

The Pluralization of Regulation

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This Article examines normative arguments for legal pluralism in regulation. First I briefly set out what we know in fact about how plural regulatory orderings interact and compete with state agency regulatory action. Second, I sketch, and reject, a simple legal pluralist response to regulatory pluralism. In the third part of the Article I show that "responsive" and "reflexive" approaches to intentional pluralization in the design of law should be seen as providing different but complementary pictures of pluralized law. Finally I argue that this pluralized view of law might provide us with the conceptual tools to identify a type of emergent, pluralistic law, without or beyond the state, which would be relevant to thinking about both transnational regulation and multiculturalism.

INTRODUCTION

It is obvious that the law of the state does not as a matter of fact exercise a monopoly in regulating the lives of citizens. Many other things — rule systems, normative orderings, symbolic meanings, economic forces and the "laws" of nature — order the lives of citizens and, indeed, "regulate" the operation of the law of the state. The scholarship of legal pluralism asks to what extent things other than the official law of the state are in fact "law,"

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questioning the centralism of official law in legal scholarship.¹ This Article addresses these questions from the perspective of research on regulation.

The Article begins by briefly setting out what we know about how plural regulatory orderings interact and compete with regulation by official law. Second, the Article sketches, and rejects, a simple legal pluralist response to regulatory pluralism — the expansion of the definition of "law" to include a variety of forms of regulation.

Instead, the dominant current in contemporary regulation and governance scholarship is to argue that law itself should be intentionally and profoundly pluralized in ways that recognize its own (severe) limitations. There are two main normative pictures of how law might do this in regulation and ("new") governance scholarship — "responsive law" and "reflexive law." The third part of the Article outlines and differentiates these two pictures of law. I shall argue that the responsive and reflexive pictures of law must be differentiated but also seen as complementary if pluralized law is to do what its advocates say, since either ideal on its own is impractical or dangerous.

The fourth part of the Article shows that conceiving of pluralized law as both responsive and reflexive also provides us with the conceptual tools to identify a type of emergent, pluralistic law, without or beyond the state, which is especially relevant to thinking about the role of "law" in a world of global capitalism and multicultural and postcolonial societies.

I. REGULATORY PLURALISM

Pluralism is fundamental to regulation scholarship. Scholarly understandings of how to define "regulation" are themselves highly pluralist. Definitions of regulation range from "a type of legal instrument," to any area of law that aims at social control, to any intentional "process of controlling behavior with reference to some standard or purpose," to "an outcome of an interaction of forces and actors," and even "a property of self-correction."² "Regulators" can be state institutions, non-state actors, social and economic forces (e.g., markets, norms, or even language), or physical

1 Brian Tamanaha, *A Non-Essentialist Version of Legal Pluralism*, 27 J.L. & Soc'y 296, 298 (2000).

2 Julia Black, *Decentring Regulation: Understanding the Role of Regulation and Self Regulation in a "Post-Regulatory" World*, 54 CURRENT LEGAL PROBS. 103, 134-35 (2001).

or virtual technologies.³ Moreover, there is a plurality of sociological and psychological mechanisms that motivate different people to comply or not comply with various rules, norms and directions. Indeed individuals and organizations can be motivated by different things simultaneously. Official legal mechanisms therefore activate only some of people's motivations for compliance, and only some of the time.⁴

Much research on regulation has been concerned with "mapping" the interpenetration of, and competition between, different regulatory influences, including law, in different social spaces.⁵ No one regulator, including law, has any monopoly or final authority across a whole regulatory "space." Nor do different regulatory influences necessarily fall into any obvious hierarchy. To the extent that law attempts to create and enforce rules, the creation, interpretation and application of those rules is always mediated by other actors — so that law itself is pluralist in the sense that state law means different things according to how it interacts with other actors and regulatory orderings. Indeed plural regulatory orderings "regulate" the operation of state law just as much as (if not more than) they are regulated by it. At a macro-level it has been argued that the reach and significance of regulatory space is expanding, and that a defining feature of contemporary society is that it operates according to a logic of "regulatory capitalism" in which state regulation (i.e., law), civil (i.e., non-state) regulation and the market coexist in various interdependent configurations.⁶ Moreover it has been argued that an emerging feature of ("new") governance, especially at the supranational level, is to operate by means of "collaborations," "partnerships," "webs" or "networks" of states, businesses, nongovernmental organizations and others in which the state, state-promulgated law, and especially hierarchical command-and-control regulation are no longer dominant.⁷

3 See NEIL GUNNINGHAM ET AL., *SHADES OF GREEN* 35-40 (2003); LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 235-39 (1999).

4 IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION* 19-35 (1992); Søren Winter & Peter J. May, *Motivation for Compliance with Environmental Regulations*, 20 *J. POL'Y ANALYSIS & MGMT.* 675 (2001).

5 Colin Scott, *Analysing Regulatory Space: Fragmented Resources and Institutional Design*, *PUB. L.*, Summer 2001, at 329.

6 David Levi-Faur, *Regulatory Capitalism: The Dynamics of Change Beyond Telecoms and Electricity*, 19 *GOVERNANCE* 497, 521 (2006); STEVEN K. VOGEL, *FREER MARKETS, MORE RULES* (1996).

7 LAW AND NEW GOVERNANCE IN THE EU AND THE US (Grainne de Búrca & Joanne Scott eds., 2006); Clifford Shearing & Jennifer Wood, *Nodal Governance, Democracy, and the New "Denizens,"* 30 *J.L. & SOC'Y* 400, 405 (2003).

II. LEGAL PLURALISM

Whatever it is we think state law is or does, legal pluralist scholarship points out that state law is not the only thing that does it.⁸ Historically, customary and religious laws existed long before the modern nation-state and the "rule of law." In postcolonial and multicultural societies, like India and Israel, various customary and religious laws continue to exist side by side with the law of the state at varying levels of recognition by, and interaction with, official law. In federal states, like Australia and Canada, not only do indigenous people's laws run in parallel with state law, but local and provincial laws interact, and sometimes conflict with, national law. In transnational communities of states, especially the European Union, legal pluralism is even more obvious. One might even argue that different areas of doctrine (tort, contract, criminal, constitutional law) conflict and compete in ways that suggest that what looks like a unitary body of law is really a multiplicity of pluralist laws.

An "extended"⁹ view of legal pluralism points out that — even beyond all these things that scholars and ordinary people already label "law" — in contemporary societies there is a range of other rule systems, normative orderings and symbolic meaning systems that also should, or could, be described as "law." Families, corporations, ethnic and religious groups, friendship groups and many other "semi-autonomous social fields" can all "generate rules and customs and symbols internally" that influence people's behavior and consciousness as much as, or more than, the official law.¹⁰

Legal pluralism looks behind the modern state's claim that its law is "king"¹¹— the "final authority."¹² Legal pluralism has both empirical and normative aspirations: The goal is to more faithfully render people's experiences by decentering the place of official law in our understanding of

8 See Tamanaha, *supra* note 1, at 300; Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869, 886-88 (1988); Gunther Teubner, "Global Bukowina": *Legal Pluralism in the World Society*, in GLOBAL LAW WITHOUT A STATE 3 (Gunther Teubner ed., 1997); see also DENIS GALLIGAN, LAW IN MODERN SOCIETY 158-72 (2007).

9 Galligan's term: GALLIGAN, *supra* note 8, at 173-92.

10 Albeit they are "vulnerable to rules and decisions and other forces emanating from the larger world." See Merry, *supra* note 8, at 878 (quoting Sally Falk Moore).

11 Gunther Teubner, *The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy*, 31 LAW & SOC'Y REV. 763 (1997); BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMONSENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION (1995).

12 GALLIGAN, *supra* note 8, at 184-85.

what "law" is, but also to democratize, emancipate or empower the "living law" of the people.¹³

A simple legal pluralist response to regulatory pluralism might be to broaden our conception of "law" to include (at least some) non-state regulatory ordering.¹⁴ This is a reactive pluralization of law — identifying things that are not currently called "law," it changes our definition of law to embrace them. There is some plausibility to this approach: While there is little non-state regulation of business, for example, that the participants explicitly think of as "law,"¹⁵ there are many rule systems (including industry and NGO codes and standard certification systems) that we might conceivably describe as "informal law," "quasi-law" or "indigenous law."¹⁶ Some of these already receive some recognition from the official law of the state as "soft law."¹⁷ Inside business organizations too, there are a range of law-like mechanisms (such as employee discipline and grievance mechanisms, consumer complaint and regulatory compliance systems) that often explicitly interact with both official law and industry and NGO regulation.¹⁸ Beyond this, we might even describe more general internal management controls and bureaucratic systems as organizational "law."¹⁹ There are also a variety of other conventions, values, cultures, myths and motivations that influence business behavior and that some might wish to label as "law" for some purposes.

Understanding that each of these things may be more influential than state law is useful. But there are three main problems with seeking to identify them as "law."

13 PHILIP SELZNICK, *THE MORAL COMMONWEALTH* 469-70 (1992). Selznick refers to EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (Harvard Univ. Press reprint 1936) (1913).

14 See, e.g., Marc Galanter, *Justice in Many Rooms*, in *ACCESS TO JUSTICE AND THE WELFARE STATE* 147, 162 (Mauro Cappelletti ed., 1981); STUART HENRY, *PRIVATE JUSTICE* 47-57 (1983).

15 Cf. Tamanaha, *supra* note 1.

16 Terms from, respectively, GALLIGAN, *supra* note 8, at 181; SELZNICK, *supra* note 13, at 469; and Galanter, *supra* note 14.

17 See Errol Meidinger, *The Administrative Law of Global Private-Public Regulation: The Case of Forestry*, 17 *EUR. J. INT'L L.* 47 (2006); HARM SCHEPEL, *THE CONSTITUTION OF PRIVATE GOVERNANCE: PRODUCT STANDARDS IN THE REGULATION OF INTEGRATING MARKETS* (2005); *VOLUNTARY CODES: PRIVATE GOVERNANCE, THE PUBLIC INTEREST AND INNOVATION* 93 (Kernaghan Webb ed., 2002).

18 See HENRY, *supra* note 14; CHRISTINE PARKER, *THE OPEN CORPORATION* (2002).

19 See Peter Muchlinski, *"Global Bukowina" Examined: Viewing the Multinational Enterprise as a Transnational Law-Making Community*, in *GLOBAL LAW WITHOUT A STATE*, *supra* note 8, at 79; *THE LEGALISTIC ORGANIZATION* (Sim B. Sitkin & Robert J. Bies eds., 1994).

First, the analysis can easily become circular in a futile way. Whether other normative orderings are law depends on how we define "law," if it can be defined. By making an argument about "legal" pluralism, (extended) legal pluralism forces itself to define what law is in a way that is not state-centered. But if its criticism that the ideology of state law centralism is endemic in contemporary society is true, then this is virtually impossible, since all definitions either subtly rely on our understanding of state law as their starting point, or fail to garner widespread acceptance because the audience is too mired in the ideology of centralist state law to accept any other definition.²⁰ This particular objection may not apply to legal pluralism in looking at historical, colonial, federal and transnational contexts when it is clear that there is a cohesive community that sees the relevant social phenomenon as "law." The other two critiques, however, apply equally to multicultural versions of legal pluralism.

Second, the identification of certain rule systems, norms or conventions as "law" is vulnerable to precisely the same myopia as seeing only state law as "law" — at another level. It tends to assume that each social group generates its own law at varying levels of formality, but that each group has only one law.²¹ This is manifestly untrue. For example: We might want to assert that a multinational chemical company's environmental health and safety program is a kind of "law" for that company. But even so, we might equally say that there are many competing ways in which that internal corporate program is interpreted and instantiated within the one enterprise, and that the environmental health and safety program itself competes with other management systems, cultures and behaviors within that enterprise. So there are pluralities within pluralities, and it is impossible to say where we should stop in naming one, or two, or three . . . of the many pluralities "law" and the others not "law." The same is equally true of other candidates for consideration as pluralist law — such as the Shari'a and Halakha of Muslim and Jewish communities.²²

Third, the plural regulatory orderings developed by different groups of people that are identified as "law" by legal pluralism may be insular, parochial and self-interested. Or they may be more legitimate and substantively valuable than the official law as ways of connecting individual groups

20 See Tamanaha's critique and reformulation of legal pluralism in Tamanaha, *supra* note 1. See also Emmanuel Melissaris, *The More the Merrier? A New Take on Legal Pluralism*, 13 SOC. & LEGAL STUD. 57 (2004).

21 See HENRY, *supra* note 14, at 47.

22 See Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, 9 THEORETICAL INQUIRIES L. 573 (2008).

with the values of the broader society.²³ But extended legal pluralism does not have the capacity to normatively evaluate what should count as "law." It gives up the sense of law having aspirations to embody democratic, inclusive, universally applicable criteria for critiquing the public interest or substantive value of individuals and group practices in a pluralist society. This critique applies equally to recognizing plural forms of business self- and civil society regulation as law as it does to recognizing the customs of religious or ethnic groups as law.²⁴ Legal pluralism does not address the possibility that the "living law," the entire range of regulatory orderings, might be able to evaluate and critique official law. Reactive legal pluralism does not allow sufficiently for the possibility that plural regulatory orderings might interpenetrate normatively, as well as empirically, to make legality itself a pluralist phenomenon. Instead it focuses on identifying plural types of laws. Yet it is the normative aspects of what pluralism means for our understanding of law that are most significant.

The problem that legal pluralism seeks to correct is too monistic a conception of the boundaries of official law, which blinds us to the way official law and other "laws" and regulatory orderings interact. One of the strengths of regulation and governance scholarship is that it is not preoccupied with what counts as "law," but has got on with the work of empirically understanding that interaction. Arguably, then, both regulation and ("new") governance scholarship are excellent examples of interdisciplinary scholarship unconstrained in scope and approach by the kind of traditional state-centered conceptions of law that legal pluralism advocates. Yet empirical understanding of plural mechanisms of social control leads naturally to normative questions about the extent to which official law should be responsive to this plurality, and reflexive about its own limitations. These are pressing normative questions in a world in which global capitalism and cultural and religious conflict have cast doubt on the capacity of liberal ideals of a democratic rule of law to control the exercise of power and provide a governance framework for peaceful coexistence.

23 See Melissaris, *supra* note 20, at 69-70.

24 See Menachem Mautner, *From "Honour" to "Dignity": How Should a Liberal State Treat Non-Liberal Cultural Groups?*, 9 THEORETICAL INQUIRIES L. 609 (2008); Shachar, *supra* note 22.

III. RESPONSIVE AND REFLEXIVE PICTURES OF LAW

Theories of "responsive"²⁵ and "reflexive"²⁶ law are related but, in some ways, opposing attempts to rethink law to encompass and account for social plurality, while retaining its universal, normative role.²⁷ Both are general social theories of law that have been applied particularly in research on regulation and governance, but are equally applicable to a range of other areas. Differentiating between responsive and reflexive law shows that there are two theoretically distinct (but ideally interdependent) roles we expect of a pluralized law.

First, Philip Selznick's ideal of *responsive law* suggests that law should promulgate broad substantive values across a range of self-regulating or semiautonomous social fields. It should do so in a way that defers as much as possible to these non-legal fields both in terms of defining the substantive values to be promulgated and also as to how those substantive values are to be implemented and detailed in practice.

Second, the notion of *reflexive law*, as most completely (and radically) theorized by Gunther Teubner, suggests that law should catalyze processes of social coordination by which people in different social fields can work out for themselves which values to apply to which problems.

The responsiveness prescription for pluralizing law puts law at the core of a series of concentric circles that pulse in and out: Law seeks to capture

25 PHILIPPE NONET & PHILIP SELZNICK, *LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* (Robert A. Kagan ed., Transaction Publishers 2001) (1978); SELZNICK, *supra* note 13, at 463-76.

26 Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 *LAW & SOC'Y REV.* 239 (1983) [hereinafter Teubner, *Substantive and Reflexive Elements*]; Gunther Teubner, *Corporate Fiduciary Duties and their Beneficiaries: A Functional Approach to the Legal Institutionalization of Corporate Responsibility*, in *CORPORATE GOVERNANCE AND DIRECTORS' LIABILITIES: LEGAL, ECONOMIC AND SOCIOLOGICAL ANALYSES OF CORPORATE SOCIAL RESPONSIBILITY* 149 (Klaus G. Hopt & Gunther Teubner eds., 1985) [hereinafter Teubner, *Corporate Fiduciary Duties*]; Gunther Teubner, *Juridification: Concepts, Aspects, Limits, Solutions*, in *JURIDIFICATION OF SOCIAL SPHERES: A COMPARATIVE ANALYSIS IN THE AREAS OF LABOR, CORPORATE, ANTITRUST & SOCIAL WELFARE LAW* 3 (Gunther Teubner ed., 1987).

27 An alternative perspective would be to argue that we should give up on law as a socially constructed, inefficient monopoly on social control and instead leave it to the market and principles of social functionality to sort out which plural orderings should remain. *Cf., e.g.*, John Hasnas, *The Depoliticization of Law*, 9 *THEORETICAL INQUIRIES L.* 529 (2008).

and embody those values that flow in from the outer circles through political deliberation, and radiates those values out again in an attempt to ensure they are embodied into institutional arrangements.²⁸

Responsive law is intimately connected with politics. Political discussion must set the law's purposes, its goals, values and principles. Responsive law goes on to put those purposes into practice in a flexible and participatory manner, and in ways that preserve their integrity while embracing the plurality of the social world by leaving the application of values to be worked out as much as possible by those in society to whom they apply. Responsive law continually corrects itself in relation to political discussion, at the same time that it expects plural actors and institutions also to learn and correct themselves.

Much empirical, policy-oriented scholarship in business regulation implicitly (or explicitly) adopts this responsiveness ideal of legal regulation. Ayres and Braithwaite's pyramid of responsive regulation is probably the most famous and influential example. That theory sees formal, coercive law as a last resort when compliance with just legal principles is not achievable through dialogue and persuasion.²⁹ It states that regulatory enforcement agencies should react responsively to the broader cooperative or non-cooperative behavior and attitudes of regulatees. Regulatees showing the will and ability to self-regulate should be rewarded with less harsh regulation or enforcement, while those that do not cooperate should be greeted with more punitive regulation until they relent and comply or until the tip of the pyramid is reached—the most coercive regulation or enforcement in court and harsh penalties, ultimately denial of the ability to operate (corporate "capital punishment"). Braithwaite's responsive regulation is pluralist in the sense that it devolves to businesses or industries the capacity to make their own law to the extent that they show commitment and capacity to correct themselves in accordance with public purposes. It also includes other pluralist elements of participation by third parties (non-state regulators) in the regulation of business including professional "gatekeepers," industry associations and so on. A responsive legal order might therefore recognize as "soft law" as much as possible the codes of conduct and social responsibility systems developed by business. It would allow business to self-regulate while also setting out substantive basic values and principles for corporate social responsibility.

28 Ayres and Braithwaite's pyramid of responsive regulation explicitly puts law at the top of a hierarchy as well as showing how law's influence pales into more informal and negotiated control. AYRES & BRAITHWAITE, *supra* note 4.

29 *Id.*; see also PARKER, *supra* note 18; SELZNICK, *supra* note 13, at 469-71.

Reflexive law, by contrast, emphasizes law's limitations for the purpose of expressing common values in a world of plural values, identities and motivations. It argues that the role of law is rather to catalyze the processes of self-regulation by which other individuals, organizations, and social systems coordinate themselves with the rest of the world — and even that is asking a lot.

Whereas responsive law puts law at the pulsating core of the expression and implementation of social values, reflexive law sees many social subsystems with many cores sometimes attempting to connect and coordinate with one another (mostly with little success) and mostly attempting to ignore each other (also with little success — since we live in an interdependent, not just plural, world). Law is just one of these subsystems connecting or not with others in fruitful and not so fruitful ways, depending on the circumstances. Some scholars leave it at that.³⁰ However, reflexive law proposes that law might still play a universal normative role because of its special concern with the process of coordination between different subsystems. Where law is sufficiently reflexive, it has a special potential to provoke other subsystems to engage in processes of networking with each other, so that law can help create the strands of social networks while retaining its separateness as just one node within them.

Reflexive law "turns back on itself"³¹ and recognizes its own inability to take "full responsibility for substantive outcomes," while still accepting that it has a role of "focused intervention in social processes."³² This "intervention," however, consists only of structuring and encouraging the process of reflexion in other "semi-autonomous social systems, by shaping both their procedures of internal discourse and their methods of coordination with other social systems."³³ For example, in relation to business regulation, it is only the business firm itself that can balance its "function" in the wider society (e.g., to contribute to wealth for future needs satisfaction), with its "performance" as it bumps against other social subsystems (e.g., the relationship of the enterprise

30 See Colin Scott, *Reflexive Governance, Meta-Regulation and Corporate Social Responsibility: The Heineken Effect*, in CORPORATE SOCIAL RESPONSIBILITY (Nina Boeger & Harlotte Villiers eds., forthcoming 2008).

31 The relevant definition of "reflexive" in the *Oxford English Dictionary Online* is "Applied to that which turns back upon, or takes account of, itself or a person's self, esp. methods that take into consideration the effect of the personality or presence of the researcher on the investigation." *Reflexive*, in OXFORD ENGLISH DICTIONARY ONLINE, www.oxfordreference.com (last visited Mar. 29, 2007).

32 Teubner, *Substantive and Reflexive Elements*, *supra* note 26, at 254.

33 *Id.* at 255.

to consumers, employees, the natural environment, etc.). Law can only hope to regulate the processes of "organizational conscience" as it weighs these different interests. Thus Teubner argues that the focus of law should be on "duties of disclosure, audit, justification, consultation, and organization of internal control processes" as it weighs different interests. Law cannot set substantive duties.³⁴

Both approaches are dangerously incomplete on their own, and it is important to understand why in order to avoid the extremes of either.

Responsive law expects to have substantive public interest-oriented goals set for it through "political" deliberation. It connects with politics for that purpose, and it connects with society in order to pass them on. It assumes that political deliberation is capable of yielding just solutions to society's problems. In their original formulation of responsive law, Nonet and Selznick recognize that otherwise it would be dangerous to even advocate responsive law: "Responsive law is no maker of miracles in the realm of justice. Its achievements depend on the will and resources of the political community."³⁵

But this lack of political capacity for justice is exactly the problem to which the facts of pluralism, multiculturalism and global conflict point. If responsive law has to assume that political deliberation over principles of justice is possible without explaining how to create it, then it seems to be a fatally flawed, even potentially oppressive,³⁶ theory for a pluralist world.

Reflexive law apparently comprehends the empirical reality of plurality better than responsive law, seeing society as so plural, and law as so limited, that law may not even be infused with substantive purpose or infuse it into others. Indeed reflexive law puts its faith in the "miracle" of switching its focus to process in order to catalyze the coordination between plural social groups that makes the emergence of agreed values possible. This is also a popular move in new governance-type scholarship:

On these accounts, law may play a crucial role in shaping the institutional environment in which decisions are reached, but it does not specify the need to achieve specific, pre-conceived goals. And even the procedures established by law may themselves be seen as self-consciously provisional and imbued with the logic of reflexive adaptation.³⁷

34 Teubner, *Corporate Fiduciary Duties*, *supra* note 26, at 167.

35 NONET & SELZNICK, *supra* note 25, at 113.

36 Where one group is able to claim that its is *the* just law approach over others' objections.

37 Grainne de Búrca & Joanne Scott, *Introduction: New Governance, Law and*

Yet if responsive law can be criticized for being overly imperialistic in its vision of law embodying values that can ultimately be foisted onto plural groups, reflexive law seems insufficiently cognizant of the ugly reality of pluralism, and too naïve about the possibility that a consensus on values might emerge from processes of deliberation. Thus reflexive law developments have been criticized for promoting a process orientation that comes at the cost of the "deconstruction of procedural and substantive rights, the dissolution of the normative legality that is historically embedded in formal justice."³⁸ The switch to process can easily descend into what Nonet and Selznick warned against:

the spectre of a multitude of narrow-ended, self-regulating institutions, working at cross-purposes and bound to special interests; of a system impervious to direction and leadership, incapable of setting priorities; of a fragmented and impotent polity in which the very idea of public interest is emptied of meaning.³⁹

Ronen Shamir, for example, has persuasively shown how various corporate social responsibility initiatives, in assuming that values can come out of corporate management and market processes, run the risk of subordinating social values to market values.⁴⁰ We need to be cautious about advocating an ideal of law that takes no responsibility for promulgating substantive values and is only concerned with processes connecting with other processes — law should be about processes for articulating substantive outcomes.⁴¹

The image of law as only one tiny center of ripples in a pond on

Constitutionalism, in LAW AND NEW GOVERNANCE IN THE EU AND THE US, *supra* note 7, at 17.

38 Wolf Heydebrand, *Process Rationality as Legal Governance: A Comparative Perspective*, 18 INT'L SOC. 325, 334 (2003); *see also* RONNIE LIPSCHUTZ & JAMES K. ROWE, *GLOBALIZATION, GOVERNMENTALITY AND GLOBAL POLITICS: REGULATION FOR THE REST OF US?* (2005); William E. Scheuerman, *Reflexive Law and the Challenges of Globalization*, 9 J. POL. PHIL. 81 (2001).

39 NONET & SELZNICK, *supra* note 25, at 103.

40 Ronen Shamir, *Corporate Social Responsibility: Towards a New Market-Embedded Morality?*, 9 THEORETICAL INQUIRIES L. 371 (2008); *see also* Christina Garsten & Kerstin Jacobsson, *Post-Political Regulation: Markets, Voluntarism and Illusory Consensus* (July 2007) (paper presented at the International Meetings on Law and Society in the 21st Century, Humboldt University, Berlin); BRONWEN MORGAN, *SOCIAL CITIZENSHIP IN THE SHADOW OF COMPETITION* (2003).

41 *See also* Christine Parker, *Meta-Regulation: Legal Accountability for Corporate Social Responsibility*, in THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW 207 (Doreen McBarnet et al. eds., 2007).

which many raindrops have fallen correctly reflects the fact of plurality in regulation and governance from a viewpoint *external to law*. But the image of law at the core of a series of concentric circles that ripple in and out gives us the necessary *internal-to-law* viewpoint regarding what law might actually aspire to do.

Combining the normative criteria of responsive and reflexive law theories would suggest that pluralized "law" should:

- Consist of substantive and procedural principles of justice — albeit these principles might be very broad and may emerge from plural regulatory orderings rather than a single official source. (This is consistent with the demands of responsive law.)
- Involve processes in which these procedural and substantive justice principles are applied to reflect back on, critique and reconstitute those plural orderings from which the principles emerged, or the behaviors of the actors who agreed on them. (Responsive and reflexive law broadly agree on this.)
- The processes and procedural and substantive justice principles of this "law" must themselves be continuously revised and reformulated as they are applied. (This is a uniquely reflexive intuition about law.)

Indeed it is surprisingly difficult to articulate a theory of a purely process-oriented reflexive law, perhaps because it is so normatively unattractive and so counterintuitive to people's view of what law should aspire to be. Even in Teubner's strongest argument against substantive rationality in law, his conception of reflexive law in fact entails substantive purposes:

Reflexive law approaches the contract relation very differently. It seeks to structure bargaining relations so as to *equalize bargaining power*, and it attempts to subject contracting parties to mechanisms of "public responsibility" that are designed to ensure that bargaining processes will take account of *various externalities*.⁴²

Even here reflexive law must enforce procedural and equality rights ("equalize bargaining power") and define which public values and stakeholder interests need to be taken into account ("various externalities"), and therefore incorporates responsiveness as well as reflexivity.

Similarly, although much new governance scholarship emphasizes the (more reflexive) role of law as process catalyst in relation to collaborations or networks of ("new") governance,⁴³ here, too, law must be seen as

⁴² Teubner, *Substantive and Reflexive Elements*, *supra* note 26, at 256 (emphases added).

⁴³ See Charles Sabel & William Simon, *Epilogue: Accountability Without Sovereignty*,

responsive as well as reflexive. Michael Dorf and Charles Sabel's concept of "democratic experimentalism" or "directly deliberative polyarchy" provides a good example of this view of law.⁴⁴

Dorf and Sabel argue that public governance should (and is beginning to) follow the example of postindustrial, post-bureaucratic business firms by using benchmarking and learning by monitoring to solve problems.⁴⁵ This "democratic experimentalism" would encourage those people directly affected to participate in defining their own problems and experimenting with solutions for them, with different solutions benchmarked against each other so that all can learn. Collaboration between government and private firms or NGOs, contracting out and various other forms of partnership would be explicitly encouraged.

The role of law in this "directly deliberative polyarchy" is to catalyze a process of deliberation, making sure that different local authorities (or firms in the case of business regulation) learn from the results of one another's deliberations, and that the law itself also learns from them. The new governance uses "explicitly provisional and incomplete legislative frameworks that set the terms of diffuse groups of stakeholders to elaborate in particular applications, which will then be reviewed at the centre with an eye toward revision of the frameworks."⁴⁶ Law enforces a process in which individuals, firms or authorities set their own goals, measure their results and learn from the process.⁴⁷

in LAW AND NEW GOVERNANCE IN THE EU AND THE US, *supra* note 7, at 395; Joanne Scott & Susan Sturm, *Courts as Catalysts: Re-Thinking the Judicial Role in New Governance*, 13 COLUM. J. EUR. L. 565 (2006); David M. Trubek & Louise Trubek, *New Governance and Legal Regulation: Complementarity, Rivalry, and Transformation*, 13 COLUM. J. EUR. L. 539 (2006); Neil Walker & Gráinne de Búrca, *Reconceiving Law and New Governance*, 13 COLUM. J. EUR. L. 519 (2006).

44 Michael Dorf & Charles Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

45 *Id.* at 287.

46 Sabel & Simon, *supra* note 43, at 399.

47 Dorf & Sabel, *supra* note 44, at 284. Note that in their 1998 paper Dorf and Sabel do apply their theory to business regulation, interpreting a number of well-known works of regulatory scholarship as well as experiments in the use of compliance-oriented regulation as incipient examples of democratic experimentalism. Dorf & Sabel, *supra* note 44, at 345-88. However these examples seem closer to responsive law in the sense that they assume the broad values for each regulatory regime are unproblematic. See Archon Fung, Dara O'Rourke & Charles Sabel, *Realizing Labour Standards*, 26 BOSTON REV. (2001), <http://bostonreview.net/BR26.1/fung.html>, for a better example of how democratic experimentalism might apply to business regulation. However, that paper does not address the role of law very explicitly.

Yet despite Dorf and Sabel's emphasis on law enforcing a process, the responsive and reflexive aspects of law are (and must be) interdependent. The following quotation from their description of the proposed role for courts in democratic experimentalism demonstrates the way that their ideal of law centered on process is still a law that must be concerned with identifying and articulating substantive justice values (i.e., the "inchoate rights" or "fundamental legal norms" that must emerge when actors declare goals and measure results) and procedural rights (the "constitutional values" that must emerge from consideration of whether a proper record of deliberation has in fact been created):

First, the courts must develop an explicit understanding of *fundamental legal norms* deeply entrenched yet always provisional in the sense that the means by which core values are both protected and ultimately defined are deliberately exposed to experimentalist understanding. By insisting that actors respect the central experimentalist condition of declaring goals and measuring results, the court can *declare and defend inchoate rights* without pretending to anticipate the manifold consequences of the finding.

Second, experimentalist courts defer to the political actors' exploration of means and ends only on the condition that the actors have in fact created *the kind of record that makes possible an assessment of their linking of principle and practice*. The system that experimentalist judicial review enables thus *introduces constitutional values into the political decisions of everyday life* while bringing the lessons of everyday life into the discourse of constitutional value

Judicial review by experimentalist courts accordingly becomes a review of the admissibility of the reasons private and political actors themselves give for their decisions, and the respect they actually accord those reasons: a review, that is, of *whether the protagonists have themselves been sufficiently attentive to the legal factors that constrain the framing of alternatives and the process of choosing among them*.⁴⁸

Presumably democratic experimentalism also involves law or government defining which stakeholders have the right to join in directly deliberative polyarchies — a decision that must entail judgments of which substantive values to prioritize — since stakeholders always represent values, as well as

⁴⁸ Dorf & Sabel, *supra* note 44, at 389-90 (emphasis added). See also Sabel & Simon, *supra* note 43, at 400.

articulating what the "problems" to be solved by democratic experimentalism are (a framing question that must also entail substantive judgments of value).

A close reading of Tom Tyler's highly influential work on "procedural justice" also indicates the empirical connection between process and more substantive values in law.⁴⁹ Tyler's extensive empirical work has established that people are likely to obey a law where they see that law, and its enforcement, as legitimate. They judge legitimacy by whether relevant legal authorities are procedurally just, and their assessments of legitimacy and procedural justice are a more important influence on their compliance with the law than whether compliance with the law leads to outcomes that are in their self-interest or not, or accord with their own personal sense of substantive justice or not.⁵⁰ Tyler also argues that there can be and, in fact, is considerable agreement on procedural justice as a basis for legitimacy among diverse ethnic and socioeconomic groups, even where there is no agreement about substantial issues of justice and public morality. According to Tyler, this suggests that procedural justice can provide a pathway forward for law and governance in an age of pluralism and multiculturalism.⁵¹

Tyler's work may appear to provide a strong empirical argument for a purely process-oriented law in a pluralist society. But a closer reading shows that Tyler's criteria for procedural justice is only satisfied where regulatory authorities infuse processes with both procedural rights and concern for substantive justice (both substantive values) in a way that is responsive and meaningful in a plural world. Tyler's conceptualization of procedural justice is a very "thick" one (compared with that of the classical rule of law) that connects with substantive justice in a similar way to responsive law's focus on the law as elaborating substantive purposes, but not setting detailed rules.

Tyler shows that people psychologically evaluate the procedural fairness of regulatory authorities according to four criteria: opportunities for participation, the quality of decision-making (neutrality), the quality of

49 Perhaps contrary to Tyler's own understanding of his main thesis.

50 TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2d ed. 2006) (especially at 269-76).

51 *Id.* at 279-80; Tom R. Tyler & John M. Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account when Formulating Substantive Law*, 28 *HOFSTRA L. REV.* 707 (2000). Tyler even sees procedural justice as indicating the possibilities for business self-regulation. TYLER, *supra* note 50, at 272. Note, however, that the main thrust of Tyler's argument is against deterrence theory as the basis for regulatory policy. His arguments about procedural justice vis-à-vis substantive justice as a basis for law are not a major emphasis of his theory. See also LON FULLER, *THE MORALITY OF LAW* (1964) (conceptualizing the procedures that law must follow as constituting their own morality).

interpersonal treatment (including acknowledgement and respect for *rights*, treatment with dignity and interpersonal respect, politeness), and trust in the motives of authorities (evidence that the representative of the authority cares about the *needs, concerns and wellbeing* of the people they are making decisions about).⁵² Here there seems to be much scope for judgments about substantive justice's goals and values (but not necessarily particular outcomes and rules) to enter into assessments of procedural justice (as I have indicated by italicizing key words in Tyler's description of procedural justice). Since Tyler's work is based on extensive quantitative research on how people from different cultural backgrounds respond to law and governance in a variety of areas, it suggests that the normative conceptualization of law as being both responsive and reflexive, as outlined here — in which legal processes are aimed at substance — might be generally applicable.

IV. RESPONSIVE AND REFLEXIVE LEGALITY

Seeing law as responsive and reflexive addresses the itch that the reactive legal pluralist response to regulatory pluralism is attempting to scratch — the intuition that the official law of the modern nation-state cannot be all there is to the concept of "law" in a pluralized, globalized world. Conceiving law as responsive and reflexive gives us the possibility of perceiving a non-state-based "law" (or "legality") "emergent"⁵³ from plural regulatory orderings that is not necessarily centered on the state,⁵⁴ yet does not give up law's aspirations to be inclusive and universal (e.g., by seeing the parochial norms of any one group as "law").⁵⁵

This notion of responsive and reflexive law is particularly attractive for explaining, and maintaining some optimism about, the possibilities for effective governance at a transnational or federal level.⁵⁶ It also provides a

52 TYLER, *supra* note 50, at 276 (emphases added).

53 On "emergence" as a scientific (autopoiesis), cognitive and social process, see FRITJOF CAPRA, *THE HIDDEN CONNECTIONS* (2002) (especially at 104-06) in relation to social organization. Lon Fuller also talked about legality and law as "emergent" from plural sources. See NONET & SELZNICK, *supra* note 25, at 95 (citing Lon L. Fuller, *Mediation — Its Form and Functions*, 44 S. CAL L. REV. 305, 339 (1971)). Thanks to Angus Corbett for drawing my attention to the concept of "emergent" phenomena.

54 Addressing my first criticism of reactive legal pluralism above.

55 Addressing my second and third criticisms of reactive legal pluralism above.

56 See, e.g., JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (2000).

set of normative criteria for assessing the capacity to cope with the pluralism (whether regulatory or multicultural) of any official law. We may well find some emergent non-state legalities that show more promise of meeting these criteria than some of the state laws of "enlightened" western countries.

For example, Gunther Teubner and others have argued that the *lex mercatoria* should be seen as a pluralized, global law without a state emergent from other discourses.⁵⁷ But it is the work of Errol Meidinger in wondering whether we are beginning to see the emergence of some sort of law or legality from various NGO and business-based voluntary forestry certification systems that is most suggestive.⁵⁸ Meidinger grapples with the difficulty of expecting plural orderings to converge on anything normative at all, and the added problem that if they do converge, it will most likely be either to engage in empty rhetoric or focus on pure process rather than having any substantive normative power to reflect back and critique the initiatives from which the latter has sprung. Meidinger's empirical work does, however, identify the possibility of a legality emergent from plural non-state regulatory orderings that is in some ways more than the sum of its parts. Indeed what Meidinger describes could be described as a global convergence in transnational product certification systems around procedures that are tied in some way to substantive values (such as sustainability in the case of forestry certification).

Meidinger argues that industry and NGO-based global certification programs (including particularly various forestry certification programs) "entail a particular and somewhat novel kind of law making" in which "self-appointed non-state officials" seek to bring the various interests and effects of actors in different parts of global markets with plural laws into "a common legal regime."⁵⁹ He also finds, on the basis of his detailed qualitative empirical work, that these certification-based regulatory systems "appear to incorporate normative discourses such as human and community rights and environmental protection much more readily than the Westphalian

57 Teubner, *supra* note 8. (Teubner says, "Global economic law is law with an undeveloped 'centre' and a highly developed 'periphery.' To be more precise, it is a law whose 'centre' is created by the 'peripheries' and remains dependent on them." *Id.* at 12.) See also the other contributions in the same volume, as well as SCHEPEL, *supra* note 17; Errol Meidinger, *Law and Constitutionalism in the Mirror of Non-Governmental Standards: Comments on Harm Schepel*, in *TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM* 189 (Christian Joerges et al. eds., 2004).

58 Errol Meidinger, *Beyond Westphalia: Competitive Legalization in Emerging Transnational Regulatory Systems* (Buffalo Legal Studies Research Paper No. 2006-019, 2006); Meidinger, *supra* note 17.

59 Meidinger, *supra* note 58, at 22.

system, and they officially value community protection and participation."⁶⁰ He finds that plural certification programs and their convergent features are based to some extent on shared (although contested) substantive (but broadly and vaguely defined) goals and values (e.g., sustainable forestry management including sustained yield) and understandings of rights of participation and procedure (e.g., "documented rule-making processes which increasingly require reasoned responses to criticisms, structured adjudication by experts, increasing visibility through public information and consultation requirements, and competition in the market for forest certification"⁶¹). These convergent understandings of substantive and procedural rights have some capacity to reflect back and critique and change the different schemes from which they have emerged in an environment in which the different schemes compete with one another. Meidinger, however, goes on to point out that "[a]t present it is intellectually defensible to see either an emerging functional learning accountability system or a gridlocked, disintegrating system of governmental accountability with nothing to replace it."⁶²

In principle such a conceptualization of pluralized law could apply equally to dealing with plural cultural and religious groups' claims that their own normative orderings should be recognized as law within multicultural and postcolonial societies. The responsive, reflexive law theory tells us that instead of focusing on whether Shari'a or Halakha should be recognized as law, the real questions are, first, whether the "law" of the nation can be reflexive enough to accommodate and learn from different cultural groups' self-governance processes; and, second, whether the law of the nation can be responsive enough to set out universal substantive and procedural values that all self-governance processes must meet, but which are themselves based on values that those self-governance processes have converged on.

These questions are essentially the same whether we are discussing business self-regulation and voluntary corporate social responsibility or cultural and religious groups' civil and criminal dispute resolution, although the challenges may be slightly different. The power of global capitalism suggests the need for particular vigilance about the agenda behind any values that emerge through plural business regulation. On the other hand many religious and ethnic groups (or subgroups) make such totalitarian claims over their members' lives and meaning systems that it can be difficult to

60 *Id.* at 24; *see also* Meidinger, *supra* note 17, at 83.

61 Meidinger, *supra* note 17, at 83.

62 *Id.* at 87.

even begin a process of deliberation about how these groups may coordinate themselves with the broader society.⁶³

CONCLUSION

This Article has explored the ways in which pluralism is evident in empirical and policy-oriented scholarship on regulation and governance. But the question of how our understanding of law should react or respond to plural social orderings, or even resile from them, is also a broader one that raises fundamental questions about the nature and role of law in multicultural, postcolonial, federal and transnational contexts.

I have argued that, at least in the context of business regulation, there is a danger that pluralization of law will occur via a purely reflexive, process-oriented law that neither sets substantive values nor even requires plural regulatory orderings to live up to any outward-looking, inclusive substantive values and goals. This type of process orientation may leave too many gaps and too much room for interpretation, in a context where some interests are more equal than others, and relevant social values are heavily contested. Nonet and Selznick themselves were very concerned about the "risk" that responsive law might make law "die" by regressing from responsiveness to repression.⁶⁴ They even suggest that societies that do not have the political commitment and resources to articulate substantive purposes for a responsive law to elaborate might be better off resisting the natural urge to make law more substantively just by moving to responsive law. Instead they should stick with the imperfect, but (at least) formally just "autonomous law" — the classical liberal democratic rule of law.⁶⁵

If law is to be pluralized, it must be both reflexive *and* responsive — it must be aimed at catalyzing processes of social coordination for people to agree on values — but it must also take up these values and apply them to the processes in order to make participation in these processes of deliberation possible in the first place and to critique their outcomes and not just the processes themselves. Reflexive *and* responsive law recognizes that substantive goals cannot come from inside law itself but only from political discussion outside of law, yet law has to help make sure that discussion

⁶³ See Talia Fisher, *Nomos Without Narrative*, 9 THEORETICAL INQUIRIES L. 473 (2008).

⁶⁴ See the epilogue to NONET & SELZNICK, *supra* note 25, at 115-18, which is titled *Two Ways Law Can Die*.

⁶⁵ *Id.* at 116.

happens freely and fairly, and go on to continuously make sure it takes on and elaborates the substantive justice goals that result.⁶⁶ This need not be the monistic product of a state. It may well "emerge" and converge out of plural social orderings within and outside of states. Yet responsive, reflexive law must remain a normative ordering with an aspiration to universal applicability, for otherwise the very concept of law is normatively meaningless.

⁶⁶ This is the dual, paradoxical role of law proposed in JURGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg Trans., MIT Press 1996) (1992). Or as Santos puts it, the aspiration or ambition of law must be to ride the "frontier" between imperialism (regulation) and being democratic and responsive (emancipation). SANTOS, *supra* note 11. See also Hugh Collins' analysis of the "productive disintegration" of the private law of contract as it collides with the "new regulation." HUGH COLLINS, *REGULATING CONTRACTS* (1999).

