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The Conceptual Problems Arising from Legal Pluralism

Jorge Luis Fabra-Zamora*

Abstract

This paper argues that analytical jurisprudence has been insufficiently attentive to three significant puzzles highlighted by the legal pluralist tradition: the existence of commonalities between different types of law, the possibility of a distinction between law and non-law, and the explanatory centrality of the state. I further argue that the resolution of these questions sets the stage for a renewed agenda of analytical jurisprudence and has to be considered in attempts for reconciliation between the academic traditions of analytical jurisprudence and legal pluralism, often called "pluralist jurisprudence." I also argue that the resolution of these problems affects the empirical, doctrinal, and politico-moral inquiries about legal pluralism.

Keywords: Analytical jurisprudence, non-state legal phenomena, distinctiveness of law, common features of law, centrality of the state

Résumé

Cet article soutient que les travaux analytiques de la jurisprudence n'ont pas été suffisamment soucieux de trois problèmes d'importance qui ont été mis en évidence par la tradition du pluralisme juridique, soit 1) l'existence de points communs entre les différents types de droit, 2) la possibilité d'une distinction entre le droit et le non-droit et 3) la centralité explicative du droit étatique. Je soutiens également que la résolution de telles questions pourrait d'ailleurs ouvrir la voie à un programme renouvelé d'analyse jurisprudentielle. De surcroît, cet article suggère que ces questions doivent être prises en compte dans les tentatives de réconciliation entre les deux traditions théoriques, souvent appelées « jurisprudence pluraliste ». Finalement, je soutiens aussi que la résolution de ces problèmes touche les enquêtes empiriques, doctrinales et politico-morales sur le pluralisme juridique.

Mots-clés : Pluralisme juridique, analyse jurisprudentielle, phénomènes juridiques non étatiques, spécificité du droit, traits communs du droit, centralité de l'État

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I. Introduction

Members of the heterogeneous intellectual tradition known as "legal pluralism" have repeatedly criticized the intellectual tradition of analytical jurisprudence for its inattention to and inability to explain non-state legal phenomena, i.e., putative forms of law different from state legal systems.[1] In response, jurisprudents have argued that pluralists' objections are based on systematic misrepresentations of the views held by respectable contemporary philosophers.[2] In their opinion, the problem posed by pluralists' complaints is not "a particularly profound one," and the "fertile resources" of jurisprudence can explain the phenomena that pluralists have highlighted.[3]

This paper rejects this view. While jurisprudents' response to the pluralist challenge is mostly correct, I argue that the jurisprudential rejection of the claims of the pluralist tradition is too hasty. In particular, jurisprudents have been insufficiently attentive to three significant puzzles highlighted by the pluralist tradition. These concern the existence of commonalities between different types of law, the possibility of a distinction between law and non-law, and the explanatory centrality of the state. I further argue that the resolution of these questions sets the stage for a renewed agenda of analytical jurisprudence and has to be considered in attempts for reconciliation between the two academic traditions, often called "pluralist jurisprudence." I also argue that the resolution of these problems affects the empirical, doctrinal, and politico-moral inquiries about the fact of legal pluralism.

II. Setting the Stage

This section provides some foundational clarifications for this inquiry. I begin by differentiating between the fact of legal pluralism and an academic tradition that

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1 For introductions to literature on legal pluralism, see John Griffiths, "What Is Legal Pluralism?," *The Journal of Legal Pluralism and Unofficial Law* 18, no. 24 (1986): 1–55; Sally Engle Merry, "Legal Pluralism," *Law & Society Review* 22, no. 5 (1988): 869–96; Gordon R. Woodman, "Ideological Combat and Social Observation," *The Journal of Legal Pluralism and Unofficial Law* 30, no. 42 (1998): 21–59; Anne Griffiths, "Legal Pluralism," in *Law and Social Theory*, 1st ed., ed. Reza Banakar and Max Travers (Oxford: Hart Publishing, 2002), 289–310; Brian Z. Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global," *Sydney Law Review* 30 (2008): 376–410; William Twining, "Normative and Legal Pluralism: A Global Perspective," *Duke Journal of Comparative & International Law* 20 (2009): 473–517; Ralf Michaels, "Global Legal Pluralism," *Annual Review of Law and Social Science* 5, no. 1 (2009): 243–62; Margaret Davies, "Legal Pluralism," in *The Oxford Handbook of Empirical Legal Research*, ed. Peter Cane and Herbert M. Kritzer (Oxford University Press, 2010), 805–24; John Griffiths, "Legal Pluralism," in *International Encyclopedia of the Social & Behavioral Sciences (Second Edition)*, ed. James D. Wright (Oxford: Elsevier, 2015), 757–61.

2 John Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford: Oxford University Press, 2012), chap. 11; John Gardner, *"What Is Legal Pluralism?" (Osgoode Hall Law School, 8 May 2013)*, 2013, https://www.youtube.com/watch?v=q-aTJgTTOA8&feature=youtube_gdata_player; Victor M. Muñiz-Fraticelli, *The Structure of Pluralism* (New York: Oxford University Press, 2014), chap. 6; Catherine Valcke, "Three Perils of Legal Pluralism," in *Concepts of Law: Comparative, Jurisprudential, and Social Science Perspectives*, ed. Seán Patrick Donlan and Lukas Heckendorn Urscheler (Farnham: Ashgate, 2014), 123–35; Cormac MacAmhlaigh, "Does Legal Theory Have a Pluralism Problem?," in *Oxford Handbook of Global Legal Pluralism*, ed. Paul Schiff Berman (Oxford: Oxford University Press, 2020), 268–98. For my view, see Jorge Luis Fabra-Zamora, "Analytical Jurisprudence and Legal Pluralism," *McGill Law Journal* 65 (2022).

3 MacAmhlaigh, "Does Legal Theory Have a Pluralism Problem?," 298.

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studies such a fact. Then, I argue that the objections of the pluralist tradition to analytical jurisprudence fail. However, despite this failure, I close the section by noting that pluralists have successfully identified forms of non-state legal phenomena, highlighting two deficits of the state-centric theories of jurisprudence.

1. What Is Legal Pluralism?

The expression "legal pluralism" is used in two different senses. In the first sense, legal pluralism is used to note a situation or state of affairs that I shall call "LP."

> LP: A situation of coexistence and interaction of semi-autonomous legal orders in a specific context.[4]

Examples of scenarios of legal pluralism include the interactions between the state law and different forms of customary, folk, religious, and indigenous law, unofficial laws created by associations, trade unions, marginalized groups, and religious minorities, and novel forms of non-state legal phenomena such as human rights law, *lex mercatoria* (transnational commercial law), the European Union, and multinational corporations among themselves and with state law in "global legal pluralism." It is critical to note that, in this factual sense, "legal pluralism is not a theory of law or an explanation of how it functions" but a situation, condition or state of affairs that "alerts observers… that law takes many forms and can exist in parallel regimes."[5]

In the second sense, legal pluralism is used to refer to a heterogeneous intellectual tradition. Members of this tradition do not recognize as "pluralists" all of those who view LP as a factual reality and attempt to identify and explain its empirical, doctrinal, and politico-moral implications. Instead, according to a pervasive narrative unveiled in the introductory paragraph of most pluralist works, pluralism contrasts with "centralism" or "monism" that pluralists define as the view that "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."[6] In other words, centralists reduce law to the norms emanating from, or recognized by, state officials and deny legal status to other putative normative phenomena. As a result, they do

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[4] cf. Jacques Vanderlinden, "Le Pluralisme Juridique: Essai de Synthèse," in *Le Pluralisme Juridique*, ed. John Gilissen (Bruxelles: Editions de l'Université de Bruxelles, 1971), 19; J. Griffiths, "What Is Legal Pluralism?," 2; Merry, "Legal Pluralism," 870; A. Griffiths, "Legal Pluralism," 2002; Twining, "Normative and Legal Pluralism," 489; Michaels, "Global Legal Pluralism," 245; Brian Z. Tamanaha, "The Promise and Conundrums of Pluralist Jurisprudence," *The Modern Law Review* 82, no. 1 (2019): 159.

[5] Sally Engle Merry, "Legal Pluralism in Practice," *McGill Law Journal* 51, no. 9 (2013): 2; J. Griffiths, "What Is Legal Pluralism?," 4, 12.

[6] J. Griffiths, "What Is Legal Pluralism?," 2; cf. Marc Galanter, "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law," *The Journal of Legal Pluralism and Unofficial Law* 13, no. 19 (1981): 1n1, 20–21; Merry, "Legal Pluralism," 874; Michaels, "Global Legal Pluralism," 261; Roderick A. Macdonald, "Pluralistic Human Rights? Universal Human Wrongs?," in *Dialogues on Human Rights and Legal Pluralism*, ed. René Provost and Colleen Sheppard (Dordrecht: Springer, 2013), 23–24; Hanisah Binte Abdullah Sani, "State Law and Legal Pluralism: Towards an Appraisal," *The Journal of Legal Pluralism and Unofficial Law* 52, no. 1 (2020): 83; Peer Zumbansen, "Manifestations and Arguments: The Everyday Operation of Transnational Legal Pluralism," in Schiff Berman, *The Oxford Handbook of Global Legal Pluralism*, 234; Schiff Berman, *The Oxford Handbook of Global Legal Pluralism*, 31.

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not consider forms of non-state legal phenomena as "law," thereby denying the possibility of LP.

In my view, the contrast with centralism is crucial to the characterization of the pluralist intellectual tradition. Advocates of orthodox theories of law are not considered legal pluralists even if they explicitly recognize LP.[7] It seems that, as an academic tradition, most of those who self-style as legal pluralists accept this double commitment, namely, a factual claim (i.e., the recognition of LP) and a combative element (i.e., the opposition to mainstream theories of law). Furthermore, because self-identification does not define the legal pluralist tradition, its advocates have not hesitated to attach the label to scholars who did not explicitly identify as such. For example, authors such as Eugene Ehrlich, Santi Romano, Bronislaw Malinowski, Karl Llewellyn and Edward Hoebel, Lon Fuller, Leopold Pospisil, and Robert Cover did not use the label "pluralism" but are often characterized as forerunners or representatives of the tradition because their work studied LP and opposed the mainstream views of the legal theory of their time. For similar reasons, I will discuss below Brian Tamanaha as a participant of the intellectual tradition, despite being critical of the principal pluralist discourse. In sum, I call "legal pluralists" or "the legal pluralist tradition" those who endorse this double commitment (recognition of LP and opposition to orthodox theories) irrespective of whether they self-identify as such.

2. *The Myth of Centralism*

Pluralists attribute the centralist view they oppose to "orthodox," "mainstream," or "dominant" theories of law, such as those of Hans Kelsen, H.L.A. Hart, and Joseph Raz. I will refer to these theories as analytical jurisprudence, that is, the theoretical inquiry concerned with explaining the fundamental features of law and legal concepts. As a consequence of this centralist commitment, pluralists argue, jurisprudents have remained focused on state law. In contrast, pluralists have identified and studied a constellation of non-state legal phenomena, such as customs, indigenous laws, norms of associations and unions, transnational and global laws of different kinds, whose existence is independent of the laws of the state. Due to this unawareness of normative diversity, some pluralists hold that the kind of work that legal theorists attempt "is simply out of date and can be safely ignored."[8] Others deny any explanatory value to centralist theoretical insights, for the constellation of non-state legal phenomena "can only be adequately explained by a theory of legal pluralism."[9]

Most jurisprudents have remained indifferent to the pluralist objection. When they choose to engage with it, they retort that such accusation is a systematic

[7] For example, Keith C. Culver and Michael Giudice, *Legality's Borders: An Essay in General Jurisprudence* (New York: Oxford University Press, 2010).

[8] John Griffiths, "Legal Pluralism and the Theory of Legislation—With Special Reference to the Regulation of Euthanasia," in *Legal Polycentricity: Consequences of Pluralism in Law*, ed. Henrik Petersen and Hahle Zahle (Dartmouth: Ashgate, 1995), 201.

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

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misrepresentation of their views. While "centralism" can describe the ideas of some legal and political philosophers of the nineteenth century and some lawyers and legal scholars of the twentieth century, jurisprudents argue that it does not represent the views of most important contemporary scholars.[10] For example, Hans Kelsen explicitly characterized as law the norms of ancient Babylonians, African tribes (e.g., the Ashantis in West Africa), and contemporary states, despite their vast differences, because they share "the social technique which consists in bringing about the desired social conduct of men through the threat of a measure of coercion which is to be applied in case of contrary conduct."[11] Despite some problematic language, Kelsen explicitly recognizes as law both modern state law and forms of "primitive, pre-state" legal phenomena that have not achieved the centralized coercion characteristic of states.[12]

Similarly, while certain statements in Hart's theory seem to justify a centralist reading, nothing in his account precludes its application to non-state legal phenomena. For Hart, a legal system contains "secondary rules," namely, standards regulating the identification, creation, and application of rules and officials in charge of those tasks.[13] Many scholars recognize that it is possible to identify officials and secondary rules, and thereby legal systems, beyond the state even if Hart did not explicitly recognize this possibility.[14] Forms of indigenous, customary, religious, international, and transnational law could be considered legal systems if the required secondary rules are present. Some critics have suggested that the problem with Hart's theory is not statism but over-inclusiveness.[15] For these critics, Hart's theory objectionably recognizes as legal practices associations, clubs, sports, and universities if they exhibit the hallmarks of a legal system, which for some writers excessively expands the domain of legal pluralism.

Even Raz, who offers the most explicit defence of statism, allows for non-state legal phenomena. For example, he claimed that legal systems are part of the normative orders of "complex forms of social life, such as religions, states, regimes, tribes, etc."[16] He also recognized international law and church law as non-central

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[10] Gardner, *Law as a Leap of Faith*, chap. 11; Gardner, *What Is Legal Pluralism?*; Muñiz-Fraticelli, *The Structure of Pluralism*, chap. 6; MacAmhlaigh, "Does Legal Theory Have a Pluralism Problem?"

[11] Hans Kelsen, *General Theory of Law and State*, trans. Andrew Wedberg (Cambridge: Harvard University Press, 1945), 19.

[12] *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the "Reine Rechtslehre" or Pure Theory of Law*, trans. Bonnie Litschewski Paulson and Stanley L. Paulson (Oxford: Clarendon Press, 1992), 99.

[13] H.L.A. Hart, *The Concept of Law*, ed. Joseph Raz and Penelope Bulloch, 3rd ed. (Oxford: Clarendon Press, 2012), chap. v.

[14] See, e.g., Neil MacCormick, "Beyond the Sovereign State," *The Modern Law Review* 56, no. 1 (1993): 5–6; Jeremy Waldron, "Legal Pluralism and the Contrast between Hart's Jurisprudence and Fuller's," in *The Hart–Fuller Debate in the 21st Century*, ed. Peter Cane (Oxford: Hart, 2010), 135–55; Detlef von Daniels, *The Concept of Law from a Transnational Perspective* (Aldershot: Ashgate, 2010), chap. 6; Mariano Croce, "A Practice Theory of Legal Pluralism: Hart's (Inadvertent) Defence of the Indistinctiveness of Law," *Canadian Journal of Law and Jurisprudence* 27 (2014): 27–47; Muñiz-Fraticelli, *The Structure of Pluralism*, chap. 7; Thomas Schultz, *Transnational Legality: Stateless Law and International Arbitration* (Oxford: Oxford University Press, USA, 2014), chap. 5.

[15] Brian Z. Tamanaha, *A Realistic Theory of Law* (Cambridge: Cambridge University Press, 2017), 48.

[16] Joseph Raz, *The Concept of a Legal System*, 2nd ed. (Oxford: Clarendon Press, 1980), 188.

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instances of law,[17] and more recently, he also acknowledged an array of non-state legal phenomena, including European Union law, canon law, sharia law, indigenous laws, rules of corporations, voluntary associations, and—more controversially—neighbourhood gangs.[18]

These three examples leave clear that contemporary jurisprudents are not "centralist" in the sense the pluralist tradition construes them. Their theories allow some forms of coexistence and interaction of different state and non-state legal orders; therefore, they are compatible with LP. This explains why these jurisprudents have claimed that the pluralist objection suffers from a defect called *antonym substitution,* in which they replace jurisprudential ideas with "antonyms of their own choosing, which [they] either ignored or explicitly rejected."[19] Others have similarly argued that the pluralist position suffers from "straw man syndrome," which is the "inclination to caricature competing visions so as to dismantle them more easily."[20] Once the confusions and caricatures are cleared up, jurisprudents claim to be able to apply their richer conceptual toolkits to address the pluralist's concerns, among others, empirical inquiries concerning the identification of the variety of legal phenomena, doctrinal questions concerning the application of norms, and some politico-moral inquiries about their legitimacy and authority.

3. *The Challenge of Non-State Legal Phenomena*

I believe that the jurisprudential response to the objections of the legal pluralist tradition is fundamentally correct. However, in concentrating on defending their tradition against the pluralists' mistaken readings, jurisprudents have set aside significant issues raised by pluralist scholars.

Importantly, in its studies of LP and its empirical, doctrinal, and politico-moral consequences, the legal pluralist tradition has highlighted and attempted to explain the existence and operation of putative forms of legal phenomena different from the legal systems of domestic states. Prominent examples of *non-state legal phenomena*, as we can generally call them, include *customary law,* the traditional norms and methods of dispute resolution that govern the life of many groups of the Global South; *indigenous law,* the norms and institutions of the more than 5,000 indigenous peoples of the world; *community-made* or *unofficial laws* created to address issues that state law is unable or unwilling to resolve; and *religious law*, the institutionalized norms regulating civil and criminal affairs of major religious systems, such as canon law, sharia, or Jewish law, which remain operative even when not recognized by domestic law. Another example is *transnational law*, namely, private- and public–private complexes of norms that attempt to regulate

[17] Joseph Raz, *Practical Reason and Norms*, 2nd ed. (Oxford: Oxford University Press, 1999), 150; Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 2nd ed. (Oxford: Oxford University Press, 2009), 105.

[18] Joseph Raz, "Why the State?," in *In Pursuit of Pluralist Jurisprudence*, ed. Nicole Roughan and Andrew Halpin (Cambridge: Cambridge University Press, 2017), 136–62.

[19] Muñiz-Fraticelli, *The Structure of Pluralism*, 125.

[20] Valcke, "Three Perils of Legal Pluralism," 126; cf. Otto Pfersmann, "Contre le pluralisme mondialisationnaliste: pour un monisme juridique ouvert et différencié," *Archiv für rechts-und sozialphilosophie, ARSP. Beiheft*, no. 121 (2010): 138.

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issues beyond and across state borders, such as transnational commercial law, *lex digitalis* and multinational enterprises. One final example is the interesting but vague claims concerning the existence of some putative *global*, *world,* or *cosmopolitan* legal phenomena—namely, forms of legal regulation with planetary influence, outside of the control of the nation-state or any other authority.[21]

These phenomena, in turn, draw attention to two problems within extant legal theories. First, the standard accounts of analytical jurisprudence have focused on studying exclusively state law, thereby ignoring possible instances of non-state law that regulate millions of people on issues of the utmost moral, social, and political importance. In some cases, non-state norms are the operating rules that actually guide a community's life (e.g., customary laws in some countries) or are the laws with which the community truly identifies (e.g., many indigenous communities prefer their laws over state law) while state norms are merely paper rules. These norms now regulate a diversity of issues beyond the control of individual nation-states, ranging from the more urgent topics of our time (e.g., human rights, crimes against humanity, migration, war and peace, trade, and environmental degradation) to seemingly "mundane" and "unexciting" subjects (e.g., banking, telecommunications, cross-border taxation, investments, and sanitary and phytosanitary measures), which are nonetheless critical to "sustaining our life."[22] In a word, extant theories of law have neglected a significant part of the pre-theoretical data they should consider.

More importantly, extant theories might be structurally incapable of explaining the distinctive nature of non-state legal phenomena. Most standard theories of analytical jurisprudence depart from the assumption of the explanatory centrality of the state law over other forms of legality. For example, Hart claimed that "the clear standard cases" of law are "constituted by the legal systems of modern states, which no one in his senses doubts are legal systems."[23] Similarly, Raz embraces the "assumption of the importance of municipal law," that is, the "intuitive perception that municipal legal systems are sufficiently important and sufficiently different from most other normative systems to deserve being studied for their own sake."[24] Per this methodological approach, the standard theories posit state law as the central case of legality and view non-state legal phenomena as types of law that lack crucial elements of the paradigm (e.g., officials, normative hierarchies, and supremacy claims). Consequently, while these theories can recognize non-state phenomena as law, these practices are often described as non-central, borderline, incomplete forms of law, if not deviant, defective, or pathological. Per this approach, non-state law can be indirectly illuminated by extrapolating from the theory of the central case.[25]

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[21] For a catalogue of non-state legal phenomena, see Jorge Luis Fabra-Zamora, ed., "Introduction," in *Jurisprudence in a Globalized Context* (Cheltenham, UK: Elgar Publishing, 2020), 1–12.

[22] Jeremy Waldron, "Cosmopolitan Norms," in Seyla Benhabib, *Another Cosmopolitanism*, ed. Robert Post (Oxford: Oxford University Press, 2008), 83–84.

[23] Hart, *The Concept of Law*, 4.

[24] Raz, *The Authority of Law*, 109.

[25] Hart, *The Concept of Law*, 4–5, 15–16; Raz, *Practical Reason and Norms*, 150; Raz, *The Authority of Law*, 105.

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By contrast, pluralist scholars hold that indigenous, customary, unofficial, and religious laws are not secondary, incomplete, or watered-down state law; they are forms of law in their own and distinct way. Similarly, according to many theorists, forms of autonomous types of transnational law distinctively operate without any state intervention.[26] That is, non-state legal scholars have highlighted a different set of putative phenomena that lack some of the features of state law but are nonetheless sufficiently important, unified in form, and distinctive and thereby merit direct theoretical attention.

III. Methodological Considerations

The pluralists' claims about putative forms of non-state legal phenomena and the problems of the extant accounts they signal should be taken seriously by philosophers and theoretically interested scholars. However, since legal pluralists aim to challenge the adequacy of mainstream legal theories, often without offering comprehensive alternatives, a serious discussion of LP requires returning to the storied conceptual question, "What is law?"—the central concern that interests analytical jurisprudence. To determine whether there is a scenario of legal pluralism with more than one legal phenomenon in a given situation, and not merely normative pluralism, we must have first determined what the relevant phenomena are, whether they are legal objects, and how they differ from non-legal objects. In other words, to engage with LP in a non-question-begging manner, we need some resolution to the conceptual question of analytical jurisprudence, i.e., the features that explain the legal character of a given normative practice and the elements that illuminate how to distinguish between legal and non-legal phenomena.

However, we should be careful. The conceptual question about law by itself is too vague and too general to be useful, and it is unclear what would count as a proper response. For many legal pluralists, we can address it by providing a new definition of law—namely, linguistic formulas that differentiate between state and non-state normative objects appropriately marked by the word "law" from other phenomena marked by different words. For example, Michaels claims that the "definition of law" is one of the "central questions of legal pluralism."[27] This methodological strategy assumes that the word "law" has some correct or proper meaning that can be defined. However, it is widely accepted in jurisprudential circles that the unqualified search for a real or *per genus et differentiam* definition of law was put to rest by Hart.[28] As far as I know, pluralists have not yet responded to Hart's concerns.

By contrast, many contemporary legal philosophers suggest that the proper response to the conceptual question entails developing an account of the nature of

[26] Teubner, "'Global Bukowina.'"
[27] Michaels, "Global Legal Pluralism," 251.
[28] Hart, *The Concept of Law*, 13–14; H.L.A. Hart, "Definition and Theory in Jurisprudence," in *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), 33–35.

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law in terms of a set of necessary features.[29] However, these sorts of analyses run into trouble when explaining non-state legal phenomena. Some of these philosophers claimed to be interested only in the "narrow usage" of the concept-term law limited to state law.[30] When facing disputed cases of putative forms of non-state legal phenomena, others decide that they are "a bit like a legal system in some senses and not in others and leave it like that."[31] In doing so, they leave unfilled their promise of providing an account of the necessary features of law.

I believe that neither of these familiar strategies satisfactorily address the concerns raised by the existence of putative forms of non-state legal phenomena. Instead, I shall adumbrate an alternative approach inspired by Hart in which the purpose of a general theory of law is to improve our understanding of law by providing an "explanatory and clarifying account of law as a social and political phenomenon."[32] I shall refer to this model as *Hartian* to avoid exegetical disputes about the best interpretation of Hart's work.

1. *Hartian Methodology*

Hart famously noticed that the question, "What is law?" is puzzling for two contrasting reasons.[33] On the one hand, philosophers, lawyers, and empirical scholars radically disagree on the proper resolution of the question and often advance diverse and contradictory attempts to resolve it. However strange and paradoxical they sometimes sound, their proposed solutions are not mere attempts to deny the "plainest deliveries of common sense" but are the result of prolonged reflection by serious thinkers attempting to illuminate the phenomenon by highlighting explanatorily salient features.[34]

The disputes among experts contrast, on the other hand, with the capacity of most ordinary citizens to identify examples of law and to provide a skeleton account of them (they can say, for instance, that law comprises rules about behaviour, confers powers, and involves courts and legislatures). Hart rejected the possibility of preserving this skeleton account as the definitive answer. For him, such an account not only is incomplete (for example, because courts and legislature are creatures of legal rules, a detailed theory must explain how such institutions come into existence) but also fails to address the *source* of their puzzlement: "those who are most perplexed by the question 'What is law?' have not forgotten and need no reminder of the familiar facts which this skeleton answer offers them."[35] That is to say that disagreement among experts is not the result of ignorance, the forgetting of basic facts, or the inability to recognize accepted phenomena as law.

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29 Julie Dickson, *Evaluation and Legal Theory* (Oxford: Hart Publishing, 2001); Scott J. Shapiro, *Legality* (Cambridge, MA: Harvard University Press, 2011), chap. 1; Kenneth E. Himma, *Coercion and the Nature of Law* (Oxford: Oxford University Press, 2020), chap. 2.

30 Himma, *Coercion and the Nature of Law*, 2; Kenneth E. Himma, *Morality and the Nature of Law* (Oxford: Oxford University Press, 2019), 4.

31 Shapiro, *Legality*, 224.

32 Hart, *The Concept of Law*, 240–41.

33 Ibid., 1–6.

34 Ibid., 2.

35 Ibid., 5.

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In this context, Hart advises that "the best course is to defer giving any answer to the query 'What is law?' until we have found out what it is that has in fact puzzled those who have asked or attempted to answer it, even though their familiarity with law and their ability to recognize examples are beyond question. What more do they want to know and why do they want to know it?"[36] On this approach, to address the conceptual question, we need to identify the central puzzles and disputes among experts, who are divided on how to account for legal phenomena even though they can identify clear instances of law. These puzzles "are not graciously chosen or invented for the pleasure of academic discussion," Hart says, but they "concern aspects of law which seem naturally, at all times, to give rise to misunderstandings, so that confusion and a consequent need for greater clarity about them may coexist even in the minds of thoughtful men with a firm mastery of knowledge of the law."[37] Thus, we need to identify and attempt to resolve the most critical and recurrent puzzles, misunderstandings, and disagreements between experts. By resolving these puzzles, we start to obtain a clearer picture of the main features of this legal phenomenon. This is the *explanatory-clarifying account of law,* an elucidation that resolves the core misunderstandings and obscuring myths clustered around law.

2. *Non-State Legal Phenomena*

The Hartian description of the initial perplexity of legal theory can be adapted to articulate the challenges created by the pluralist's identification of putative forms of non-state legal phenomena. Here, lawyers, empirical scholars, and philosophers have advanced contrasting catalogues and accounts that locate phenomena different from state law as clear and central instances of law. These claims do not seek to doubt common sense. They are the outcome of the sustained study of serious thinkers who cannot be deemed as ignorant, forgetful, or conceptually confused about law even if they are unfamiliar with some nuances of state-centred theories of law. Still, because these claims do not come with a novel theory of law and are partly at odds with the standard accounts, we end up with serious disagreements on foundational issues.

Scholars have contrasting intuitions on selecting the pre-theoretically relevant phenomena, the features that make up their legal nature, and how we should explain them. The puzzles are not mere philosophical divertimentos, but their resolution is necessary to achieve greater clarity about a central social phenomenon and guide theoretical and practical inquiries about it. For example, pluralists' doctrinal explorations of the use of non-state norms in the resolution of disputes presuppose, albeit perhaps only implicitly, a working answer to the conceptual question. Similarly, pluralists' politico-moral inquiries need a working understanding of law to inquire into authority, justice, legitimacy, and the obedience that subjects owe to these norms. Finally, empirical projects need some basic account of law to identify the relevant phenomena and to describe how they operate and

[36] Ibid., 5.
[37] Ibid., 6.

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influence their social context or are influenced by it. In this sense, the theoretical question about law is unavoidable; if it is not resolved before starting empirical, politico-moral, or doctrinal inquiries, it will return through the backdoor when justifying a certain account, resolving difficult cases, or providing fine-grained details. This does not mean that the project of general jurisprudence is explanatorily prior to all other inquiries. In my view, the role of the explanatory-clarifying theory is to provide a preliminary account that serves as a starting point; this initial account can, in turn, be complemented, refined, and revised in light of more specific doctrinal, empirical, or normative findings.

In sum, for the Hartian, the purpose of legal theory is to solve some primary and recurrent puzzles, confusions, and misunderstandings about law. The resolution of these questions results in an instructive explanatory account, different from definitions and analysis in terms of necessary conditions, that seeks to illuminate the main features of the phenomena and create a stable point of departure for further empirical, doctrinal, and politico-moral studies.

IV. Three Problems

In keeping with the Hartian explanatory-clarifying proposal, I will isolate some central and recurrent puzzles highlighted by the legal pluralist tradition. In my view, these puzzles concern the common features or generalities that all instances of law share, the distinction between legal and non-legal phenomena, and the explanatory centrality of the state. The competing positions in each of these puzzles will be identified, along with some relationships and differences among them.

1. The Common Features of Law

The first and most important problem can be introduced using one of Hart's methodological formulations. He suggested that "[law], in spite of many variations in different cultures and in different times, has taken *the same general form and structure*, though many misunderstandings and obscuring myths, calling for clarification, have clustered around it."[38] Elsewhere, Hart also claimed that law is "a form of social institution with a normative aspect, which in its recurrence in different societies and periods exhibits many *common features of form, structure, and content*."[39] In these passages, Hart calls our attention to some *common features* or *generalities* shared by all types of law in different cultures and different times. Hart presupposes that such features exist and that it is the role of legal theory to explain them. Here, I shall call *unified accounts of law* all those theories that, like Hart's, attempt to identify the common features of legality.[40]

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[38] Ibid., 240–41 (italics mine).

[39] H.L.A. Hart, "Comment," in *Issues in Contemporary Legal Philosophy: The Influence of H.L.A. Hart*, ed. Ruth Gavison (Oxford: Oxford University Press, 1989), 36 (italics mine).

[40] Hart is often presented as the founding father of the essentialist theory demanding a theoretical explanation of law in terms of a set of necessary and sufficient conditions. See Dickson, *Evaluation and Legal Theory*; Shapiro, *Legality*, chap. 1; Himma, *Coercion and the Nature of Law*, chap. 2. However, we have reason to doubt this characterization. Not only was Hart wary of essentialist readings of human phenomena but his theoretical goals were significantly more modest than those of essentialists. See Hart, *The Concept of Law*, 1, 6, 13, 189–90. See also Frederick Schauer, "Hart's

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The common features of law can recast the challenge generated by the pluralists' pre-theoretical identification of instances of non-state legal phenomena. A great deal of the discourse about non-state law and legal pluralism presupposes (albeit implicitly) the existence of these generalities, such that any object that exhibits certain features is an instance of law. John Griffiths expresses this commitment to the unified features as follows: "Any sort of 'pluralism' necessarily implies that more than one of the sorts of the thing concerned is present within the field described. In the case of legal pluralism, more than one law must be present."[41] For Griffiths, different forms of non-state legal phenomena are different instances of the same thing. When pluralists identify putative forms of non-state law, they could be taken as suggesting that these objects exemplify some of the common features that allow us to characterize them as an instance of law. Similarly, when pluralist scholars criticize state-centric theories, this could be taken as suggesting that these familiar accounts are incomplete or defective because they fail to adequately capture and explain instances of non-state law and therefore should be replaced by alternative explanations that accommodate all the relevant data.

Proponents of the legal pluralist tradition, however, have had problems in articulating and making explicit their unified account. As we suggested above, they often advanced underdeveloped, *ad hoc* definitional accounts that fail to address Hart's concerns. Furthermore, other pluralists have not even articulated unified accounts at all. Griffiths's and Sally Engle Merry's canonical formulations of legal pluralism, for example, rely on Sally Falk Moore's account of a "semi-autonomous social field," which is a societal sector that "can generate rules and […] induce compliance to them" while remaining "vulnerable to […] other forces emanating from the larger world by which it is surrounded."[42] However, as Tamanaha repeatedly noted, Moore did not provide what I call a unified account of law but a general theory of social structures.[43] The lack of a successful unified theory in law, in my view, justifies critics of legal pluralism who argue that the tradition is "banal" or "point[s] to nothing" distinctive because "it merely reminds us that from the

Anti-Essentialism," in *Reading HLA Hart's "The Concept of Law,"* ed. Luis Duarte d'Almeida, Andrea Dolcetti, and James Edwards (Oxford: Hart Publishing, 2013), 237–47. Note that, in the main text, there is no reference to articulating law's necessary conditions. "Explanatory capacity"—the ability to resolve central puzzles and guide further inquiries about legal phenomena—constitutes the success of Hart's project, not its ability to capture law's essence. Hart, *The Concept of Law*, 98. An explanatory-clarifying account of law could be illuminating and useful, even without accounting for its subject's essential features. Meanwhile, a description of law's analytically necessary features could constitute a list of trivialities failing to resolve its foundational puzzles or guide doctrinal, empirical or politico-moral inquiries. Thus, Hart's modest explanatory-clarifying approach differs considerably from the essentialist project developed by some of his followers. I develop this distinction further in Jorge Luis Fabra-Zamora, "Two Conceptions of Analytical Jurisprudence" (MS, n.d.).

41 J. Griffiths, "What Is Legal Pluralism?," 1.

42 Sally Falk Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study," *Law & Society Review* 7, no. 4 (1973): 720–22, https://doi.org/10.2307/3052967; cf. J. Griffiths, "What Is Legal Pluralism?," 29–39; Merry, "Legal Pluralism," 878–80.

43 Tamanaha, "Understanding Legal Pluralism," 394; Tamanaha, "The Promise and Conundrums of Pluralist Jurisprudence," 171.

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legal perspective (as from any other) isolated, homogeneous societies do not actually exist."[44]

However, the analytical components of other pluralists' empirical and doctrinal projects about non-state legal phenomena have constructed substantive accounts of the central features of legality. Notable examples include Boaventura Sousa Santos's conception of law as bodies of justiciable procedures and standards,[45] Gunther Teubner's understanding of law as self-generated discourses that use the binary code legal/illegal and include institutionalized processes of secondary rulemaking,[46] and Emmanuel Melissaris's characterization of law in terms of people's shared normative experiences.[47] Although very different in their theoretical ambitions, all three forms share an underlying commitment: the multiplicity of legal orders they identify are fundamentally diverse kinds of the same thing.

In contrast, some members of the pluralist tradition reject such a commitment. For them, the core of pluralism is not merely that there exists a "multiplicity" or "plurality" of the same uniform phenomena, as Griffiths' argued, but that there are a variety of multifarious phenomena with different distinctive features or which reflect different rationalities or cultural conceptions that cannot be explained by a single overarching account of law. I will refer to this second approach as *fragmentary accounts of law.* The best-articulated version of the fragmentary position is advanced by Tamanaha, who develops a conventionalist understanding in which "law is whatever we attach the label 'law' to."[48] On this view, communities attach the label "law" to a cornucopia of objects, including state law, international law, transnational law, indigenous law, natural law, the law of sub-state organizations (states, provinces, etc.), religious law, and soft law. These are, for Tamanaha, "quite different phenomena, sometimes involving institutions or systems, sometimes not; sometimes connected to concrete patterns of behaviour, sometimes not; sometimes using force, sometimes not."[49] As a result, they are not a "multiplicity of one basic phenomenon" that co-regulate the life of contemporary agents, but they are instead different kinds of objects that we happen to label with the same word: "each one of these does many different things and/or is used to do many things."[50] Like Tamanaha, other pluralists deny the existence of unified features. For example, Margaret Davies suggests that contemporary legal pluralism rejects the "dogma of the singularity of the concept of law,"[51] Sionaidh Douglas-Scott holds that law is not

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44 Chris Fuller, "Legal Anthropology, Legal Pluralism and Legal Thought," *Anthropology Today* 10, no. 3 (1994): 10; Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2001), 171.

45 Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, 2nd ed. (Cambridge: Cambridge University Press, 2002), 86; cf. Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition*, 1st ed. (London: Taylor & Francis, 1995), 112.

46 Teubner, "'Global Bukowina,'" 14.

47 Emmanuel Melissaris, *Ubiquitous Law: Legal Theory and the Space for Legal Pluralism* (Farnham: Ashgate, 2009).

48 Tamanaha, *A General Jurisprudence of Law and Society*, 128.

49 Ibid., 166 and 194 (original in italics).

50 Ibid., 193.

51 Margaret Davies, "Pluralism and Legal Philosophy," *Northern Ireland Legal Quarterly* 57 (2006): 755.

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to be understood as "homogenous, insular and closed but instead to encompass very plural entities and diverse opportunities,"[52] and Franz and Keebet von Benda-Beckmann depict law as "a generic term that comprises a variety of social phenomena (concepts, rules, principles, procedures, regulations of different sorts, relationships, decisions) at different levels of social organization."[53]

With these clarifications, we have identified some points of controversy among experts generated by the pre-theoretical identification of non-state legal phenomena. On the one hand, there is a dispute between several legal pluralist unified accounts of the common features of law. These views compete amongst themselves and also conflict with the fragmentary project. Notably, fragmentary legal pluralists not only attack the unified theories of law provided by analytical jurisprudents but also reject any unified account, including those advanced by other legal pluralists. Indeed, the fragmentary approaches of Tamanaha, Davies, Douglas-Scott, and von Benda-Beckmann attack the unified projects of Sousa, Teubner, and Melissaris. In this sense, paying attention to the unified features of law also allows us to uncover a critical yet neglected intramural tension within the pluralist tradition.[54] Each of these proposals faces distinctive challenges. Unified legal pluralists must develop illuminating accounts of the general features of legality that address the fragmentary project's concerns (i.e., inasmuch as such features exist, are meaningful, and are epistemically accessible). Moreover, each unified account must demonstrate that its particular account compares favourably with other competing theories. Fragmentary accounts of law must, in turn, explain how they identify some objects as instances of law while excluding others. Thus, we have transformed the abstract question, "What is 'law'?" required to identify LP into a more focused and manageable debate between unified and fragmentary accounts.

2. *The Distinctiveness of Law*

The second problem concerns the distinction between legal and non-legal phenomena. Despite their defects, state-centric theories provided an operative form of the distinction. Setting borderline cases aside, traditional theories have restricted the legal domain to the norms that state officials create, practice, and recognize. These legal norms contrast with the non-legal norms that lack official *imprimatur,* such as those of etiquette, associations, groups, clubs, academic institutions, dating, the exchange of gifts, religious rites, or aesthetic judgment. However, once pluralists open Pandora's box of non-state law and call into question the state-centric account, the distinction between legal phenomena and social objects traditionally

[52] Sionaidh Douglas-Scott, *Law after Modernity* (Oxford: Hart Publishing, 2013), 64.

[53] Franz von Benda-Beckmann and Keebet von Benda-Beckmann, "The Dynamics of Change and Continuity in Plural Legal Orders," *Journal of Legal Pluralism and Unofficial Law* 38, no. 53–54 (2006): 13.

[54] This point has been suggested by Melissaris, *Ubiquitous Law*, chap. 3; Michael Giudice, *Understanding the Nature of Law: A Case for Constructive Conceptual Explanation* (Cheltenham, UK: Edward Elgar Publishing, 2015), chap. 1; Keith C. Culver and Michael Giudice, *The Unsteady State: General Jurisprudence for Dynamic Social Phenomena* (Cambridge: Cambridge University Press, 2017), chap. 2. See also, Margaret Davies, "Plural Pluralities of Law," in *In Pursuit of Pluralist Jurisprudence*, ed. Nicole Roughan and Andrew Halpin (Cambridge: Cambridge University Press, 2017), 239–59.

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considered as non-legal phenomena risks collapse. That is, if the state no longer offers the mark of legality, a new distinction between legal and non-legal normative phenomena, if any, must be established.

This issue has held centre stage in the literature on legal pluralism. For example, Merry discusses the problem as follows:

> Why is it so difficult to find a word for non-state law? It is clearly difficult to define and circumscribe these forms of ordering. Where do we stop speaking of law and find ourselves simply describing social life? Is it useful to call all these forms of ordering law? In writing about legal pluralism, I find that once legal centralism has been vanquished, calling all forms of ordering that are not state law by the term law confounds the analysis.[55]

Similarly, Tamanaha calls this "Malinowski's problem,"[56] Baudouin Dupret talks about the "definitional deadlock,"[57] and William Twinning calls it the "problem of the definitional stop."[58] Here, pluralists are divided into two groups.

Non-distinctivist theories, on the one hand, find no sharp and illuminating distinction between legal and non-legal forms of social normativity. For example, Marc Galanter suggested that law can be found in "universities, sports leagues, housing developments, hospitals, etc.," and John Griffiths claimed that "all forms of social control are *more or less legal.*"[59] In a similar vein, Boaventura de Sousa Santos shifts the burden of proof: "It might be asked: why should these competing or complementary forms of social ordering be designated as law and not rather as 'rule systems,' 'private governments' and so on? Posed in these terms, the questions can only be answered by another: Why not?"[60]

By contrast, *distinctivist accounts* posit a difference between legal and non-legal normative phenomena and seek to clarify it. For example, Teubner has explicitly claimed that the *legal proprium* is limited to autopoietic (i.e., self-creating) forms of discourse that define actions as legal or illegal,[61] Melissaris grounded the legal practices on "shared normative commitments,"[62] and Mariano Croce has stipulated that no common feature can distinguish law from non-law, so we should identify as law a distinctive and specialized form of knowledge that claims to be self-sufficient and separate from common knowledge.[63] To be clear, claims about the putative distinction between law and non-law are also part of the repository of

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55 Merry, "Legal Pluralism," 878; cf. Galanter, "Justice in Many Rooms," 8n26.

56 Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism," *Journal of Law and Society* 20, no. 2 (1993): 206–7.

57 Baudouin Dupret, "Legal Pluralism, Plurality of Laws, and Legal Practices," *European Journal of Legal Studies* 1, no. 1 (2007): 11.

58 William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge: Cambridge University Press, 2009), 369.

59 Galanter, "Justice in Many Rooms," 17–18; J. Griffiths, "What Is Legal Pluralism?," 39 (italics in the original); cf. Woodman, "Ideological Combat and Social Observation," 45.

60 Santos, *Toward a New Legal Common Sense (2002)*, 115.

61 Gunther Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism," *Cardozo Law Review* 13 (1992): 1452; Teubner, "'Global Bukowina,'" 15.

62 Melissaris, *Ubiquitous Law*, chap. 6.

63 Mariano Croce, *Self-Sufficiency of Law: A Critical-Institutional Theory of Social Order* (New York: Springer, 2012).

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fragmentary approaches. Tamanaha holds that the only available explanation of the distinction is a conventionalist one, i.e., "law is whatever we happen to call 'law.'"[64]

While there are many other views in the literature, this selective exposition suffices to show the existence of significant debates among legal pluralists about the distinction between legal and non-legal phenomena. Distinctivist and non-distinctivist pluralist accounts of law disagree about the possibility of drawing a meaningful and illuminating distinction. Moreover, there is an intramural dispute amongst distinctivist scholars about the best explanation of the difference. Each of these two positions has its challenges. Non-distinctivist approaches must demonstrate that their view does not trivialize legal phenomena and that it illuminates further inquiries. They need to justify why we should categorize as law the norms of universities, sports leagues, and housing developments, along with state law and European Union law, and why this informs further debates (e.g., about the application or legitimacy of legal rules). The distinctivist project, on the other hand, needs to develop a proper account of the unified features that correctly captures the relevant phenomena—one that is not over- nor under-inclusive—and each specific approach also needs to demonstrate that their particular formulation of the distinction is more illuminating than the alternatives.

3. *The Centrality of the State*

The third question concerns the explanatory centrality of state law. As noted above, members of analytical jurisprudence suggest not only that the state is an important political arrangement but also that it deserves an important role in our accounts of law. Some members of the pluralist tradition endorse a similar position. For example, Roger Cotterrell treats "state law as central to but not the exclusive concern of analysis of law in contemporary Western society,"[65] André-Jean Arnaud[66] discusses a multiplicity of "juridical systems" while reserving the term "law" for state law, and Dennis Galligan assigns a central role to the state over non-state phenomena.[67] As Moore suggests, these pluralists attempt to distinguish between state and "other rulemaking entities" for purposes of analysis and policy without "necessarily adopting a 'legal centralist' view."[68] However, other legal pluralists, such as Griffiths and Tamanaha, forcefully reject this positioning of state law "as the standard and measure of legality."[69] For these scholars, non-state legal phenomena are not merely non-central secondary, incomplete, or watered-down state law and state law is one form of legal phenomena among many without any special place in legal theory.

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64 Tamanaha, *A General Jurisprudence of Law and Society*; Tamanaha, *A Realistic Theory of Law.*

65 Roger Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Clarendon Press, 1995), 32.

66 André-Jean Arnaud, "Legal Pluralism and the Building of Europe," in *Legal Polycentricity: Consequences of Pluralism in Law.*, ed. Hanne Petersen and Henrik Zahle (Aldershot: Dartmouth, 1995), 149–69; André-Jean Arnaud, "From Limited Realism to Plural Law. Normative Approach versus Cultural Perspective," *Ratio Juris* 11, no. 3 (September 1, 1998): 246–58.

67 Denis Galligan, *Law in Modern Society* (Oxford: Clarendon Press, 2006), chap. 10.

68 Sally Falk Moore, "Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949–1999," *Journal of the Royal Anthropological Institute* 7, no. 1 (2001): 106–7.

69 Culver and Giudice, *Legality's Borders*, xxiii.

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Thus, we have shifted towards a new dispute different from the accusations of centralism and monism that have partly defined legal pluralism as an academic tradition. Using Griffiths's language,[70] we can characterize it as the dispute between "weak" and "strong" advocates of LP: the former assign explanatory centrality to the state, whereas the latter deny such centrality. The question about the centrality and role of the state in our legal theories, often called "methodological nationalism" or "statism" in other disciplines,[71] is a central inquiry that needs to be addressed because of the recognition of the facts of plurality and pluralism.

Again, each of these two positions has its challenges. Statist pluralism needs to demonstrate that the state still has a substantive central role in regulating contemporary life and that certain substantive and methodological implications follow from that position without distorting non-state legal phenomena. By contrast, non-statists should show either that statism is not the best description of our current practices or that the implications that statist scholars extract are not warranted. Some scholars have made a case for new central phenomena. For example, one can argue non-state legal norms are central because state sovereignty and the prominent role played by the state in the contemporary world could be seen as a creation of non-state norms (e.g., the Montevideo Convention on the Rights and Duties of States, the Vienna Convention of Treaties, and the UN Charter).[72] More radically, some proponents of so-called global legal pluralism claim that a "Copernican revolution" has occurred in legal thought: some non-state legal phenomena—perhaps international law, human rights, or some global constitutional norms—now occupy the place that the state once had as the centre of the legal universe.[73]

V. Main Consequences

The previous section identified three problems highlighted by the legal pluralist tradition: the common features of law, the distinction between law and non-law, and the centrality of the state. This section argues that recognizing this trio of problems affects the definition and agenda of analytical jurisprudence and legal pluralism, as well as the possibility of a reconciliation between the two approaches.

1. The Agenda of Analytical Jurisprudence

Until today, analytical jurisprudents have felt free to ignore the pluralist tradition or merely attempt to correct the pluralists' misrepresentations of their work. Moreover, when they choose to engage with the questions of legal pluralism,

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70 J. Griffiths, "What Is Legal Pluralism?," 5–8.

71 See, e.g., Andreas Wimmer and Nina Glick Schiller, "Methodological Nationalism and beyond: Nation–State Building, Migration and the Social Sciences," *Global Networks* 2, no. 4 (2002): 301–34.

72 cf. Culver and Giudice, *The Unsteady State*, 41; Ralf Michaels, "State Law as a Transnational Legal Order," *UC Irvine Journal of International, Transnational, and Comparative Law* 1 (2016): 141–62.

73 See Giuliana Ziccardi Capaldo, *The Pillars of Global Law* (Aldershot: Ashgate, 2008), 8, 154; Mattias Kumm, "The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State," in *Ruling the World? Constitutionalism, International Law, and Global Governance*, ed. Jeffrey L. Dunoff and Joel P. Trachtman (Cambridge University Press, 2009), 266; Rafael Domingo, *The New Global Law* (Cambridge: Cambridge University Press, 2011), xvii.

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jurisprudents do so in terms of their own theories. However, I think that recognizing this trio of problems should modify the agenda of analytical jurisprudence in three crucial respects.

First, analytical jurisprudence needs to recognize pluralists' unified accounts of law. It would be a mistake if mainstream legal theorists dismissed the analytical components proposed by legal pluralists as non-philosophical or assumed that their own theories have the upper hand. These analytical components, while developed for specific inquiries, outline accounts of the common features that all forms of state and non-state law share and can be compared with the standard accounts of jurisprudence advanced by Hart, Raz, and Kelsen on several theoretical standards, such as simplicity, coherence, consilience, and generality. For example, if pluralist accounts could explain both state and non-state law, we would have a reason to reject the extant theories of analytical jurisprudence that have assigned a secondary role to non-state legal phenomena.

Second, it is critical to note that fragmentary legal pluralism levies the clearest and most thorough challenge against the possibility of analytical jurisprudence—one that has not yet been adequately answered. While analytical jurisprudence attempts to identify some basic features present in all forms of legal phenomena, fragmentary pluralists claim that manifestations of law cannot be reduced to one single unified account.[74] Finally, by challenging the explanatory centrality of the state, non-statist pluralists do not merely claim that the extant theories "leave out too much"[75] data that they should consider. Instead, the key claim is that the extant jurisprudential accounts might be structurally incapable of explaining the distinctive legal character of non-state forms of normativity.

As a result, analytical jurisprudents do not monopolize the conceptual questions about law. To borrow from Michael Oakeshott, if to be a "philosopher" is not a matter of holding certain doctrines but "having submitted [one]self to a particular kind of curiosity" and providing "ordered systems of answers" to the questions this curiosity creates,[76] the claims of legal pluralists count as forms of legal philosophy. Pluralists have contributed to this project by highlighting critical evidence that challenges well-established assumptions and introduces novel and sophisticated accounts. The fact that some pluralists are skeptical of the conceptual questions is not an obstacle for this engagement. Because the denial of metaphysical thinking is itself a form of metaphysics, as F. H. Bradley suggested, jurisprudents should consider the pluralist skeptics as fellow theorists with a different understanding of the fundamental principles.[77] In a word, then, jurisprudents should take legal pluralism seriously.

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74 For the most important attempt to address this question, see Giudice, *Understanding the Nature of Law*.

75 William Twining, *Globalisation and Legal Scholarship*, Tilburg Law Lecture Series – Montesquieu Seminars (Nijmegen: Wolf Legal Publishers, 2011); cf. William Twining, *Globalisation and Legal Theory* (Cambridge: Cambridge University Press, 2000), 66.

76 Michael Oakeshott, *The Concept of a Philosophical Jurisprudence*, ed. Luke O'Sullivan (Exeter: Imprint, 2009), 181.

77 Francis Herbert Bradley, *Appearance and Reality: A Metaphysical Essay*, 2nd ed. (London: Swan Sonnenschein, 1893), 1–2.

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2. Pluralist Empirical, Doctrinal, and Politico-Moral Inquiries

Awareness of this trio of problems affects the inquiries that legal pluralist advance. As suggested above, to determine whether there is a scenario of legal pluralism with more than one legal phenomenon in a given situation, and not merely normative pluralism, we must have first determined what the relevant phenomena are and whether they are legal objects. In this sense, to fruitfully engage with LP in a non-question-begging manner, we must be aware of the existence of the puzzles surrounding the common features and distinctiveness of law and the centrality of the state. It is difficult to identify and describe norms (empirical inquiries), apply them to specific contexts (doctrinal inquiries), or assess their legitimacy or justice (politico-moral inquiries) without a provisional understanding of what law is. In advancing this working understanding, pluralists should not adjudicate in a principled manner the disputes between unified and fragmentary accounts, distinctivist and non-distinctivist accounts, and statist and non-statist projects.

Consequently, pluralists should overcome their contrived attitudes to the conceptual inquiries that interest analytical jurisprudents. As suggested here, jurisprudence does not entail centralism or certain disciplinary pedigree; it is simply the project of providing a general answer to the conceptual question, "What is law?" The tradition of legal pluralism has contributed to this project by highlighting pre-theoretical data and developing views on each of the three problems. In my opinion, those conceptual contributions should not be advanced covertly or inadvertently. It would be more effective if pluralists engaged in some of the debates of the mainstream jurisprudential tradition to clarify and contrast their conceptual claims and uncover the assumptions on which they are based. In other words, instead of opposing the project of jurisprudence, legal pluralists should embrace them as a necessary and valuable component of their explanatory and normative agendas.

3. The Possibility of Reconciliation

Finally, these considerations allow us to revisit the possibility of reconciliation between analytical jurisprudence and legal pluralism. "The analytical positivists and the empirical pluralists are not adversaries," Maks Del Mar writes, "they are better thought of as partners, though so far they have been like different groups of blind persons pointing to different parts of the same elephant."[78] A cooperative project, sometimes called "pluralist jurisprudence" or "pluralist positivism," which is sensitive to the evidence and the methodological, doctrinal, and politico-moral concerns of the legal pluralist tradition, has emerged as a possible solution to the conflict.[79]

[78] Maksymilian Del Mar, "Beyond the State In and Of Legal Theory," in *Concepts of Law: Comparative, Jurisprudential, and Social Science Perspectives*, ed. Seán Patrick Donlan and Lukas Heckendorn Urscheler (Farnham: Ashgate, 2014), 34.

[79] Andrew Halpin and Nicole Roughan, "The Promises and Pursuits of Pluralist Jurisprudence," in *In Pursuit of Pluralist Jurisprudence*, ed. Nicole Roughan and Andrew Halpin (Cambridge: Cambridge University Press, 2017), 326–65; Muñiz-Fraticelli, *The Structure of Pluralism*, 118–60.

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While pluralist jurisprudence has successfully challenged the state-centric assumptions of mainstream theories,[80] in my view, it has failed to address the full extent of the questions raised by the pluralist tradition. Like mainstream jurisprudents, pluralist jurisprudents depart from the standard unified and distinctivist accounts of law. Nicole Roughan and Andrew Halpin's "candidate pluralist theory of law," for example, discusses features such as the openness or decisiveness of law taken directly from the standard accounts.[81] Still, to properly engage with the conceptual questions raised by the pluralist tradition, jurisprudents should not only widen their purview to new phenomena but also consider the pluralist intuitions and their candidate unified accounts developed for non-state legal phenomena. Furthermore, the possibility of a pluralist analytical jurisprudence, as Roughan and Halpin depict it, presupposes the defensibility of a unified and distinctivist account of law that adequately incorporates both state and non-state legal phenomena. Consequently, a successful pluralist jurisprudence needs to consider and respond to the challenge of fragmentary legal pluralism and establish a plausible distinction between law and non-law.

VI. Conclusion

In this paper, I have argued that jurisprudents have not fully considered the theoretical puzzles discussed by the intellectual tradition of legal pluralism. Here, I identified the three main puzzles. First, the question of the commonalities shared by all forms of law, disputed by unified and fragmentary accounts (i.e., what are, if any, the key explanatory and illuminating common features of form, structure, and content between the state and non-state phenomena that theorists have pre-theoretically identified as law?). Second, the distinction between legal and non-legal phenomena, where contenders are demarcationist and non-demarcationist projects (i.e., what are, if any, the features that allow us to differentiate between legal and non-legal phenomena?). Finally, the dispute between state-centred and non-state-centred approaches concerning the explanatory centrality of states in our theories of non-state legal phenomena (i.e., what role should the state play in our legal theories?).

In sum, the challenge posed by legal pluralism is more profound than what jurisprudents commonly believe, and it is not addressed by incorporating the possibility of non-state legal phenomena. In addition, analytical jurisprudents should contrast their accounts of law with those of the unified and non-distinctivist accounts theories developed by legal pluralists, reconsider, if not abandon, the methodological centrality that standard theories attribute to the state, and critically respond to challenges levied by fragmentary legal pluralists. Any reconciliation attempt between the two traditions, such as pluralist jurisprudence, should also consider these questions.

[80] Andrew Halpin and Nicole Roughan, "Introduction," in *In Pursuit of Pluralist Jurisprudence*, ed. Nicole Roughan and Andrew Halpin (Cambridge: Cambridge University Press, 2017), 3.
[81] Halpin and Roughan, "The Promises and Pursuits of Pluralist Jurisprudence," 353.

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