

# Journal of Civil Law Studies

---

Volume 4

Number 2 *Mediterranean Legal Hybridity: Mixtures and Movements, the Relationship between the Legal and Normative Traditions of the Region; Malta, June 11-12, 2010*

---

Article 9

12-1-2011

## The Mediterranean Hybridity Project: Crossing the Boundaries of Law and Culture

Seán Patrick Donlan

Follow this and additional works at: <https://digitalcommons.law.lsu.edu/jcls>

 Part of the [Civil Law Commons](#)

---

### Repository Citation

Seán Patrick Donlan, *The Mediterranean Hybridity Project: Crossing the Boundaries of Law and Culture*, 4 J. Civ. L. Stud. (2011)  
Available at: <https://digitalcommons.law.lsu.edu/jcls/vol4/iss2/9>

This Conference Proceeding is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Journal of Civil Law Studies by an authorized editor of LSU Law Digital Commons. For more information, please contact [kreed25@lsu.edu](mailto:kreed25@lsu.edu).

# THE *MEDITERRANEAN HYBRIDITY PROJECT*: CROSSING THE BOUNDARIES OF LAW AND CULTURE

Seán Patrick Donlan\*

*There is no state in which a government would be possible for any length of time which relies solely on the law.*

Eugen Ehrlich<sup>†</sup>

*The Mediterranean is not even a single sea . . .*

Fernand Braudel<sup>‡</sup>

I. Introduction .....	356
II. The Mediterranean Hybridity Project .....	358
III. Legal Hybridity .....	374
IV. Normative Hybridity.....	383
V. Conclusion .....	395

---

\* JD, PhD, Lecturer in law, University of Limerick, Ireland. President, *Juris Diversitas* and Secretary General, *World Society of Mixed Jurisdiction Jurists*. This essay expands on presentations made at the *Mediterranean Legal Hybridity Conference* (Lija and Valletta, Malta; June 11-12, 2010) and the Third International Congress of the *World Society of Mixed Jurisdiction Jurists* (Jerusalem, Israel; June 20-23, 2011). I want to thank all of those who read earlier drafts of this paper, not least Tom Bennett, Ignazio Castellucci, Baudouin Dupret, Sue Farran, David Nelken, Esin Örüçü, and Vernon Palmer. They are not, of course, responsible for my mistakes in interpretation or infelicities of expression.

<sup>†</sup> EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 56 (trans. Walter L. Moll, from the original German edition of 1913, 2002) (1936).

<sup>‡</sup> FERNAND BRAUDEL, *THE MEDITERRANEAN AND THE MEDITERRANEAN WORLD IN THE AGE OF PHILIP II* (2 vols., trans. Siân Reynolds, 1972) (1966), *Preface to the First Edition*, at 17.

## I. INTRODUCTION

Neither the hybridity nor the diffusion of laws is new.<sup>1</sup> Within Europe, law predated the state and the creation of genuinely national laws; a legal ‘system’ centered on the modern nation-state, and the elimination of competing jurisdictions and marginalization of non-legal norms was a very long historical process. Especially before the nineteenth century, there were multiple contemporaneous legal orders co-existing in the same geographical space and at the same time. Modern national traditions are unique hybrids rooted in diverse customary or folk-laws, summary and discretionary jurisdictions, local and particular *iura propria*, the Romano-canonical ‘learned laws’ or *ius commune*, and other trans-territorial *iura communia* (including feudal law and the *lex mercatoria*). Over time, these various bodies of law were linked to public institutions and increasingly meaningful and centralized powers of enforcement. They only slowly came under the control of early modern states to form modern legal traditions, contributing much to the substance and subsequent success of common laws.

This legal hybridity was paralleled by additional normative hybridity. Indeed, the boundaries between such official and unofficial legalities were porous. The ‘law’ blurred seamlessly into the less formally institutionalized, but meaningful, normative pluralism from which more formal legal rules often emerged and with which they would continue to compete. As Marc Galanter has put it:

One of the striking features of the modern world has been the emergence of those institutional-intellectual complexes that we identify as national legal systems. Such a system consists of

---

1. See Seán Patrick Donlan, *Remembering: Legal Hybridity and Legal History*, 2 COMP. L. REV. 1 (2011), available at [www.comparativelawreview.com/ojs/index.php/CoLR/article/view/13/17](http://www.comparativelawreview.com/ojs/index.php/CoLR/article/view/13/17) (Last visited November 9, 2011) and *Histories of Hybridity: A Problem, a Primer, a Plea, and a Plan (Of Sorts)*, in COMPARATIVE LAW AND HYBRID LEGAL TRADITIONS (Eleanor Cashin-Ritaine, Seán Patrick Donlan & Martin Sychold eds., 2010), full volume available at [www.e-collection.isdc.ch/#](http://www.e-collection.isdc.ch/#) (Last visited November 9, 2011).

institutions, connected to the state, guided by and propounding a body of normative learning, purporting to encompass and control all the other institutions in the society and to subject them to a regime of general rules. These complexes consolidated and displaced the earlier diverse array of normative orderings in society, reducing them to a subordinate and interstitial status.<sup>2</sup>

Similar patterns of hybridity occurred with the diffusion of European law, often through colonialism, around the world.<sup>3</sup> Both in the West and beyond, however, the displacement and reduction of non-state norms has not made them unimportant.

The extraordinary legal and normative hybridity (hereinafter ‘hybridity’) of the Mediterranean region was produced in a complex history of conquest, colonization, and social and legal diffusion across shifting and porous political boundaries.<sup>4</sup> Studies of this hybridity and diffusion have been isolated, sporadic, and too often framed within narrow jurisdictional and disciplinary constraints. The objective of the *Mediterranean Hybridity Project* is, through a collaborative international and interdisciplinary network of experts, (i) to produce a published comparative or cross-cultural collection on the subject and, if possible, (ii) to generate additional projects related to our theme. Encompassing both state laws and other social norms, the outcome will be more accurate, useful, and accessible accounts of Mediterranean legalities. Our project might produce an analytical model more useful than existing taxonomies and methods for new research in the region, in Europe, and around the world.

---

2. Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1, 19 (1981).

3. Indeed, ‘[s]cholars who study the one could learn from those who study the other, and vice versa.’ Dirk Heirbaut, *Europe and the People without Legal History: On the Need for a General History of Non-European Law*, 68 LEGAL HIST. REV. 269, 277 (2008).

4. “If a system is attached to two families . . . the question is one of genealogy, and thus of historical research first of all.” Maurice Tancelin, *How Can a Legal System be a Mixed System?*, in FREDERICK PARKER WALTON, THE SCOPE AND INTERPRETATION OF THE CIVIL CODE OF LOWER CANADA 3 (Wilson & Lafleur, 1980) (1907).

This brief paper outlines the initial general approach to the project and related issues. It reflects its progress as of summer 2011. In the second section, the general outlines of the project will be laid out based on a Roundtable held in Catania in late October 2010. The remaining sections will reflect my thinking on the subject rather than that of the project Committee or participants. The concepts of ‘hybridity’ and ‘diffusion,’ as used in my research, will be discussed in more detail in the second section. The third section will discuss legal hybridity, especially mixed systems; the fourth section will briefly discuss normative hybridity and the relationship between comparativists and social scientists. While my interpretation of these topics was not imposed on those participating in the project, it was influential. The paper is meant both to suggest how the project is conceived and how it might develop. It suggests a shared, basic vocabulary for the project and notes some of the conceptual resources available in comparative law and in the social sciences. Specific information on the Mediterranean region is not discussed here.

## II. THE MEDITERRANEAN HYBRIDITY PROJECT

The Mediterranean Hybridity Project was the result of discussions between members of *Juris Diversitas*, an international legal association dedicated to (i) the study of legal and normative mixtures and movements and (ii) the encouragement of interdisciplinary dialogue between jurists and others.<sup>5</sup> Begun in 2007, the group has so far held two symposia on the subject of hybridity. The first was co-organized with the *Swiss Institute of Comparative Law* in September 2009. A collection of articles generated by that event was recently published as *Comparative Law and Hybrid Legal Traditions* (2010). A second symposium was held in June 2010 in Malta and focused on Mediterranean

---

5. See *Juris Diversitas* at [www.jurisdiversitas.blogspot.com](http://www.jurisdiversitas.blogspot.com) (Last visited November 9, 2011). Our Executive Committee includes: Seán Patrick Donlan (Limerick), Ignazio Castellucci (Trento and Macau), Lukas Heckerdorn-Urschler (Swiss Institute of Comparative Law), Salvatore Mancuso (Macau), and Olivier Moréteau (Louisiana State). Our Advisory Board is composed of Patrick Glenn, Marco Guadagni, Roderick Macdonald, Werner Menski, Esin Örucü, Vernon Valentine Palmer, Rodolfo Sacco, Boaventura de Sousa Santos, William Twining, and Jacques Vanderlinden.

hybridity. It was co-organized with the Department of Civil Law and the *Mediterranean Institute* of the University of Malta. Professor Vernon Palmer, President of the *World Society of Mixed Jurisdiction Jurists* and author of *Mixed Jurisdictions Worldwide: The Third Legal Family*, was kind enough to launch the Mediterranean project there.<sup>6</sup> In addition, a project planning roundtable was held in October 2010 at the Faculty of Political Science at the University of Catania to finalize the questionnaire to be used in our work and to begin the selection of jurisdictional reporters. This will occur over the course of 2011. Another colloquium will be held at Rabat, Morocco in June 2012.<sup>7</sup>

The various legal orders, past and present, of the Mediterranean include the Anglo-British, canonical, continental, Islamic, Ottoman, Roman, socialist, and Talmudic traditions as well as various customary and trans-territorial legal traditions. This legal hybridity predates the establishment of modern nation-states. It is complemented and further complicated by an equally diverse and dynamic normative hybridity.<sup>8</sup> Neither has received sufficient attention from jurists and social scientists. The project is rooted in the desire across the region and within different disciplines to improve our knowledge of the various legalities in the Euro-Mediterranean region. It encompasses both the state laws that are the domain of lawyers and the wider normative orders typically studied by social scientists.<sup>9</sup> In particular, it will both draw on and go beyond earlier analysis of (i) ‘mixed legal systems,’ where

---

6. VERNON V. PALMER, *MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY* (2001). On the *World Society of Mixed Jurisdiction Jurists*, see [www.mixedjurisdiction.org](http://www.mixedjurisdiction.org) (Last visited November 9, 2011). The papers of the Maltese conference are published in this volume of the *J. CIV. L. STUD.*

7. *Doing justice: official and unofficial ‘legalities’ in practice* (Rabat, Morocco; June 15-16, 2012).

8. For a different, more critical, understanding of ‘hybridity’ in the Mediterranean, see Christian Bromberger, *Towards an Anthropology of the Mediterranean*, 17 *HIST. & ANTHROPOLOGY* 91, especially 96-98 (2006).

9. In an even bolder program than ours, the *Southern African Development Community* (SADC) proposes to codify both common principles and non-state practices. See Salvatore Mancuso, *Creating Mixed (?) Jurisdictions: Some Methodological Reflections on Legal Integration in the Southern African Development Community (SADC) Region*, *J. COMP. L.* (forthcoming 2012).

diverse state laws emerge from different legal traditions, and (ii) 'legal' or 'normative.' The focus of the former scholarship is typically limited to state law, especially mixtures of explicitly Western legal traditions. Study of the latter is rooted in empirical study, but is often focused on non-Western communities and rarely extends across state boundaries.<sup>10</sup> As will be clear, these two bodies of scholarship are importantly related.<sup>11</sup>

A Managing Committee is responsible for the coordination, steering, and oversight of the project.<sup>12</sup> An Advisory Board is being created to assist the Committee.<sup>13</sup> The project's main objective is the relatively simple production of a comparative collection on legal and normative hybridity in the region.<sup>14</sup> Our project addresses the existing lacuna in research by developing a collaborative inter- and multi-disciplinary network of experts on

---

10. *But see* LAURA NADER & HARRY TODD, *THE DISPUTING PROCESS: LAW IN TEN SOCIETIES* (1976), the culmination of the fieldwork on the "Berkeley Village Project." It involved, among others, Lebanon, Sardinia, and Turkey; *see also* PEREGRINE HORDEN & NICHOLAS PURCELL, *Mists of Time: Anthropology and Continuity*, a bibliographical essay, in *THE CORRUPTING SEA: A STUDY OF MEDITERRANEAN HISTORY* (2000).

11. On joining the study of legal and normative hybridity, as I define these ideas, see Seán Patrick Donlan, 'The Ubiquity of Hybridity: Norms and Laws, Past and Present, and around the Globe,' a paper delivered at the *New Frontiers of Comparative Law* Conference (Macau, November 11, 2011). A follow-up article will be published in 2012. For a similar argument, *see* Ido Shahar, *State, Society and the Relations between Them: Implications for the Study of Legal Pluralism*, 9 *THEORETICAL INQUIRIES IN L.* 417, 441 (2008). *See also* Mauro Bussani, *A Pluralist Approach to Mixed Jurisdictions*, *J. COMP. L.* (forthcoming 2012).

12. In addition to me, the Committee includes Baudouin Dupret and Olivier Moréteau. The Committee provides continuity within the project's flexible framework. Editorial and Advisory Boards may also be created to provide advice and assistance to the Committee.

13. The Advisory Board includes Biagio Andò, Tom Bennett, Nathalie Bernard-Maugiron, Sue Farran, David Nelken, Esin Öricü, Vernon Palmer, and David Zammit.

14. *Cf.* John H. Merryman, *Law and Development Memoirs II: SLADE*, 48 *AM. J. COMP. L.* 713 (2000). The SLADE (Studies in Law and Development) project resulted in *LAW AND SOCIAL CHANGE IN MEDITERRANEAN EUROPE AND LATIN AMERICA: A HANDBOOK OF LEGAL AND SOCIAL INDICATORS FOR COMPARATIVE STUDY* (John H. Merryman, David S. Clark, & Lawrence M. Friedman eds., 1979). It included both Italy and Spain.

the region—from law, anthropology, geography, history, sociology, etc.—to foster dialogue on the subject. The project will benefit from this jurisdictional and disciplinary diversity. Scholars from throughout Europe, the Levant, North Africa, and beyond will participate. Chief reporters will be selected for each of the jurisdictions involved. It will be the responsibility of the chief reporters, in collaboration with the Committee, to assemble a team of additional reporters appropriate to complete the reports and to ensure that deadlines are met. Essential to the project is the creation of a questionnaire on which to structure our work. This questionnaire will be produced by the Committee in discussion with the participants. The combination of such reports and their subsequent analysis is an established method of comparative law. The *International Academy of Comparative Law* takes an analogous approach in the thematic reports to its quadrennial World Congress. In the 1990s, two projects managed in a similar manner by the legal philosophers Neil MacCormick and Robert S. Summers ended in the publication of important comparative collections on statutory interpretation and precedent.<sup>15</sup> Our project will take a broadly similar approach, but will marry this comparative approach with other conceptual and empirical models from the legal and social sciences.

In its origins, ‘*hybrid*’ had a very narrow meaning. The Latin “*hibrida* was the offspring of a (female) domestic sow and a (male) wild boar.”<sup>16</sup> In fact, a hybrid is often seen as a complex *individual* entity, a singularity, from two parents. More recently, however, it has become far broader in application. Indeed, the

---

15. INTERPRETING STATUTES: A COMPARATIVE STUDY (Neil MacCormick & Robert Summers eds., 1991) and INTERPRETING PRECEDENTS: A COMPARATIVE STUDY (Neil MacCormick & Robert Summers eds., 1997). For summaries, see Robert S. Summers, *The Comparative Statutory Interpretation Project*, 17 CORNELL L. FORUM 7 (1990) and *The Comparative Precedent Project, 1992-97*, 24 CORNELL L. FORUM 17 (1997). These projects grew out of earlier work comparing English and American law. PATRICK. S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS (1987). See also Robert S. Summers, *Form and Substance in Anglo-American Law*, 14 CORNELL L. FORUM 2 (1987).

16. Brian Stross, *The Hybrid Metaphor: From Biology to Culture*, 112 J. AM. FOLKLORE 254 (1999).



word in its current usages is arguably, as the historian Peter Burke has written, “a slippery, ambiguous term, at once literal and metaphorical, descriptive and explanatory.”<sup>17</sup> ‘Hybridity’ has also developed more nuanced meanings in, for example, Post-Colonial Studies, serving both as a recognition of social complexity, “a way out of binary thinking” about cultures (and individuals).<sup>18</sup> This understanding of hybridity is not entirely unrelated to our Project. Indeed, even the legal historian George Dargo, who wrote the classic work on the founding of Louisiana’s mixed system, has recently noted that, in Louisiana, “[h]ybridity produced a rich interaction—call it conflict, contestation, or negotiation—from within the mix of languages, cultures and legal traditions that the Americans found in their first true colony.”<sup>19</sup> Hybridity’ is thus meant to suggest, more explicitly than discussions of legal ‘mixes’—which typically focus on the various positive laws of the state—a more dynamic complexity of both laws and other norms. More diffuse normative influences and practical considerations, both internal and external are also relevant, not least geo-political, economic, and social relationships of power.

The phrase ‘legal hybridity’ is only rarely employed in either legal or social science. Where it is used, it is broadly synonymous with ‘legal pluralism.’<sup>20</sup> Iza Hussin has used it to

---

17. PETER BURKE, CULTURAL HYBRIDITY 54 (2009).

18. ANJALI PRABHU, HYBRIDITY: LIMITS, TRANSFORMATIONS, PROSPECTS 1 (2007). Indeed, it also arguably “allow[s for] the inscription of the agency of the subaltern, and even permit[s] a restructuring and destabilizing of power.” *Id.* Note that the focus of Prabhu’s book is on the small islands of Mauritius and La Réunion, the former of which is a mixed legal system. See also HOMI BHABHA, THE LOCATION OF CULTURE (1994) and Alpana Roy, *Postcolonial Theory and Law: A Critical Introduction*, 29 ADEL. L. REV. 317 (2008).

19. George Dargo, *The Digest of 1808: Historical Perspectives*, 24 TUL. EUR. & CIV. L. F. 1, 30 (2009). See *id.*, 29-30 (citing BHABHA, *supra* note, 2). This is indeed far more nuanced than what he earlier called the “clash of traditions” in nineteenth-century Louisiana. See GEORGE DARGO, JEFFERSON’S LOUISIANA: POLITICS AND THE CLASH OF LEGAL TRADITIONS (1975, revised 2010).

20. Cf. Justin Holbrook’s use of ‘legal hybridity’ for what I call ‘normative hybridity.’ *Legal Hybridity in the Philippines: Lessons in Legal Pluralism from Mindanao and the Sulu Archipelago*, 18 TUL. J. INT’L & COMP. L. 1, 3 n. 8 (2010). See also Clever Mapaure, *Legal Hybridity: A Comparative Analysis of the Role of Custom and Intricacies of Legal Pluralism in Relation to Customary*

capture not only plural laws and norms, but power relationships as well.<sup>21</sup> *For the purposes of the project*, however, ‘legal hybridity’ refers to state laws and legal principles (hereinafter ‘laws’), those traditions generally, conventionally recognized as legal by modern lawyers.<sup>22</sup> This is the focus of most mixed jurists, though it may extend still further to, among others, the ‘*law in action*,’ ‘*legal formants*,’ or ‘*legal polycentricity*.’<sup>23</sup> ‘*Normative hybridity*’ is, for us, a far wider concept, largely synonymous with ‘normative pluralism’ and including both laws and wider patterns of normative ordering and non-state norms (hereinafter ‘norms’). Defined in this way, law and norms are not opposites but points on a continuum. As Baudouin Dupret writes,

[i]n our attempt to analyze the phenomenon of norms we should move resolutely away from legal categories and towards social categories, and . . . we should do this both at a conceptual level and at a methodological level. This is a shift from the law to the norm, with all that such a move implies in terms of assimilation with social constraints . . . Law must be stripped of its conceptual status and returned to the fold of general normativity, so that there is no longer any ex post facto distinction between it and other types of norms such as moral injunctions,

---

*Marriages in Britain and African Jurisdictions*, available at <http://ssrn.com/abstract=1515630> (Last visited November 9, 2011).

21. Iza Hussin, *The Pursuit of the Perak Regalia: Islam, Law, and the Politics of Authority in the Colonial State*, 32 L. & SOC. INQUIRY 759 (2007). See also Mancuso, *supra* note 8.

22. See e.g. Biagio Andò, Seán Patrick Donlan & David Zammit, “A Happy Union?” *Malta’s Legal Hybridity*, 27 TUL. EUR. & CIV. L. F. (forthcoming 2012).

23. Donlan, *supra* note 11. See Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910); Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, (1991) 39 AM. J. COMP. L. 1 and 343; HANNE PETERSEN & HENRIK ZAHLE, *LEGAL POLYCENTRICITY: CONSEQUENCES OF PLURALISM IN LAW* (1995); and ARI HIROVONEN, *POLYCENTRICITY: THE MULTIPLE SCENES OF LAW* (1998).

political rules, traditions, habits, etiquette and even table manners.<sup>24</sup>

This normative hybridity is not, or not necessarily, prescriptive, but descriptive of a social fact with which scholars must contend. Indeed, “as a purely descriptive matter, hybridity cannot be wished away.”<sup>25</sup>

Herbert Hart, the foremost legal positivist of the twentieth century, began *The Concept of Law* (1961) with the remark that “[f]ew questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange, and even paradoxical ways as to the question, *What is law?*”<sup>26</sup> This fact, and related definitional complexities, have important consequences for our project. We must both recognize the complexity of defining ‘law’ while, at the same time, provide flexibility and reasonable coherence to our work. The distinction between law and norms employed here is largely meant to reflect juristic practice and modern, common understandings of the terms in the West. This is *not* meant to suggest deep ontological divisions between laws and other norms.<sup>27</sup> It is

---

24. Baudouin Dupret, *Legal Pluralism, Normative Plurality, and the Arab World*, in LEGAL PLURALISM IN THE ARAB WORLD 31 (Baudouin Dupret, Maurits Berger, & Laila al-Zwaini eds., 1999); See also Baudouin Dupret, *Legal Pluralism, Plurality of Laws, and Legal Practices: Theories, Critiques, and Praxiological Re-Specification*, 1 EUROPEAN J. LEGAL STUD. 1 (2007) and *What is Islamic Law? A Praxiological Answer and an Egyptian Case Study*, 24 THEORY, CULTURE & SOC’Y 79 (2007).

25. Paul S. Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1179 (2007). For a “social fact conception of legal pluralism,” see William Twining, *Normative and Legal Pluralism: A Global Perspective*, 20 DUKE J. COMP. & INT’L L. 473, 488-489 (2010).

26. HERBERT L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1997). Twining has proposed a “flexible working conception of law” in which “[f]rom a *global* perspective it is illuminating to conceive of law as a species of *institutionalized social practice* that is *oriented to ordering relations* between *subjects* at one or more levels of relations and of ordering.” WILLIAM TWINING, *GENERAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE* 116-117 (2009).

27. Twining refers to the difficulty in distinguishing legal and non-legal phenomenon as the problem of “the definitional stop.” See Twining, *supra* note 25, at 497. There exists a long-established and widespread conventional usage of ‘law’ (or, at least, ‘lex’) that defines the ‘legal’ on the basis of some minimal

intended instead to prevent the project from becoming mired in complex theoretical debates in its early stages.<sup>28</sup> State laws are distinct, at least in practice, from other norms. Western legal institutions, in particular, are highly formalized or institutionalized in contrast to alternative forms of normative ordering. This view is, however, open to challenge over the course of the project. Even within modern Anglo-American analytical jurisprudence or legal philosophy, there has been a move away from a narrow focus on state law. For example, the late Neil MacCormick wrote that “[i]nstitutional normative orders are characterized by the presence of explicitly issued norms and decisions in authentic (that, in some way official or authorized) texts, such that understanding and interpreting such texts becomes an implicit part of maintaining the order.”<sup>29</sup> More important was the argument that “[l]aw is institutional normative order, and state law is simply one form of law.”<sup>30</sup> As noted, our focus will extend to normative orders while avoiding, for now, any decision on whether such orders are indeed “law, properly so-called.”<sup>31</sup>

Our decision to avoid using ‘*legal pluralism*’ is, in part, the result of the very different ways in which that phrase may be

institutional structure and accepted authority. Critically, however, the development of this convention *preceded* the development of the mature state and a later conventional correspondence of law and the state. Cf. Jean-Louis Halpérin, *The Concept of Law: A Western Transplant*, 10 THEORETICAL INQUIRIES IN L. 333, 353 (2009). ‘*Ius*’ had, of course, a less precise meaning of right or rightness.

28. With sufficient support, a future meeting of participants will be organized that would allow for such theoretical considerations to be revisited.

29. Neil MacCormick, *Institutions and Laws Again*, 77 TEX. L. REV. 1429, 1431 (1999). See also Mariano Croce, *Is there a Place for Legal Theory Today? The Distinctiveness of Law in the Age of Pluralism*, in LAW’S ENVIRONMENT: CRITICAL LEGAL PERSPECTIVES (Ubaldo de Vries & Lyana Francot eds., 2011).

30. Neil MacCormick, *Institutional Normative Order: A Conception of Law*, 82 CORNELL L. REV. 1051, 1067 (1997). See also NEIL MACCORMICK, *INSTITUTIONS OF LAW: AN ESSAY IN LEGAL THEORY* (2009); and William Twining, *Institutions of Law From a Global Perspective: Standpoint, Pluralism and Non-State Law*, in LAW AS INSTITUTIONAL NORMATIVE ORDER (Maksymilian Del Mar & Zenon Bankowski eds., 2009).

31. See generally JOHN AUSTIN, *THE PROVIDENCE OF JURISPRUDENCE DETERMINED* (1832), Lecture Five.

employed. Both comparative lawyers and legal historians frequently use 'legal pluralism' as a synonym for what is called 'legal hybridity' here.<sup>32</sup> Social scientists have, however, usually used the same term in their more extensive discussions of the concept of normative hybridity.<sup>33</sup> This social science use of 'legal' to include both state laws and non-state norms has admittedly made scholars sensitive to similarities between them. It has also often confused jurists, arguably dissuading many from engagement with social scientists.<sup>34</sup> This is not always true. A small number of jurists have similarly noted that "the existence and content of explicit laws depend on a network of tacit understandings and unwritten conventions, rooted in the soil of social interaction."<sup>35</sup> These are also called law: 'everyday law,' 'implicit law,' 'informal law,' and 'unofficial law.'<sup>36</sup> But, as the anthropologist Sally Engle Merry puts it, "calling all forms of ordering that are not state law by the name law confounds the analysis."<sup>37</sup> Where project

---

32. In social science debates, this has often been called 'state' or 'weak' legal pluralism. Legal historians have to deal with an additional complication. The 'State' has not always existed and use of 'state' terminology can, depending on the historian's focus, be deeply anachronistic.

33. This is also referred to as 'deep' or 'strong' legal pluralism. See Gordon R. Woodman, *Ideological Combat and Social Observation: Recent Debate about Legal Pluralism*, 42 J. LEGAL PLURALISM 21 (1998).

34. Franz von Benda-Beckmann, *Who's Afraid of Legal Pluralism?*, 47 J. LEGAL PLURALISM 37, 40 (2002).

35. Gerald J. Postema, *Implicit law*, in REDISCOVERING FULLER: ESSAYS ON IMPLICIT LAW AND INSTITUTIONAL DESIGN 255 (Willem J. Witteveen & Wibren van der Burg eds., 1999). Postema was writing about Lon Fuller. Fuller's thoughts on "implicit law" were discussed in LON FULLER, *THE ANATOMY OF THE LAW* (1968).

36. Roderick Macdonald uses each of these. See RODERICK MACDONALD, *LESSONS OF EVERYDAY LAW/LE DROIT DU QUOTIDIEN* (2002). See Edward J. Eberle's use of "internal law" in, *Comparative law*, 13 ANN. SURV. INT'L & COMP. L. 93, 97-99 (2007). Other writers have even suggested that *legal* study, including comparative analysis, should focus on "the mundane and the very small within its gaze. There is often enough kinship between normative orders at various level of social life to make them comparable." Daniel Jutras, *The Legal Dimensions of Everyday Life*, 16 CAN. J.L. & SOC'Y 45, 64 (2001). See also W. MICHAEL REISMAN, *LAW IN BRIEF ENCOUNTERS* (1999).

37. Sally E. Merry, *Legal Pluralism*, 22 L. & SOC'Y REV. 869, 878 (1988); see also Brian Z. Tamanaha, *The Folly of the 'Social Scientific' Concept of Legal Pluralism*, 20 J.L. & SOC'Y 192 (1993). His response has been to suggest

participants want to emphasize the real continuum between laws and other norms, it was suggested they might, with other writers, refer to both as ‘legalities.’ As Christopher Tomlins has recently defined them, “legalities are not produced in formal legal settings alone. They are social products, generated in the course of virtually any repetitive practice of wide acceptance within a specific locale, call the result rule, custom, tradition, folkway or pastime, popular belief or protest.”<sup>38</sup> This is admittedly something of a fudge. But ‘legalities’ underlines the similarities between laws and other norms without ignoring the genuine differences already noted.<sup>39</sup> It might also be useful, for the purposes of the project, to make finer distinctions between different types of norms.<sup>40</sup> In addition, as both comparatists and legal philosophers have noted, there is far more to the interpretation of the law of the state than a straightforward reading of its texts; context is critical.<sup>41</sup>

Discussions at the Catania Roundtable largely focused on the questionnaire to be used in the project. For practical purposes,

---

that “[l]egal norms are whatever people in the social group conventionally recognize as legal norms through their social practices.” Brian Z. Tamanaha, *A Non-Essentialist Version of Legal Pluralism*, 27 *J.L. & SOC’Y* 296, 316 (2000); see also *The Internal/External Distinction and the Notion of a Practice in Legal Theory and Sociological Studies*, 30 *L. & SOC’Y REV.* 163 (1996).

38. Christopher L. Tomlins, *The Many Legalities of Colonialization: A Manifesto of Destiny for Early American Legal History*, in *THE MANY LEGALITIES OF EARLY AMERICA 2-3* (Christopher L. Tomlins & Bruce H. Mann eds., 2001); see also *THE LAW AND OTHER LEGALITIES OF IRELAND, 1689-1850* (Michael Brown & Seán Patrick Donlan eds., 2010).

39. Cf. PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* (1998), especially chapters two and three.

40. Tamanaha has, for example, recently listed “forms of normative ordering commonly discussed in studies of legal pluralism.” Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 *SYDNEY L. REV.* 375, 397 (2008). These included both “official or positive legal systems” as well as “customary,” “religious/cultural,” “economic/capitalist,” “functional,” and “community/cultural” normative systems. See generally *id.* at 397-400.

41. See, e.g., Sacco, *supra* note 23. See also P.G. Monateri & Rodolfo Sacco, *Legal Formants*, in *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* (Peter Newman ed., 1998).

it was agreed that the questionnaire should be completed in 2011.<sup>42</sup> It should be designed in a simple manner, complete with a basic lexicon of terms as used in project correspondence. The reports will focus on the contemporary situation in the jurisdictions covered.<sup>43</sup> It is important, however, that sufficient attention be given to the historical development of the laws and norms discussed. Like much of the project, the appropriate amount of text dedicated to history can be determined together by the Committee and the Chief Reporters. More critically, the category of normative hybridity is potentially very wide, extending to ordinary etiquette and table manners. To narrow our focus, it was agreed that non-state norms should be limited to either “non-state justice systems” or to norms or normative orders that significantly influence legal or normative practices.<sup>44</sup> There is no simple metric for the application of this standard. The Committee will be responsible for determining whether reporters have established that norms have met this requirement. Insofar as is possible, both ‘internal’ perceptions of the actors engaged in the legalities involved and ‘external’ perceptions from actors beyond those legalities should be considered. The emergence of new legal or normative creations should also be considered.

Several approaches to the structure of the questionnaire were considered. It was agreed that the final version should lay out general headings that must be followed by reporters. These headings apply to both laws and norms (as defined here). Beneath the headings, however, will be more specific, optional questions that might be relevant. These questions might not apply to all jurisdictions and might not apply to both legal and normative

---

42. As a working rule, the reports should not exceed 25,000 words.

43. Cf. the “country surveys” in the YEARBOOK OF ISLAMIC AND MIDDLE EASTERN LAW.

44. MIRANDA FORSYTH, A BIRD THAT FLIES WITH TWO WINGS: KASTOM AND STATE JUSTICE SYSTEMS IN VANUATU 29 (2009). In discussing “normative orderings existing outside the state,” she includes “customary law, non-state justice systems, non-state legal fields, dispute-resolution systems, rule systems, folk law, informal justice, collective justice, popular justice and vigilantism.” *Id.* at 81. See also her discussion in chapter seven (‘A typology of relationships between state and non-state justice systems’).

hybridity. The basic, *preliminary* draft questionnaire includes the following headings and questions:

1. **Historical background:** what are the origins of the major legal and normative traditions, especially through “diffusion?” How does this relate to the creation of the jurisdiction spatially?
2. **Sources and institutions:** what forms of state laws or non-state norms are applicable and in what institutions?
3. **Bodies of law and norms:** what bodies of state law or non-state norms—substantive and procedural—are utilized?
4. **Actors:** what actors are involved in state law and non-state norms?
5. **Methods:** what methods—“customary,” “doctrinal,” “legislative,” and “adjudicative” (or analogous forms)—are used in state law and non-state norms?
6. **Efficacy:** how certain is the enforcement of state law and non-state norms? What role does the “rule of (state) law” play in the jurisdiction? How litigious are people in the various fora available to them?
7. **Regionalism and globalization:** what is the impact of regionalism and globalization—including cultural, economic, and legal—on laws and other norms? This includes, of course, the role of human rights.
8. **Identity:** what is the relevance of state law and non-state norms to individual and community identities? Language, ethnicity, religion, and culture might all be considered.

As noted, this is a first draft. The final questionnaire will be completed in 2011. The approach is intended to provide a general, uniform structure with a menu of questions that will be answered, as appropriate, by the reporters. Throughout the project, the Committee will adjust the program and the questionnaire as



necessary. Participant feedback, project meetings, and the review of draft reports in advance of publication will almost certainly suggest changes. A bibliography will also be created for each report. And, insofar as is possible, the reports should combine existing empirical research with theoretical insight.<sup>45</sup>

An important aspect of the project is the creation of legal and normative hybrids as the product of the ‘diffusion’ of law and norms. The mixtures and movements of both are two sides of the same coin.<sup>46</sup> This is true both of time and space with the result that “comparative law merges the approach of the legal historian with that of the legal geographer.”<sup>47</sup> Here comparative lawyers have generated an impressive, if bewildering, scholarship on the movements of law and legal thinking. Alan Watson’s ‘transplant’ thesis is especially influential.<sup>48</sup> He has suggested that the transplantation of legal ideas and institutions is extremely common. While the difference between a ‘transplant’ and a ‘reception’ is probably best seen as one of degree, the latter is generally used for more wide-scale borrowing, especially the historical incorporation of the Romano-canonical *ius commune* by

---

45. Given the current size of the project, it is not expected that new studies can be undertaken. It is hoped, however, that the project might encourage such research, especially where gaps exist.

46. Cf. Esin Örüçü, *Mixed and Mixing Systems: A Conceptual Search*, in *STUDIES IN LEGAL SYSTEMS: MIXED AND MIXING* (Esin Örüçü, Elspeth Attwooll & Sean Coyle eds., 1996).

47. SCHLESINGER’S COMPARATIVE LAW: CASES - TEXTS - MATERIALS 178 (7th ed. Ugo A. Mattei, Teemu Ruskola & Antonio Gidi eds., 2009). The editors define ‘diffusion’ as “the spreading of legal ideas, concepts and rules across jurisdictions.” *Id.*

48. See ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW*, (2d ed. 1993); see also ALAN WATSON, *LEGAL TRANSPLANTS AND EUROPEAN PRIVATE LAW, IUS COMMUNE LECTURES ON EUROPEAN PRIVATE LAW 1* (2000). For additional discussions, see Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839 (2003) and Margit Cohn, *Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom*, 58 AM. J. COMP. L. 583 (2010).

the German states.<sup>49</sup> It can also be used in other contexts, including the reception of Anglo-American law across the globe. These concepts are so important to modern comparative analysis that Michele Graziadei has even suggested that comparative law can be characterized as the “study of legal transplants and receptions.”<sup>50</sup> In fact, considerable ink has been spent on the metaphors of legal movement. In contrast to Watson’s organic ‘transplants,’ Nelken has suggested the more neutral ‘transfers.’<sup>51</sup> Others speak of ‘contaminations,’<sup>52</sup> ‘irritants,’<sup>53</sup> or the ‘migration of law.’<sup>54</sup> William Twining’s choice of ‘diffusion’ is preferred here for (i) reasons of simplicity and (ii) in parallel to discussions of similar processes within the social sciences.<sup>55</sup> In addition, Twining’s use of the concept is particularly sophisticated, untangling the deep

49. Alan Watson, *Aspects of Reception of Law*, 44 AM. J. COMP. L. 345 (1996); see also Albert Kocourek, *Factors in the Reception of Law*, 10 TUL. L. REV. 209 (1936).

50. Michele Graziadei, *Comparative Law as the Study of Transplants and Receptions*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW (Mathias Reimann & Reinhard Zimmermann eds., 2008). Indeed, “[u]nified visions of legal cultures and legal orders should thus be replaced by a more analytic, dynamic, and realistic picture of the local law, which also comprises that law’s interaction with other legal orders.” *Id.* at 471-472.

51. “The terms we use will make a difference.” David Nelken, *Legal Transplants and Beyond: Of Disciplines and Metaphors*, in COMPARATIVE LAW IN THE 21ST CENTURY 31 (Andrew Harding & Esin Öricü eds., 2000).

52. P.G. Monateri, *The Weak Law: Contaminations and Legal Cultures*, in ITALIAN NATIONAL REPORTS TO THE XVTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW, BRISTOL 1998 (1998). See Olivier Moréteau, *An Introduction to Contamination*, 3 J. CIV. L. STUD. 9 (2010); see also Olivier Moréteau, *Mare Nostrum as the Cauldron of Western Legal Traditions: Stirring the Broth, Making Sense of Legal Gumbo whilst Understanding Contamination*, in this same volume of the J. CIV. L. STUD.

53. Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11 (1998).

54. Öricü has also spoken of “law as transposition,” the “tree model,” and the “wave theory,” the last two borrowed from linguistics. See Esin Öricü, *A Theoretical Framework for Transfrontier Mobility of Law*, in TRANSFRONTIER MOBILITY OF LAW (Robert Jagtenberg, Esin Öricü, & Annie J. De Roo eds., 1995) and Esin Öricü, *Law as Transposition*, 51 INT’L & COMP. L.Q. 205 (2002).

55. The term was also used a century ago in Robert W. Lee, *The Civil Law and the Common Law: A World Survey*, 14 MICH. L. REV. 89, 90 (1915).

complexity of the process of diffusion.<sup>56</sup> These are important considerations in our work. Normative diffusion is, of course, still more complex.<sup>57</sup>

At the time of the Roundtable, potential reporters were available for Algeria, Cyprus, Egypt, France, Greece, Israel, Italy, Libya, Malta, Morocco, Slovenia, Spain, Tunisia, and Turkey.<sup>58</sup> It was agreed that reporters for additional jurisdictions would also be sought, especially for those jurisdictions falling outside of Western Europe.<sup>59</sup> Particularly important was the inclusion of additional social scientists and, given the levels of relevant research and scholarship produced in French, that that language should be included as a working language of the project. The importance of funding and institutional support was also noted. Subject to securing such support, the project will progress through meetings, colloquia, and conferences. These gatherings will foster research and dialogue and prepare participants for production of the jurisdictional reports. At all events, the Committee will work to ensure dissemination of the information generated by participants, including, most importantly, publication of the final reports. The process towards publication will include pre-circulation of draft reports by participants before discussion in a colloquium.

---

56. See William Twining, *Diffusion of Law: A Global Perspective*, 49 J. LEGAL PLURALISM 1, 34-35 (2004); see also William Twining, *Diffusion and Globalization Discourse*, 47 HARV. INT'L L.J. 507, 512 (2006). Note that Twining's use of the term effectively envelopes the study of both (i) hybridity and (ii) legal culture. See William Twining, *Globalisation and Comparative Law*, in *COMPARATIVE LAW: A HANDBOOK* (Esin Örüçü & David Nelken eds., 2007); see also William Twining, *Social Science and Diffusion of Law*, 32 J.L. & SOC'Y 203 (2005).

57. See e.g. the discussion of "ethnoscapes, technoscapes, finanscapes, mediascapes, and ideoscapes" in Arjun Appadurai, *Disjuncture and Distance in the Global Cultural Economy*, in *MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION* (1996).

58. Additional reporters are now available.

59. E.g. Albania, Croatia, Lebanon, Montenegro, the Palestinian Authority, Syria, and additional microstates (Andorra, Gibraltar, Monaco, San Marino, Vatican City, etc). Additional countries not currently touching the Mediterranean Sea may also be included—e.g. Jordan and Portugal—depending on their historical and contemporary connection to the region. Rather than creating simplistic rules to determine difficult cases, the Committee will decide on the inclusion of additional countries on a case-by-case basis.

Participants will then be expected to edit their reports on the basis of those discussions. As the reports are completed, the project leaders will prepare a draft general overview to be discussed with participants. The leaders will complete an introduction and conclusion for the published collection. Finally, an international conference will be organized to publicize the project, the network, the resulting reports, and the database.

Participants also agreed to try to meet at various other related conferences and events (e.g. the *World Society of Mixed Jurisdiction Jurists'* Third 'International Congress' held in Jerusalem, Israel in June 2011). The extended process of preparing reports will better enable participants to transcend jurisdictional and disciplinary boundaries. In addition to the published collection, we will work to disseminate, as widely as possible, the information gathered and generated. This will be accomplished in numerous ways, *i.e.* through

- various public events made possible by the project;
- teaching, blogging, and presentations by participants;
- additional research projects and publications—both academic and mainstream—generated.

In addition, a website hosting an online database of laws and norms in the region may be created and updated over the course of the project. This will provide for the collection of existing primary and secondary materials, links to information currently dispersed, and an extensive bibliography. Access to both existing official legislation and jurisprudence and more complex redactions of unofficial norms could be included. Each of these will assist knowledge transfer to jurists and scholars, to practitioners and policy-makers, and to civil society organizations and the wider community.

By combining the study of laws and norms and the methods of the legal and social sciences, the project will produce numerous conceptual and practical benefits. It will create more accurate, useful, and accessible accounts of Mediterranean hybridity. It might spur development of a new framework for scholarly collaboration. Indeed, it may produce an analytical model more

useful than existing taxonomies and methods for new research in the region, in Europe, and around the world. Most importantly, the project will permit a more empirically-grounded approach to issues of law and policy. The collective activities of the network and the research it generates may make important contributions to current Euro-Mediterranean debates on, for example, commerce, the environment, and human rights, and security. Another benefit will be to facilitate discussion of future alignments between Mediterranean and wider European cultures and their laws, *i.e.* the Union for the Mediterranean. Given continuing debates in research on the Mediterranean, it is important to note that the region will serve as a geographical and jurisdictional focus for our study. We do not seek evidence of a reified and perennial Mediterranean experience. As Peregrine Horden expressed in a different context, '[w]e put "the Mediterranean" *within* our frame rather than assume it *as the frame itself*.'<sup>60</sup> Instead, the region is a laboratory.<sup>61</sup>

### III. LEGAL HYBRIDITY

The recognition of historical and comparative hybridity, both legal and normative, allows us to better contextualize modern traditions identified as '*mixed legal systems*.'<sup>62</sup> These are designated as such largely through the failure of comparatists to assign them elsewhere.<sup>63</sup> The crude classifications of much past and present comparative study—positivist, centralist, monist—have often resulted in pushing these jurisdictions "into a marginal

---

60. Peregrine Horden, *Mediterranean Excuses: Historical Writing on the Mediterranean Since Braudel*, 16 HIST. & ANTHROPOLOGY 25, 26 (2005). On these contemporary debates, see HORDEN & PURCELL, *supra* note 10.

61. See Dionigi Albera, *The Mediterranean as an Anthropological Laboratory*, 16 ANALES DE LA FUNDACIÓN JOAQUÍN COSTA 215 (1999).

62. Michele Graziadei, *Legal Transplants and the Frontiers of Legal Knowledge*, 10 THEORETICAL INQUIRIES IN L. 723, 727 (2009). Cf. the use of 'hybrid' in Dorcas White, *Some Problems of a Hybrid Legal System: A Case Study of St Lucia*, 30 INT'L & COMP. L. Q. 862 (1981) and 'hybridity' in Dargo, *supra* note 19.

63. Jacques du Plessis, *Comparative Law and the Study of Mixed Legal Systems*, in REIMANN & ZIMMERMANN, *supra* note 50, at 478.

and uncertain position.”<sup>64</sup> That peripheral status has begun to change. In the last decade, scholars have increasingly focused on mixed systems, or at least the European hybrids among them. The jurisdictions are, or so it has been argued, models for a more mixed century to come.<sup>65</sup> More specifically, it has been argued that mixed systems suggest what a future European common law, a *novum ius commune Europeum*, might look like.<sup>66</sup> The implications of scholarship on mixed jurisdictions is, however, still more significant. Indeed, as Palmer argues,

[r]ecognizing that hybridity is a universal fact will no doubt require us to revise some of the received attitudes and prejudices about mixed systems . . . [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.<sup>67</sup>

Mixity is thus not the exception, but “the rule.”<sup>68</sup> Mixed traditions are simply the most explicit and obvious legal hybrids.<sup>69</sup> But

---

64. See Luigi Moccia, *Historical Overview on the Origins and Attitudes of Comparative Law*, in *THE COMMON LAW OF EUROPE AND THE FUTURE OF LEGAL EDUCATION* 619 (Bruno De Witte & Caroline Forde eds., 1992). See also Ake Malmström, *The System of Legal Systems: Notes on a Problem of Classification in Comparative Law*, 13 *SCANDINAVIAN STUDIES IN LAW* 129, 148 (1969).

65. See Nora V. Demleitner, *Combating Legal Ethnocentrism: Comparative Law Sets Boundaries*, 31 *ARIZ. ST. L. J.* 737, 748-749 (1999).

66. See JAN SMITS, *THE MAKING OF EUROPEAN PRIVATE LAW: TOWARDS A IUS COMMUNE EUROPAEUM AS A MIXED LEGAL SYSTEM* (2002); see also Jan Smits, *Introduction: Mixed Legal Systems and European Private Law*, in *THE CONTRIBUTION OF MIXED LEGAL SYSTEMS TO EUROPEAN PRIVATE LAW* (Jan Smits ed., 2001); see also Hein Kötz, *The Value of Mixed Legal Systems*, 78 *TUL. L. REV.* 435 (2003).

67. See Vernon Palmer, *Mixed Legal Systems . . . and the Myth of Pure Laws*, 67 *LA. L. REV.* 1205, 1211 (2007).

68. Du Plessis, in REIMANN & ZIMMERMANN, *supra* note 63, at 481.

69. ‘Mixed jurists,’ those working within or on mixed systems, may be, as a result, especially sensitive to the hybridity of all traditions. See Esin Öricü, *A*

difficulties remain in determining “how mixed a mixed system must be.”<sup>70</sup> Inevitably, classification of a tradition as mixed—or indeed ‘pure’—is subjective. It is also fundamentally historical. The transition from considerable legal hybridity to greater legal unity, largely occurring in the nineteenth century, also effectively created the modern distinction between ‘pure’ and ‘mixed’ legal traditions.<sup>71</sup> There remains, however, a meaningful division between the identification of past and present hybrids. Four decades ago, Joseph McKnight distinguished “between what may be termed mixed and that which has already been blended to an extent that origins of rules are lost in ordinary legal practice. The distinction is therefore at once a practical and a psychological one. . . .”<sup>72</sup> While the dividing line between these might be better seen as a fuzzy border between implicit and explicit mixes, it is nevertheless a significant distinction.

Discussion of mixed systems can be confusing. The topic is complex and the vocabulary of ‘mixture’ is “basically an accident of history.”<sup>73</sup> The classification of jurisdictions, explicitly mixed or

---

*General View of “Legal Families” and of “Mixing Systems”, in ÖRÜCÜ & NELKEN, supra note 56, at 169-187.*

70. Ignazio Castellucci, *How Mixed Must a Mixed System be?*, 12 ELEC. J. COMP. L. (May 2008), available at <http://www.ejcl.org/121/art121-4.pdf> (Last visited November 9, 2011). See also Örüçü, supra note 46.

71. This is the “hidden temporal dimension” in the categorization of mixed traditions. Patrick Glenn, *Quebec: Mixité and Monism*, in ÖRÜCÜ ET AL., supra note 46, at 1.

72. Joseph McKnight, *Some Historical Observations on Mixed Systems of Law*, 22 JURID. REV. 177, 186 (1977).

73. Vernon Palmer, *Mixed Jurisdictions*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 467 (Jan Smits ed., 2006) (referring to mixed jurisdictions). In two articles, Palmer has traced the genealogy of this terminology. See Vernon Palmer, *Two Rival Theories of Mixed Legal Systems*, in MIXED LEGAL SYSTEMS AT NEW FRONTIERS (Esin Örüçü ed., 2010). See also Vernon Palmer, *Quebec and Her Sisters in the Third Legal Family*, 54 MCGILL L. J. 321 (2009). Note that the former is also available in (2008) 3 J. COMP. L. 7 and (2008) 12 ELEC. J. COMP. L., available at <http://www.ejcl.org/121/abs121-16.html> (Last visited November 9, 2011). See also Kenneth G.C. Reid, *The Idea of Mixed Legal Systems*, 78 TUL. L. REV. 7 (2003).

otherwise, remains subjective.<sup>74</sup> In current research, ‘*mixed legal systems*’ is generally used for those jurisdictions that contain significant and explicitly segregated elements of different pan-national legal traditions.<sup>75</sup> It remains a residual, catch-all category for those that cannot be assigned elsewhere and can cover any mix, whether Western or non-Western. ‘*Mixed jurisdictions*’ may sometimes be used in this general manner or for *any* mixture of Anglo-American and continental laws.<sup>76</sup> It is most often, however, applied to a narrower subset of Western mixes that dominate scholarship.<sup>77</sup> Here, ‘mixed jurisdictions’ refers to situations in which (i) continental laws are “overlaid” or “suffused” with Anglo-American laws later in time<sup>78</sup> or (ii) continental private law is joined to Anglo-American public and criminal law. For

---

74. PALMER (2001), *supra* note 6, at 17 and Palmer (2006), *supra* note 73, at 468.

75. For example, a list prepared and posted online by the University of Ottawa, uses ‘mixed legal systems’ to cover various collections of ‘civil law,’ ‘common law,’ ‘customary law,’ ‘Muslim law,’ and ‘Jewish law.’ *Mixed Legal Systems*, University of Ottawa, <http://www.juriglobe.ca/eng/sys-juri/class-poli/sys-mixtes.php> (Last visited November 9, 2011). See generally, *Classification of Legal Systems and Corresponding Political Entities*, University of Ottawa, <http://www.juriglobe.ca/eng/sys-juri/index-syst.php> (Last visited November 9, 2011).

76. See T.B. Smith, *Mixed Jurisdictions*, in 6 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW (F.H. Lawson ed., 1974), 2-230; T.B. Smith, *The Preservation of the Civilian Tradition in “Mixed Jurisdictions,”* in CIVIL LAW IN THE MODERN WORLD 5 (Athanasios N. Yiannopoulos ed., 1965); Robin Evans-Jones, *Receptions of Law, Mixed Legal Systems and the Myth of the Genius of Scots Private Law*, 114 L. Q. REV. 228 (1998). By this latter definition, however, seemingly pure Anglo-American jurisdictions might be classified as mixed given their past borrowing from pan-European legal traditions. See Seán Patrick Donlan, *All this Together Make Up Our Common Law: Legal Hybridity in England and Ireland, 1704-1804*, in ÖRÜCÜ (2010), *supra* note 73.

77. “Facetiously, one might therefore define a mixed jurisdiction as a place where debate over the subject takes place.” William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 680 n.3 (2000).

78. See Smith (1965), *supra* note 76, at 5; Walton, *supra* note 4, at 1. In Israel, Anglo-American law was overlaid with continental law rather than the other way around. See Stephen Goldstein, *Israel*, in PALMER (2001), *supra* note 6, at 448-468.



historical reasons, the first has usually resulted in the second. The so-called ‘classical mixed jurisdictions’ are roughly the same, referring to specific jurisdictions—Louisiana, Puerto Rico, Quebec, Scotland, and South Africa—on which a scholarly critical mass has long existed. This terminological plasticity arguably impedes more accurate classification and effective communication.<sup>79</sup> For example, in an important essay on “The idea of *mixed legal systems*,” the Channel Islands, Cyprus, and Malta are each described as ‘mixed jurisdictions.’<sup>80</sup> In fact, each is quite distinct, both from one another and the ‘classical mixed jurisdictions.’<sup>81</sup> Non-Western mixed systems—Cameroon, Indonesia, the United Arab Emirates, etc—are still more diverse.

A decade ago, Vernon Palmer added another term with the publication of *Mixed Jurisdictions Worldwide: The Third Legal Family* (2001). A native Louisianan, he emphasized the degree to which the systems discussed in his work shared “profound generalizable resemblances.”<sup>82</sup> The work included reports on Israel, Louisiana, Quebec, the Philippines, Puerto Rico, Scotland,

---

79. See Donlan (2010), *supra* note 1.

80. Reid, *supra* note 73, at 7 n.1 (2003). See also George L. Gretton & Kenneth G.C. Reid, *The Civil Law Tradition: Some Thoughts from North of the Tweed*, 11 JERSEY & GUERNSEY L. REV. (2007), available at [www.jerseylaw.je/Publications/jerseylawreview/Oct07/JLR0710\\_Gretton.aspx](http://www.jerseylaw.je/Publications/jerseylawreview/Oct07/JLR0710_Gretton.aspx) (Last visited November 9, 2011).

81. The legal tradition of the Channel Islands combines Norman ‘Germanic’ folklaw with the pan-European *ius commune*. This is, in fact, true for *all* of Western Europe. But its legal ideas and institutions also reflect both significant English influence and post-*Code civil* borrowings. In contrast to the classical mixed jurisdictions, Maltese criminal law combines both Anglo-American and continental law at both the substantive and procedural levels. Its civil procedures also reflect the investigative traditions of the continent. Cyprus, for example, mixes Anglo-American private law with continental public and criminal law. Symeon C. Symeonides, *The Mixed Legal System of the Republic of Cyprus*, 78 TUL. L. REV. 441 (2003).

82. PALMER (2001), *supra* note 6, at 4. See also Seán Patrick Donlan, *A Thing Without Cohesion of Parts: The Professional and Pedagogical Contribution of Mixed Jurisdictions*, 38 IRISH JURIST 383 (2003) (reviewing VERNON VALENTINE PALMER, *MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY* (2001) and JAN SMITS, *THE CONTRIBUTION OF MIXED LEGAL SYSTEMS TO EUROPEAN PRIVATE LAW* (2002)).

and South Africa.<sup>83</sup> Palmer suggests that the jurisdictions can be treated collectively as a distinctive ‘third legal family’ between the well-known Anglo-American and continental legal ‘families.’<sup>84</sup> In addition to combining continental private law with Anglo-American public and criminal law, he notes that in each of these jurisdictions Anglo-American law penetrates, to varying degrees, both (i) judicial institutions and procedures and (ii) substantive (private and commercial) law.<sup>85</sup> The former is significant; the latter varies in a reasonably common “pattern of penetration and resistance.”<sup>86</sup> Precedent in these jurisdictions falls somewhere between the parent traditions, “rais[ing] a defining issue in the quest for the ‘soul’ of the system.”<sup>87</sup> While Palmer, like other mixed jurists, uses different terms at different times to label these different jurisdictions, he sees the classical mixed jurisdictions and the third legal family as synonymous.<sup>88</sup> His classification can sometimes, however, marginalize elements, especially non-Western laws and customs, unique to a tradition that might otherwise exclude it from ‘third family’ gatherings: *e.g.*, the customary laws of South Africa, the Islamic law of the Philippines, and the religious laws of Israel.<sup>89</sup>

---

83. A footnote notes that “other of this type” include Botswana, Lesotho, Mauritius, Saint Lucia, the Seychelles, Sri Lanka, Swaziland, and Zimbabwe. PALMER (2001), *supra* note 6, at 4.

84. See PALMER (2001), *supra* note 6, at 7-10 and Palmer (2006), *supra* note 73, at 467-468.

85. Indeed, his inclusion of public law was an important shift from the traditional narrow focus of comparative law on private law. PALMER (2001), *supra* note 6, at 6 n.8.

86. PALMER (2001), *supra* note 6, at 57. While property law is largely unaffected, Anglo-American influence on obligations, especially tort, is more significant. Succession law is somewhat resistant, though pressure for freedom of testation has altered the laws of some jurisdictions. For practical reasons, Anglo-American commercial laws were also adopted with little resistance. *Id.*, 53-59, 66-76 and Palmer (2006), *supra* note 73, at 471-472, 474. See Palmer’s detailed synopsis in Palmer (2009), *supra* note 73, at 343-344.

87. PALMER (2001), *supra* note 6, at 45. See *id.*, 44-46. See also Palmer (2006), *supra* note 73, at 471.

88. It might be better to see the latter as a subset of the former with specific traits.

89. But note “The Stellenbosch Papers” generated in a colloquium on “Mixed Jurisdictions as Models? Perspectives from Southern Africa and

But Palmer is central to the study of mixed systems. This is, in part, due to his role as the driving force in the establishment of the *World Society of Mixed Jurisdiction Jurists* in 2002. But great strength of his work has been to promote communication among, and considerable scholarship on, mixed traditions. And Palmer's *Mixed Jurisdictions Worldwide* is an especially important resource for the Mediterranean Project. The work is, as a result of his method, both far more general and richer in detail than that of other mixed jurists. His approach was broadly familiar to comparatists. He collected jurisdictional reports based on a questionnaire he produced. The study was collaborative, involving specialists in the respective jurisdictions supplemented by his own cross-cultural comparison.<sup>90</sup> Palmer's report categories included:

- the founding of the system
- the magistrates and the courts
- judicial methodology
- statutory interpretation
- mercantile law
- procedure and evidence
- the judicial reception of common law
- the emergence of new legal creations
- purists, pollutionists, and pragmatists
- the linguistic factor<sup>91</sup>

Using these categories, he was able to go into considerably more detail than earlier discussions of mixed system. It is an obvious model for our work. And even within the intentionally juridical limits of his questionnaire, his analysis revealed the importance not only of history, but of culture, to the development and unique character of the mixed traditions studied.<sup>92</sup>

---

Beyond", collected in 25 TUL. EUR. & CIV. L.F. 1-209 (2010) and introduced by Palmer.

90. PALMER (2001), *supra* note 6, at 15-16.

91. The expanded questionnaire is included as 'Appendix A' in PALMER (2001), *supra* note 6, at 471-478. A report bibliography was also included.

92. This is especially true with respect to differences in the source and living languages of the law in the jurisdictions. PALMER (2001), *supra* note 6, at 41-44 and Palmer (2006), *supra* note 73, at 470. *See also* Roger K. Ward, *The*

Equally important to the scholarship on mixed systems and our project is the work of Esin Örüçü.<sup>93</sup> Her writings, perhaps especially her “Mixed and Mixing Systems: A Conceptual Search,” may be the most sophisticated general analyses of legal hybridity.<sup>94</sup> A native of Turkey, she has consistently argued for an ‘expansion’ of research beyond the classical mixed jurisdictions to more exotic hybrids.<sup>95</sup> She has been especially critical of the traditional legal families of comparative law.<sup>96</sup> Instead, Örüçü has 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.”<sup>97</sup> She has also employed an especially colorful vocabulary and useful models. She has used, for example, culinary terms to describe the ways in which laws might mix:

---

*French Language in Louisiana Law and Legal Education: A Requiem*, 57 LA. L. REV. 1283 (1997). On culture, see Daniel Visser, *Cultural Forces in the Making of Mixed Legal Systems*, 78 TUL. L. REV. 41 (2003) and Nir Kedar, *Law, Culture and Civil Codification in a Mixed Legal System*, 22 CAN. J.L. & SOC’Y 177 (2007).

93. Her scholarship on Turkey is especially important to our work. See especially Esin Örüçü, *Turkey: Change under Pressure*, in ÖRÜCÜ ET AL., *supra* note 46 at 89; see also Esin Örüçü, *Turkey’s Synthetic Legal System and Her Indigenous Socio-Culture(s) in a “Covert” Mix*, in ÖRÜCÜ (2010), *supra* note 73, at 150.

94. Örüçü, *supra* note 46, at 335. The title—*Mixed and Mixing Systems*—underscores the dynamic, on-going nature of hybridity.

95. Esin Örüçü, *What is a Mixed Legal System: Exclusion or Expansion?*, in ÖRÜCÜ (2010), *supra* note 73. Earlier versions of this article can be found in 3 J. COMP. L. (2008) and in 12:1 ELEC. J. COMP. L. (2008) available at [www.ejcl.org/121/abs121-15.html](http://www.ejcl.org/121/abs121-15.html) (Last visited November 9, 2011).

96. Örüçü, *supra* note 69 at 177. See also Sue Farran, *Scots Law: A System in Search of a Family*, 61 N. IRELAND LEGAL Q. 311 (2010). On the rise of modern comparative taxonomy, see Mariana Pargendler, *The Rise and Decline of Legal Families*, 60 AM. J. COMP. L. (2012).

97. See Esin Örüçü, *Family Trees for Legal Systems: Towards a Contemporary Approach*, in EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW 363, 375 (Mark van Hoecke ed., 2004); see also H. Patrick Glenn, *Comparative Legal Families and Comparative Legal Traditions*, in REIMANN & ZIMMERMANN, *supra* note 50, at 425.

At times, elements from socio-culturally similar and legal-culturally different legal systems come together forming ‘mixed jurisdictions’ of the already mentioned “simple” kind, [*i.e.*] ‘mixing bowls,’ the ingredients being still in the process of blending but in need of further processing if a “puree” is to be produced . . . Next come the “complex” mixed systems, where the elements are both socio-culturally and legal-culturally different . . . [*i.e.*, t]he “Italian salad bowl,” where, although the salad dressing covers the salad, it is easy to detect the individual ingredients clearly through the sides of the glass bowl . . . Then, there is . . . the “English salad plate,” the ingredients sitting separately, far apart on a flat plate with a blob of mayonnaise to the side into which the different ingredients can be dipped before consumption.<sup>98</sup>

Indeed, Öricü has repeatedly argued that “[i]nstances of mixing are complicated. They may be overt or covert, structured or unstructured, complex or simple, blended or unblended.”<sup>99</sup> In her most recent edited collection, *Mixed Legal Systems at New Frontiers*, she has written that “it is invaluable to consider legal systems, designated as 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.”<sup>100</sup> While this might seem to suggest a focus limited to legal hybridity or state legal pluralism, she has also argued that “comparative law studies should extend to norms of non-state law, folk law and customary law, remembering that the law is global, national and local.”<sup>101</sup> Combining these ideas of expanding research on legal

---

98. See Öricü, *supra* note 69, at 180; see also Öricü, *supra* note 54, at 10-12.

99. Öricü, *supra* note 95, at 67. As noted, Öricü has also written about the diffusion of law.

100. See Esin Öricü, *General Introduction*, in ÖRÜCÜ (2010), *supra* note 73, at 7; see also Öricü, *supra* note 46, at 342, 350-351.

101. See Esin Öricü, *Developing Comparative Law*, in ÖRÜCÜ & NELKEN, *supra* note 56, at 60-61. “In the context of ‘legal pluralism,’ law goes far beyond

hybrids with extending comparative study into other norms is a challenging, but promising, approach for future study. It is at the center of our project.

Even limiting ourselves to legal rather than normative hybridity, there remain still deeper complexities. First, all legal traditions are hybrids. There are also, however, a number of other approaches to law that underline the complexity of the most ordinary law and legal systems. One commonly-acknowledged type of complexity can be discovered in the distance between formal law and its actual application. Roscoe Pound famously formulated this as the gap between the ‘*law in books*’ and the ‘*law in action*.’<sup>102</sup> If this is now a standard bromide in legal scholarship, Rodolfo Sacco’s theory of ‘*legal formants*’ arguably goes still further, underscoring the considerable diversity in the interpretation of state laws, a diversity that was frequently rooted in practical, professional differences among those interpreting the law.<sup>103</sup> Similarly, the study of ‘*legal polycentricity*’ stresses legal diversity within or internal to state law, especially with regard to sources.<sup>104</sup> Other varieties of post-modern and critical thinking provide many of the same conclusions. In each of these instances, the insistence on context significantly problematizes neat divisions between legal families, portrayed as closed and discrete ‘*systems*.’

#### IV. NORMATIVE HYBRIDITY

Örücü’s interest in non-state law reflects a wider “ethos of pluralism” in legal and social science scholarship.<sup>105</sup> This ethos reflects the increasingly explicit complexity of contemporary law and legal systems at the global, national, and sub-national levels. Both within states and without, it is difficult to ignore the

---

the so-called ‘official law, and extends to multi-layers o systems. Thus, today, ‘law’ spans the range of positive law and then moves to non-state law, rules, custom and tradition.” *Id.*, at 60. *See also* Twining, *supra* note 56, at 69-89.

102. Pound, *supra* note 23.

103. Sacco, *supra* note 23.

104. PETERSEN & ZAHLE, *supra* note 23 and HIROVONEN, *supra* note 23.

105. Margaret Davies, *The Ethos of Pluralism*, 27 SYDNEY L. REV. 87, 112 (2005).

proliferation of laws and the recognition of norms over the course of the last half-century. Social scientists, in particular anthropologists and sociologists, have long noted the frequently fuzzy divisions between state and non-state legalities.<sup>106</sup> The coexistence of both is, John Griffiths argued, “the omnipresent, normal situation in human society.”<sup>107</sup> Social scientists and their allies in the legal academy have provided very sophisticated analyses, often rooted in empirical study, of these relationships. In a classic of the genre, Sally Falk Moore has described these plural “legal” orders as “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.”<sup>108</sup> A few comparatists have also embraced (what I’ve called) hybridity, most notably Patrick Glenn and Werner Menski.<sup>109</sup> Complementing in many respects the former’s analysis, Menski, a comparatist and social geographer, has “place[d] legal pluralism . . . confidently into the mainstream study of comparative law” and “emphasize[d] the need for strengthening socio-legal approaches.”<sup>110</sup>

In fact, the growth of scholarship on hybridity has brought an ever-expanding catalogue of ‘pluralist’ approaches. The first wave of social science research, the so-called ‘classical legal

---

106. Masaji Chiba, *Other Phases of Legal Pluralism in the Contemporary World*, 11 *RATIO JURIS* 228 (1998), available at <http://onlinelibrary.wiley.com/doi/10.1111/1467-9337.00088/pdf> (Last visited November 9, 2011).

107. John Griffiths, *What is Legal Pluralism*, in 24 *J. LEGAL PLURALISM* 39 (1986). Note his shift to the language of ‘normative pluralism’ in *The Idea of Sociology of Law and its Relation to Law and Society*, in 8 *LAW AND SOCIOLOGY: CURRENT LEGAL ISSUES* 49, 63-64 (Michael Freeman ed., 2005).

108. Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Field of Study*, 7 *L. & SOC’Y REV.* 719, 720 (1973).

109. See also MATTEI ET AL., *supra* note 47 and Graziadei, *supra* note 50.

110. WERNER MENSKI, *COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEMS OF AFRICA AND ASIA* 16 (2d ed. 2006). “Within a global framework for the comparative study of law and legal systems, 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.” *Id.* at 185-186.

pluralism,' focused on non-Western, post-colonial communities.<sup>111</sup> It often served as a critique of Western colonialism and hegemony. An important distinction is also made between (i) 'weak' or 'state legal pluralism' in which plural legal orders are effectively part of the wider state systems and (ii) 'strong' or 'deep legal pluralism' in which the focus includes both state laws and significant non-state norms.<sup>112</sup> Understandably, lawyers, including comparatists, are often more interested in the former than the latter.<sup>113</sup> More recently, research in so-called 'new legal pluralism' has included case studies of hybridity within the West, suggesting the continuing importance of non-state norms here.<sup>114</sup> These works have suggested, that "[i]n most contexts, law is not central to the maintenance of social order."<sup>115</sup> And, if the "specifics are not yet clear," one element of a third pluralist paradigm—after 'classical' and 'new' legal pluralism—is "global legal pluralism."<sup>116</sup> This encompasses international law, human rights, and, more problematically, involves the assertion of an increasingly important

---

111. There were exceptions. In addition to Ehrlich's work, some early classics of "legal pluralism" were not limited to colonial societies. See e.g. GEORGES GURVITCH, *SOCIOLOGY OF LAW* (1947) and LEOPOLD POSPISIL, *ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY* (1971).

112. See e.g. Gordon Woodman, *The Idea of Legal Pluralism*, in DUPRET, *supra* note 24, at 5.

113. In the former, non-state normative orders exist with the approval of, or at the sufferance of, the state; the latter refers to non-state normative orders that exist despite the state. The lawyer's distinction might be that between *intra* or *praeter legem* on the one hand and *contra legem* on the other. "[W]eak' pluralism is no more than a plural arrangement in a diversified legal system whose basic ideology remains centralist." Menski, *supra* note 110, at 116.

114. Merry, *supra* note 37, at 872 et seq. (This has sometimes been linked to research on 'social norms' linked both to political science and to the "law and economics" movement.); see also William K. Jones, *A Theory of Social Norms*, 1994 U. ILL. L. REV. 545 (1994) and ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000).

115. ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 280 (1991).

116. See Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007); Ralf Michaels, *Global Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 243 (2009). See also Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society*, in *GLOBAL LAW WITHOUT A STATE* (Gunther Teubner ed., 1996); Gunther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism*, 13 CARDOZO L. REV. 1443 (1991-1992).



commercial ‘law’ or *lex mercatoria* created by non-state actors. These are often linked to debates on the character of globalization. Perhaps more useful to our project is ‘critical legal pluralism.’ Here, rather than “reify[ing] ‘norm-generating communities’ as surrogates for the State,” the focus is on the role of individuals in “generating normativity.”<sup>117</sup> Rather than being the product of formal legislation or even informal custom, individuals are themselves the site of law or norm creation in a complex and fluid normative web.<sup>118</sup> In a similar manner, the ‘post-modern legal pluralism’ of Boaventura de Sousa Santos details a “conception of different legal spaces superimposed, interpenetrated and mixed in our minds, as much as in our actions.”<sup>119</sup> He insists that the modern situation is one of the thick “interlegality” of both laws and norms.<sup>120</sup>

In addition to the numerous internal debates on legal pluralism in the social sciences, broadening the mission of comparative law to include the study of both legal and normative hybridity has also encountered opposition. Among mixed jurists, Palmer has expressed concerns about the dangers of expanding the concept of ‘mixity’ to include the complexities of legal pluralism.<sup>121</sup> While he has recognized the virtues of a functionalist or “factual approach” to the study of legal and non-state norms, Palmer has significant anxieties about the implications of the study

---

117. Martha-Marie Kleinhans & Roderick Macdonald, *What is a Critical Legal Pluralism?* 12 CAN. J.L. SOC’Y 25, 35, 38 (1997). See also Jacques Vanderlinden, *Return to Legal Pluralism: Twenty Years Later*, J. LEGAL PLURALISM 149, 151-152 (1989).

118. Cf. Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 11 (1983) (arguing “that the creation of legal meaning—‘jurisgenesis’—takes place always through an essentially cultural medium”).

119. Boaventura De Sousa Santos, *Law: A Map of Misreading. Toward a Postmodern Conception of Law*, 14 J.L. & SOC’Y 279, 297-298 (1987); see also BOAVENTURA DE SOUSA SANTOS, *TOWARDS A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION* (2nd ed. 2002); Franz von Benda-Beckmann & Keebet von Benda-Beckmann, *The Dynamics of Change and Continuity in Plural Legal Orders*, 53-54 J. LEGAL PLURALISM 1, 10 (2006).

120. De Sousa Santos (1987), *supra* note 119, at 298.

121. Note Palmer’s critical comment on the “eclectic list of systems”—including Australia, Algeria, and the European Union—discussed in Palmer (2009), *supra* note 73, at 333 n.43.

of hybridity on comparative law, especially in the classification of legal traditions. In discussing mixed systems, he has expressed concern about the loss of precision in expanding mixed scholarship to more complex varieties of legal hybridity or *state* legal pluralism:

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 . . . <sup>122</sup>

Palmer acknowledges the importance of expanding our understanding of how hybrid traditions are generated, but remains cautious:

Attempting to reclassify and reorder the mixed legal systems of the world in accordance with the information supplied by historical pluralism, ethnic pluralism, and transnational legal pluralism is the next daunting task of comparative law. If it can be accomplished, it would revolutionize the legal universe in a way comparable to the Copernican

---

122. Palmer (2009), *supra* note 73, at 333. “Pluralism,” he writes, “has yet to present a taxonomy that differentiates and arranges the hybrids into useful groupings.” *Id.* at 335. Kenny Anthony has also noted that “in a mixed system, unlike a plural system, there is just one set of rules for every situation.” *The Identification and Classification of Mixed Systems of Law*, in *COMMONWEALTH CARIBBEAN LEGAL STUDIES: A VOLUME OF ESSAYS TO COMMEMORATE THE 21ST ANNIVERSARY OF THE FACULTY OF LAW OF THE UNIVERSITY OF THE WEST INDIES* 194 (Gilbert Kodilinye & P.K. Menon eds. 1992); *The Viability of the Civilist Tradition in St Lucia: A Tentative Appraisal*, in *ESSAYS ON THE CIVIL CODES OF QUÉBEC AND ST. LUCIA* (Raymond Landry & Ernest Caparros eds. 1985).

revolution on the old Ptolemaic system of astronomy.

He adds, however, that:

We are far from that at the present time. So far pluralism is an insight suggesting that the playing cards need to be reshuffled; it has yet to be shown how the cards can be re-dealt in a rational and coherent way.<sup>123</sup>

Palmer is right, of course, to note these very real difficulties.<sup>124</sup> It is, after all, his focus on selected mixtures that has proven most constructive in the study of mixed systems.

But legal pluralists and their allies are not attempting to create new classifications, but to provide instead a conceptual lexicon and analytical models that allow for the unique characteristics of legal-normative orders (or the intersection of such orders).<sup>125</sup> And Palmer's 'pluralist challenge' may be met by the methodological pluralism he has suggested in other writings. He has written "that there is not, and indeed cannot be, a single exclusive method that comparative law research should follow."<sup>126</sup> Comparative law must, in fact, "be accessible and its methods must be flexible."<sup>127</sup> For example, one response to this pluralist challenge is to look to alternative approaches to taxonomy. Both (i)

---

123. Palmer (2010), *supra* note 73, at 48. "But I predict that if this task is one day accomplished, it will be done by a mixed jurisdiction jurist, for he or she knows best that there is a need, and knows best the means to achieve the goal." *Id.* Cf. Örüciü, *supra* note 100, at 7 (including Örüciü's desire for a "workable grid").

124. Jane Matthews Glenn has expressed a similar concern that including "[m]ixity between formal and informal law" in discussions of mixed jurisdictions "runs the risk of extending the notion beyond recognition." Jane Matthews Glenn, *Mixed Jurisdictions in the Commonwealth Caribbean: Mixing, Unmixing, Remixing*, in ÖRÜCÜ, *supra* note 45, at 76, 76. The article is also available in (2008) 3 J. COMP. L. 53 and (2008) 12 ELEC. J. COMP. L., available at <http://www.ejcl.org/121/abs121-10.html> (Last visited November 9, 2011).

125. It is also "first and foremost a scheme of comprehension, and not a moral or political theory." Croce, *supra* note 29, at 38.

126. Vernon Palmer, *From Lerotholi to Lando: Some Examples of Comparative Law Methodology*, 53 AM. J. COMP. L. 261, 290 (2005).

127. *Id.*

Ugo Mattei and (ii) Marc van Hoecke and Marc Warrington have recently suggested new models of comparative classification and corresponding paths to research.<sup>128</sup> The legal philosopher Kaarlo Tuori has suggested classifying law according to its “surface level,” “legal culture,” or “deep structure.”<sup>129</sup> Interestingly, Tuori borrows from, among others, Ferdinand Braudel. Reflecting the varying rates of historical change detailed in Braudel’s magisterial work, *The Mediterranean and the Mediterranean world in the age of Philip II* (originally published in French in 1949), Tuori suggests that:

Even within the law, approached in its symbolic normative aspect, we can distinguish between levels obeying different historical times. At the *surface level*, change is an everyday phenomenon, at the level of the *legal culture* the pace of change slows down, and the most inert level in its variation is the *deep structure*, which represents the *long durée* of the law.<sup>130</sup>

Each of these approaches reflects a move away from the narrow observation of black-letter law. Other comparatists have begun to combine these different methods in novel and productive ways.<sup>131</sup>

---

128. See Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World’s Legal Systems*, 45 AM. J. COMP. L. 5 (1997); Mark van Hoecke & Mark Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, 47 INT’L & COMP. L.Q. 495 (1998). See also James A. Whitman, *Consumerism versus Producerism: A Study in Comparative Law*, 117 YALE L. J. 340 (2007).

129. Kaarlo Tuori, *Towards a Multi-layered View of Modern Law*, in JUSTICE, MORALITY AND SOCIETY: A TRIBUTE TO ALEKSANDER PECZENIK ON THE OCCASION OF THIS 60TH BIRTHDAY 433 (Aulis Aarnio, Robert Alexy & Gunnar Begholz eds., 1997); see also the discussion in chapter 6 of KAARLO TUORI, CRITICAL LEGAL POSITIVISM (2002).

130. *Id.* at 150. See also Kjell Å. Modéer, *Mixed Legal Systems and Coloniality: Parts of the Construct of a Global Legal Culture*, in ASIA AND EUROPE IN GLOBALISATION: CONTINENTS, REGIONS AND NATIONS 14 (Göran Therborn & Habibul Haque Khondker eds. 2006).

131. Lukas Heckendorn-Urscheler, *Multidimensional Hybridity: Nepali Law from a Comparative Perspective*, in CASHIN-RITAINE ET AL., *supra* note 1, at 55 (combining the traditional ‘legal families’ approach, Glenn’s ‘legal traditions,’ and Mattei’s ‘three patterns of law’).

Alternatively, of course, we might resist the taxonomic urge in favor of generating additional research. Aware that the two cannot be easily separated, we might instead “research first, categorize later.”<sup>132</sup>

Our project takes up this task of researching *both* legal and normative hybridity, *i.e.* both ‘state’ and ‘deep’ legal pluralism. We will do so by combining the concentrated research, comparative method, and specific results of Palmer with the vivid, creative conceptual vocabulary of Örüçü and the rich resources of the social sciences. Admittedly, a shift to studying both ‘official’ and ‘unofficial’ legalities significantly complicates the work of comparative law, drawing jurists into debates they typically avoid and for which they are arguably ill-prepared. Jurists and social scientists not only define ‘law’ differently, but also often adopt very different methods in their research. In a recent discussion of law and anthropology, for example, Thomas Bennett usefully outlined “[i]n very general terms, the preferences of each discipline . . .”

	COMPARATIVE LAW	LEGAL ANTHROPOLOGY
<i>Perspective</i>	◦Macro ◦Lawyer’s	◦Micro ◦The subject’s
<i>Subject matter of research</i>	◦Formal laws ◦Rules and concepts	◦All normative orders ◦Social contexts
<i>Method</i>	◦Theoretical and dogmatic	◦Participant observation
<i>Ultimate concern</i>	◦System	◦Social result <sup>133</sup>

There are obviously more complex approaches between these two ideal types. They remain, however, meaningful disciplinary distinctions related to the respective goals of legal and social

132. Ignazio Castellucci, in CASHIN-RITAINE ET AL., *supra* note 1, at 75. In conversation, Castellucci has also noted that “only two things in life are certain: death and taxonomy.” We are, it is true, classifying animals. *See also* Giovanni Marini, *Foreword: Legal Traditions—A Critical Appraisal*, 2 COMP. L. REV. 1 (2011), available at [www.comparativelawreview.com/ojs/index.php/CoLR/article/view/15/19](http://www.comparativelawreview.com/ojs/index.php/CoLR/article/view/15/19) (Last visited November 9, 2011).

133. T.W. Bennett, *Legal Anthropology and Comparative Law: A Disciplinary Compromise*, 21 STELLENBOSCH L. REV. 1, 16-19 (2010).

science research and pedagogy. The prescriptive purposes of state laws, either for social ordering or legal practice, are quite different from the comparative luxury of the descriptive research of social scientists. Tamanaha has created a similar table comparing “legal versus social scientific perspectives:”

<i>Concept of law</i>	FIRST CATEGORY—LIVED NORMS	SECOND CATEGORY—ENFORCED NORMS
<i>Phase</i>	◦Patterned or regular conduct	◦Social reaction to disruption of regular conduct
<i>‘Legal’ Mechanism</i>	◦Complex of social obligations	◦Institutionally imposed sanction
<i>Sociological Studies</i>	◦Internal control—conformity	◦External control—response to deviance
<i>Sociological Mechanism</i>	◦Socialization	◦Coercive application of power
<i>Effective Moment</i>	◦Proactive (shaping conduct)	◦Reactive (following disruptive conduct) <sup>134</sup>

These disciplinary differences reflect not only distinctive training and research, but mirror the distinction between legal and normative hybridity, between “(state-)enforced” and “lived” norms. Combining the study of both will require a rarely exhibited interdisciplinary spirit.<sup>135</sup> It will demand considerable collaboration and dialogue as well as translation between legal and social science vocabularies.<sup>136</sup> We are optimistic about both the practicalities and the possibilities of our project. As Öricü has written, “[i]f comparatists and regionalists work more closely in the future, the outcome will prove to be extremely beneficial to both and to legal scholarship.”<sup>137</sup>

134. Brian Z. Tamanaha, *An Analytical Map of Social Scientific Approaches to the Concept of Law*, 15 OXFORD J. LEGAL STUD. 501, 523 (1995).

135. William Twining, *Law and Anthropology: A Case Study in Inter-Disciplinary Collaboration*, 7 L. & SOC’Y REV. 561 (1973).

136. See also David Nelken, *Can Law Learn From Social Science?*, 35 ISR. L. REV. 205 (2001).

137. Esin Öricü, *The Boundaries of Unity: Mixed Systems in Action*, J. COMP. L. 1, 6 (2008).

While there are real obstacles to such research, several writers have recommended that the study of pluralism or hybridity might be the ideal subject on which jurists and social scientists can collaborate. Annelise Riles has suggested, for example, a “new rapprochement” was occurring between comparatists and socio-legal jurists, not least because of legal pluralism.<sup>138</sup> Roger Cotterrell has similarly written that “comparative law and legal sociology are interdependent and . . . their central, most general and most ambitious scientific projects—to understand law in its development and its variety as an aspect of social life—are identical.”<sup>139</sup> His suggestion that “a genuinely pluralist approach” to law involves shifting the research focus away from the state to communities might also be of particular use to our work.<sup>140</sup> With others, Cotterrell has specifically noted that scholarship on comparative law and legal culture is also promising.<sup>141</sup> Indeed, it points away from positivist understandings of law and “towards a legal pluralist understanding of the scope of law that is close to that of many legal sociologists and legal anthropologists.”<sup>142</sup> Indeed, as Nelken notes:

---

138. Annelise Riles, *Comparative Law and Socio-Legal Studies*, in REIMANN & ZIMMERMANN, *supra* note 50, at 777. *See id.*, at 805-806. *See* Bennett, *supra* note 133, at 25.

139. ROGER COTTERRELL, *LAW, CULTURE AND SOCIETY: LEGAL IDEAS IN THE MIRROR OF SOCIAL THEORY* 129 (2006); *see* Roger Cotterrell, *Comparatists and Sociology*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 135 (Pierre Legrand & Roderick Munday eds., 2003); *see also* Nelken, *supra* note 51, at 22. For an earlier attempt, *see* JEROME HALL, *COMPARATIVE LAW AND SOCIAL THEORY* (1963) and Jerome Hall, *Comparative Law and Jurisprudence*, 16 *BUFF. L. REV.* 61 (1966).

140. Roger Cotterrell, *Transnational Communities and the Concept of Law*, 21 *RATIO JURIS* 1, 10 (2008). *See* particularly the types of legal pluralism (monistic, agnostic, statist, and genuinely pluralist) discussed in *id.*, at 8–10. *See also* Roger Cotterrell, *A Legal Concept of Community*, 12 *CAN. J.L. & SOC'Y* 75; *see also* ROGER COTTERRELL, *LAW'S COMMUNITY: LEGAL THEORY IN SOCIOLOGICAL PERSPECTIVE* (1995).

141. *See* COTTERRELL, *supra* note 138, at 81-82 and Roger Cotterrell, *The Concept of Legal Culture*, in *COMPARING LEGAL CULTURES* 13 (David Nelken ed., 1997).

142. Roger Cotterrell, *Comparative Law and Legal Culture*, in REIMANN & ZIMMERMANN, *supra* note 50, at 729; *see also* RENDEZVOUS OF EUROPEAN LEGAL CULTURES (Jørn Øyrehagen Sunde & Knut Einar Skodvin eds., 2010).

In employing the idea of legal culture in comparative exercises geared to exploring the similarities and differences amongst legal practices and legal worlds the aim is to go beyond the tired categories so often relied on in comparative law such as ‘families of law’ and incorporate that attention to the ‘law in action’ and ‘living law’ which is usually missing from comparative lawyers’ classifications and descriptions.<sup>143</sup>

Our project may appropriately be seen as a comparative study of both the ‘law in action’ and the ‘living law’ (as Ehrlich called it) in the Mediterranean.<sup>144</sup> This cultural approach to comparative law is promising. It may even be essential to any genuine understanding of normative ordering, whether of the state or society, in context.<sup>145</sup>

Acknowledging the ubiquity of hybridity has important consequences for both comparative law and for legal theory.<sup>146</sup> It undermines the dissection of plural and dynamic traditions into discrete, closed legal families or systems. It challenges legal

---

143. David Nelken, *Using the Concept of Legal Culture*, AUSTRALIAN J. LEGAL PHIL. 1 (2004). Note section II, “Legal Delay in Italy: A Case Study.” *Id.* at 11-26. See David Nelken, *Defining and Using the Concept of Legal Culture*, in ÖRÜCÜ & NELKEN, *supra* note 56.

144. In discussing Ehrlich, Nelken writes that “it may be helpful to distinguish developments in the study of law beyond the law (law other than that contained in statutes and judgments), law without the state (especially the coexistence of plural legal regimes), and order without the law (the implicit norms that make order possible).” David Nelkin, *Eugen Ehrlich, Living Law, and Plural Legalities*, 9 THEORETICAL INQUIRIES IN L. 443, 466 (2008). See David Nelken, *Law in Action or Living Law?: Back to the Beginning in Sociology of Law*, 4 LEGAL STUD. 157, 169 *et seq.* (1984). See also Mathias Hertogh, *A “European” Conception of a Legal Consciousness: Rediscovering Eugen Ehrlich*, 31 J.L. & SOC’Y 457 (2004).

145. In part, this is the recognition that law is “constituted by culture, and culture (in no small way) by law.” LAWRENCE ROSEN, *LAW AS CULTURE* xii (2006).

146. *Juris Diversitas*, with the Swiss Institute of Comparative Law, held a conference (21-22 October 2011) on the theme of “*The Concept of ‘Law’ in Context: Comparative Law, Legal Philosophy, & the Social Sciences.*” A collection of essays from that conference will be published in 2012.



nationalism, positivism, centralism, and monism.<sup>147</sup> Indeed, much of the scholarship of legal pluralism was rooted in a critique of state- and state law-centered analytical models.<sup>148</sup> This parallels legal theory, informed by legal history, which suggests that much of the legal and moral thought of the pre-modern era adopted, by necessity, a more complex view of human ordering.<sup>149</sup> Similarly, contemporary legal philosophers like Twining and Tamanaha—each with their own personal experiences with hybridity and links to the social sciences—have recently recognized the value, or necessity, of incorporating multiple sources of legal and normative authority into their analysis.<sup>150</sup> Twining, for example, has stressed the importance of moving beyond Euro-centric and state-centered legal theory in an age of globalization. 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 (*e.g.* international, regional) and non-state law (*e.g.* religious, transnational law, chthonic law, *i.e.* tradition/custom) and various forms of ‘soft law’<sup>151</sup>

---

147. Roderick Macdonald and David Sandomiershi extend this critique to “prescriptivism,” which is “the belief that law is a social fact existing outside and apart from those whose conduct it claims to regulate.” Roderick Macdonald & David Sandomiershi, *Against Nomopolies*, 57 N. IRELAND LEGAL Q. 610, 615 (2006).

148. Griffiths, *supra* note 107, at 39.

149. As Geoffrey Samuel notes, with admittedly different ends, “[t]he task of historical jurisprudence is not, then, to provide the basis for a philosophy of law. It is to provide insights into law as an object of knowledge.” Geoffrey Samuel, *Science, Law and History: Historical Jurisprudence and Modern Legal Theory*, 41 N. IRELAND LEGAL Q. 1, 3 (1990). See also Harold J. Berman, *The Historical Foundations of Law*, 54 EMORY L.J. 13 (2005) and Geoffrey MacCormack, *Historical Jurisprudence*, 5 LEGAL STUD. 256 (1985).

150. Twining was born, raised, and taught for some time in Africa; Tamanaha is a native of Hawaii and practiced law there and in Micronesia.

151. Twining, *supra* note 56, at 71. 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.” *Id.*

Although there are important differences between their approaches, Tamanaha has made similar arguments.<sup>152</sup> For both, state law is but one manifestation of normative ordering and the study of legal theory is closely linked to comparative law and socio-legal studies. And Twining and Tamanaha are not alone.<sup>153</sup> Such theoretical insights will inform our project. But it is hoped that the data generated by the project as well as the project's conclusions may also contribute to a more grounded philosophy of law and normative ordering.

#### V. CONCLUSION

In concluding, it is important to note that the legal traditions and normative orders that are the focus of the *Mediterranean Hybridity Project* are, by their nature, fluid and slippery, constantly in flux. Even their component parts are hybrids. As the anthropologist Brian Stross wrote in discussing 'hybrid' as a metaphor:

There are after all no 'pure' individuals, no 'pure' cultures, no 'pure' genres. All things are of necessity 'hybrid.' Of course we can construct them to be relatively 'pure,' and in fact we do so, which is precise how we manage to get (new) hybrids from purebreds that are (former) hybrids.<sup>154</sup>

This article has briefly sketched an outline of our attempt to capture the legal and normative complexity of the Mediterranean region. It may be too much, of course, to ask that scholars *as individuals* grasp both the theoretical writings and detailed case studies of both jurists and social scientists. But a collaborative, interdisciplinary project might successfully combine both theory

---

152. BRIAN TAMANAHA, *A GENERAL JURISPRUDENCE OF LAW AND SOCIETY* (2001). On Tamanaha, see William Twining, *A Post-Westphalian Conception of Law*, 37 *LAW & SOC'Y REV.* 199 (2003).

153. See, e.g., EMMANUEL MELISSARIS, *UBIQUITOUS LAW: LEGAL THEORY AND THE SPACE FOR LEGAL PLURALISM* (2009) and DETLEF VON DANIELS, *THE CONCEPT OF LAW FROM A TRANSNATIONAL PERSPECTIVE* (2010). See also MENSKI, *supra* note 110, at chapter three.

154. Stross, *supra* note 16, at 266-267.

and practice to produce new information and novel insights on both hybridity and diffusion. In attempting this, our project will combine three elements. First, the comparative method, concentrated research, and specific results of Professor Palmer on the classical mixed jurisdictions and the 'third legal family.' Second, the expansive vision and vivid conceptual vocabulary of Professor Öricü in her research on comparative law and mixed legal systems. Third, we will add the rich resources of the social sciences, especially the extensive scholarship on legal or normative pluralism. Recent political reforms and continuing social crises across the region suggest how timely and useful the *Mediterranean Hybridity Project* might be.