Developments

Review Essay — Emmanuel Melissaris's *Ubiquitous Law: Legal Theory and the Space for Legal Pluralism*

By Derek McKee[*]

[Emmanuel Melissaris, *Ubiquitous Law: Legal Theory and the Space for Legal Pluralism*; Ashgate Press, ISBN: 978-0-7546-2542-1; 178 pages; £ 55.00 (2009)]

I.

Legal pluralism, as a scholarly pursuit, can be traced to early 20th century attempts to situate law in its social context. Eugen Ehrlich, one of the modern pioneers of legal pluralism, investigated the *living law* of families, businesses and other social associations in Austria-Hungary.[1] Ehrlich located law in concrete social practices rather than the abstractions of codes and doctrine.[2] Like many other jurists of his generation (and some who came before and after it), Ehrlich promoted the idea that law should be responsive to social needs.[3] *Living law* was thus an antidote to the liberal formalism that had dominated legal scholarship in the late 19th century.

But the idea of making law respond to society rests on a paradox. It presupposes the ability to identify something as law and something else as society. But each of these concepts is already an unstable compound of descriptive and normative elements.[4] Society, for instance, may be seen as providing data to be evaluated by a formal legal

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[1] *See* EUGEN EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW (1913). *See also* LIVING LAW: RECONSIDERING EUGEN EHRLICH (Marc Hertog ed., 2009).

[2] *See* EHRLICH, *supra* note 1, at 504.

[3] *See, e.g.,* RUDOLF VON JHERING, LAW AS A MEANS TO AN END (1877); Oliver Wendell Holmes, *The Path of the Law*, BOSTON L. SCH. MAG., Feb. 1897, at 1; ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1922); GEORGES GURVITCH, L'IDÉE DU DROIT SOCIAL (1932).

[4] *See* David Kennedy, *A New Stream of International Law Scholarship*, 7 WIS. INT'L L.J. 1, 8 (1988) ("Rather than a stable domain which *relates* in some complicated way *to* society or political economy or class structure, law is simply the practice and argument about the relationship between something posited as law and something posited as society.").

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system, or it can seen as itself constituting its own forms of law. This ambivalence is already contained in Ehrlich's concept of *living law*.

Emmanuel Melissaris's book, *Ubiquitous Law*,[5] represents a sustained attempt to engage with this paradox and to explore its theoretical consequences. A lecturer at the London School of Economics, Melissaris had already made important contributions to legal pluralist theory in four recent articles.[6] One of these, "The More the Merrier?" provides one of the clearest analyses of the theoretical debates within legal pluralism. In *Ubiquitous Law*, Melissaris ties together, refines, and enhances these earlier writings. In doing so, Melissaris shows how the paradox of law poses problems for mainstream legal theory while demonstrating the challenge it also poses for pluralistic theories. In due course, Melissaris proposes an original account of legal pluralism based on discourse theory. However, as I will explain in this review, it remains to be seen to what extent Melissaris's reconstructive attempt can avoid the pitfalls he has identified in other legal pluralist theories. But Melissaris's more critical moments show how the concept of legal pluralism can illuminate general problems in legal theory.

Legal pluralism gained greater prominence in the late 20th century as part of a moderate-left critique of the administrative-welfare state. In the mid-20th century, European and North American states had largely taken up the "substantive,"[7] "social-welfare,"[8] or "social"[9] conception of law imagined by Ehrlich and his contemporaries. They had created powerful legal institutions to regulate social and economic matters such as employment, housing, and health care. Private law and other forms of economic regulation had also been reformed in service of social and economic policies.[10] But as the project of making law responsive to social needs advanced, many progressive law reformers became

[5] EMMANUEL MELISSARIS, UBIQUITOUS LAW: LEGAL THEORY AND THE SPACE FOR LEGAL PLURALISM (2009) [hereinafter MELISSARIS, UBIQUITOUS LAW].

[6] The four articles are: *The More the Merrier? A New Take on Legal Pluralism*, 13 SOC. & LEGAL STUD. 57 (2004) [hereinafter Melissaris, *More the Merrier*]; *The Limits of Institutionalised Legal Discourse*, 18 RATIO JURIS 464 (2005); *The Chronology of the Legal*, 50 MCGILL L.J. 839 (2006); *Perspective, Critique, and Pluralism in Legal Theory*, 57 N. IRELAND LEGAL Q. 597 (2006).

[7] Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1686 (1976) [hereinafter Kennedy, *Form and Substance*]; Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 L. & SOC'Y REV. 239 (1983); Peer Zumbansen, *Law After the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law*, 56 AM. J. COMP. L. 769 (2008).

[8] JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY, 388–446 (1992).

[9] Duncan Kennedy, *Three Globalizations of Law and Legal Thought, in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 19, 37–62 (David M. Trubek & Alvaro Santos eds., 2006).

[10] On private law, *see* Kennedy, *Form and Substance, supra* note 7. *See also* IAN MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS (1980).

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increasingly skeptical. On one hand, they noted the welfare state's failure to remedy persistent social inequalities.[11] On the other, they lamented law's disciplinary, conformity-producing effects.[12] Both of these disappointments had the potential to reopen the law/society distinction. The persistent power of informal normativity could help explain the futility of instrumental law reform. Also, the state's overbearing regulation could lead to a search for social justice outside the state, in more informal or grassroots forms of association.

The legal pluralist movement that arose in academia around 1970 drew on both of these critiques.[13] Empirically, legal pluralists observed the limits of state law. They called attention to the internal diversity of state legal systems and the persistent role of custom in modern societies.[14] They drew parallels with other contexts where the limits of state law were (or had been) even more evident: the colonial and post-colonial experiences in Africa and Asia;[15] the practices of groups on the margins of capitalist modernity;[16] and European history from the Middle Ages[17] up to the 19th century.[18] Normatively, many legal pluralists looked beyond the state for social transformation—although some also warned against romanticizing non-state actors.[19] Collectively, these strands of inquiry problematized the distinction between law and its other: facts, society, custom, and norms.

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[11] *See, e.g.,* Marc Galanter, *Why the Haves Come out Ahead*, 9 L. & SOC'Y REV. 95 (1974).

[12] *See, e.g.,* Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 746–51 (1963).

[13] For the classic overview and assessment of this literature, see Sally Engle Merry, *Legal Pluralism*, 22 L. & SOC'Y REV. 869 (1988).

[14] *See* LE PLURALISME JURIDIQUE (John Gilissen ed., 1971); Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Topic of Study*, 7 L. & SOC'Y REV. 719 (1973); Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering and Unofficial Law*, 19 J. LEGAL PLURALISM 1 (1981). For related observations, see Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); Lon L. Fuller, *Human Interaction and the Law*, 14 AM. J. JURIS. 1 (1969).

[15] *See* LE PLURALISME JURIDIQUE, *supra* note 14; Moore, *supra* note 14; M.B. HOOKER, LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS (1975); John Griffiths, *What is Legal Pluralism?*, 24 J. LEGAL PLURALISM 1 (1986); Merry, *supra* note 13.

[16] Boaventura da Sousa Santos, *The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada*, 12 L. & SOC'Y REV. 5 (1977).

[17] *See* HAROLD BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION (1983).

[18] *See* H. W. ARTHURS, WITHOUT THE LAW: ADMINISTRATIVE JUSTICE AND LEGAL PLURALISM IN NINETEENTH-CENTURY ENGLAND (1985).

[19] *See* Galanter, *supra* note 14, at 25; BOAVENTURA DA SOUSA SANTOS, TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION 120–21 (1995) [hereinafter SANTOS, NEW COMMON SENSE].

Of course, the administrative-welfare state also had its critics on the right. Some of these critiques drew on classical liberal ideas about the rule of law.[20] A more original line of critique focused on the market as a spontaneous form of social organization. Friedrich von Hayek argued that centralized, top-down state regulation could never respond efficiently to the myriad signals produced by market actors.[21] There were parallels between Hayek's social theory and that of some left-wing critics: both observed the limits of state law, and located dynamism and progress outside of state law, and in society. In later years, this economic critique of law has spawned parallel inquiries into the informal normativity underlying economic relations.[22]

In the last two decades, left and right visions of informality and pluralism have converged in an agenda that is sometimes referred to as governance: supplementing state regulation and enforcement with more flexible and participatory processes, such as voluntary standards accompanied by disclosure requirements, benchmarking, negotiated rulemaking, self-regulation, and so on.[23] Many of these developments fulfill legal pluralist aspirations in that they recognize the jurisgenerative capacities of non-state actors.

As Orly Lobel explains, the rise of the governance paradigm can be attributed to developments in legal theory as well as pressures from political economy. From the perspective of legal theory, governance is presented as a synthesis, overcoming the binary oppositions that had dominated legal thought throughout the 20th century, such as public/private, form/substance, and regulated/unregulated.[24] In political-economic terms, governance is described as a response to advances in science and technology (especially transportation and communication) leading to increased competition: the market is seen as ever more dynamic and volatile.[25]

These political-economic developments have a distinct global dimension. Although ideas about a regulatory crisis and a breakdown of state law first became prominent in the 1970s, the pressures of globalization have amplified these earlier tendencies.[26] Since the

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[20] *See* GORDON HEWART, THE NEW DESPOTISM (1929); F. A. HAYEK, THE ROAD TO SERFDOM 80–96 (1944).

[21] *See* F. A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

[22] *See, e.g.,* NORMS AND THE LAW (John N. Drobak ed., 2006).

[23] *See* Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004).

[24] *Id.* at 361–67.

[25] *Id.* at 356–61. *See also* Scott Burris, Michael Kamper & Clifford Shearing, *Changes in Governance: A Cross-Disciplinary Review of Current Scholarship*, 41 AKRON L. REV. 1 (2008).

[26] *See* Peer Zumbansen, *Transnational Legal Pluralism*, 1 TRANSNAT'L LEGAL THEORY (forthcoming 2010), *available at* http://ssrn.com/abstract=1542907 (last visited May 20, 2010) [hereinafter Zumbansen, *Transnational*].

1990s, scholars have noted the proliferation of transnational forms of law and regulation.[27] Alongside new formal international institutions such as the World Trade Organization and the International Criminal Court, there have also appeared countless informal or private transnational processes such as *lex mercatoria* and commercial arbitration, or processes of standard-setting, self-regulation and voluntary certification.[28] Perhaps more importantly, such distinctions between public and private, formal and informal seem increasingly inappropriate in this global context. State and non-state forms of law and regulation are interpenetrated and mutually constitutive.[29] Some institutional components of states have themselves been denationalized: oriented towards global systems and logics rather than national agendas.[30] "[T]he sheer density of rules and institutions in the global space," their chaos and messiness, make global governance hard to describe, much less to design or prescribe.[31] Since the 1990s, theorists of legal pluralism have been explicitly engaged with these challenges, extending the idea of legal pluralism to encompass transnational forms of lawmaking.[32] I will return to discuss two of these theories, those of Boaventura de Sousa Santos and Gunther Teubner, below.

Due to this intellectual-historical legacy, contemporary legal pluralism tends to bundle together four distinct critiques.[33] First, taken literally, legal pluralism merely signifies the recognition of multiple legalities—as opposed to legal *monism* (an account of law as unitary, forming a systemic whole). But in its modern form, legal pluralism has mainly been used to challenge state-centered accounts of law. Some legal pluralists have therefore identified their second target as legal *centralism*: the identification of law with the normative output of state institutions.[34] Third, some (but not all) legal pluralists also

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[27] For a prescient account of the triumph of substance over form at a global scale, see PHILIP C. JESSUP, TRANSNATIONAL LAW (1965).

[28] *See* Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society, in* GLOBAL LAW WITHOUT A STATE 3 (Gunther Teubner ed., 1997) [hereinafter Teubner, *Global Bukowina*].

[29] *See* SANTOS, NEW COMMON SENSE, *supra* note 19, at 403–55.

[30] *See* SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES (2006).

[31] David Kennedy, *The Mystery of Global Governance*, 34 OHIO N.U. L. REV. 827, 848 (2008).

[32] SANTOS, NEW COMMON SENSE, *supra* note 19; Teubner, *Global Bukowina*, *supra* note 28; WILLIAM TWINING, GLOBALISATION AND LEGAL THEORY (2000); Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 24 MICH. J. INT'L L. 999 (2004); Boaventura de Sousa Santos & César A. Rodríguez-Garavito, *Law, Politics and the Subaltern in Counter-Hegemonic Globalization, in* LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY 1 (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2005); Zumbansen, *Transnational*, *supra* note 26.

[33] *See* Roderick A. Macdonald, *Here, There … and Everywhere: Theorizing Legal Pluralism; Theorizing Jacques Vanderlinden, in* ÉTUDIER ET ENSEIGNER LE DROIT : HIER, AUJOURD'HUI ET DEMAIN : ÉTUDES OFFERTES À JACQUES VANDERLINDEN 381 (Lynn Castonguay & Nicholas Kasirer eds., 2006).

[34] *See, e.g.*, Griffiths, *supra* note 15, at 2–5.

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reject legal *positivism*: the idea that there can be neutral criteria for identifying law. (In modern legal thought, positivism has usually been linked to centralism, although it need not be.) Fourth, legal pluralism can also be taken to challenge *prescriptivism*: the idea that law exists apart from the subjects who create it and maintain it.[35]

But in jettisoning these orthodoxies—especially that of the state and its legal positivism—legal pluralism lays bare the central paradox of law: its dual nature as fact and norm. Law always involves both an *is* and an *ought*: an engagement with something outside law (understood perhaps as *facts* or *society*) as well as some notion of how things *should* be. Different legal theorists have attached different labels to this paradox. Robert Cover speaks of the tension between reality and vision.[36] For H.L.A. Hart, the paradox is implicit in the idea that law can be seen from an internal or external perspective. The internal perspective is that of someone who participates in the legal system and is normatively bound by its rules, whereas the external perspective is that of the detached observer who seeks to explain how the system works.[37] Jürgen Habermas's legal theory also explores the consequences of this paradox: according to Habermas, modern law supplies strategic, self-interested actors with both de facto constraints and normative validity claims.[38]

II.

Melissaris begins his book by showing how this paradox afflicts mainstream, state-centred legal theories, such as that of H.L.A. Hart—despite their efforts to avoid it. In this analysis, Melissaris draws on all four of the critical strands noted above. Melissaris argues that mainstream legal theories such as Hart's are compromised by their monism. As Melissaris puts it, "*All* legal theory ought to be pluralistic. Otherwise, it simply *is not* legal theory but rather a first-person account of intrasystemic coherence."[39] Hart tried to provide a general legal theory, i.e. one that would be applicable to any legal system.[40] But as Melissaris argues (correctly in my view), Hart succumbed to centralism, taking the modern Western state and its form of law for granted.[41] Melissaris emphasizes the historical

[35] *See* Macdonald, *supra* note 33, at 406–407; Roderick Macdonald & David Sandomierski, *Against Nomopolies*, 57 N. IRELAND LEGAL Q. 610 (2006).

[36] Robert M. Cover, *The Supreme Court, 1982 Term – Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 9–10 (1983) [hereinafter Cover, *Nomos and Narrative*].

[37] *See* H.L.A. HART, THE CONCEPT OF LAW 56-57, 84–85, 89–90 (1961).

[38] HABERMAS, *supra* note 6, at 27.

[39] MELISSARIS, UBIQUITOUS LAW, *supra* note 5, at 76.

[40] *See* HART, *supra* note 37 at 239-40; MELISSARIS, UBIQUITOUS LAW, *supra* note 5, at 9.

[41] MELISSARIS, UBIQUITOUS LAW, *supra* note 5, at 9–11.

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contingency of the association of law with the state.[42] Melissaris also opposes the prescriptivist tendencies of state-centered legal theories: because they privilege the interpretive role of judges and other experts, they are hierarchical and undemocratic.[43]

Most importantly, Melissaris objects to the positivism of mainstream legal theories like Hart's. For example, as Melissaris notes, Hart aspired to produce a descriptive account of law.[44] Hart acknowledged the internal perspective on law and the sense that law involves obligation.[45] But he tried to account for the obligatory character of law by giving a prominent role to secondary rules (rules of recognition, rules of change, and rules of adjudication). According to Hart, these secondary rules make it possible to identify the primary rules of the legal system and to specify what these require of citizens.[46] But as Hart's critics have long argued, by sharply separating law from morality, Hart vitiated any sense of a duty to obey the law (other than on the basis of its substance).[47] Melissaris's analysis shows why such difficulties are inherent in the positivist enterprise. As Melissaris explains, positivism represents an attempt to bracket the paradox of law by treating law as a fact. But positivism never overcomes the paradox: law's buried normative dimension keeps rising to the surface.

In his second chapter, Melissaris turns to pluralistic theories of law. All of these theories reject monism and centralism. But as Melissaris explains, one group of legal pluralist theories is nevertheless positivistic. These "empirical-positivist" theories, such as John Griffiths's "social-scientific" legal pluralism, are purportedly descriptive and analytical.[48] They try to define law according to a set of neutral criteria. They take an external perspective on law. But in doing so, Melissaris argues, they encounter problems similar to those of Hart's legal theory: they are unable to account for the internal perspectives of participants in the system, and for law's normativity. Melissaris also accuses them of presupposing a particular concept of law and trying to generalize from it.[49] Alternatively,

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[42] *Id.* at 79.

[43] *Id.* at 61–71.

[44] *Id.* at 9. Hart said that his account of law is "morally neutral and has no justificatory aims." HART, *supra* note 37, at 240.

[45] HART, *supra* note 37, at 56–57, 84–85.

[46] *Id.* at 109–19. However, as Melissaris points out, Hart added a subtle normative twist when he justified secondary rules in terms of certainty, flexibility and efficiency. *Compare* MELISSARIS, UBIQUITOUS LAW, *supra* note 5, at 12–15 *with* HART, *supra* note 37, at 94–98.

[47] *See* Lon L. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart,* 71 HARV. L. REV. 630, 638–48 (1958).

[48] Griffiths, *supra* note 15. For a related approach, see Franz von Benda-Beckmann, *Who's Afraid of Legal Pluralism?*, 47 J. LEG. PLURALISM 37 (2002).

[49] MELISSARIS, UBIQUITOUS LAW, *supra* note 5, at 29–30.

says Melissaris, these theories follow the route of Brian Tamanaha's conventionalist approach, in which they purport to start from an internal perspective, leaving them unable to take an external analytical or evaluative stance.[50]

Melissaris identifies a second group of legal pluralisms, which includes Gunther Teubner's systems-theoretical approach, Boaventura de Sousa Santos's oppositional-postmodern approach, and critical approaches such as those of Desmond Manderson, Margaret Davies, and Martha-Marie Kleinhans and Roderick Macdonald.[51] Melissaris distinguishes these theories on the basis that they acknowledge the paradox of law. They are sensitive to both internal and external perspectives. Although they consider an internal perspective, their use of an external perspective also relativizes any internal perspective. These theories therefore destabilize any notion of system or order. They also problematize the normative claims made in the name of any single legality.

Although Melissaris acknowledges these theories' engagement with the law/non-law paradox, he is wary of them on other grounds. He argues that critical or postmodern theories are so attuned to multiple perspectives that they are unable to say anything meaningful about law in general—that they deprive law of its distinctiveness and collapse it into its social context.[52]

Melissaris then attempts to elaborate a new theory of legal pluralism designed to survive the recognition of the paradox of law. As Melissaris puts it, the challenge for legal theory is how to account for communication among multiple legalities—i.e., the possibility of a concept of law that makes sense beyond a particular system—while also recognizing the "institutional autonomization" of law. In other words, legal theory must be able to grapple with both external and internal perspectives.

To answer the first of these challenges, Melissaris turns to discourse theory. Melissaris suggests that legal theory should pursue the intuition that law has some meaning that can transcend particular systems or contexts. Drawing on Habermas, Melissaris argues that people with different perspectives can participate in a pragmatic, rational discourse about the meaning of law.[53] His starting point is the linguistic practice of distinguishing law from something else: society, facts, or social norms.[54] Melissaris acknowledges that people's

[50] *Id.* at 30–33.

[51] *Id.* at 33-35.

[52] *Id.* at 43.

[53] *Id.* at 72–76.

[54] *Id.* at 46. While Melissaris recognizes that the word "law" may be laden with ideological baggage—such as its association with the state—he correctly points out that it should be possible to cast off this baggage.

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uses of the term *law* are subjective and context-specific, but he argues that they nevertheless imply universal claims about law.[55] Melissaris therefore suggests that legal theory should begin with these subjective understandings of law, but that it should work *through* them, in an "interperspectival" dialogue, to discover what is universal about law.

Melissaris argues that legal theory therefore requires a thin, prima facie account of law that can act as a hypothesis to "kickstart" such a discussion.[56] But Melissaris emphasizes that this prima facie account of law does not only need to be intelligible from multiple perspectives. It also needs to be able to account for law's institutionalization and systematization.

To explain how law can be institutionalized without reference to authoritative institutions such as those of the state, Melissaris first analyzes law in terms of speech-act theory, again drawing on Habermas.[57] For example, if a judge said to a defendant, "I sentence you to ten years' imprisonment," the judge would not be describing a state of affairs so much as performing an action.[58] Melissaris argues that what distinguishes legal discourse from other speech-acts is that it depends on certain assumptions about facts, norms, and the way the two are related. As Melissaris puts it (adopting Robert Cover's biblical vocabulary), legal discourse is based on the movement from word to deed, and from deed to word. Legal discourse is uniquely able to *authorize* and to *evaluate* action.[59]

Melissaris emphasizes that neither of these transformations can be explained in logical terms, as processes of induction or deduction. This is because neither facts nor norms are distinct categories.[60] Facts and norms help to constitute one another. This is apparent in the move from word to deed: The concretization of a general rule, so that it dictates a particular set of actions, as in a criminal sentencing, is only intelligible with reference to a particular social and institutional context.[61] Likewise in the move from deed to word: legal fact-finding is always normatively colored, in that it depends on assessments of relevance. Hence Melissaris concludes that "legal norms are always already hinged on

[55] *Id.* at 49–50.

[56] *Id.* at 115.

[57] *See id.* at 80–90.

[58] *See id.* at 89.

[59] *See id.* at 91.

[60] *See* Clifford Geertz, *Local Knowledge: Fact and Law in Comparative Perspective, in* LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 167 (1983).

[61] *See* MELISSARIS, UBIQUITOUS LAW, *supra* note 5, at 93–100. *See also* Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1985).

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facts . . . the law does not develop separately from the way people experience the world, but is rather constituted by those experiences."[62]

Melissaris therefore offers the concept of "shared normative experiences" as a way of bridging this gap between facts and norms, deeds and words.[63] Melissaris derives this concept from Robert Cover's account of the creation of legal meaning through narrative.[64] For Cover, law emerges from individuals' and communities' *commitment* to certain narratives and normative worldviews; this commitment is "jurisgenerative."[65] In Melissaris's words, "at the bedrock of legality lie certain presuppositions on the part of participants concerning their ability in common to transform the world through their normative commitments. These presuppositions I term[] shared normative experiences . . . ."[66] Melissaris argues that the concept of shared normative experiences is able to mediate law's paradox. This is because it builds on the sense of commitment experienced by participants in a legal community. It is both normative and empirical, because it is "part of how the participants understand themselves as individuals."[67]

III.

I accept Melissaris's point that a concept of law should be thin and open-ended so as not to presuppose the outcome of an ongoing dialogue. But it seems unlikely that "shared normative experiences," without something more, can also account for the institutionalization and autonomization of law, or for the determinacy (or concretization) of particular norms, as Melissaris claims.[68] Melissaris is deliberately vague about how "shared normative experiences" can account for institutionalization and autonomization,[69] and says he would rather leave the details to be worked out through an interperspectival

[62] MELISSARIS, UBIQUITOUS LAW, *supra* note 5, at 104–106.

[63] *Id.* at 76, 115.

[64] *See id.* at 51–55.

[65] Cover, *Nomos and Narrative*, *supra* note 36. Cover also appears to endorse a kind of political liberalism, in which the state and its judges maintain peace by choosing which of these competing legalities to nurture and which ones to kill. Melissaris suggests a re-reading of Cover in which this "jurispathic" function of state legality is recast as a trans-contextual discussion of law. Instead of espousing an order imposed through violence (as Cover sometimes seems to do), Melissaris suggests that we read Cover as being concerned with the possibility of meaningful communication across legal contexts. *See* MELISSARIS, UBIQUITOUS LAW, *supra* note 5, at 55–59.

[66] MELISSARIS, UBIQUITOUS LAW, *supra* note 5, at 109.

[67] *Id.* at 115.

[68] *See id.* at 123.

[69] *Id.* at 123–24.

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dialogue.[70] While Melissaris's reticence may be well motivated, it seems to leave him vulnerable to the same charges he has leveled against critical or postmodern theories of legal pluralism: that they decline the opportunity to say anything meaningful about law.[71]

The uncertainties of Melissaris's theory become apparent when compared with the two leading theories of global legal pluralism, those of Santos and Teubner. Santos and Teubner both acknowledge the paradoxical nature of law. But both of them also put forward accounts of law and of society that move beyond critique to some tentative form of reconstruction.

Santos, like Melissaris, adopts a subjective, phenomenological approach to legal pluralism. For Santos, this is centered on the concept of "interlegality": "the conception of different legal spaces superimposed, interpenetrated and mixed in our minds, as much as in our actions."[72] But Santos connects this subjective perspective to a sociology of globalization, noting that different actors in global processes tend to see the same developments at different scales—from the local to the global—leading to mixtures (and clashes) of different forms of law.[73] Santos also ventures an analysis of the world system, identifying six privileged "structural places" where law is generated in capitalist societies.[74] And while Santos rejects the (positivist) search for a definition of law, he is willing to venture a prima facie concept of law that can serve for the purposes of his inquiry—law, for Santos, consists of combinations of rhetoric, bureaucracy and violence.[75] Santos uses these concepts to describe the emergence of new global legalities—and to assess their emancipatory potential.

Melissaris's legal pluralism also shares certain features with that of Teubner. Like Melissaris, Teubner begins with discourse, identifying law as a communicative process employing the binary code legal/illegal.[76] Teubner sees legal discourses as largely autonomous, self-contained systems. However, acknowledging that legal discourses influence one another in various ways, he formulates ideas of "productive misreading," "linkage institutions," and "responsiveness" to explain how these interactions occur.[77] In

[70] *Id.* at 115.

[71] *See id.* at 43.

[72] SANTOS, NEW COMMON SENSE, *supra* note 19, at 473.

[73] *Id.* at 456–78. This chapter of *Toward a New Common Sense* is based on an earlier article: Boaventura de Sousa Santos, *Law: A Map of Misreading. Toward a Postmodern Conception of Law*, 14 J. L. & SOC'Y 279 (1988).

[74] SANTOS, NEW COMMON SENSE, *supra* note 19, at 416–41.

[75] *Id.* at 112–14.

[76] Gunther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism*, 13 CARDOZO L. REV. 1443, 1451 (1992).

[77] *Id.* at 1453–61.

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subsequent work, Teubner has used his theory of law to describe the autonomy of global regimes such as *lex mercatoria*.[78] Together with the international lawyer Andreas Fischer-Lescano, Teubner has also used this theory to explain the fragmentation of international law into sectoral regimes, suggesting a way of conceptualizing conflicts among such regimes.[79]

One of the puzzles of *Ubiquitous Law* is Melissaris's limited engagement with Santos and Teubner's theories. Although Melissaris discusses and assesses both theories,[80] he does not explain how his own theory builds on them or is to be distinguished from them. This is all the more puzzling because in *The More the Merrier?*, Melissaris had seemed to embrace aspects of both theories.[81] Although Melissaris expresses misgivings about critical or postmodern legal pluralisms, it is not clear whether these concern Santos and Teubner's theories, or only to those of Manderson, Davies and Kleinhans and Macdonald.

Ubiquitous Law is a bold exploration of legal pluralism. By his relentless insistence on sustaining law's paradox, Melissaris shows how legal pluralism can be a potent analytical and critical tool. When he applies this analysis to state law and mainstream legal theory, it becomes immediately clear how much is at stake. At the same time, Melissaris's critical methods severely restrain any move toward reconstruction. His concept of "shared normative experiences" seems to reiterate law's paradox rather than overcoming it. Like other versions of legal pluralism, Melissaris's theory has a powerful relativizing effect, making it clear that the stability of state law is, and always was, an illusion. But again like other legal pluralisms, Melissaris's theory leaves us with significant ambiguity. This is not to fault Melissaris: it seems to be in the nature of the task he has undertaken.

[78] *See* Teubner, *Global Bukowina*, *supra* note 28.

[79] *See* Fischer-Lescano & Teubner, *supra* note 32.

[80] *See* MELISSARIS, UBIQUITOUS LAW, *supra* note 5, at 35-39.

[81] *See* Melissaris, *More the Merrier*, *supra* note 6, at 73–75. In that article, Melissaris gave Teubner credit for developing a discourse-based approach to legal pluralism that was able to manage the tension between description and normativity, observation and participation. While more critical of Santos, Melissaris also gave Santos credit for his attention to the relations among dispersed legalities.