Introduction

This issue of *Theoretical Inquiries in Law* juxtaposes legal pluralism, the privatization of law, and multiculturalism — three distinct areas of legal thought. Yet while these fields differ in many ways, they all share a fundamental concern: the extent to which state law claims, and should claim, a monopoly over the regulation of people's lives; the scope and legitimacy of the operation of non-state legal systems within, alongside, and in competition with the state.

Each of the three fields offers an attack on a different variety of "legal centralism." Students of legal pluralism dispute the legal-centralist notion that state law is exclusive; legal pluralists assert and explore the proposition that non-state legal systems exist alongside state law and are not necessarily subordinate to it. Scholarship on the privatization of law presents a normative challenge to the legal centralism inherent in states' massive legislative and adjudicative capacities, and examines the possibility of replacing monolithic state law with polycentric, private-sector legal regimes in which individuals submit voluntarily to various competing legal systems. Research on multiculturalism challenges the legal-centralist notion of uniform nation-state law by debating the extent to which today's multicultural states, inhabited by multiple national, religious or ethnic groups, should allow non-state (often illiberal) law to apply to the lives of their citizens.

The articles in this issue are written by scholars whose work, for the most part, is rooted in one of these three fields of thought. And yet, it is our hope that the combination of these articles and the interplay between them can serve not only to advance the scholarship in each of the three spheres but also to create an appreciation for what each sphere can gain from the others. We hope that this issue demonstrates that each of the three distinct but related fields of scholarship can benefit from closer ties to the work conducted in the other two.

Legal pluralism is the focus of the issue's first set of articles. One of the questions raised by this field is the extent to which phenomena other than state law should be considered "law." Christine Parker addresses this question from the point of view of research on regulation. Parker rejects a common legal pluralist response to regulatory pluralism, which expands the definition of "law" to include a variety of forms of regulation. Instead, she sets forth the position that the law itself should be intentionally and

profoundly pluralized in ways that recognize its own limitations. Parker distinguishes between two ways in which this might be done, "responsive law" and "reflexive law," and elaborates their outlines and the differences between them. She argues that the responsive and reflexive views of law must be distinguished from each other, yet that at the same time they should also be seen as complementary, since either one of these views on its own is impractical or even dangerous. Parker claims that this scheme provides the conceptual tools for identifying a type of emergent, pluralistic law beyond the state which is particularly relevant to thinking about the role of law in a globalized, capitalist, multicultural world.

Ronen Shamir's article highlights the effect that global capitalism has on private organizations. Contemporary literature often paints a rosy picture in which private regulatory authorities are increasingly concerned with promoting moral behavior in the social and economic spheres. In this scheme, we should not lament the decline of central authorities: magnates and multinational corporations do set the tone, but they regulate the market to conform to socially acceptable standards, and in doing so sometimes bring about important social reforms. Shamir puts market-actor regulatory benevolence in a framework that highlights its perils. He identifies other pervasive processes, such as the "corporatization" of voluntary organizations, as kin phenomena. These manifestations of the neo-liberal project involve the framing of moral problems in an epistemology that encodes the "social" as a specific instance of the "economic." The result is a shift to an ethics that subordinates socio-moral sensibilities to cost-benefit analyses and the further economization of the political and moral foundations of society.

A general problem in research on legal pluralism, according to Gad Barzilai, is the fact that it has not developed a theory of political power. Barzilai wishes to integrate political power into legal pluralism in three contexts: identity politics, non-ruling groups, and globalization. In all three areas, Barzilai is interested in states' veiled political motives to foster legal pluralism. He argues that legal pluralism has not been only a consequence of irreducible historical development, but also a significant product of state strategies to control and construct power relations, while conceding some of their political domination through transformative relations with local and global actors. Barzilai analyzes the interplay of political power between the local-communal level, the national level, and the global level, and concludes that nation-states are still the primary actors in the sociopolitical setting in terms of political power.

Ido Shahar points to another fundamental failing of much work on legal pluralism: its naïve acceptance of the image of the state as a monolithic entity, distinct from society. Notably, this understanding of the state is implicit in

John Griffiths' prominent distinction between "weak" legal pluralism, which exists within the boundaries of the state, and "strong" legal pluralism, which involves both state and non-state legal orders. Shahar claims that a more complex understanding of the state, which takes into account the state's internal diversity and contradictions and the blurred boundaries that it has with society, provides a more productive foundation for the study of legal pluralism. It also directs our attention to the perspective of individual litigants' ability to maneuver between different legal orders. This, according to Shahar, forms the basis for an alternative conceptualization of "strong" versus "weak" legal pluralism.

The final article on legal pluralism in this issue is David Nelken's study of the influence of Eugen Ehrlich's concept of "living law" on contemporary scholarship. Nelken points to three aspects of living law which have been developed in later writing: "the law beyond the law," "law without the state," and "order without law." Nelken reviews the literature in these fields, spells out some of its links to a number of articles in this issue, and suggests that Ehrlich's work, though sometimes misread, is an important key to understanding current work on legal pluralism.

The next group of articles deals with the privatization of law. Yet the first of these, Talia Fisher's contribution, is not limited to this field; instead, it seeks to bridge the gap between discussions of the privatization of law and those of multiculturalism. As Fisher notes, scholarship on legal decentralization tends to focus on criticism of the centralistic, monopolistic role of the state, while obscuring the important questions of how, and to whom, law should be decentralized. Fisher compares the privatization of law model and the multiculturalism paradigm, and shows that they represent two contrasting approaches, founded on alternative worldviews regarding such crucial issues as the essence of the human subject, the meaning of community, and the nature of law. Thus, the adoption of either approach would imply very different socio-legal systems (and Fisher hints that not all approaches to decentralization are necessarily compatible with liberal principles). This approach thus underscores the importance of the project embodied by this issue.

Bryan Caplan and Edward Stringham focus on a narrower facet of the privatization of law project — the move to privatize the adjudication of disputes. Caplan and Stringham contend that private dispute resolution, particularly through arbitration, would generally be preferable to the system of adjudication currently supplied by government courts. Their arguments are rooted in the application to this area of general principles regarding the advantages of free markets over monopolies and bureaucracies. They suggest that for private dispute resolution to live up to its full potential,

government must step back and refrain from unwarranted intervention in private arrangements — primarily, public courts must respect contractually stipulated final and binding arbitration.

In his contribution to this issue, John Hasnas does not advocate the privatization of law. Instead, introducing the concept of "depoliticized" law, he envisions a legal system in which the law is not made by elected political agents. Arguing that "politicized" law is inherently incompatible with the concept of the rule of law, since it means that legislators and judges impose their own wills and ideologies on others, Hasnas depicts a legal system in which law arises through a process of unplanned evolution, tailored to each new set of circumstances, and as such is not a tool for domination in the hands of any identifiable persons or social groups. Hasnas argues that only such a depoliticized system can be truly consistent with the idea of the rule of law and not of men.

The issue's remaining articles are devoted to multiculturalism. Jeff Spinner-Halev argues against the idea, embedded in much recent liberal and feminist theory, that society should be governed by one overriding value. Spinner-Halev argues that it is a group's members, not the state, who ought to shape the contours of the group's norms; the push for too much congruence between general, state forms of justice or equality and particular rules (such as religious precepts) that are dedicated to some other good is dangerous, for it means giving the state excessive power. Spinner-Halev stresses that if liberalism is to take the ideas of liberty and toleration seriously, it must be prepared to tolerate illiberal religions; to happily proclaim that liberals will tolerate liberals is to hollow out the meaning of toleration. Thus, religious groups should be allowed to be internally illiberal as long as society remains pluralistic, exit from the groups is assured, and all members of society receive a decent education.

Ayelet Shachar employs the recent debate over the Canadian Shari'a tribunal to examine "privatized diversity," the demands made by minority communities to opt out of a polity's legal system. The Shari'a tribunal, which combined an alternative forum for adjudication and an alternative source of law for family-law disputes, elicited strong opposition, and was ultimately rejected by the Canadian government. Shachar argues that the prevalent privatized diversity discourse is built on oversimplified distinctions between private and public, culture and citizenship, contractual and moral obligation. It is thus blind to people's overlapping affiliations, though these can be significant sources of meaning and value. At the same time, this framework may be particularly hard on women affiliated with minority religious communities, because it leaves them to fend for themselves while handicapped by multiple social and economic disadvantages. Shachar

examines non-dichotomous solutions to the Shari'a tribunal case, solutions which might have provided better responses to devout women's complex identities as group members and citizens of the larger polity.

The question underlying the two previous articles, namely, how a liberal state should treat the cultural practices of non-liberal groups living within it, is tackled head-on by Menachem Mautner. Mautner rejects the answers given to this question by two major groups of liberal thinkers, "autonomy liberals" and "diversity liberals." At the heart of his article is the conviction that the only standards that a liberal state may invoke in its relations with non-liberal groups are universal standards, i.e., those that transcend any particular culture and that can also be applied to the culture of mainstream liberal society. Mautner enumerates major considerations that must be taken into account when state intervention in cultural practices of non-liberal groups is considered, and ultimately proposes two standards that should guide the liberal state in such cases: the human rights doctrine and the concept of humanness.

Also included in this issue is the first Annual Cegla Lecture on Legal Theory, *The Perils of Minimalism* by Owen Fiss. The Cegla Lectures on Legal Theory feature prominent legal scholars who are asked to address fundamental questions about law and legal institutions. In his lecture, delivered at Tel Aviv University in October 2007, Fiss examines the decisions of the United States Supreme Court in cases involving detainees at the American naval station in Guantánamo Bay. The judicial methodology employed by the Court in these cases was minimalism — that is, the Court chose to resolve the cases on statutory rather than constitutional grounds. Fiss argues that this methodology ignores the role of the Supreme Court as the protector of the Constitution, and, more generally, misunderstands the nature of democracy.

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