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THE PURSUITS AND PROMISES OF PLURALIST JURISPRUDENCE

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1. PRELIMINARY EXPECTATIONS

The expectations we entertained for a pluralist jurisprudence in chapter 1 were threefold: to be given an explanation of the relationship between pluralist jurisprudence and its monist predecessor; to be provided with clarification of the precise role of pluralism within a pluralist jurisprudence; and, to be offered understanding of the part played by normative or aspirational agendas within a pluralist jurisprudence. We are now in a position to reconsider these expectations, having benefited from the detailed acquaintance with chapters 2-13.

An obvious point to make is that the different authors do not each meet all of these expectations in their contributions, nor engage with them in quite the same way. To take the relationship between pluralist jurisprudence and monist jurisprudence first, some authors show little interest in examining this relationship. There are those who take the state of legal pluralism to be a self-evident fact and their interest lies in exploring that condition, at the most noticing in passing that a monist perspective on law is no longer adequate (Del Mar, Mac Amhlaigh, Taekema, von Daniels, Walker, Davies, Anker). Others specifically address the inadequacies of certain approaches to monist jurisprudence within a pluralist setting. So, both Cotterrell and Krygier remark on the inadequacies of analytical or philosophical approaches, on the one hand, and social-science or sociological approaches on the other hand, within monist jurisprudence, and encourage a fusion between these often opposed intellectual preferences in order to deal effectively with the challenges of a legal plurality. By contrast, Sciaraffa employs the pluralist setting to re-run a contest between positivist and non-positivist approaches from monist jurisprudence, using that setting to at least enhance the credentials of a non-positivist approach. Michaels suggests the need for a particular addition to the standard (Hartian) monist jurisprudence in order to cope with pluralist law. More radically, Taekema uses pluralist phenomena to encourage embracing an interactionist understanding of law across any monist-pluralist divide. Raz, while acknowledging the need for some revision to take account of pluralist legal phenomena, nevertheless, maintains the conventional framework of monist jurisprudence in considering the credentials of global law.

As for the precise role of pluralism and the degree of accommodation of diversity associated with it, we can again detect quite different approaches. For some authors, pluralism is not given a precise role within a fully theorized jurisprudence but is accorded recognition for its direct involvement with the accommodation of diversity. Davies and Del Mar are found expressing this viewpoint. Other authors are motivated to examine how an endorsement of pluralism can be theoretically linked to the interaction between the members of a recognized plurality, dealing with the abstract accommodation of different normative orders (notably, Michaels and Sciaraffa) or the practical accommodation at the point of the legal disposition of concrete cases. Cotterrell, Sanne and Anker engage with this concern. Mac Amhlaigh and von Daniels redirect pluralism away from the simple recognition of a plurality of normative orders, to envisage a theoretical pluralism.

Finally, on normative or aspirational agendas for pluralist jurisprudence, some authors directly address a clear normative agenda. Walker's concern with global justice, or Krygier's commitment to advancing a definite understanding of the rule of law, both display such an approach. For other authors, a normative agenda fits into other theoretical concerns regarding the outworking of a legal plurality. The invocation of legal values by both Cotterrell and Taekema falls under this description. Yet another approach can be discerned where a normative or aspirational agenda is linked to the promotion of pluralism, such as found in the contributions of Davies, Del Mar and Anker – as well as von Daniels, if we include a notion of theoretical pluralism. More obliquely, it would also be possible to trace the active part played by social values in theoretical understandings of legality that employ some form of social commitment to broach the challenge of pluralism, as seen in different ways within the contributions of Raz, Sciaraffa, Anker and Cotterrell.

One way of responding to the quite different engagements that we have observed with our preliminary expectations is to question their value as possible ways into a pluralist jurisprudence; even to abandon them and seek an alternative route. However, the above observations do disclose some meaningful engagements from our contributors with what were taken to be core concerns for a pluralist jurisprudence. The varied and piecemeal connections to these concerns within the different chapters of this book suggest two things. First, we should acknowledge that the issues underlying our expectations do not readily lead to a uniform template for a pluralist jurisprudence. That is not to say that our preliminary expectations are unimportant, but rather to treat them as possibly incidental to a wider variety of theoretical concerns that can be pursued within pluralist jurisprudence. Secondly, it follows that the greater diversity found within contributions to pluralist jurisprudence can be better approached by a more refined understanding of the variety of theoretical pursuits it provokes, springing from quite distinct motivations.

We shall undertake a more refined profiling of the pursuits of pluralist jurisprudence in section 2.1, again drawing on the rich illustrative material found in chapters 2-13. As a preliminary to that, we shall explore more fully each of the preliminary expectations in the present section, in order to draw out any lessons that might provide for a fuller portrayal of pluralist jurisprudence.

It is important to note a broader consequence of this strategic development in our approach to pluralist jurisprudence. Recognizing that the field of pluralist jurisprudence is open to a disparate variety of pursuits raises a basic question about the standing of pluralist jurisprudence. Can we treat it as a distinctive intellectual discipline, or should we rather concede that there is not an intellectual coherence to be found in addressing a set of disorganized and unrelated phenomena, capable of lending themselves in support of any theoretical speculation that takes the theorist's fancy? If that is the sole direction of travel between the raw data and the theory, then we may reasonably doubt the credentials of a pluralist jurisprudence. Our own position, however, is that, given the messiness of the pluralist reality, it is even more important for legal theorists (whether philosophers, sociologists, historians, or indeed jurists) to contribute in some way to understanding the phenomena, however disparate or disorganized they may appear. And if we take seriously the suggestions made by a number of our authors (notably Anker, Cotterrell, Davies, Del Mar, Krygier, and Michaels) over the importance of pluralist jurisprudence for the challenges posed by legal practice, we should expect that theoretical illumination to shed light on the practical legal character of these phenomena.

There is, accordingly, a secondary refinement required, if we are to achieve a credible pluralist jurisprudence. Having moved from theoretical engagement with pluralist phenomena to the opportunity for multiple theoretical pursuits, we then need to consider what demands to make of these pursuits in order to secure effective illumination of the subject matter within a coherent pluralist jurisprudence. Clarifying these demands is the critical moment in ensuring that a pluralist jurisprudence has the promise to deliver a specific understanding of plurality and pluralism in the practice of law. The magnitude of this task lies not simply in portraying a pluralist environment in which law can be seen to be operating, but also in identifying what it is that provides a distinctively pluralist character to those legal operations. We commence this task in section 2.2 by placing the types of pursuits within a coordinated framework and showing the sort of way they need to be combined so as to deliver a pluralist jurisprudence.

In section 3, we propose our own candidate pluralist theory of law. This amounts to a tentative filling out of the framework identified in section 2.2, to demonstrate how it can generate a theory that can be characterized as both legal and distinctively pluralist. The crucial attribute we need to claim for our candidate theory is that it is capable of revealing the conditions under which the potential of pluralist law can be realized, in ways that are not discernible from a conventional monist jurisprudence. Capturing this potential within a pluralist jurisprudence delivers on a technical promise, in providing a coherent disciplinary account of pluralist jurisprudence. Beyond that technical achievement of delivering an understanding of plurality and pluralism in the practice of law, the fuller promise of a pluralist jurisprudence extends to an appreciation of the wider social significance of plurality and pluralism in the practice of law, or, the idealist promise of legal pluralism itself.

With some brief concluding remarks in section 3.6, we subject our candidate theory to further scrutiny and reflect more widely on the promises of a pluralist jurisprudence. Alongside the technical and idealist promises just mentioned, which relate to an appreciation of the internal character of legal pluralism, we point to an instrumental promise that can be associated with pluralist jurisprudence: showing how the greater resources it reveals for legal pluralism can be harnessed to an external normative or aspirational objective.

1.1. The Disciplinary Challenge: Pluralist Jurisprudence and Monist Jurisprudence

One advance represented by the preceding chapters, in combination and in conversation with one another, is a de-escalation of an old contest for the territory of jurisprudence as a discipline. There are few remnants of the view of jurisprudence in which 'sociological' questions about law were sharply distinguished (and disconnected) from 'philosophical' ones. For instance, even within Raz's monist-derived and referential framework for considering global law, there is an ultimately sociological grounding of the quality and character of pluralism (on which more below, in section 2.1).[1] Formerly deep rifts between self-proclaimed philosophical approaches to jurisprudence, and the work of theorists of legal pluralism who identified more strongly with social-scientific approaches, appears to have narrowed.[2] This in turn suggest a more interesting space for confronting ideas that are central to understanding law and laws – however one may then design or delimit a theory so as to emphasise its pluralist or monist qualities.

While former turf wars may have diminished, theoretical differences still leave open a range of options for the relationship between monist and pluralist jurisprudence. One option is for theories to attempt an integration of pluralist and monist concerns via the confrontation of substantive questions in jurisprudence (about institutions, systems, authority, normativity, legal reasoning, legitimacy, and values), with an eye on the interaction of both pluralist-conceived and monist-conceived phenomena, rather than being stymied by debates over their respective demarcation as state-legal or pluralist objects. Another option is to assimilate theories of monist jurisprudence into theories of pluralist jurisprudence, or vice versa, creating a single dominant perspective which overcomes any troublesome distinctions. A third option chooses to concentrate on what is perceived to be important about either monist or pluralist objects in jurisprudence, notwithstanding the presence of the other.

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1 Commented upon in the contributions from Cotterrell and von Daniels.

2 Compare this to the earlier work of some of our contributors, who sought to expressly challenge the divide. Margaret Davies, 'Pluralism and Legal Philosophy' (2006) *Northern Ireland Legal Quarterly* 577; and Roger Cotterrell, 'Why Jurisprudence is not Legal Philosophy' 5 *Jurisprudence* (2014) 1;. Also see the integrative work offered in Brian Z. Tamanha, *A General Jurisprudence of Law and Society* (Oxford University Press, 2001); WL Twining, *General Jurisprudence* (Cambridge University Press, 2009). To the extent that pluralist disciplinary developments have been driven by taking those challenges seriously, they represent a major (and perhaps rare) jurisprudential success.

With no way to adjudicate between these different ways of relating monist and pluralist jurisprudence, the narrowing of the gap between those interested in pluralism and those favouring a monist standpoint seems to reveal and perhaps reignite an important tension over the standards for what counts as a successful theory. That tension is made all the more complicated by the elusive character of the pluralist subject matter, which causes us to worry that, not knowing exactly what we are pursuing, we cannot know whether a theory counts as a successful pursuit. While there is some reason to be hopeful that the work offered here and elsewhere may enrich understandings of pluralist phenomena such as customary law, indigenous law, transnational and international law, the contributions here also reveal, and in some cases perpetuate or even embrace, a particular kind of vagueness that may yet push apart pluralist and monist positions in jurisprudence.

The worry is that pluralist jurisprudence can seem unpromisingly vague, and even antithetical to the manner in which monist jurisprudence has typically been conducted. Monist jurisprudence is avowedly fond of conceptual clarity, finely-articulated distinctions, classifications, justifications and conclusions that proceed with the armour of logic and/or the authority of work that has gone before. It is not only that monist jurisprudence embraces theoretical values of cogency, precision, simplicity and logic, but something about law itself is often thought to invite a certain degree of clarity. After all, monist/state law as it is practiced deals in classifications, dividing lines in the application of concepts, finality and hierarchy of decisions, and clarity of arguments. The monistic jurisprudent, as philosopher of law at least, has been primed to marry both philosophical and distinctively legal technical expertise, argumentative skill, and a preferred style of scholarship with an object of study seemingly well-suited to that approach.

To pursue pluralist jurisprudence is to take away that apparent match. The pursuit unsettles the object of study by introducing matters of degree, multiplicity and heterarchy. Everything – subject matter, methods and theories – gets pluralized. Instead of law we have laws, instead of methodology we have methodologies, and even plurality itself is observed and analyzed pluralistically, noting that plurality is not susceptible to analysis or evaluation from a single general framework, but from within multiple contingent frameworks. The fields of legal-theoretical analysis with relevant contributions are also multiplied, so that there are important contributions to pluralist jurisprudence to be found within the voluminous literature on constitutional pluralism, global law, transnational law, indigenous laws, religious laws, international law, customary law, as well as on state-centered responses to the realities of plural legal phenomena.

While there is a need for creative and sometimes novel ways to think about what happens to the central ideas of jurisprudence when confronted with such a plural reality, there are ever-present risks of giving away too much of the precision that jurisprudence itself has to offer, The basic concern, reflected, evident, and discussed in many of the chapters presented here, is that such

opening up of the object of jurisprudential interest renders ideas about law – including its authority, validity, institutionalization, and justification – less sharply articulated, more contingent, and less absolute than they appear to be in monist jurisprudence. Accounts of law in this pluralized sense become rich in nuanced matters of degree, subtle non-distinctions, and spectrums along which particular phenomena may be situated. For instance, instead of institutions organized into comprehensive and bordered legal systems, there are institutions of diverse forms, whose connections with each other are thought to include non-systemic, sometimes even non rule-governed interactions. In place of jurisdictional borders that match the effective boundaries of political and/or de facto sovereignty, there are norms that defy jurisdictional limits or which creep or seep into those limits. Rather than a legal system making claims to independent, supreme authority, there are plural legal systems making claims to relative authority. The very idea of law that is under the microscope of pluralist jurisprudence is, we are told, fuzzy.[3]

While this feature of fuzziness may draw some support from complex normative interactions of the sort discussed below, it remains problematic for exploring relationships between monist and pluralist jurisprudence. Are ideas and theoretical standards honed and tested within monist or state-centric jurisprudence simply to be left out or left behind? And most importantly, would a mismatch in the standards for successful theories, between monist and pluralist pursuits, strengthen the adoption of one or another extreme (the strong separation of the two, or the assimilation of one under the dominant framework of the other)? Our concern is that, if there is to be any kind of engagement in the middle, then pluralist and monist approaches need somehow to bite upon shared jurisprudential concerns in ways that force their re-examination, either to reveal strengths and weaknesses in existing approaches or to generate new ones. Fuzziness will not generate that engagement. It is one thing to represent a reality that is indeed fuzzy, unfocused, and somewhat hazy, but the theorist's role is to help find, map and follow pathways through an unclear subject matter with some form of precision. At the same time, debates over ways to sharpen the focus will have to be conducted in a way that does not commit the opposite sin of dogmatism, where the desire for rigour is used to close off any destabilizing factors introduced by recognizing matters of degree, contingency and contextuality. The middle road, as always, is a tricky path to find.

1.2. Plurality and Pluralism: Conceptual and Practical Challenges

The conceptual and practical challenge for pluralist jurisprudence is to explain what (if anything), pluralism amounts to, and calibrate its associated degree of accommodation of diversity among legal phenomena. In addressing this challenge, contributors to this volume reveal both explicit and underlying preferences for either openness or closure of their theoretical objects, and in particular,

[3] Oren Perez, Fuzzy Law: A Theory of Quasi-Legal Systems' 28 *Canadian Journal of Law and Jurisprudence* (2015), pp. 343-370; on the prevalence of fuzziness, also see Haris Psarras, 'Law's Authority and Overlapping Jurisdictions' in Cotterrell and Del Mar (Eds) *Transnational Authority: Theorising across Disciplines* (Edward Elgar, 2016) and Davies, in this volume.

openness or closure around the idea or practice of law, and the status that legality confers. Within their various positions on legality, the contributors offer a range of positions on the issue of vagueness or flexibility surrounding legal categories. One path opts to temporarily accept or excuse vagueness. Raz, for instance, suggests that temporary vagueness, and avoiding premature conclusions or conceptualizations about law-like systems and features, may help to re-open jurisprudential lines of inquiry that had been shut down. If we are not quite ready to say that these alternatives or additions to state law are indeed law, or are at least apt for jurisprudential attention of the sort devoted to state law, then we are also not ready to say that they are not. Such an approach treats vagueness as a useful interim measure, but it is also suggestive of a substantive opening in a former fortress of canonical monist jurisprudence.

An alternative path embraces vagueness about legality for different reasons – offering it as a weapon against monistic jurisprudence itself, a potential kryptonite reinforced by the broader insights of critical theory. In Davies' chapter generally, and in Del Mar's extended discussion of Glenn, pluralist jurisprudence embraces the power of loosened categories and non-binary approaches to thinking about and doing law. Yet other contributions would suggest that the time for vagueness is past, and that vagueness, far from being a weapon, may end up being a driver for exclusion rather than inclusion, despite the best intentions of its handlers. The chapter from Anker, for instance, as well as a body of work from Cotterrell, suggests that vagueness may be partly to blame for allowing a bifurcation between 'state-legal' and 'other-legal' (or 'law-like') to be theorized and practiced as a distinction between 'state-legal' and 'non-legal'. Instead, vagueness should be met head-on with one or more direct strategies.

One such strategy, expressly offered by Cotterrell, notes the messiness and fragmentation of normative realities, and indeed the presence of vagueness, but confronts them not in the abstract, but from the particular perspective of the jurist. That standpoint then gives a reason to prefer a set of normative arguments that are appropriate for the legal purpose, and a long way from embracing vagueness. Yet if this is to offer either a conceptual or practical account of plurality and pluralism, a juristic perspective on pluralist jurisprudence then needs tools for the task it sets itself. The tools offered by Michaels' external recognition rule, or Del Mar's legal imagination processes, or Mac Amhlaigh's roles of legal officials, Taekema's interactional law, or Sciaraffa's approach to customary law, begin from familiar technical foundations then work through vagueness by tweaking the uses we can make of old tools in legal theory. Alternatively, a juristic approach may reject orthodox juristic legal analyses and conventional jurisdictional spaces in favour of a juristic perspective that reimagines pluralist space without a frame in which a dominant legal enterprise is the starting point from which to theorize, as Anker suggests. In all these approaches, the emphasis on a juristic, practiced, and concrete focal point from which to theorize pluralism may invite major contests over whether the particular perspective chosen is plausible or defensible, but they attempt degrees of precision in dealing with the challenges of plurality and ways in which theorists and jurists might respond to them.

Aside from the adoption of a particular perspective (such as that of the jurist), a second type of approach locates particular histories and traditions of thinking about legal pluralism in order to identify the objectives that any further engagement with a normative plurality must keep in sight. The weight of these traditions and the authority of their proponents give any residual vagueness and flexibility of legal categories their own kind of pedigree. From MacCormick's heuristic pluralism, Glenn's cosmopolitanism, Cover's inter-subjective normativities; to the greats of philosophy of international law and the precise contributions of empirical analysts of particular pluralist phenomena; these approaches suggest that even if normative plurality throws up imprecisions that may be hard to work with, they have in fact been worked with to produce insights which reveal that vagueness itself cannot be used as an excuse for lack of progress.

Drawing on traditions and their insights can also be used in an evaluative way to deal with the challenges of a pluralist legality. Krygier's extension of a rule of law tradition to the valuation of pluralist legality, for instance, would confront vagueness with the value of the rule of law, with the aim of being clear about what is at risk, and what is lost, when pluralist power is not 'tempered' by the rule of law. Just as vagueness might be offered as a weapon against dogmatic exclusionary legality, it may also be embraced by a power-holder in order to avoid triggering the demands of legality itself. Krygier's work here reveals that alongside the concerns over legality, there must be attention not only to categories, but also to the values that each can carry

Finally, it is important to reflect upon the extent to which attempts to propose a theoretical solution to vagueness by using conceptual organization and analytical categorizations might stick to the usual business of jurisprudence, or attempt a distinct offering in a pluralist setting. Walker's work on Global Law is exemplary of a strategy which acknowledges that the sheer diversity of legal phenomena, and the range of commitments to diversity embodied in different articulations of pluralism, present too great a challenge to a single precise concept of law. Yet rather than water down or avoid such conceptual working out of legality, Walker multiplies the concepts, multiplies the options for thinking about kinds of legal phenomena and the relations between them, and multiples the available abstractions to be drawn in order to avoid giving up on the task of making sense of them all.

In all of these theoretical approaches, both the characterizations of legality, and the range of strategies for addressing vagueness about whether or where there are demarcations of legality, might seem like a purely conceptual exercise. Viewing this challenge of pluralist jurisprudence in this way has the effect of rekindling attention to the old jurisprudential question, 'What is law?', and the associated debate over law's inclusivity or exclusivity vis-à-vis morality. Yet whatever else it entails, the debate over the reach of legality across a normative plurality offers precisely the point of practical bite that engages pluralist and monist theories, as well as rendering them

juristically and not simply academically important. The challenge here is a shared conceptual and practical challenge, not a matter for either alone.

For jurists and legal officials, the facts of plurality require a normative response that relies more or less explicitly upon either the attribution or denial of legality. In both political and legal institutions, conflicts between pluralist phenomena and monist state law generate moments of decision where plurality is either validated or ruled out. While some have argued that, by conceptual necessity or by definition, judges and other officials can only recognize the supremacy and exclusivity of their own system, the actual practice of judges and other officials reveals instances in which inclusive toleration, accommodation or promotion of other legal statuses has been preferred. The potential reimagining of both legal reasoning and the role of jurists, in pluralist directions, squarely challenges the notion of practical and epistemic closure that monist jurisprudence had easily assumed. On the other hand, while those who operate with pluralist conceptions of law tend to make do, sometimes expertly, with nuanced distinctions, normative ambiguities, revisable or partial solutions, and indeed vagueness, they ultimately deal in decisions, settlements and other binary resolutions. The jurist, or other practitioner or official, cannot ultimately get away with fuzziness, and the results they produce are decidedly unfuzzy.[4]

The mostly monist responses of jurists reflect that the problems inherent in the exclusive and inclusive legality debates are much more complex than agents at the coal-face may have time to resolve. Not only are the phenomena of plurality unclear and diverse, but they may present themselves unevenly or as being laden with normative contestability whose resolution requires political rather than legal or even juristic argument. While jurists (and theorists) are accustomed to using legal status to demarcate legal versus moral norms, or law versus fact, or legal versus political claims, they are less used to dealing with clashes between purported legal orders.

Aside from theorists and jurists, the range of responses to plurality may also divide subjects of laws, though aside from those with the sorts of normative commitments and agendas discussed in the following subsection, these may be pragmatically delegated to the responses of jurists. This raises all sorts of empirical possibilities. If jurists and officials engage in exclusively monist legal practices, will law-subjects, as law-users, tend towards similarly exclusive views of law shaped by what they see of the officials' work? Subjects may never even contemplate that legality could be something other than what a state's legal officials practice it to be – so closely is law identified with its officials, and those officials with the state. Many subjects, furthermore, may never think of themselves as potential subjects of plural laws, unless of course they are the ones posing the pluralist challenge.

[4] For further discussion, see Andrew Halpin, 'The Applications of Bivalent Logic, and the Misapplication of Multivalent Logic to Law' in H Patrick Glenn and Lionel Smith (eds), *Law and the New Logics* (Cambridge: Cambridge University Press, 2017).

Alternatively, if officials embrace more inclusive pluralist practices, will these be accepted and utilized by law-subjects? In cases where an ethnic, religious, or indigenous minority has claimed a legal right on grounds other than state law, for instance, subjects are confronted with (or instigators of) a squarely pluralist challenge to an exclusively state notion of legality. Resulting debates over the actual and/or justified inclusivity or exclusivity of legality then tends to spiral outside of legal fora into public, political and social debates. Thus the range of normative responses to plurality are not simply (and indeed not primarily), the responses of theorists to theory; rather they are responses of law-users and indeed law-subjects, to facts that have ramifications beyond abstract characterizations of jurisprudence, and which are connected to ideals and agendas that, on both sides, people think are worth fighting for.

1.3. Normative and Aspirational Agendas

The diverse agendas found within legal pluralism present some familiar features. Among the most prominent arise in situations where more or less distinct polities assert claims to use 'their own' law (as law) in order to self-govern or govern interactively with a competitor (such as the state). This may be characterized as 'polity-driven pluralism'. Other advocates of pluralism are driven by pragmatic or technical/expertise-based arguments for the value of pluralistic 'problem-solving', favouring alternatives to state regulation of issues which individual states are not thought to be (as) good at regulating, or are unable/unwilling to regulate or govern together. Call this more pragmatic version 'problem-solving pluralism'.

None of these pluralisms support plurality for its own sake, but for what it entails (including status and symbolic value) and what it allows law-subjects or law-users to achieve. Legal pluralism is not committed to legal diversity as such, rather it advocates the ways in which a plurality of laws either solves problems that monist approaches cannot, or supports values that monist approaches would ignore or deny. In cases of polity-driven pluralism, legal status (and its application) is sought because of the instrumental and/or inherent value of that status for the community whose law is being invoked. In cases of pragmatic problem-solving pluralism, legal status (and its application) is valued for its potential to generate and/or sustain public settlements of common concerns. Pluralist jurisprudence's thematic concern for inclusive concepts and practices of legality are thus grounded upon substantive theories defending the institutionalization of practices representing political or value pluralism; cosmopolitanism or self-determination. The normative preferences behind inclusive and exclusive responses to plurality are themselves positions in debates in political theory and moral philosophy, and not technical or analytical constructs of a more narrowly-conceived jurisprudence.

Yet although the contributions in this collection are mostly sympathetic to pluralism, or at least open to its potential values, it is important that pluralism is not (and should not be) romanticized nor oversimplified. This is all fairly obvious, but it bears repeating in order to avoid missing the

nuanced connections between the three topics under discussion here. Importantly, claims for pluralism do not always insist upon watertight demarcations of legality and non-legality. Pluralism's normative agendas sometimes include a critical bent which denies the very value of legal status, and/or which avoids seeking that status which, even if inclusive of a particular pluralist challenger to state law, remains exclusionary of others. The persistence of an exclusively monist model of legality in juristic theory and practice may encourage pluralist critics of exclusivity to pursue their normative agendas through more promising means (such as the rejection of analytical categories of legality in favour of social-scientific concepts of law; or the articulation/demonstration of softer or looser practices of authority, obligation, regulation and governance).[5] Thus the normative advocacy of pluralism is used to skirt or trump the question of how inclusive or tolerant legality can or should be; that question is deemed less important than the substantive agendas which pluralism is claimed to advance.

One does not have to be a critic of pluralism, however, to see that its potential should not be overstated. For every proponent of pluralist arrangements there will be opposing claims for some special value of state-centred, monist alternatives while rejecting plurality. The response to the polity-pluralists who advocate for space and recognition for that polity's law, for instance, may be grounded on majoritarian or liberal-democratic preferences. Why should a liberal democracy defer to one part of its polity, or a distinct sub-polity or overlapping polity, especially if the law being claimed is itself non-democratic or contains non-liberal values? The responses to the problem-solving pluralists, in turn, divide into scepticism about the pluralist alternatives' problem-solving capacities, or sovereigntist rejections of their procedural or substantive value. For instance, responses to those who favour transnational private or hybrid regulation may be sceptical of technical expertise, and may feature outright, even 'post-truth', denial of the expertise itself. (If there is doubt or disagreement over the right answer, then shouldn't a society take its own chances rather than follow supposed experts?) This may then be married to a more foundational defence of sovereignty that rejects the public or collective agendas of problem-solving pluralists, in favour of the supposed value of serving more local and parochial interests.

Normative and aspirational ideals or agendas, then, appear on both sides of pluralist v monist debates, as well as within different pluralist positions (as notably explored in Walker's chapter). The exploration of these ideals must therefore take care to account for nuances in the claims that are made. Pluralist and monist agendas do not consistently or neatly track claims for more inclusive or exclusive state legality, nor are they consistently defended in opposition to one another. For instance, an advocate of tolerance, inclusivity or deference towards an ethnic, religious or other minority's legal order might simultaneously wish to retain state institutions and state law for certain purposes (e.g., protection of individual rights within that order, or protection of state-

[5] See, e.g., Nico Krisch, 'Authority: solid and liquid, in transnational governance' in Roger Cotterrell and Makysmilian Del Mar (eds), *Transnational Authority: Theorising Across Disciplines* (Cheltenham: Edward Elgar, 2016).

secured social or political rights or statuses that benefit the group in isolation or in interaction with the wider polity). The pluralist challenge may also recognize or rely upon state institutions for the very pursuit of plurality itself. In particular, the strength of state institutions might be used to combat potential or actual popular rejection of normative plurality, as in cases of judicial or executive insistence on the place of an alternative legal system, in the face of public or even legislative opposition.

Looking beyond single polities to the international sphere reveals similarly complicated combinations of ideals and commitments. An advocate of international legal authority or global constitutionalism, for instance, might reject the coercive enforcement of such authority as being unjustifiable on the grounds of there being too much distance between those enforcing the rules and those subject to them, or the lack of a legitimate enforcement body. Meanwhile, a sovereigntist defence of the primacy of state law might carve out very significant space for supra-state law in some domains of activity where that is seen to be in the interests of the state itself – as in the example of international investment rules and dispute resolution. Despite the polarity of their extremities, neither pluralist nor monist agendas in jurisprudence operate in silos from each other or removed from the possibility of borrowing from each other's good ideas or worthwhile practices.

What becomes most interesting, for a pluralist jurisprudence is the difference it makes to think about these normative preferences as matters for legal theory and not simply political or moral theory. Pluralist jurisprudence needs to fill in the details of the difference it might make (if any) to have general pluralist values applied in legal pluralist forms. What difference is made, in other words, by features such as law's institutionalization, normativity, comprehensiveness, or coercive enforcement? What is the further significance of the reality check in which legal institutions and officials, and their processes such as legal reasoning, adjudication, and drafting, shape the ways in which abstract pluralist ideas can be operated through legal forms? The enticing further challenge for jurisprudence, in general, is to revisit the possibility that these very forms and processes are marked and altered by pluralist challenges, thus potentially with implications for shifting pluralism's justification from political or moral debate into legal theories and practices.

(4) Greater Expectations

Our reassessment of the preliminary expectations canvassed in chapter 1 has led us to a more realistic view of the role those expectations might fulfil, but with that a more exacting set of demands to be made of pluralist jurisprudence. The lessons we take from this exercise can be summarized as follows. From further reflection on the relationship between pluralist and monist jurisprudence and the disciplinary challenge it presents, we take it to be desirable for a pluralist jurisprudence to be identified with some shared jurisprudential concerns found within monist jurisprudence, yet crucial for it to offer a distinctive theoretical perspective that illuminates the

subject matter of a legal plurality. From the variety of roles encountered for pluralism within examples of pluralist jurisprudence, and the conceptual and practical challenges that raises, it is apparent that a pluralist jurisprudence must confront problems of vagueness in the characterization of legality and follow this through to the point of practical impact. From consideration of the diversity of normative or aspirational agendas that can be detected both within the subject matter and the theorizing of pluralist jurisprudence, it becomes essential to account for this diversity and also to explain the ways it may have particularly legal significance within a pluralist jurisprudence.

If our preliminary expectations, and the more exacting demands that they give rise to, are not met individually by our contributors, it is time to follow the alternative route: to commence with the variety of theoretical concerns that can be pursued within pluralist jurisprudence, and then to work through those concerns towards the realization of an effective pluralist jurisprudence, that is capable of meeting the demands which have been placed upon it. We take the first steps along that route in the next section by profiling the types of pursuits of pluralist jurisprudence that can be found within the previous chapters.

2. THE PURSUITS OF PLURALIST JURISPRUDENCE

2.1. Profiling the Pursuits

It is important to preface the exercise we undertake in this section with some preliminary remarks on the pursuits we aim to profile here and how they relate to the contributions to this volume. We are not suggesting that each contribution should necessarily be identified with a single exclusive pursuit. In some cases this may be so, but the differentiation between the pursuits we profile here is not based on attribution to individual authorship but rather on their presence within the literature, and their standing as a type of pursuit that lends itself to discrete engagement – whether or not a particular pursuit happens to feature alongside one or more other pursuits within a particular piece, and even though there may at times be an overlap between one pursuit and another. Another point to make is that we have been guided in selecting the following profiles by the objective of coming up with pursuits that could be regarded as typical pursuits, not simply in terms of being representative of the pursuits found within the contributions to this volume, but also as those commonly found within the wider literature. A final comment on our selection is that we consider the four pursuits profiled below as being collectively required to portray an effective pluralist jurisprudence.

To put that last point another way, our contention is that work within pluralist jurisprudence may valuably contribute to only one of the following pursuits, but in so doing cannot pass off such work as capable of capturing pluralist jurisprudence as a whole. In much the same way that work in any theoretical field may narrow its objectives and focus on a very specific issue in that field, but

cannot then take that limited contribution as exhaustively covering the field and rendering other insights redundant.[6] The four pursuits we have picked out involve the recognition of pluralism, a practical outworking of pluralism, a normative or aspirational agenda for pluralism, and a theoretical account of pluralism.

(a) Pursuing the recognition of pluralism. For some authors, pursuing the recognition of pluralism is regarded as valuable in broadening the perspectives and expanding the resources available for investigating the subject matter of law. This enthusiasm can be justified in terms of analytical rigour: pluralism provides the missing parts of a picture that monism overlooked, and accordingly provides the material to take corrective measures to deal with the distortions that a monistic approach imposed. Often, it runs into normative or ideological concerns when the non-pluralist approach is taken to disadvantage or suppress interests and values that become evident with the more accommodating recognition of pluralism. Nevertheless, the recognition of pluralism in itself does not necessitate a particular analytical standpoint or a definite normative outlook. Anker pointedly reminds us that pluralism has been used historically to serve both colonial and post-colonial outlooks.

Where the pursuit of pluralism is accompanied by an open, expansive embrace of a number of normative possibilities, it appears that it is accommodating them on an equal footing. This would make pluralism both an accommodating and authenticating theoretical perspective on plurality. Certainly, as 'strong' pluralism it seeks to confer valence on each member of the normative plurality on its own terms. Yet, as has been noted in chapter 1, 'weak' forms of pluralism have also been suggested. This indicates that the recognition of pluralism is one thing and the extent of its authenticating aspect another. Strong pluralism then comes across as pluralism plus: pluralism with a full normative accommodation.

It is worth pausing to emphasize the point that the normative accommodation afforded by pluralism to a plurality of normative orders is the crucial feature of a pluralist perspective. Other arrangements between a plurality of normative orders, such as hierarchical authorization or division into discrete realms of influence, make no call upon pluralism. Yet there is an ambiguity in this idea of pluralist accommodation, which straddles both the initial pluralist recognition of the normative plurality and the subsequent interaction between the recognized members of that plurality.[7]

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[6] On this, see the comments from von Daniels and Davies, as picked up in the commentary in ch 1, on spurious pretentions to theoretical comprehensiveness. Broader discussion of such a tendency is found in Andrew Halpin, 'Austin's Methodology? His Bequest to Jurisprudence' (2011) 70 *Cambridge Law Journal* 175; 'The Creation and Use of Concepts of Law when Confronting Legal and Normative Plurality' in Seán Patrick Donlan and Lukas Heckendorn-Ursheler (eds), *Concepts of Law: Comparative, Jurisprudential, and Social Science Perspectives* (Farnham: Ashgate, 2014).

[7] Neil Walker, in his illuminating 'Constitutionalism and Pluralism: A Conflicted Relationship?' in Anthony Lang & Antje Wiener (eds), *Handbook on Global Constitutionalism* (forthcoming, Edward Elgar Press), commences

At the point of initial recognition it is easy to proclaim the strong position that each normative order is fully authenticated on its own terms, but once the recognition of a plurality of normative orders has been made, there is nothing that follows by way of exploring the interaction between members of the plurality. Indeed, nothing can obviously follow from the strong pluralist premise that each normative order is authenticated on its own terms. It would be contingent, even accidental, if it happened that the different normative orders, accommodated on their own terms, also happened to be accommodating of each other.[8] As we shall see below, in order to overcome this contingency attached to the initial strong premise an additional premise is required, to ensure such mutual accommodation or mode of interaction.

This might suggest that strong pluralism should be limited to the point of initial recognition and weak pluralism associated with the subsequent stage of practical interaction. However, this simple move would betray the subtlety and nuance to be found in the arguments over different (weak and strong) forms of pluralism, at both stages of recognition and interaction. A crude demarcation between strong recognition and weak interaction would also imperil the distinctive credentials of pluralism, if that weak interaction simply dissolved into an alternative arrangement between normative orders, such as hierarchical authorization. Something has to be retained of the initial pluralist recognition at the point of interaction. On the other hand, mere pluralist recognition cannot of itself produce a mode of interaction.

Here we face a conundrum, particularly for legal pluralism which has a peculiar need for a practical outworking of pluralism. Our own attempt to work through this conundrum is provided in section 3. What we suggest more generally, for the moment, is that distinguishing (though not ultimately separating) the pursuits of recognition and interaction provides important assistance in taking theoretical bearings in the face of this intimidating conundrum.

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by citing Victor Muniz-Fraticelli, *The Structure of Pluralism: On the Authority of Associations* (Oxford: Oxford University Press, 2014) 11, for the general proposition that all forms of pluralism recognise a variety of normative sources and 'the need to accommodate that multiplicity and diversity in terms that are not reducible to a set ranking or any other general ordering formula' ('they are incapable of being categorically ranked', as Muniz-Fraticelli puts it). Here accommodation is used by Walker to refer more specifically to the point of interaction between normative orders. So, Walker proceeds to consider different attempts at constitutional pluralism and distinguishes them on 'a gradation between "thin" and "thicker" - between provisional and ad hoc forms of accommodation on the one hand and relatively stable and generalised rules or guidelines on the other.' He places 'radical' (or 'strong') pluralism at the 'thin' end of this spectrum in that the accommodation (in the sense of interaction) is sketchy and loosely defined. Yet Muniz-Fraticelli in stressing the lack of a categorical ranking is arguably more concerned with the pluralist recognition of the normative sources as 'foundationally independent' with a '[normative] basis … incommensurable with that of the state' (at 4), rather than with their subsequent interaction on which his remark on the possibility of 'tragic conflict' is more germane.

[8] Hence the possibility of 'tragic conflict' for Muniz-Fraticelli (previous note).

Self-evidently, some kind of recognition of pluralism is a threshold pursuit for a pluralist jurisprudence, and even if it leads on to other pursuits, as our prefatory comments have suggested, there may well be value in treating it as a dedicated pursuit, to compensate for the distortions of monism. In the present volume, Davies offers the most single-minded example of this pursuit. Del Mar's contribution displays similar qualities in the more restricted context of legal reasoning; and, at times, the recognition of pluralism is treated as a valuable pursuit in itself by Taekema and Anker.

(b) *Pursuing a practical outworking of pluralism in the legal setting*. Other authors, taking it as a given that pluralism has been recognized, are concerned to pursue a broader understanding which will account for the interaction between the members of the recognized normative plurality. There may be a tendency here towards a form of 'weak' pluralism, diluting a strong pluralist premise that each normative order is authenticated on its own terms by the additional premise that the status of each member is subordinated to an external mechanism or ulterior values that makes interaction possible. A hierarchical ordering around state law, mentioned in Anker's recollection of colonial pluralism, provides a simple example of an additional mechanism; deference to juristic values, encouraged by Cotterrell as a means of negotiating regulatory plurality (and hinted at by Taekema as a possible resource for achieving harmony), illustrates a recourse to ulterior values.

On the other hand, pursuit of a practical outworking might be attempted while seeking to maintain a strong pluralism; that is, keeping intact the authentication of each member of the normative plurality on its own terms even to the point of its practical outworking with other normative orders, by finding within each of those sets of terms a mechanism that fosters mutual recognition between members. Michaels' device of an external rule of recognition, which serves just such a role, is representative of other devices to be found in the literature;[9] and again we can find a parallel strategy in the narrower context of legal reasoning in Del Mar's 'relational pluralism'.

The interesting question to be asked of Michaels' external rule of recognition is whether it should be treated as a descriptive, analytical claim about the existence of pluralist normative orders or as an additional premise which provides a normative theory of how pluralist normative orders can best function together. As we mentioned in chapter 1, within Michaels' own chapter there is to be found empirical material relating to the relations between EU and municipal legal orders suggestive of a lack of mutual recognition. As a purely empirical matter, this then reiterates the contingency or accidental character of the interaction between members of a normative plurality, which we noted in our comments at (a) above, even after the more sophisticated device of an external rule of recognition is introduced. In order to overcome the contingent impact of the device, an additional premise would be required to ensure such mutual accommodation or mode of

[9] As we noted in chapter 1, Michaels refers in particular to von Daniels' linkage rules among other similar devices.

interaction. Advancing that as a normative or aspirational premise, we take to involve another pursuit.

(c) *Pursuing a specific normative or aspirational agenda*. We have just mentioned the possibility that a normative or aspirational premise may be imposed upon a contingent interaction identified from a strong pluralist perspective, so as to ensure that members of the normative plurality are required to interact in a mutually supportive way. This is one way in which the pursuit of a pluralist jurisprudence may turn to advancing a specific normative or aspirational agenda. In this kind of case the agenda can be regarded as internal to the understanding of pluralism itself, which is taken to constitute pluralism that is both strong and interactive. The agenda, whether described as normative or aspirational, is to ensure that pluralism (and a pluralist jurisprudence) serves a non-discriminatory, liberal accommodation of different legal (or, more loosely, normative) orders on their own terms, even to the point of considering the practical outworking of those normative orders.

Earlier we raised the prospect that a set of ulterior values (such as juristic values) may be adopted to dilute strong pluralism, in order to achieve a practical outworking of pluralism. Although this can also be regarded as pursuing a specific normative or aspirational agenda, the difference here is that the values are extrinsic to the understanding of pluralism; they are brought in to deal with the aftermath of recognizing a regulatory plurality. Even though these values are regarded as juristic or legal values, as they are (at least in part) by Cotterrell and Taekema, and as such might be thought of as in some way internal to law, it is important to see that they are not internal to the understanding of pluralism being proffered. Unlike Michaels' pluralism which is strong and interactive due to the interactive mechanism being constitutive within each of the members of the normative plurality,[10] in this case we have a weak form of pluralism where the normative reach of each member cannot be treated simply on its own terms but is subjected to a set of external values.

What is common to both of these cases is that the normative or aspirational agenda being pursued tackles the problem of interaction between members of the normative plurality. There is a third type of case, where the richer resources provided by a plurality of normative phenomena are used as an opportunity to promote an extrinsic normative or aspirational agenda. Such an agenda is not primarily concerned with the interaction between the members, although some degree of interaction may be an incidental beneficiary of pursuing the agenda. The broader normative landscape created by a normative plurality makes it easier to facilitate that normative or aspirational agenda. Walker's pursuit of global justice and Krygier's pursuit of the rule of law fall under this third type of case. If each normative order within the normative plurality were to comply with common standards of global justice or a common notion of the rule of law, then to that extent there would be no interaction problems between members of the normative plurality. However,

[10] We noted in chapter 1 that Michaels sees this as an effective response to Griffiths' rejection of weak pluralism.

since there will be other normative measures undertaken by members that fall outside of the particular concerns of global justice or rule of law, potential interaction problems here will not be covered, even incidentally.

(d) *Pursuing a theoretical basis to account for legal pluralism*. Other authors adopt a more removed interest in the theoretical puzzles that pluralism throws up, concentrating more on metatheoretical questions or the investigation of aspects of a theoretical groundwork from which other pursuits of pluralist jurisprudence could proceed. This pursuit is intimately connected with establishing (or questioning) the disciplinary integrity of pluralist jurisprudence. We might expect this pursuit to be elevated from the precise concerns of the previous pursuits, but we find here a variety of theoretical endeavours whose progress is affected by factors arising in the other pursuits. Perhaps the purest instance within this category is von Daniel's pursuit of theoretical pluralism. Yet, as we noted in chapter 1, his theoretical complementarity leaves open a number of issues, and the 'context' of his theoretical inquiry will be established from factors related to the extent to which a pluralistic recognition of normative phenomena is embraced (as in (a)), a practical legal outworking is confronted (as in (b)), and any normative agenda is selected (as in (c)).

The connectedness latent in von Daniel's approach is more evident in Mac Amhlaigh's treatment of theoretical pluralism. He is content to point out from an empirical encounter with instances of legal (constitutional) pluralism how any theoretical account will itself have to assume a pluralistic character. Mac Amhlaigh's study centres on a practical legal outworking by the judiciary, and so draws from pursuit (b) to demonstrate a variable rather than a theoretically discoverable constant affecting interaction. Implicitly, we can also read into his account a connected restriction on the pursuit of pluralism in (a); and, more obviously, see the recognition of a variable approach to a normative agenda in pursuit (c).

Two other contributions obviously fall within pursuit (d), which it is illuminating to compare. First, Raz's close questioning of the relationship between a pluralist jurisprudence and conventional monist jurisprudence effectively suggests a stop on the open embrace of pluralism in pursuit (a) until a criterion of legality linked to social legitimacy can be met. For him, this criterion is linked to the institutional character of law, so equally related to the practical aspect found in pursuit (b). A wholly extrinsic normative agenda for pursuit (c), is ruled out by Raz consistent with his positivist outlook, although there remains a place for any values that might undergird social legitimacy. The second contribution from Sciaraffa expounds an avowedly non-positivist approach, but, as we pointed out in chapter 1, his use of socio-political commitment overlaps interestingly with Raz's emphasis on social legitimacy.

Socio-political commitment is used by Sciaraffa as the basis for working through potential conflicts within a plurality of normative orders, and so curtails a strong embrace of pluralism in pursuit (a). It favours a practical legal outworking of pluralism in pursuit (b), suitably informed by

the socio-political agenda in pursuit (c). Although Sciaraffa is considering a non-positivist outlook, it is clear that he does not allow for an extrinsic normative agenda beyond those politico-moral values that are incorporated within his expanded understanding of legal reasoning. In this respect, his 'content-independent' approach to legality draws him towards the positivist side of the fence with regard to pursuit (c). These brief observations in comparing Raz and Sciaraffa are hardly sufficient as the basis for any grand pronouncement, but they do at least stimulate further thought on the possibility that within pluralist jurisprudence there may be de-escalation of another old contest from monist jurisprudence.

A final contribution which includes material falling within pursuit (d) comes from Anker, in her suggestion that an indigenous ontology can provide a theoretical foundation for legal pluralism. She adopts pursuit (a) in the strongest possible terms, and when it comes to pursuit (b) concedes that the approach is not judicially tenable. Anker effectively relies on an ontological disposition rather than a judicial determination to keep the interaction among a plurality of normative orders one that is strongly pluralist. Although this may be regarded as pursuing an aspirational agenda for strong pluralism, any pursuit (c) found in Anker's contribution is hard to characterize as a normative one. She takes an ontological turn to avoid the normative impasse encountered within a plurality of normative orders. This raises the question whether an ontological commitment can be insulated from the contestability associated with normative commitments.[11]

2.2. Coordinating the Pursuits

The questions to consider now are how far a satisfactory pluralist jurisprudence needs to address all four of the pursuits identified in section 2.1, and how this might be attainable. We stressed at the beginning of 2.1 that particular projects within pluralist jurisprudence may make valuable contributions to the field without covering the whole field. However, for these individual contributions to be regarded as valuable there must be some appreciation of the standing and worth of the field itself. An effective pluralist jurisprudence must be capable of rendering that standing and worth to itself as an academic discipline, in ways that we amplified in our extended reflection on the preliminary expectations and the more exacting demands that process disclosed in section

[11] The recourse to an indigenous ontology found in Anker's chapter is also adopted and defended at length by other scholars of indigenous legal theory such as Christine Black, John Borrows, or Gordon Christie,. It raises the matter of choosing between different ontologies that may be deployed for confronting pluralism. For instance, our colleague, Alec Stone Sweet is currently undertaking a project which explores the possibility of a Kantian framework to account for the resolution of a European legal pluralism involving different state legal orders and the European Convention of Human Rights. In this case, the ontological underpinning is Western, liberal and individualistic, rather than indigenous, involving ecological interrelationships. The significance of a choice of ontology is likely to rekindle, rather than avoid, contestable normative commitments. See further, Gordon Christie, 'Indigenous Legal Theory: Some Initial Considerations; in Richardson, Inai and McNeil (eds), *Indigenous Peoples and the Law* (Oxford: Hart Publishing, 2009); Christine Black, *The Land is the Source of the Law; A Dialogic Encounter with Indigenous Jurisprudence* (Abingdon: Routledge, 2011).

1.4. Our response to the current questions amounts to an attempt to deliver that status, and to meet those more exacting demands, through showing the collective importance of the four pursuits we have introduced above. We commence here with some general discussion of the way that coordinating these pursuits is necessary for an effective pluralist jurisprudence, and then continue in section 3 with our own attempt at meeting these requirements.

The discussion of pursuit (d) at the close of section 2.1 illustrated in some detail the connectedness between that pursuit and the previous three pursuits. We amplify that connectedness here by considering some other key connections between the pursuits and then addressing their collective importance in producing a theory of the pluralist legal environment, and so providing a credible status to pluralist jurisprudence.

We took it to be self-evident that the recognition of pluralism in pursuit (a) is a threshold pursuit for a pluralist jurisprudence, but that in itself does not engage with the deeper problems of what kind of pluralism (weak or strong) and what extent of pluralism (which legal or normative orders are accepted into the plurality[12]) is envisaged. Our further discussion of pursuit (a) spilled over into pursuit (b) and made it clear that for pluralist jurisprudence, with its particular burden to illuminate legal practice, the recognition of pluralism had to be connected to the practical outworking of pluralism in pursuit (b). That in turn led us to the different ways in which the pursuit of a normative or aspirational agenda in pursuit (c) would be implicated in how the practical outworking (or interaction between normative orders) is perceived in (b).

So we can establish a fairly straightforward, connected progression from pursuit (a) to pursuit (c). The onward connection to pursuit (d) is called for as an exercise in tidying up theoretical loose ends emerging in the previous pursuits, and, in particular, establishing the disciplinary integrity of any proposed pluralist jurisprudence. Taking into account our earlier review of how efforts under pursuit (d) could be related back to the previous pursuits, we complete a picture of the four pursuits as having a collective importance in delivering an effective pluralist jurisprudence. If this picture is accepted, then the failure to integrate any one of these pursuits into a pluralist jurisprudence would suggest severe limitations to the theoretical endeavour; and in the absence of remedial work on those limitations, would challenge the standing and worth of pluralist jurisprudence.

[12] There are two ways in which this second problem has been addressed. The first is through conceptual analysis in order to establish a theoretical boundary between law and non-law normative orders. The second is by assuming empirical data regarding interconnections between different orders will vindicate a theoretical postulate that those orders that are legal will mutually reinforce their legal status through interconnection. Neither approach can be regarded as successful in dealing with all the issues that arise from this problem of the extent of recognition. (For discussion of some of the issues, see Andrew Halpin, 'Conceptual Collisions' (2011) 2 *Jurisprudence* 507; 'The Creation and Use of Concepts of Law' (n 3).) What can be confidently maintained is that any recognized plurality which is brought into a pluralism characterized as legal will have to be confronted with the interaction problem.

That leaves one part of the earlier discussion unaccounted for in the picture just presented. In pursuit (c) we noted three types of aspirational or normative pursuits, only two of which were directly connected to the problem of interaction. The third type of case was described as promoting an extrinsic normative or aspirational agenda: global justice or the rule of law. We should be careful to point out that the agenda in these cases was considered extrinsic to the issues of pluralism, but that is not to say it therefore has an inferior part to play in a pluralist jurisprudence.

If the pluralist legal environment, once effectively surveyed, yields richer normative resources which make the pursuit of these agendas plausible in a way that could not be contemplated in a leaner normative environment, then it is appropriate to extend the ambit of a pluralist jurisprudence to include such concerns. To claim that the pursuit of global justice, or the tempering of arbitrary power, takes on a distinctive character within a pluralist legal environment, nevertheless, requires a plausible account of that environment. The recognition of these pursuits as part of a pluralist jurisprudence is, accordingly, still dependent on the collective importance of the four pursuits, integrated in the way our basic picture presents. The basic picture is put forward as a condition for pluralist jurisprudence, but not as a limitation on how a pluralist jurisprudence might develop.

3. A CANDIDATE PLURALIST THEORY OF LAW

3.1. An Overview

In this section we offer our own candidate for a pluralist jurisprudence. In its own way it meets (and so illustrates) the basic picture reached in section 2 of the four integrated pursuits: (a) the recognition of pluralism, (b) a practical outworking of pluralism, (c) a normative or aspirational agenda for pluralism, and (d) a theoretical account of pluralism. Our approach gains its particular connectedness between these four pursuits by offering a distinctive account of the working of law in a pluralist legal environment – meeting (b), which at the same time involves an authoritative recognition of pluralism – meeting (a), and incorporates a dual mode of normativity for law encompassing both formal jurisdiction and legitimate authority – meeting (c); and then, in order to reinforce the pluralist credentials of the proposed jurisprudence – so meeting (d) – draws out a distinctive interplay between legal interventions and social responses within the pluralist institutional and normative social context adumbrated in the previous pursuits. Nevertheless, what we offer here is only a preliminary sketch of a fully integrated theory. It is offered in an ambitious spirit, but one which is conscious of both optimism and skepticism, constraint and creativity, idealism and realism, about the pursuits and promises of a pluralist theory of law.

These dispositions play out amidst each of four components found in our candidate theory. The first two of these are: (1) the openness and (2) the decisiveness of law; features which, whilst present in monist practices and theories of law, are modified and take on particular significance

in a pluralist context. Law's characteristic openness and decisiveness not only mark law (and laws) as distinctive kinds of normative social practices, but can also double as virtues, notwithstanding some degree of tension between them. A candidate pluralist theory of law must somehow account for these two features to explore their operation in the juristic encounters with pluralism, or even to bring them together by exploiting the tension between them for its pluralist promise. That search for accommodation or engagement means avoiding both a tendency of pluralist theories to assume or favour openness over decisiveness, and a tendency of monistic theories to assume or favour decisiveness over openness. Pluralist theories typically entail openness towards normative alternatives if not parallel normative universes, which legal theory can recognize through ascribing the quality of legality to diverse kinds of law. In that narrative, decisiveness is sometimes treated pejoratively, as a kind of closure that excludes these normative alternatives. In contrast, monistic jurisprudence has tended to champion law's ability to make and impose decisions, to resolve or dissolve disputes, and manifest some kind of decisive authority. In those narratives, law's openness is carefully and formally contained by the idea of jurisdiction, in which only rules or practices of legal validity can confer the force of decision upon norms, whatever their origin.

The third component explores this idea of formal jurisdiction as a constraint upon or a containment of law's openness, and a delimitation of law's decisiveness. It considers (3) the relationship between openness and decisiveness, and conceives that relationship to operate in one of two modes of normativity: formal jurisdiction and legitimate authority. It explores whether these are strictly distinct or separable modes of normativity, as well as the possibility that in pluralist contexts, there may be greater reason to integrate or at least re-engage the two, mindful of both the constraints of law's formal jurisdiction and the potential scope for evaluating law's legitimate authority

The fourth component is (4) a direct account of this pluralist institutional and normative social context itself, made distinct by plurality both in the form of diffuse legal interventions in social practices (institutionalizations) and the social responses to those interventions which dictate their ultimate acceptability and effectiveness. Within a pluralist institutional context, then, we find diffuse institutions, whose interactions and entanglements with one another involve both the work of officials (as those who design and operate institutions) and wider subject communities (as those who use and accept or reject institutional offerings). The interplay between the work of those charged with institutionalized roles, and those who are subject to and responsive to the institutions, generates the normative social practices which, reflexively, shape the institutions themselves as well as the extent to which their pluralist status will be acceptable and effective.

3.2. Law's Openness and Jurisdictional Constraints

Law's openness is its search for reasons for a decision, or more precisely, the search for reasons that will validate and/or justify a particular legal decision. This is not a new idea. The canon of jurisprudence is well-versed in the notion that law (and legal systems) are open, and/or that legal reasoning is in some sense an open process in which external norms or principles can be incorporated or integrated into a system. It is common for theories of legal reasoning to embrace degrees of openness amidst practices of norm-interpretation and norm-generation, as well as practices of norm-guided degrees of discretion.

In more detail, an orthodox juristic approach comfortably admits the openness that arises from treating law's normativity as continuous in some way with social and/or moral normativity. An orthodox monistic theory of law (typically of state law) analyses how legal systems control their borders with these other norms, thus constituting a formal jurisdiction. That does not, at first sight, look very open. Yet having constructed some idea of jurisdiction, law and legal reasoning can then entail a more open search for norm-content from these other normative domains. In its search for or receptivity to external norms, law and legal reasoning may also be open to norms that can be incorporated from other legal systems using a system's jurisdictionally-valid channels, or norms whose content might be copied from other legal systems without being directly incorporated. Law might also be considered to be, more generally, diachronically open, so that at any point in time there will be potential legal norms which include candidate norms from other systems, which can be activated, as legal norms, through subsequent processes and practices of jurisgenerative activity.

A monistic account might use these forms of openness to downplay the significance of any pluralist challenge. For instance, doctrinal tools for containing openness are available in the form of rules dealing with the application of public international law, or the conflict of laws, and these may be turned, with a little modification, upon pluralist instances of laws other than the laws of international law or the law of foreign states. Thus although the content of legal norms may be open to outside influence (sometimes confusingly termed 'persuasive authority'), both synchronically and diachronically, those norms' authority is always determined intra-systemically. Either a system has its own valid norm which dictates the conditions under which an external legal norm might be incorporated, or the terms on which an external legal system is to attract deference or even a deferral of jurisdiction; or it has norms of systemic closure. The importation of an external norm's content, or its formal incorporation into a host system, does not amount to treating that norm as authoritative in its own right. Monist jurisprudence may insist that in these practices of responding to plurality, a norm's provenance is still essential to its authority (or lack thereof), and that authority is still conferred by a monistic jurisdictional approach, contained by the 'host' norms and their formal jurisdiction. Thus while law may be open to influence from another law's content, its authority is thought to remain systemically closed. Rather than combatting jurisdictional containment, these approaches multiply the sites of jurisdictional containment, which then operate in parallel or sometimes in conflict. In those

circumstances, legality's effectiveness is not determined juridically at all, or not merely juridically, but by matters of social fact such as the strength of one system's de facto authority or the extent to which it is accepted.

Yet the full pluralist challenge is broader than that. It recognizes forms of openness that are not so consistent with a formal jurisdictional approach. On the most robust pluralist interpretation of practices responding to plurality, these forms of openness do not simply alter the content of what is contained within formal jurisdiction, they do not simply open jurisdiction up to infiltration by plural legal norms and institutions, only to close it off again by reference back to the monist moment of decision. Instead, they may be regarded as challenges to the very operation of jurisdictional containment, so that jurisdiction becomes a matter of constraining legal norms, systems, and agents, rather than containing them within formal boundaries. The interaction of norms, systems, and authorities in these expanded forms of openness are treated as defeating the normative closure that formal jurisdiction seeks to impose.

It is instructive to consider three different forms of this kind of openness in turn. The first makes use of law's institutionality not to explore the ways in which one legal system can be open to another while ultimately protective of itself, but to de-link institutional forms from single legal systems. On offer are conceptions of inter-institutional norms, linkage norms, or other rules that are institutional but not monistically institutional. The inter-institutional approach sets out a juridical account of law's openness, but must still acknowledge that, as juridical tools, even inter-institutional norms need to be operated within an institution by its agents. This raises key questions over how those operations occur and how they should be interpreted. Are they still contained by formal institutional domains of jurisdiction? To what extent are such inter-institutional norms actively used by institutions; do their applications attract sufficient acceptance as to make them effective? These questions are raised not to discount the existence or peculiar potential of inter-institutional legality but to suggest the need for further exploration of the ways in which such inter-institutional practices amount to challenges to orthodox juridical concerns, and/or may be examined in light of socio-political as well as juridical concerns.

The second form of pluralistic openness that is arguably constrained but not contained by jurisdiction appears in practices of interaction between legal systems interpreted as revealing law's openness to other systems' authority, not just their content. These point to practices in which particular non-state laws have direct effect or similar status within the state legal system, and which are understood to involve a 'host' system giving space to an outsider's authority. Examples include legislative (or even constitutional) provisions that not only recognize the content but also uphold the authority of some other normative system (often regional law or public international law, or the law of a particular religious or ethnic group, or indigenous law). More controversial examples appear in some adjudicatory practices (such as reliance on customary international law or even unincorporated treaty norms; or courts treating indigenous law as law, not simply as fact)

that reveal more openness to extra-jurisdictional authority than a conventional monist may expect or accept.

The third kind of openness is still more diffuse, and involves practices of open interaction of systems in which the matter of authority is not settled by one system accepting or deferring to another's authority, nor by each system claiming exclusive authority for itself. Instead, each system's claims to authority can be understood as claims to some kind of interdependent authority, which entails the existence of the other's authority without amounting to deference to that other system. Thus despite claiming authority, the systems do not render themselves juridically closed; they blur jurisdiction through practices of interaction which entail the sharing of juridical space, rather than its management through doctrines of jurisdiction or deference. This is the kind of openness often analyzed by accounts of constitutional pluralism such as those examined in Mac Amhlaigh's chapter, but also in practices of interaction between state and indigenous or other polities' laws. It cannot be analyzed or addressed through jurisdictional containment of openness, because there are multiple jurisdictions in play such that their interaction defeats or preempts each other's claims to closure. This is not an abstract problem. Rather, overlap and contestation of normative systems, and their authority, arises from the overlap and interaction of the subjects of those systems. This much is recognized, for instance, in Raz's suggestion in this volume that the relations between rules that generate the identification of 'law-like systems', includes the relation between rules and people, so that the identification of systems includes 'identifying the people who are relevant by reference to the rules that apply to them.' If this is right, and if Raz is right that rules can be part of more than one system, it highlights the fundamental scale and scope of the pluralist challenge, in which norm-subjects can be subjects of multiple norms and systems, and rules can belong to different systems each claiming authority. In that full pluralist challenge, both the subjection to authority and the claim to authority may be better interpreted without the monistic notion of exclusivity, so that instead the matter of laws' authority is open for negotiation or contestation between those who act to represent and serve the overlapping or interacting subjects. This form of openness plays out as a fundamental challenge not only from a pluralist starting point, but also as a central problem for jurisprudential accounts of the authority of law.[13]

In order to make sense of each of these forms of openness, it is crucial to situate openness, and its interpretation and responses, within the pluralist institutional context in which it is operated. This context may involvediffuse institutional forms and complex sets of subjects, which differ in their management of and responses to plurality. Thus in some plural institutional contexts, pluralist legal reasoning may still be reined in by jurisdiction, simply a jurisdiction that is shaped by norms other than those of a host system, e.g., norms which generate concurrent or competing jurisdictions, or which entail deference to another system. In those cases a host system's

[13] See Nicole Roughan, *Authorities: Conflict, Cooperation, and Transnational Legal Theory* (Oxford: Oxford University Press, 2013).

jurisdiction is not self-contained; unlike a pre-pluralist setting, in which the constraints of jurisdiction are closely controlled by the local norms of the legal order associated with that jurisdiction, in a pluralist setting the jurisdictional feature itself constrains in ways that are not simply contained in a set of local norms but are informed by an interaction with norms of other legal orders. In other contexts, however, an institutional response may still give effect to a locally-determined jurisdiction, This would capture, for instance, a pluralist account which appears 'weak' in that it concedes that the orthodox toolkit for managing pluralism seeks to contain it through explicit rules of incorporation, or other jurisdiction-affirming rules, which empower judges to engage in such open critical inquiry while still structuring an interaction in which a 'host' system determines the space it creates for another. Even that weak, pluralist account emphasizes that the juristic enterprise is, at that point, already pluralist to some degree. It suggests that those who make such rules of association between systems, whether they are made as legislative enactments, constitutional amendments, or common law rules of substance or procedure, have already embraced plurality and wish to assert some control over its operation. In section 3.5 below we return to the significance of the work of these agents who handle plurality, to see how they work through these distinctly pluralist forms of openness in order to arrive at decisions.

3.3. Decisiveness: Against Accommodation?

For all its openness, law remains decisive. Law's decisiveness is its characteristic of stopping and settling, at least in a static and sometimes partial sense, both legal and political disputes. From a synchronic perspective, law is decisive in its enactment or application of particular rules, or in simply reaching a particular momentary decision; while in a diachronic sense, law retains a claim to decisiveness at any particular moment, even if it holds off deciding at a given time or decides 'for now,' leaving open the prospect of later revision.

Law, in this sense, is not conciliatory or accommodating. For all the appeal of theories that emphasize law's features beyond its creation of binaries – winners and losers, appeals upheld or dismissed, rights awarded and duties imposed – these binaries remain the business of the decisive part of legal reasoning. This does not deny that legal institutions can utilize conciliatory tools and mechanisms where these are thought useful and suitable, but they will, ultimately, be either backed up by or at the mercy of divisive and binary resolutions. In this light, decisiveness is a troubling virtue. It upsets more relational or conciliatory intuitions (including those of some pluralists), and there is a lot to criticize in its form and substance. Decisiveness is nevertheless a virtue for those who use the law, in both private and public capacities, to seek enforceable determinations of their status, their rights, and obligations vis-s-vis one other, both individually and collectively.

Legal reasoning leads to decisions that effect this virtue, but legal reasoning does not cease once a decision is made, just as decisiveness itself does not entail ultimate finality. In a dispute resolution setting, a decision will eventually be final for its subjects once appeals are exhausted, but legal reasoning both precedes that decision, and continues in the work of jurists who work to challenge or improve that decision for the next time around. The structures for appeal of judicial decisions, and the opportunity for political challenges leading to reform of law's content, mean that law's decisiveness is itself open to evaluation and resistance. Decisiveness is in this way tempered by openness, and in the space provided by a diachronic perspective of legal reasoning, as well as in the physical and normative space provided by institutional structures of appeals, law's decisiveness finds a kind of humility.

Where, if anywhere, does a pluralist jurisprudence find an inroad amidst all this decisiveness? From a diachronic perspective, there is obvious potential for pluralist infiltration of a system of law through the work of its decision-makers. Legal reasoning leads to decisions that can be informed by plurality even as plurality is subsumed and thus eroded by the decider's jurisdiction. Again, however, there is more to it than that. Plurality of laws also multiplies the normative and physical spaces in which law's decisive virtues can be given effect. With such diffusion of law's decisiveness comes the possibility that decisions made in one legal system may be challenged in another. It adds the prospect of both forum-shifting and system-switching, and thus the creation of decisions that might sit in contrast and even conflict with one another. A decision made within state law might be at odds with one made in a transnational, international, religious or indigenous legal system. Importantly, however, it also adds the prospect of influence or interplay between decision-making locations. Decisions in one system may be made either in the light or in the shadow of decisions made elsewhere. Yet we only get to see this interplay of decisions, and recognize it for what it is (rather than mere learning from others or copying or matching what they do) if we first recognize plurality of legal orders and their own decisive virtues.

The concern here may be that such plurality of decision-making could undermine the value of decisiveness itself, in so far as a decision, once made, may be reopened elsewhere, sometimes including a direct challenge to the original decision. This vulnerability of decision-making in a pluralist context, however, may also add value. Decisiveness is more demanding but potentially richer, for having to take into account a plurality of resources as well as for taking note of the interaction of one's own decisions with those of others. Pluralism thus features among the factors that may affect those who make legal decisions, not in every case, but in cases where the processes of open legal reasoning we have described put pressure on the very achievement of decisiveness, as well as enhancing its virtue.

3.4. Re-engaging Jurisdiction with Legitimate Authority

The pressures generated by pluralistic openness, and the ways in which it is met with decisiveness can then be explored through the third component of our candidate pluralist theory, which reassesses the role of jurisdiction in pluralist challenges to monist jurisprudence, as well as its relationship to law's legitimate authority. One way of exploring the pressures generated by pluralistic openness, and the ways in which it is met with decisiveness, is to relate these features to two different, and arguably distinct, modes of normativity in which law's openness operates and is constrained; and law's decisiveness is valued or achieved. One mode is the domain of legitimate authority; the other is the mode of formal jurisdiction. There is often slippage between the two modes, to the extent that in some accounts a domain of legitimate authority is determined by or simply synonymous with formal jurisdiction. Yet the two are importantly distinct in ways that may be of significance for a pluralist jurisprudence.

Formal jurisdiction is constituted and governed by legal rules and is manifested in their operation over a range of subjects and activities, while a domain of legitimate authority is constituted and governed by both social facts (which determine de facto authority as a precondition of legitimate authority) and reasons, or in some accounts, values (which determine the matters on which authority is legitimate, and over whom). While a domain of authority can be conceived pluralistically as open to contestation and perhaps subject to relativity, it is both more difficult, and more pressing from a juristic perspective to reconcile the formal jurisdictional mode with pluralistic openness. As a matter of legitimate authority, plurality presses jurisprudence to offer a justification and ratification of jurisdictional borders, or to explore their relaxation or even disintegration. Yet even if, as a matter of legitimate authority, there is justification for openness beyond the constraint of formal jurisdiction, the juristic worry remains. How, if it all, could legal reasoning engage in such a practice of pluralist openness? This is a problem about both the potential and constraints of legal reasoning, the role of rules, and the nexus between rules, systems and a buttressing idea of jurisdiction.

The pluralist challenge is to monistic approaches to legal theory and legal reasoning that treat jurisdiction as a kind of fortress, within which legal reasoning, and law's openness, is both protected and contained. In the most profound of the pluralist challenges, the question for the practical juristic problem of plurality asks what legal reasoning permits or requires when there are rules belonging to different systems (and thus featuring different institutional protections), which, when triggered by a legal dispute or other inter-systemic legal engagement between subjects, directly challenge each other's protective layer of jurisdiction. In these challenges, the modes of normativity (authority and jurisdiction) become entangled because of the relationship between the twin factors of institutionalization of norms and individuals' subjection to multiple systems of insitutionalized norms. Adding these factors together creates a problem. For we can view the institutionalization of a legal system operating to alter the relation between rules and the social practices that give rise to them (as Raz's chapter suggests), such that there is an intervening layer of validity (or other protective notion such as jurisdiction). This implies that such

jurisdiction/validity is then supposed to be operable without needing to revisit questions of legitimate authority, because such institutionalization is designed to operate as a proxy for legitimate authority. Yet it does not replace the domain of legitimate authority itself, which remains in the background and may be applied in order to evaluate the protective doctrines themselves. If there is reason to doubt the manner in which jurisdiction is being applied, or to question the location of its limits, its content, or its substantive doctrine, then jurisdiction itself can be subjected to an evaluation against the standards of legitimate authority. Perhaps the strongest (and most salient) instances in which such evaluations of jurisdiction are warranted, are conditions of multiple jurisdictions offering their own parallel modes of normativity with no means of either integrating or ordering those domains.

Consider, for instance, what happens when the traditional account of the institutionalization of rules that is typical of law, and the role of institutions in altering the relationship between rules and the social practices that give rise to them, is placed in a pluralist context of both institutions and subjects, as well as both institutionalizations and their constitutive social practices. Now add the prospect that these constitutive social practices might divide polities either internally or among each other, with nothing to determine the ordering among the different institutionalizations (except the order that each claims for itself, or the order resulting from de facto power differentials). The social practices that support institutionalization may well claim some hierarchy or supremacy over other similar practices, but even if they do so, their claim is just that; and it raises rather than answers the matter of its own relation with others. In a situation of conflict, it seems appropriate then to turn back to ideas of legitimate authority to attempt an evaluation of the competing jurisdictional claims. It is appropriate for either of two reasons. First, if the point of jurisdiction is to carve out and separate a domain of legal authority, then from an external perspective, at least, the point at which a jurisdictional protection runs into another is the point at which the case for its protected mode of authority runs out. Alternatively, if the reasons to value jurisdictional authority, and the reasons to institutionalize and protect a normative domain of law, lie in the difficulty of working out what would be legitimate, or the incommensurability / equality of multiple legitimate options, then in the (perhaps rare) circumstances in which there actually is an available answer to that question, it should, arguably be followed.

When there is no ready answer, for instance where notions of legitimate authority are manifested differently and/or contested among the plurality of formal authorities, two related prospects remain. One looks to an idealized version of legitimate authority, to be used to assess the pluralistic claimants of authority. This need not subject plurality to a single ulterior value, rather it may be a standard of legitimate authority that embodies multiple values and commits their advocates to seek their accommodation. The second, either with or without the first, looks for a further venue of openness, either formal or informal, authoritative or guiding, where the particular view of legitimate authority from one formal jurisdiction can be decisively challenged by or made answerable to that from another.

While the first prospect might satisfy some external perspective on the implications of plurality, what would it mean for (and from) an internal perspective, for those tasked with its management? While an abstract account of legitimate authority might be able to offer an ideal response to such plurality, the institutionalization of norms requires that these concerns also be met with some form of the second prospect. We need to offer an insitutionalized theory – legal theory – that responds to conflicts by reference to the institutional layers set up precisely for that purpose, and, arguably, with attention to those who are tasked with treating law as authoritative. This includes the layer of empowered and authorized legal reasoners – those officials whose role it is to effect law's institutionalization, and operate both its open and decisive features.

3.5 Pluralist Legal Practices among Officials and Subjects

A pluralist jurisprudence offers itself as a point at which some kind of resolution between openness and decisiveness, and between jurisdiction and legitimate authority, might be found. The resolution offered in this section, tentatively for now, emphasizes the role of open and decisive yet pluralist legal reasoning in the hands of legal officials, who work with an account of jurisdiction that can re-engage with (but does not collapse into) legitimate authority. In the hands of officials, that is, there is a potential for pluralist openness in pursuit of legitimate authority that might be obscured if we looked only at the content of institutions and their formal jurisdictions.

At this point the pluralist intervention challenges the simpler, conventional relationship outlined earlier between formal jurisdiction and legitimate authority. It asks whether jurisdiction itself can bend in the direction of legitimate authority, to the extent we might say that in circumstances in which more than one system of legal norms is implicated in a legal dispute, or where more than one set of legal institutions is needed to resolve a particular legal problem facing subjects, then as a matter of legitimate authority, there may be no justification for one system/set ignoring or excluding the other under the rubric of jurisdiction. To render jurisdiction responsive to legitimate authority is itself also undoubtedly an ideal, but the bending of jurisdiction to authority may be evident in small steps of pluralist legal reasoning by officials, so that, rather than containing the operation of legal reasoning or the tools or content with which such reasoning is concerned, jurisdiction still harbours an openness to legitimate authority for its own modification or displacement.

The institutional layer of law thus contains both barriers and opportunities for pluralist jurisprudence. The key barrier is the one already described in the formal notion of jurisdiction. Yet, jurisdiction neither constitutes nor controls itself; rather it is operated by the official agents who, though institutionally constrained, retain capacities to act which, in a pluralist setting, include the capacity to render law more or less pluralist. While law's institutional agents can be

specifically directed (by linkage norms or inter-institutional norms) to reason inter-systemically and/or pluralistically, those agents may also, without further direction, engage in pluralistic legal reasoning. Pluralistic legal reasoning makes the first part of the legal reasoning process one of systemically open inquiry, which canvasses, contemplates and critically evaluates legal norms that do not necessarily fall within the host legal system but which are made pertinent to the resolution of a dispute or a legal problem either because of the identities of the parties or its substantive issues which render the subject matter of the dispute interactive or overlapping. This does not simply entail a free-for-all; rather, at the moment of decision, there is a choice to embrace plurality of norms either by adopting their content, by deferring to their authority, or more subtly, by claiming something other than exclusive authority. That choice is unresolved by a theory of legal reasoning, and indeed by a theory of law in the narrowly institutional sense. Rather its analysis and evaluation falls to an understanding of the roles of those who are tasked with deciding: those officials who make, apply and enforce the law.

This is not the place to defend a full account of the roles of legal officials,[14] but rather to outline any potential of those roles for thinking about pluralist jurisprudence. In even a non-pluralist setting, the agents of law who engage in legal reasoning retain the capacity, because of their agency, to reflect upon and potentially challenge jurisdictional solutions. They may even come under some pressure to do so when there are strong reasons (perhaps counting in the direction of legitimate authority) for adopting less rigid jurisdictional constraints, even if this interferes with formal jurisdiction. If they hold themselves out as having authority over subjects, then they ought to pursue its legitimacy for those subjects.This may, in a pluralist setting, lead to pluralist engagement rather than monistic isolation; especially, if subjects themselves are conceived pluralistically, as overlapping or interacting. A robust pluralist account of legal official roles may go further, to explore the potential for officials to operate in dual or multiple institutional roles (e.g., as state officials and international officials), which may require them, at times, to choose between respective jurisdictional constraints. Or it might conceive of officials' roles as being in the service of subjects, conceived pluralistically, rather than bare institutions themselves. The element of choice here is important – it emphasizes that legal reasoners are not automatons, and also that legal reasoners may be assessed not only by the quality of what they do measured against standards of formal competence and their contribution to furthering their institution(s), but also the reflective ability and, indeed, judgement that they bring to their judgments. It positions officials as being institutionally created, but it maintains that, as agents, they are constrained but not contained by their institutional character.

Yet the emphasis on the roles of officials, as bearers of promise for pluralist jurisprudence, then opens up a further and foundational element bearing on the manner in which openness and decisiveness in legal reasoning, the engagement of jurisdiction with legitimate authority, and any pluralist practices of officials, may operate. The foundations of all of these components of

[14] A fuller account is currently being undertaken by Nicole Roughan as a book to be published by Oxford.

pluralist jurisprudence lie in the social practices which ultimately determine their degree of acceptance and effectiveness. The roles of officials, for instance, may be best understood as being generated socially, not only by the officials themselves, but also by those subject to their powers, and what they accept or require of the official role. There is thus a de facto constraint on pluralist legal practices (their success depends on the extent to which they are effective), as well as a sociological vulnerability (their effectiveness may depend on the extent to which they are accepted or at least tolerated by subjects). Importantly, plurality itself may be politicized, so that a subject community may actively embrace or reject attempts by officials to reason pluralistically; just as officials may embrace or reject the pluralistic claims and practices of subjects. In so far as roles are shaped by normative social practices, as well as shaping those practices, pluralism itself stands or falls upon a critical degree of normative acceptance.

Evidently pluralism is often perceived as a threat to the positions of those who embrace or at least assume the primacy of monist legal forms and content; it may be seen to threaten the security of institutions and practices that subjects familiar with monism have simply assumed. This perceived threat, moreover, is amplified wherever plurality is not just a matter of managing the interaction of formal jurisdictions, but a matter of different polities contending for spaces or places for their law, involving conflicts over territory, authority, or power.

A complete analysis of 'pluralist legal practices', then, both reveals and must account for the contingency of the promise of pluralist jurisprudence, a dependence upon how prepared legal reasoners are to reason pluralistically, and the extent to which law's subjects welcome the results of those processes. It suggests that the work of officials and subjects in dealing with plurality and their responses to pluralist claims, rather than bare institutional arrangements or even inter-institutional tools, ultimately holds out or holds back the full promise of a pluralist jurisprudence.

3.6 Concluding Remarks

The candidate pluralist jurisprudence sketched out above was introduced at the beginning of this chapter as needing to reveal something of the potential of pluralist law beyond what a conventional monist jurisprudence could deliver. This was linked to a technical promise for pluralist jurisprudence, in attaining a credible disciplinary status. The achievement of this status was subsequently amplified (in section 2) in terms of a basic picture of four integrated pursuits of pluralist jurisprudence: (a) the recognition of pluralism, (b) a practical outworking of pluralism, (c) a normative or aspirational agenda for pluralism, and (d) a theoretical account of pluralism.

Four components were identified in our candidate theory: (1) the openness of law; (2) the decisiveness of law; (3) the relationship between openness and decisiveness operating within the dual modes of normativity associated with formal jurisdiction and legitimate authority; and, (4) the pluralist institutional and normative social context with its distinctive interplay between legal

interventions and social responses. In section 3.1 we indicated how these components could be viewed together as satisfying the basic picture of the four integrated pursuits of pluralist jurisprudence we had previously introduced. The plausibility of our candidate theory is not, however, simply a matter of demonstrating it might meet these technical requirements. It is to be found in the detail of the argument and illustration through which these components are integrated together to portray a distinctively pluralist jurisprudence. So, for example, the three forms of pluralistic openness portrayed in section 3.2, or the peculiar impact of a pluralist setting on the institutionalization of rules and the role of institutions in altering the relationship between rules and social practices that was discussed in section 3.4, need to be examined carefully for the plausibility of their individual accounts before any judgement is made of the credibility of the candidate theory as a whole.

The candidate theory is put forward as a theory to which detailed critical responses of this sort should be made, but in advancing it we hope to make a more general point. It illustrates the way that any secure future for pluralist jurisprudence is to be found in a legal theory that is technically competent according to criteria appropriate to its subject matter, and can withstand detailed critical scrutiny of its specific elements.

The future of pluralist jurisprudence, as we have discussed it and as it is frequently approached, is often tied up with a normative or aspirational ambition, which can be associated with pluralism itself. Our own candidate theory has an idealist edge in looking to unlock what might be regarded as the promise of pluralism itself through the outworkings of pluralist law, and in that respect acknowledges the possibility of an idealist promise for pluralist jurisprudence. That should be regarded as distinct from an idealism which is not associated with the technical outworkings of pluralist law but with the subjection of those legal practices and the theory that informs them, instrumentally, to some extrinsic vision of what those practices might achieve, if aligned with an appropriate conception of global justice, or a cosmopolitan enlightenment, or even the proper appreciation of the values informing the rule of law.

In our own candidate pluralist theory of law we tempered idealism with realism in stressing that any fulfilment of the full promise of pluralism could not be secured by theoretical appreciation of institutional arrangements and inter-institutional tools, but was dependent upon the responses of officials and subjects to plurality and pluralist claims. This may serve as a second general point made by way of illustration, regarding the idealist promises (whether inherent or instrumental) of a pluralist jurisprudence.