Codice Municipale di Malta in European legal history*, in Id-Dritt 330, 346 (20, 2009).

[123] A. Levasseur, *Code Napoleon or Code Portalis?*, in Tulane Law Review, 762 (43, 1969). See also W.T. Tête, *The Code, custom and the courts: notes toward a Louisiana theory of precedent*, in Tulane Law Review, 1 (48, 1973).

were attempts to create a set of laws that was authoritative, comprehensive, systematic, and internally harmonious. They were intended to abrogate previous or conflicting law and to unify the legal system into a national common law. While reflecting the laws of the *ancien régime*, both Roman and Germanic in origin, this movement was exemplified in the *Code Civil* (1804).[124] Modern nationalism and codification marked an important change from Europe's plural, juridical culture. It was a shift from European *iura communia* and local *iura propria* to national law, from persuasive to binding authorities, from open to closed legal systems, and from judges and jurists to legislators.[125] Suggesting Maine's famous distinction, it has been noted that 'the famous historical shift from status to contract was accompanied by an equally significant shift from status to *locus*.'[126]

Nineteenth-century Anglo-American positivism, exemplified by Jeremy Bentham and John Austin, echoed the concern for legal uniformity and clarity. It was linked to British parliamentary supremacy and the rise of statute law. It can also be seen in the hardening of precedent into *stare decisis*, where a single judicial decision is binding, rather than merely persuasive, on the basis of the court's authority alone.[127] Legal education and law reporting improved, often with official reporters. A clearer appellate hierarchy of courts was established with, by mid-century, professional law lords at their head. The writ system was relaxed in favour of general pleading, bringing a new focus on substantive, rather than procedural, law. Finally, along with the political union of Britain and Ireland, the common law and equity were fused and England's

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[124] J. Gordley, *Myths of the French Civil Code*, in American Journal of Comparative Law, 459 (42, 1994). See also M. Ascheri, *A tuning point in the Civil-law: from ius commune to Code Napoleon*, Tulane Law Review, 1041 (70, 1996) and R.C. van Caenegem, *The national codes: a transient phase*, in *European law in the past and the future* (2002).

[125] See G. Gorla and L. Moccia, *A "revisiting" of the comparison between "continental law" and "English law" (16th-19th century)*, in Journal of Legal History, 143 (2, 1981) and *A short historical account of comparative law in Europe and in Italy during modern times (16th to 19th century)*, in Italian national reports to the XII International Congress of Comparative Law (1986); J.H. Merryman, *The French deviation*, in American Journal of Comparative Law, 109 (44, 1996); P. Stein, *Judge and jurist in the civil law: an historical introduction*, in P. Stein, *The character and influence of the Roman Civil Law* (1980, also in Louisiana Law Review, 241(46, 1985)).

[126] R.T. Ford, *Law's territory (a history of jurisdiction)*, in Michigan Law Review, 843 (97, 1999, *italics included*, also available, in part, in N. Blomley, D. Delaney, and R.T. Ford (eds), *The legal geographies reader*, 201 (2001).

[127] J. Evans, *Change in the doctrine of precedent during the nineteenth century*, in L. Goldstein (ed), *Precedent in law* (1991) and P. Stein, *Civil law reports and the case of San Marino*, in P. Stein, *The character and influence of the Roman civil law* (1988).

multifarious jurisdictions were enveloped by the courts of common law.[128] This brought a new focus on substantive, rather than procedural, law, and an attempt to limit judicial subjectivity.[129] If this did not entirely eliminate, in fact, either legal or normative hybridity, '[b]y the end of the nineteenth century law can hardly be thought of except in its formal or professional sense.'[130] American reforms mirrored these, though primarily at the level of the states rather than the national government. In contrast to Britain, the United States also saw the development of a more significant and rationalised textbook tradition and more meaningful legal education in the universities.[131] If this served to undermine the need for extensive codification, American lawyers were also more receptive to modest codification than were their English counterparts.[132] Codes of procedure were especially common throughout the states, but private law codification also occurred.

VI. A BRIEF ASIDE ON MODERN 'MIXED LEGAL SYSTEMS'

This brief jaunt through comparative legal history is offered as a reminder of the hybridity of the past and to better prepare jurists for the pluralism of the present. Even in the West, a unified system of national state law is the historical exception, the product of complex historical developments. This overview points to the importance of legal history to comparative law. Each is closely connected: '[t]he step in this direction—towards the study of the past as another country—entails the same exit and return to the familiar landscape of contemporary law that comparativists experience when they approach

[128] I referred to this as 'sausage-making' in S. Donlan, "*All this together make up our Common Law"*, in E. Örücü, *Mixed legal systems at new frontiers*, 290 (2010).
[129] P. Glenn, *The civilization of the common law*, in A.M. Rabello (ed), *Essays on European law and Israel* , 72 (1996). On the influence of the (largely continental) natural law, see D.J. Ibbetson, *Natural law and common law*, in Edinburgh Law Review, 4, 7 (5, 2001).
[130] H.W. Arthurs, "*Without the law": courts of local and special jurisdiction in nineteenth-century England*, in Journal of Legal History, 130, 14 (5, 1984). See also H. Arthurs, *'Without the law': administrative justice and legal pluralism in nineteenth-century England* (1985). See also H. Hartog, *Pigs and positivism*, in Wisconsin Law Review, 1 (4, 1985).
[131] Continental influence continued to be important in providing a comparative and international benchmark, examples of systemic legal structures and methods, and supplementary substantive law. M. Reimann (ed), *The reception of continental ideas in the Common law world 1820-1920* (1993).
[132] M. Cook, *The American codification movement: a study of antebellum legal reform* (1981). See also R. Batiza, *Sources of the Field Civil Code: the civil law influences on a common law code*, in Tulane Law Review 799 (60, 1986).

contemporary legal systems.'[133] Meaningful comparative legal history is, however, rare.[134] Admittedly, it is 'exceedingly difficult to do'. [135] But genuine comparative legal history offers the possibility of escaping simplistic genealogies of national and pan-European legal history, including crude accounts of the reception of the *ius commune*. It provides a wider context for legal ideas and institutions and is, as a result, valuable both to legal practice and legal theory. The survey of Western legal history presented here also suggests the utility of more elaborate 'histories of hybridity', detailed histories of the pluralisms of the Western past.[136] Followed across time, these histories—either 'internal' or 'external'—would provide a unique perspective on the move from (i) an unstructured, strong hybridity to a (ii) structured, weak mix under the ultimate authority (at least in theory) of the state to (iii) genuine national common laws.[137] Ideally, these accounts would also include the study of other normative systems. Histories of both 'law in action' and 'living law' would be very valuable.[138] Given their subject, they would be inherently comparative, requiring significant historical-cultural immersion.

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[133] M. Graziadei, *Comparative law, legal history and the holistic approach to legal cultures*, in Zeitschrift für Europäisches Privatrecht, 531 (7, 1999). Legal history and comparative law are 'two sides of the same coin.' J.H.A. Lokin, *Legal history and comparative law, a pair of bifocals*, in European Journal of Legal Reform, 13, 27 (8, 2006). See also E. Schrage and V. Heutger, *Legal history and comparative law*, in J.M. Smits, *Elgar encyclopedia of comparative law* and R. Zimmermann, *Savigny's legacy: legal history, comparative law, and the emergence of a European legal science*, in Law Quarterly Review, 576 (112, 1996).

[134] C. Donahue, *Comparative legal history in North America*, in Tijdschrift voor Rechtsgeschiedenis, 1 (65, 1997) and *Comparative law before the Code Napoléon*, in M. Reimann and R. Zimmermann, *The Oxford handbook of comparative law*. Note, however, the recent creation of *the European Society for Comparative Legal History* (www.esclh.blogspot.com (last visited 30 November 2010)).

[135] M. Reimann and A. Levasseur, *Comparative law and legal history in the United States*, in American Journal of Comparative Law, 1, 14 (46, 1998). See *Ibid*, 13. See also A. Lewis, *On not expecting the Spanish Inquisition: the uses of comparative legal history*, in J. Holder, C. O'Cinneide, and M. Freeman, *Current Legal Problems* 2004: volume 57, 53 (2005).

[136] See S. Donlan, *Histories of hybridity*. Cf. Heirbaut's 'integral legal history' in *Reading past legal text - a tale of two histories: some personal reflections on the methodology of legal history*, in D. Michalsen (ed), *Reading past legal texts* (2006).

[137] On 'internal' and 'external' legal histories, see M. Lobban, *Introduction: the tools and the tasks of the legal historian* and D.J. Ibbetson, *What is a legal history a history of?*, both in A. Lewis and M. Lobban, *Law and history* (2004). See also D.J. Ibbetson, *Historical research in law* in P. Cane and M. Tushnet (eds), *The Oxford handbook of legal studies* (2004).

[138] On the distinction between Roscoe Pound's 'law in action' and Ehrlich's 'living law', as well as the latter's importance to 'legal pluralism', see D. Nelken, *Law in action or living law?:*

The overview offered here should also allow, or perhaps require, us to better contextualise modern legal traditions identified as 'mixed legal systems'.[139] These need not be 'reduced', as Luigi Moccia put it, by crude taxonomies 'into a marginal and uncertain position'.[140] Mixity is instead 'the rule.'[141] Modern hybrid systems are simply the most explicitly and obviously mixed.[142] Indeed, the 'concept' of a mixed system is, as Glenn has suggested, 'very recent', dependent on the nationalism, monism, centralism, and positivism of the past two centuries.[143] This is the 'hidden temporal dimension' in the categorisation of mixed systems.[144] The uniqueness of mixed jurisdictions is thus no longer the fact of their hybridity, but their particular mix and character.[145] The absence of 'pure' legal traditions also goes some way towards explaining the 'perilous and delicate task' involved in scholarship on mixity.[146] Ignazio

back to the beginning in sociology of law, in Legal Studies, 157, especially 169 ff. (4, 1984). See also M. Hertogh, *A "European" conception of a legal consciousness: rediscovering Eugen Ehrlich*, in Journal of Law and Society, 457 (31, 2004).

[139] M. Graziadei, *Legal transplants and the frontiers of legal knowledge*, in Theoretical Inquiries in Law, 723, 727 (10, 2009).

[140] L. Moccia, *Historical overview on the origins and attitudes of comparative law*, B. Witte & C. de Forder (eds.), *The common law of Europe and the future of legal education*, 619 n. 4 (1992). See L. Moccia, Review of G. Gorla, *Il Diritto Comparato in Italia e nel 'Mondo Occidentale' e una Introduzione al 'Dialogo Civil Law-Common Law'* (1983), 535. See also L.G. Baxter, *Pure comparative law and legal science in a mixed legal system*, in Comparative and International Law Journal of Southern Africa, 84 (16, 1983).

[141] J. du Plessis, *Comparative law and the study of mixed legal systems*, in M. Reimann and R. Zimmermann, *The Oxford handbook of comparative law*, 481

[142] V. Palmer, *Mixed jurisdictions worldwide: the third legal family*, 8 (2001).

[143] P. Glenn, *Persuasive authority*, in McGill Law Journal, 271 (32, 1987). See P. Glenn, *On common laws*, 119.

[144] P. Glenn, *Quebec: mixité and monism*, in E. Örücü, E. Attwooll, and S. Coyle, *Studies in legal systems: mixed and mixing*, 1 (1996).

[145] Jan Smits has suggested that continuing mixity is the product of rational choice. See J. Smits, *The making of European private law: toward a Ius Commune Europaeum as a mixed legal system* (2002) and *Introduction: mixed legal systems and European private law*, in J. Smits, *The contribution of mixed legal systems to European private law*. But compare the role of culture in D. Visser, *Cultural forces in the making of mixed legal systems*, in Tulane Law Review, 41 (78, 2003) and N. Kedar, *Law, culture and civil codification in a mixed legal system*, in Canadian Journal of Law and Society, 177 (22, 2007).

[146] E. Örücü, *What is a mixed legal system: exclusion or expansion?*, in E. Örücü, *Mixed legal systems at new frontiers*, 1. William Tetley has said that '[f]acetiously, one might therefore define a mixed jurisdiction as a place where debate over the subject takes place.' *Mixed jurisdictions: common law v. civil law (codified and uncodified)*, in Louisiana Law Review, 677, 680 (60, 2000).

Castellucci has, for example, noted the difficulty in determining how mixed a system must be to qualify as such:

Some balance is needed, for classifications to be useful at all. A classification which is too fine is not so useful … A classification which is too coarse and general is not so either, as its categories will be broader than appropriate to convey the desirable amount of information.[147]

Modern mixes include both European and more exotic hybrids. Most of these are outside of Europe, the result of nineteenth- and twentieth-century colonialism and subsequent Anglo-American political and military hegemony.[148] Most often discussed by comparatists are the 'classical mixed jurisdictions' combining Anglo-American public and criminal law with continental private law in reasonably discreet sections. The numerous non-European hybrids vary considerably.[149] Where the mix includes European law, local laws may persist, but Western traditions are often dominant in a weak, state legal pluralism.[150] The non-European laws in these systems might themselves be linked to other transnational bodies of law such as the Hindu or Islamic legal traditions. And, just as with the transplantation of the modern state, the reception of Western law may be imperfect beyond Europe.[151] As noted, anthropologists have endeavoured to examine the persistence of normative pluralism or strong legal pluralism in which laws and norms coexist, both in the West and beyond. Comparatists have done so less often.

Given their explicit experiences with legal hybridity, mixed jurists may be particularly well-placed to pursue research on both legal and normative

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[147] I. Castellucci, *How mixed must a mixed system be?*, in Electronic Journal of Comparative Law 6-7 (12, 2008, available at www.ejcl.org/121/art121-4.pdf (last visited 30 November 2010)).

[148] Cf. S.C. Symeonides, *The mixed legal system of the Republic of Cyprus*, in Tulane Law Review, 441 (78, 2003) and J.M. Ganado, *Malta: microcosm of international influences*, in E. Örücü, E. Attwooll, and S. Coyle, *Studies in legal systems* (1996).

[149] See the 'Classification of legal systems and corresponding political entities' compiled by the Faculty of Law of the University of Ottawa and available at www.juriglobe.ca/eng/sys-juri/index-syst.php (last visited 30 November 2010). The list is also available in V. Palmer, *Two rival theories of mixed legal systems*, in Journal of Comparative Law, 7, 30 (3, 2008, also available in Electronic Journal of Comparative Law (12, 2008) at www.ejcl.org/121/issue121.html) (last visited 30 November 2010).

[150] See, e.g., J. Matthews Glenn, *Mixed jurisdictions in the Commonwealth Caribbean: mixing, unmixing, remixing*, in E. Örücü, *Mixed legal systems at new frontiers* (2010).

[151] Cf. J Fisch, *Law as a means and as an end: some remarks on the function of European and non-European law in the process of European expansion*, in W.J. Mommsen and J.A. De Moor (eds), *European expansion and law: the encounter of European and indigenous law in 19th- and 20th-century Africa and Asia* (1992).

hybridity, past and present and around the globe. Some are already engaged in this research. Patrick Glenn has been especially forceful in pointing out the significant limits to, and distortions created by, assigning legal orders to more-or-less discrete and closed legal families.[152] His insistence on speaking of legal 'traditions'—rather than 'systems'—is meant, among other things, to draw attention to the historically dynamic nature of legal orders. And unlike a closed legal 'system', legal 'traditions' are acknowledged to have been—and to remain—open to and inclusive of non-state norms.[153] This is, for him, both merely descriptive as well as usefully prescriptive:

The concept of legal tradition thus allows comparative appreciation of laws of the world which are non-systematic in character. They need not be filtered through state systems in order to be included in a taxonomic process of categorization, but may be appreciated as normative information with their own criteria for human grouping.[154]

This acknowledgement of normative pluralism is rooted in Glenn's considerable historical and comparative *nous*. He has written extensively on the complexity of Europe's plural and often transnational common laws.[155] This historical analysis is an essential component of his 'normative legal history', the critique of legal nationalism, centralism and positivism.[156] Drawing on this research and his experience in a mixed system, Glenn has also criticised the canard of legal incommensurability, arguing that 'the dialogue of mixed jurisdictions is proof to the contrary'.[157]

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[152] P. Glenn, *Legal traditions of the world* (4th ed. 2010). Cf. N.H.D. Foster (ed), *A fresh start for comparative legal studies: a collective review of Patrick Glenn's Legal traditions of the world, 2nd edition*, in Journal of Comparative Law, 100 (1, 2006).

[153] P. Glenn, *A concept of legal tradition*, in Queen's Law Journal, 427, 438-40 (34, 2009). Cf. J. Merryman and R. Pérez-Perdomo, *The civil law tradition: an introduction to the legal systems of Europe and Latin America* 1, 2 (3rd ed. 2007) and J. Merryman, *On the convergence (and divergence) of the civil law and the common law*, in Stanford Journal of International Law, 357, especially 379-85 (17, 1981).

[154] P. Glenn, *Comparative legal families and comparative legal traditions*, in M. Reimann and R. Zimmermann, *The Oxford handbook of comparative law*, 433, 436.

[155] P. Glenn, *The national law tradition*, in Electronic Journal of Comparative Law (11, 2007, available at www.ejcl.org/113/abs113-1.html (last visited 30 November 2010), section 1.1. See P. Glenn, *A transnational concept of law*, in P. Cane and M. Tushnet, *The Oxford handbook of legal studies* and P. Glenn, *Transnational common laws*, in Fordham International Law Journal, 457 (29, 2005-6).

[156] P. Glenn, *On common laws*, viii.

[157] P. Glenn, *Mixing it up*, in Tulane Law Review, 79 (78, 2003). See also P. Glenn, *Are legal traditions incommensurable*, in American Journal of Comparative Law, 133 (49, 2001). See also

A Louisianian, Vernon Palmer has written extensively on the 'classical mixed jurisdictions', arguing that a number of these jurisdictions—Israel, Louisiana, the Philippines, Puerto Rico, Quebec, Scotland, and South Africa—make up a 'third legal family' in specific combinations of continental private law with Anglo-American public and criminal law.[158] These, he argues, have 'profound generalizable resemblances'.[159] In his work and with the creation of the *World Society of Mixed Jurisdiction Jurists*, of which he is President, Palmer has been instrumental in encouraging scholarship in and communication between these jurisdictions.[160] If his focus is largely on the 'third legal family', he is also an historian and a comparatist with experience in African law.[161] Focusing largely on legal rather than normative hybridity, he has written about the 'myth of

D. Visser, *Cultural forces in the making of mixed legal systems*, 76. Cf. P. Legrand, *The impossibility of legal transplants* and *European legal systems are not converging*.

[158] V. Palmer, *Mixed jurisdictions worldwide*. See V. Palmer, *Mixed jurisdictions*, in Smits, *Elgar encyclopedia of comparative law* and Palmer's most recent summary, *Quebec and her sisters in the Third Legal Family*, 54 McGill Law Journal//Revue de Droit de McGill 321, 343-4 (2009). Note that Palmer's inclusion of public law is especially useful in moving away from comparative law's traditional narrow focus on private law. Palmer., *Mixed jurisdictions worldwide,* 6n8. See also. Örücü, *Public law in mixed legal systems and public law as a "mixed system"*, in 5 Electronic Journal of Comparative Law (2001, available at www.ejcl.org/52/abs52-2.html (last visited 30 November 2010).

[159] Palmer, *Mixed jurisdictions worldwide*, 4. Included in Appendix B of *Mixed jurisdictions worldwide* is a list of additional jurisdictions: Botswana, Lesotho, Mauritius, Saint Lucia, the Seychelles, Sri Lanka, Swaziland, and Sri Lanka.

[160] See, most recently, Palmer and E Reid (eds), *Mixed jurisdictions compared: the private law of Louisiana and Scotland* (2009).

[161] See, e.g., over the past decade: *Insularity and leadership in American comparative law: the past one hundred years*, in 75 Tulane Law Review 1093 (2001); *The French connection and the Spanish perception: historical debates and contemporary evaluation of French influence on Louisiana civil law*, in 63 Louisiana Law Review 1067 (2003); *The recent discovery of Moreau Lislet's system of omissions and its importance to the debate over the source of the Digest of 1808*, in 49 Loyola Law Review 301 (2003); *The Louisiana civilian experience: critiques of codification in a mixed jurisdiction* (2005); *From Lerotholi to Lando: some examples of comparative law methodology*, in 53 American Journal of Comparative Law 261 (2005); *The customs of slavery: the war without arms*, in 48 American Journal of Legal History 177 (2006); *Historical notes on the first codes and institutions in French Louisiana*, in O. Moretéau, J. Romanch, Jr, and A.L. Zuppi (eds), *Essays in honor of Saul Litvinoff* (2008); *Strange science of codifying slavery: Moreau Lislet and the Louisiana Digest of 1808*, in 24 Tulane European & Civil Law Forum 83 (2009). See also Palmer and S.M. Poulter, *The Legal System of Lesotho* (1972).

pure laws', noting that 'we live in a *predominantly* mixed and plural world.'[162] Indeed, he has even acknowledged the value of pluralism to research on mixed systems:

To legal anthropologists and legal pluralists, the principal criterion of a mixed system is simply the presence or interaction of two or more kinds of laws or legal traditions with the same social field. The mixed nature of a legal order can be discovered and confirmed in an objective manner by research and observation. Any interaction between laws of a different type or source—indigenous with received, religious with customary, Western with non-Western—is sufficient to constitute a mixed legal system….[163]

Palmer has also argued, however, that there are significant limitations to this approach. 'Pluralism', he writes, 'has yet to present a taxonomy that differentiates and arranges the hybrids into useful groupings.'[164] If he questions whether pluralism has shown how to do this 'in a rational and coherent way', he also suggests that 'it will be accomplished by a mixed jurisdiction jurist.'[165]

Esin Örücü has contributed both general and more-narrowly targeted research on legal hybridity. Her writings, perhaps especially her 'Mixed and mixing systems: a conceptual search', may be the most sophisticated general analyses of the plurality of laws in mixed systems.[166] A native of Turkey, she has argued for an 'expansion' of research beyond the 'classical mixed jurisdictions' to more exotic hybrids.[167] A noted comparatist, Örücü has also been especially critical of the traditional legal families of comparative law.[168] Instead, she has

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[162] Palmer, *Mixed legal systems … and the myth of pure laws*, 1207 (italics in original). 'A useful classification scheme ought to begin with their centrality as a point of departure.' *Ibid.*, 1211.

[163] Palmer, *Quebec and her sisters in the Third Legal Family*, 333.

[164] *Ibid.*, 335.

[165] Palmer, *Two rival theories of mixed legal systems*, 30, 30.

[166] See especially Örücü, *Mixed and mixing systems: a conceptual search*, in Örücü, Attwooll, and Coyle, *Studies in legal systems*.

[167] Örücü, *What is a mixed legal system: exclusion or expansion?*, in Örücü, *Mixed legal systems at new frontiers*. Note that this earlier versions of this latter article can be found in Örücü (ed), 3 Journal of Comparative Law (2008) and in 12 Electronic Journal of Comparative Law (2008) at www.ejcl.org/121/abs121-15.html (last visited 30 November 2010). Cf. Castellucci, *How mixed must a mixed system be?* On Turkey, see, e.g., Örücü, *Turkey's synthetic legal system and her indigenous soci-cultural(s) in a "covert" mix*, in Örücü, *Mixed legal systems at new frontiers*.

[168] Örücü, *A general view of "legal families" and of "mixing systems*, in Örücü and Nelken, *Comparative law*, 177. See, e.g., Örücü, *Critical comparative law* (1999, also available in 4

proposed a 'family trees' model that 'regards all legal systems as mixed and overlapping, overtly or covertly, and groups them according to the proportionate mixture of the ingredients.'[169] Indeed, she has argued that not only mixed traditions, but other 'extraordinary places' may be of great use to comparative law.[170] In her work, Örücü has also employed an especially colourful vocabulary and useful models. She has used, for example, culinary terms—from 'mixing bowls' to 'purees'—to describe the ways in which laws might mix.[171] She has also written about the diffusion of law.[172] 'Mixed and mixing systems and the migration of legal institutions', she writes, 'are two inseparable fields of study. The fact that law is not static lies at the bottom of all mixed systems.'[173] Finally, Örücü has encouraged engagement with 'legal pluralisms, in order to appreciate the relationship between official state law and religious and customary laws, not only as anthropologists but as comparative lawyers.'[174] As a whole, she has provided important elements for a research project that might build on the work of Glenn and answer Palmer's pluralist challenge.

VII. CONCLUSION

'Remembering' the 'lost memory' of our past hybridity has significant implications for comparative law as well as for legal philosophy more generally. Most obviously, it undermines the conjoined ideas of legal

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Electronic Journal of Comparative Law (2000) at www.ejcl.org/41/abs41-1.html (last visited 30 November 2010); *The enigma of comparative law: variations on a theme for the twenty-first century* (2004); *Looking at convergence through the eyes of a comparative lawyer*, in 9 Electronic Journal of Comparative Law (2005, available at www.ejcl.org/92/art92-1.html (last visited 30 November 2010)).

[169] Örücü, *Family trees for legal systems: towards a contemporary approach*, in van Hoecke, *Epistemology and methodology of comparative law*, 363.

[170] Örücü, *Comparatists and extraordinary places*, in Legrand and Munday, *Comparative legal studies*.

[171] See Örücü, *Developing comparative law*, in Örücü and Nelken, *Comparative law*, 180. See Örücü, *A theoretical framework for transfrontier mobility of law*, in Jagtenberg, Örücü, and de Roo, *Transfrontier mobility of law*, 10-12.

[172] Örücü, *A theoretical framework for transfrontier mobility of law*, in Jagtenberg, Örücü, and de Roo, *Transfrontier mobility of law and Law as transposition*.

[173] Örücü, *Mixed and mixing systems: a conceptual search*, 341.

[174] Örücü, *General introduction: mixed legal systems at new frontiers*, in Örücü, *Mixed legal systems at new frontiers*, 7. See Örücü, *Mixed and mixing systems: a conceptual search*, 342, 350-1 and *Developing comparative law* in Örücü and Nelken, *Comparative law*, 61.

nationalism, monism, centralism, and positivism spawned by nineteenth-century shifts in social and intellectual history. It reminds us that the 'state' has been historically, and in much of the world remains, only the most obvious and formal creator of norms. In place of forcing plural and dynamic traditions into discrete, closed legal families or systems, the complexity of Western legal history suggests a new, admittedly complex and challenging, study of hybridity and diffusion. I have tried to suggest how social scientists and jurisprudes, comparatists and legal historians, have given us the resources to pursue this project. Comparative legal history is especially important here, not least in allowing us to better understand and contextualize contemporary mixed legal systems. As Palmer has written,

Recognizing that hybridity is a universal fact will no doubt require us to revise some of the received attitudes and prejudices about mixed systems, particularly attitudes about 'classical' mixed jurisdictions such as Louisiana …. [M]ixed systems have been too much at the center of legal evolution to be regarded as something unusual or strange. They cannot be both paradigms and pariahs at the same time. A useful classification scheme ought to begin with their centrality as a point of departure. That would force us to abandon the conceit that 'pure' legal systems are somehow privileged or preferred, that some mixtures are superior to other mixtures, or that the utility of mixed systems lies in the incidental lessons or insights they may have for their parents.[175]

Mixed jurists like Palmer, Glenn, and Örücü have already contributed much to studies of hybridity and diffusion, past and present and around the globe. Comparativists and legal historians have, in an engaged, expanded interdisciplinary dialogue, much more to offer.

[175] Palmer, *Mixed legal systems … and the myth of pure laws*, 1210-1211.