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A Non-Essentialist Version of Legal Pluralism

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The concept of legal pluralism has been touted by many socio-legal scholars as a key concept in the analysis of law. Yet, after almost twenty years of such claims, there has been little progress in the development of the concept. This article will argue that the underlying cause of this lack progress lies in the fact that promoters of the concept have relied upon function-based, essentialist concepts of law. It will describe the problems generated by such concepts and, following this general analysis, will review the versions of legal pluralism articulated by Boaventura de Sousa Santos and Gunther Teubner. The critique of their versions of legal pluralism will lead into the posing of a non-essentialist alternative which avoids the conceptual problems of prevailing versions of legal pluralism, and provides a better tool for purposes of research and analysis of the relationship between law and society.

INTRODUCTION: OVERVIEW OF THE CONCEPT OF LEGAL PLURALISM AND ITS PROBLEMS

Many of the leading socio-legal scholars in the world today – prominently including Marc Galanter, Sally Falk Moore, Peter Fitzpatrick, Roger Cotterrell, Gunther Teubner, Boaventura de Sousa Santos, Sally Engle Merry, and Masaji Chiba – have announced their allegiance to the concept of legal pluralism. It has been called 'the key concept in a post-modern view of law',[1] 'a central theme in the reconceptualization of the law/society relation',[2] and 'capable of identifying authentic legal phenomena operating

1 B. de Sousa Santos, 'Law: A Map of Misreading. Toward a Postmodern Conception of Law' (1987) 14 *J. of Law and Society* 279, 297.
2 S.E. Merry, 'Legal Pluralism' (1988) 22 *Law and Society Rev.* 869, 869.

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on a global level'.[3] 'The new paradigm, as far as the social scientific study of law is concerned, is legal pluralism[.]'[4] Indeed, adherents assert, law everywhere 'is fundamentally pluralist in character', and 'anyone who does not [accept this] is simply out of date and can safely be ignored'.[5] 'Today, this pluralism is so commonly accepted that it can be assumed.'[6]

Despite these confident pronouncements and the apparent unanimity that underlie them, however, the concept gives rise to complex unresolved problems. These problems are widely recognized and can be summarily set out in terms of two different but connected categories: analytical and instrumental.

The *analytical* problems go to the heart of legal pluralism, and consist of two related aspects. While they agree on the initial proposition that there is a plurality of law in all social arenas, legal pluralists immediately diverge on what this assertion entails because there is no agreement on the underlying concept of law. For example, John Griffiths, one of the leading promoters of the concept of legal pluralism, defines law as 'the self-regulation of a ''semi-autonomous social field'' ';[7] Galanter defines law in terms of the differentiation and reinstitutionalization of norms into primary and secondary rules;[8] Santos defines law in more elabourate terms as 'a body of regularized procedures and normative standards, considered justicable in any given group, which contributes to the creation and prevention of disputes, and to their settlement through an argumentative discourse, coupled with the threat of force.'[9] This lack of underlying agreement is the first aspect of the analytical problem.

Since there are many competing versions of what is meant by 'law', the assertion that law exists in plurality leaves us with a plurality of legal pluralisms. Legal pluralists can hardly be condemned for their failure to come up with an agreed upon concept of law. As H.L.A. Hart noted, 'Few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange, and even paradoxical ways as the question ''What is law?''.'[10] Until this problem is resolved, however, the concept of legal pluralism will not have a sound foundation.

3 G. Teubner, 'Legal Pluralism in World Society' in *Global Law Without a State*, ed. G. Teubner (1997).
4 J. Griffiths, 'Legal Pluralism and the Theory of Legislation - With Special Reference to the Regulation of Euthanasia' in *Legal Polycentricity: Consequences of Pluralism in Law*, eds. H. Petersen and H. Zahle (1995) 201.
5 id.
6 A. Riles, 'Representing the In-Between: Law, Anthropology, and the Rhetoric of Interdisciplinarity' (1994) *Illinois Law Rev.* 597, 641.
7 J. Griffiths, 'What is Legal Pluralism?' (1986) 24 *J. of Legal Pluralism* 1, 38.
8 M. Galanter, 'Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law,' (1981) 19 *J. of Legal Pluralism* 1, 18–19.
9 B. de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (1995) 114–15.
10 H.L.A. Hart, *The Concept of Law* (1961) 1.

Legal pluralists are in agreement on a second proposition, a negative proposition: 'not all the phenomena related to law and not all that are law-like have their source in government.'[11] The core credo of legal pluralists is that there are all sorts of normative orders not attached to the state which nevertheless are 'law.' These non-state 'legal' orders range from pockets within state legal systems where indigenous norms and institutions continue to exert social control, to the rule-making and enforcing power of corporations and universities, to the normative order which exists within small social groups, including, among others, business networks, community associations, factories and sports leagues, and the family. So generous a view of what law is, for reasons I will articulate in greater detail in the next section, raises the imminent danger of sliding to the conclusion that all forms of social control are law.[12] As Sally Merry put it, 'Where do we stop speaking of law and find ourselves simply describing social life?'[13] This is the second aspect of the analytical problem.

To their credit, legal pluralists have explicitly acknowledged this central difficulty. Aware that social life 'is a vast web of overlapping and reinforcing regulation', Galanter asked, 'How then can we distinguish ''indigenous law'' from social life generally?'[14] Santos conceded that 'this very broad conception of law can easily lead to the total trivialization of law – if law is everywhere it is nowhere[.]'[15] Teubner observed that it 'has proved hopeless to search for a criterion delineating social norms from legal norms.'[16] Some legal pluralists have embraced this result, insisting that that 'all social control is *more* or *less* legal',[17] or that all normative orders can be seen in legal terms.[18] This approach generates confusion by doing violence to common understandings. It also raises the suspicion that, at base, legal pluralism involves an exercise in theoretical re-labelling, transforming the commonplace sociological observation that social life is filled with a pluralism of normative orders into the supposedly novel observation that it is filled with a pluralism of legal orders.

The analytical problems, then, are quite serious in both of their primary aspects. First, there is no agreed upon definition of law; and, secondly, the

11 S.F. Moore, 'Legal Systems of the World' in *Law and the Social Sciences*, eds. L. Lipson and S. Wheeler (1986) 15.
12 Griffiths, op cit., n. 7, 'all social control is more or less ''legal'' ' (emphasis in original), p. 39.
13 Merry, op. cit., n. 2, pp. 869, 870.
14 Galanter, op. cit., n. 8, pp. 1, 18, fn. 26.
15 Santos, op. cit., n. 9, p. 429.
16 G. Teubner, ' ''Global Bukowina'': Legal Pluralism in the World Society' in *Global Law Without a State*, ed. G. Teubner (1997) 3–28, 13.
17 Griffiths, op. cit., n. 7, p. 39 (emphasis in original).
18 R.A. Macdonald and M.-M. Kleinhans, 'What is Critical Legal Pluralism?' (1997) 12 *Cnd. J. of Law and Society* 25,40. (A critical legal pluralism 'takes as its starting point the assumption that all hypotheses of normativity merit consideration from a legal point of view'.)

definitions of law proffered by legal pluralists suffer from a persistent inability to distinguish law sharply from social life, or legal norms from social norms.

The *instrumental* problems are a function of the analytical problems. It is difficult to reconceptualize the law/society relationship if there is no agreement on what 'law' is, and if the versions of 'law' adopted share the inability to keep law from swallowing up social life. Without agreement on fundamental concepts that allow for the careful delineation of social phenomena, there can be no cumulative observation and data gathering. Moreover, current versions of legal pluralism flatten and join together distinct phenomena, resulting in less refined categories, leading to less information and a reduction in the ability to engage in careful analysis. Consequently, the use value of the concept is open to serious question.

Despite its flaws, legal pluralists have succeeded in one instrumental respect: combating what they call the ideology of legal centralism. Legal centralism, according to legal pluralists, is the false ideology that 'law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions'.[19] Galanter charged that: ' ''Legal centralism'' has impaired our consciousness of ''indigenous law''.'[20] Legal pluralism was intended by its proponents to dispel this ideology. Griffiths described the legal pluralists pursuit of this instrumental objective in heroic terms, whereby:

> an initially small band of revolutionaries waged an ideological battle against the vested ideology of legal centralism [until] ... the paradigmatic change was accomplished (at least within legal sociology and anthropology of law).[21]

With the growing list of social scientists and social theorists announcing their rejection of legal centralism and adoption of legal pluralism, legal pluralists have reason to exult. The history of social science and social theory, however, is littered with the remains of theories that had claimed victory prematurely. The analytical problems identified earlier cannot be suppressed no matter how impressive the list of adherents.

In a previous article in this journal, I explored in greater depth the analytical problems with the concept of legal pluralism just recited. I concluded therein that the key source of these problems is that the concepts of law proffered by legal pluralists have been essentialist in nature – grounded in the assumption that: 'law is a fundamental category which can be identified and described, or an essentialist notion which can be internally worked on until a pure (de-contextualized) version is produced.'[22]

19 Griffiths, op. cit., n. 7, p. 4.
20 Galanter, op. cit., n. 8, p. 8.
21 Griffiths, op. cit., n. 4, p. 201.
22 B. Tamanaha, 'The Folly of the ''Social Scientific'' Concept of Legal Pluralism' (1993) 20 *J. of Law and Society* 192, 201. Perhaps owing to the regrettably strident tone of the earlier article, many readers assumed that I was irrevocably opposed to

In this article, I will reconstruct the concept of legal pluralism based upon a non-essentialist version of law. This non-essentialist version will capture the insights that make the notion of legal pluralism compelling, while striving to avoid the failings of current approaches.

Following a brief elaboration of the problems raised by functionalist approaches to the concept of law, the argument will proceed through an examination of the two most sophisticated recent theoretical articulations of legal pluralism, the first by Boaventura de Sousa Santos and the second by Gunther Teubner. The alternative I suggest in the final section is set out by way of contrast to these two approaches. Concepts that that specify what law is, and what legal pluralism entails, are not testable or falsifiable; they are more or less useful, and their use value is a function of the purposes for which they are constructed.[23] The ultimate test for the approach I suggest is whether it enhances our ability to describe, understand, study, analyse and evaluate legal phenomena.

GENERAL PROBLEMS WITH THE CONCEPT OF LAW AND FUNCTIONAL ANALYSIS

There have been so many attempts by social scientists and legal theorists to define what law is that it has been likened to 'the quest for the Holy Grail'.[24] None of these attempts have succeeded in attracting a critical mass of support. The underlying reasons for this failure are involved and have been explored in depth elsewhere,[25] but the basic problem can be simply stated. Virtually all attempts to define law fall into one of two categories: law is either seen in terms of concrete patterns of behaviour within social groups (Eugen Ehrlich, Bronislaw Malinowski), or in terms of institutionalized norm enforcement (Adamson Hoebel, Max Weber, H.L.A. Hart).[26] Both categories revolve around the maintenance of social order, the former focusing on the norms and mechanisms embodied within ordered behaviour itself, and the latter focusing on institutional responses to the disruption of ordered behaviour.

All such function-based definitions of law suffer from one of two prongs of difficulty, linked, respectively, to each of the two categories identified above. The first prong derives from the fact that many social phenomena contribute to the maintenance of social order (giving rise to concrete patterns

any version of legal pluralism. To the contrary, as the title indicates, the critique was aimed at the self-avowed, social scientific version. I continue to believe that this still dominant version is deeply flawed. This article proposes a reconstruction.

23 B. Bix, 'Conceptual Questions in Jurisprudence' (1995) 1 *Legal Theory* 465.

24 A. Hoebel, *The Law of Primitive Man* (1954) 18.

25 See B. Tamanaha, 'An Analytical Map of Social Scientific Approaches to the Concept of Law' (1995) 15 *Oxford J. of Legal Studies* 501.

26 id., pp. 503–11.

of behaviour) – including customs, habits, language, the complex of social obligations (that is, reciprocity), and the institutionalized imposition of sanctions. 'The law is an ordering', according to Ehrlich.[27] Defining law in terms of order based upon patterns of behaviour, however, leads directly to the tendency, mentioned earlier, to include all sorts of social phenomena within the label 'law'. As Felix Cohen observed, 'under Ehrlich's terminology, law itself merges with religion, ethical custom, morality, decorum, tact, fashion, and etiquette.'[28] Likewise, 'the conception of law that Malinowski propounded was so broad that it was virtually indistinguishable from the study of the obligatory aspect of all social relationships.'[29] The problem that Ehrlich and Malinowski could not overcome was the existence of functional equivalents or alternatives.[30] In the presence of functional alternatives, a single phenomenon cannot be defined exclusively in terms of the function it fulfills because that alone cannot distinguish it from other phenomena that serve the same function. In the case of patterns of behaviour, some other criterion must be specified if we are to identify the distinctively legal.

This problem explains why most theorists, following Weber, Hoebel, and Hart, have preferred to define law in terms of the institutionalized enforcement of norms. This second way of defining law, it should be noted, is an abstraction from the state law model of law, which explains why it matches our intuitions about the nature of law. But it leads to the second prong of difficulty. Law (now seen in terms of institutional norm enforcement) – at least state law – is often not a major source of social order. As the discussion of functional equivalents just indicated, there are many sources of social order, including culture, customs, habits, reciprocity, and language, many of which do not entail the institutionalized enforcement of norms (which Malinowski emphasized in his observation that law does 'not consist in any independent institutions'[31]). The institutionalized enforcement of norms is seldom the dominant influence on social order, at least in non-totalitarian societies. Moreover, law often does more things, or is used to do more things, than just maintain social order, including, among other functions or purposes, enabling, facilitative, performative, status conferring, defining, legitimative, distributive, power-conferring, and symbolic; or being used as an instrument of harassment, revenge or vindication, or as a resource of raw power. Finally, it should not be assumed that law is always functional – the presence of and resort to law can, under

27 E. Ehrlich, *The Fundamental Principles of the Sociology of Law* (1975) 24.
28 F. Cohen, *The Legal Conscience* (1960) 187.
29 S.F. Moore, *Law as Process* (1978) 220.
30 For a critique of Malinowski's version of functionalism, see R. Merton, *Social Theory and Social Structure* (1968) 84–6. The problem of functional alternatives plagues functionalist theory generally. An excellent critique of functionalist theory can be found in C. Hempel, *Aspects of Scientific Explanation* (1965).
31 B. Malinowski, *Crime and Custom in Savage Society* (1926) 14.

many circumstances, actually lead to a disruption of social order.[32] Building a concept of law on its supposed function as the primary source of social order is thus flawed in two respects. It presupposes that law (as institutionalized norm enforcement) plays a major role in maintaining social order, when its role is often relatively marginal, and it keys on this function to the exclusion of other possible functions and effects of law.

SANTOS'S CONCEPT OF LAW AND LEGAL PLURALISM

Using concrete examples can better establish the difficulties with essentialist, function-based approaches to the concept of law and legal pluralism. Boaventura de Sousa Santos has produced one of the most nuanced accounts of legal pluralism to date, especially as it relates to globalization. Santos defines law as 'a body of regularized procedures and normative standards, considered justicable in any given group, which contributes to the creation and prevention of disputes, and to their settlement through an argumentative discourse, coupled with the threat of force.'[33] With its emphasis on regularized procedures, normative standards, and the threat of force, his definition falls in the category of the institutionalized enforcement of norms, closely resembling the definitions put forth by Weber and Hoebel, except that the latter two emphasized the *public* production and enforcement of norms. Santos's definition is functionalist in orientation, grounded in the idea that the function of law is to maintain the normative order of a group by enforcing norms and resolving disputes. His definition is essentialist in the sense that it specifies what he believes to be the characteristics essential to law; any social practice lacking in the characteristics he describes would not qualify as law.[34]

Santos acknowledges that this broad definition 'could easily lead to the total trivialization of law' because if literally applied it would suggest that law is everywhere.[35] He accepts that under his definition there are 'a great variety of legal orders circulating in society' but reduces this surplus by focusing particularly on 'six structural clusters of social relations in capitalist societies integrating the world system'.[36] First is *domestic law*: 'the set of rules, normative standards and dispute settlement mechanisms both resulting from and in the sedimentation of social relations in the household'.[37] Second

32 E. Schur, *Law and Society: A Sociological View* (1968) 84.
33 Santos, op. cit., n. 9, pp. 428–9.
34 Compare J. Coleman, 'Incorporationism, Conventionality, and the Practical Difference Thesis' (1998) 4 *Legal Theory* 381, 389–90 (describing how Hart's concept of law is essentialist in precisely the same terms that I argue Santos's concept is essentialist).
35 Santos, op. cit., n. 9, p. 429.
36 id.
37 id.

is *production law*: 'the law of the factory, the law of the corporation, the set of regulations and normative standards that rule the everyday life of wage labour relations (both relations of production and relations in production), factory codes, shop floor regulations, codes of conduct for employees and so on'.[38] Third is *exchange law*: 'the law of the marketplace, trade customs, rules and normative standards that regulate market exchanges among producers, between producers and merchants, among merchants, and between producers and merchants on the one side, and consumers on the other'.[39] Fourth is *community law* ('one of the most complex legal forms'): 'It may be invoked either by hegemonic or oppressed groups, may legitimize and strengthen imperial aggressive identities or, on the contrary, subaltern, defensive identities, may arise out of fixed, unbridgeable asymmetries of power or regulate social fields in which such asymmetries are almost nonexistent or merely situational.'[40] Fifth is *territorial* or *state law*: 'the law of the citizenplace and, in modern societies, it is central to most constellations of legalities'.[41] Finally, sixth is *systemic law*: 'the legal form of the worldplace, the sum total of rules and normative standards that organize the core/periphery hierarchy and the relations among nation-states in the interstate system.'[42] Although he sets them out in terms of separate clusters, Santos recognizes that the law from each of these clusters often overlaps with and interpenetrates law from the other clusters. State law, in particular, operates in each of the other clusters. It tends to be more spread out, and it 'is the only self-reflexive legal form, that is, the only legal form that thinks of itself as law'.[43]

Santos's account is exceedingly elabourate and can neither be fully reproduced, nor adequately critiqued, here. Instead I will rest upon a few observations. Ultimately, as with all alternatives, including the one I later suggest, the validity of his approach must be measured by its value in illuminating the situation of law in society. Santos's scheme suffers from an immediate weakness in this respect. It indeed appears to construe law as virtually everywhere. Society is a thick complex of legal regulation. In response to the question repeatedly asked of legal pluralism – 'Where do we stop speaking of law and find ourselves simply describing social life?'[44] – Santos answers, in effect, much of social life is law. By comprehensive relabelling, Santos has in effect juridified the social world. Contributing to this all-encompassing quality, the outlines of each cluster are exceedingly fuzzy. His community law category, in particular, appears devoid of any specific

38 id., p. 432.
39 id., p. 434.
40 id., p. 434.
41 id., p. 435.
42 id., p. 436.
43 id., p. 429.
44 Merry, op. cit., n. 13, p. 878.

identifying content. It is as difficult to say what falls within this cluster as it is to identify what would not. More generally, it is difficult to say where each cluster ends and the others begin, intensifying the sense produced by his scheme that law is omnipresent, even overlapping and doubling up on itself.

In addition to these general objections, there are several evident specific difficulties raised by his approach. Santos is not troubled by the problem of including social norms within the 'legal,' as revealed in his use of the notion of domestic law, which he describes as 'very informal, nonwritten, so deeply embedded in family relations that it is hardly conceivable as an autonomous dimension thereof'.[45] Reiterating this complaint would thus be redundant. But that does not obviate questions of conceptual consistency and use value. It is not clear that the normative relations within the family satisfy, or fit within, his explicit criteria for law as consisting of regularized procedures and normative standards backed by the threat of force. Informal, unwritten, deeply embedded family relations sounds like the first category of the concept of law described earlier, which focuses on concrete patterns of behaviour, while Santos's explicit definition of law focused on the second category of the concept of law. Santos's approach to law cannot, without pain of incoherence, straddle both categories of the concept of law, because they refer to markedly different phenomena.[46]

It is also not clear what is gained, either analytically or instrumentally, by appending the label 'law' to the informal, unwritten normative relations within the family. Use of this label does not facilitate the analysis of the normative relations within the family; to the contrary, it leads to confusion owing to an unfamiliar usage of terms. More important, there is a political cost. Consider the society where the culture tacitly approves of wife beating, while the state law makes it illegal, a situation that until relatively recently prevailed in many communities in the United States of America. Following Santos's view, one could reasonably assert that wife beating is prohibited under 'state law' but acceptable under 'domestic law.' Indeed, the claim that physical abuse is a form of 'domestic law' is almost required, since Santos defines law in terms of the threat of force, and physical abuse is the most obvious instance of the threat of force within the family. This phraseology should give discomfort to opponents of domestic violence, for the reason that the term 'law' often possesses symbolic connotations of right. The man who defends his conduct as legitimate according to 'domestic law' has much greater rhetorical authority than the man who claims that his father, and many of his pals, consider it appropriate for him to beat his wife, regardless of what the state law says.

45 Santos, op. cit., n. 9, 429.

46 For an extended argument that it is conceptually incoherent to combine both categories of the concept of law, see B. Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law* (1997) 111–14.

As this example demonstrates, many patterns of behaviour are *bad*. Many legal pluralists are anti-state law by inclination – as reflected in their attack on legal centralism – and consequently have a tendency to romanticize non-state normative systems. In terms of Santos's own assertion that every concept of law and legal pluralism must be adjudged by its political value, especially in its capacity to relieve oppression, his concept is found susceptible to abuse.

There are more difficulties. The possibility that, under Santos's account, one body of rules can belong to more than one cluster leads to substantial confusions. This is not a problem at the borders only, but rather involves core instances of law. *Lex mercatoria* provides a good example. Santos explicitly mentions *lex mercatoria* as an example of exchange law.[47] However, it is clearly a prime example of global law, and thus also falls in his systemic law category. His comments on the status of *lex mercatoria* do not help clarify matters:

> *Lex mercatoria* operates, in general, either as a mixture of exchange law and production law or as a mixture of exchange law and systemic law.[48]

But according to Santos, *lex mercatoria is* exchange law and *is* systemic law, so what does it mean to call it a *mixture* of the two? Mixture implies a combination of two different elements, whereas the way he has constructed the categories suggests that *lex mercatoria* is simultaneously both. And his use of a disjunction raises even more questions. *Lex mercatoria* by its nature would seem to always be a form of systemic law, since it operates on the global level; by interjecting an 'either/or' in the above statement, however, Santos implies that when *lex mercatoria* is a mixture of economic law and production law, it is not still a form of systemic law. The analytical confusion does not stop there. Despite its autonomy from any particular national legal system, *lex mercatoria* operates on a background of these systems in at least two senses: it borrows many legal norms from these systems, and in cases of appeals from arbitration decisions it is subject to the decisions of national courts. In such instances, *lex mercatoria* would appear to be a part of the state law, systemic law and economic law clusters simultaneously. Or perhaps this is another example of a mixture. With effort, Santos can probably clear up these confusions. These examples, however, and each additional one, merely re-raise the issue of whether the benefits of seeing law in this way are worth the trouble.

Indeed, what are the benefits of squeezing together all of the following under the rubric 'law': the sedimented social relations within the household, the 'law' of the corporation, the regulations and normative standards that rule the everyday life of wage labour relations, the 'law' of the market-place, the rules invoked by hegemonic or oppressed groups or by imperial

47 Santos, op. cit., n. 9, p. 434.
48 id., p. 436.

aggressive identities, the 'legal' form of the world-place, state law, and much more? In their various and complex manifestations, these phenomena are far more unlike than alike one another. The one – narrow but fundamental – characteristic these myriad phenomena share is that they involve rules. This common element is captured most precisely by calling them *rule systems*, with the concomitant assertion that social arenas are characterized by *rule-system pluralism*. No information is lost in this formulation because being involved with rules is exactly what they have in common. Instead of leading to the counter-intuitive assertion that much of social life is law, this will result in the uncontroversial assertion that rule systems are pervasive in social life.[49]

Santos contemplated, and flippantly dismissed, this obvious critique of his position:

> It may be asked: why should these competing or complementary forms of social ordering be designated as law and not rather as 'rule systems', 'private governments', and so on? Posed in these terms, this question can only be answered by another question: Why not?[50]

The answer is that the latter designations allow for more subtle discriminations to be made, and thus they generate more information and facilitate more careful analysis than lumping all of this under the label 'law'.

The primary value Santos cites in support of his view is that:

> a broad conception of law and the idea of a plurality of legal orders coexisting in different ways in contemporary society serve the analytical needs of a cultural political strategy aimed at revealing the full range of social regulation made possible by modern law (once reduced to state law) as well as the emancipatory potential of law, once it is reconceptualized in postmodern terms.[51]

If emancipatory potential is the primary consideration, if it's about successful politics, then a premium must be placed upon the clarity and persuasiveness of the analysis and the analytical tools and resources it provides. On this score, Santos's version of legal pluralism is wanting.

TEUBNER'S AUTOPOIETIC APPROACH TO LEGAL PLURALISM

The work of Gunther Teubner, one of the leading theorists of autopoiesis, provides a point of departure for the non-essentialist approach to law I will articulate in the following section. Teubner recognized two basic flaws of legal pluralist attempts to define law: their inability to distinguish law from other kinds of social norms, and the limiting effect of defining law in terms of a single function. His solution to both problems was to follow the

49 See P. Winch, *The Idea of a Social Science* (1958).
50 Santos, op. cit., n. 9, p. 115.
51 id.

'linguistic turn'. According to autopoietic theory, law consists of all discourse that invokes the binary communicative code of legal/illegal. This approach to identifying what law is excludes 'merely social conventions and moral norms since they are not based on the binary code legal/illegal'.[52]

Teubner's version of legal pluralism bears quoting at length:

> Now, if we follow the linguistic turn we would not only shift the focus from structure to process, from norm to action, from unity to difference but most important for identifying legal proprium, from function to code. This move brings forward the dynamic character of a world-wide legal pluralism and at the same time delineates clearly the 'legal' from other types of social action. *Legal pluralism is then defined no longer as a set of conflicting social norms in a given social field but as a multiplicity of diverse communicative processes that observe social action under the binary code of legal/illegal.* Purely economic calculations are excluded from it as are sheer pressures of power and merely conventional or moral norms, transactional patterns or organizational routines. But whenever such non-legal phenomena are communicatively observed under the *distinction directrice* legal/illegal, then they play a part in the game of legal pluralism. It is the implicit or explicit invocation of the legal code which constitutes phenomena of legal pluralism, ranging from the official law of the State to the unofficial laws of world markets.
>
> To avoid misunderstanding, I hasten to add that the binary code legal/illegal is not peculiar to the law of the nation-state. This is in no way a view of 'legal centralism.' It refutes categorically any claim that the official law of the nation-states, of the United Nations or of international institutions enjoy any hierarchically superior position. It creates instead the imagery of a heterarchy of diverse legal discourses.
>
> A global merchant's law would belong to the multitude of fragmented legal discourses, whether the discourse is of state law, or rules of private justice or regulations of private government that play a part in the dynamic process of the mutual constitution of actions and structures in the global social field. Nor is it the law of nation-states but a symbolic representation of validity claims that determines their local, national or global nature. The multiple of orders of legal pluralism always produce normative expectations, excluding, however, merely social conventions and moral norms since they are not based on the binary code legal/illegal. And they may serve many functions: social control, conflict regulation, reaffirmation of expectations, social regulation, coordination of behaviour or the disciplining of bodies and souls. It is neither structure nor function but the binary code which defines what is the 'legal proprium' in local or global legal pluralism.[53]

Teubner's account of law and legal pluralism advances over previous formulations in precisely the respects he identifies. It provides a sharper means to distinguish law from non-law than heretofore available, and it allows for a broader view of the various functions of law. It is not essentialist in the same way as concepts that identify or define the essential characteristics of law (although, as I will show, it is essentialist in the

52 G. Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism' (1992) 13 *Cardozo Law Rev.* 1443, 1451.

53 Teubner, op. cit., n. 16, pp. 3, 14–15.

different sense that it contains a thick set of functionalist and autopoietic assumptions about the nature of law); he merely says law is whatever people discuss in terms of the binary code of legal/illegal.

This novel way of understanding law and legal pluralism produces interesting insights, but it contains several debilitating drawbacks. First I will point out the problems in relation to functional analysis, then the problems in relation to his way of distinguishing law from non-law, and finally the problems which follow from viewing law exclusively in terms of communication. Most of these problems, it should be noted, derive more from his autopoietic theory than from his particular approach to the identification of law.

Autopoiesis, initially developed by Niklas Luhmann, is fundamentally functionalist in nature. Law is an autonomous, differentiated sub-system within society, according to Luhmann.[54] Law, he asserted, involves the facilitation of normative behavioural expectations, and in serving this function it co-ordinates social order.[55] Although Teubner's version of autopoiesis differs in certain respects from Luhmann's, it does not substantially differ in this view of the tight, functional relationship between law and society. Teubner remarked:

> the historical relationship of 'law and society' must, in my view, be defined as a co-evolution of structurally coupled autopoietic systems.[56]

Consequently, although Teubner is more generous than most legal pluralists about the possible range of functions law might serve – 'social control, conflict regulation, co-ordination of behaviour, or disciplining bodies and souls'[57] – and (significantly) he does not use any particular function as a means to *identify* or *define* law, he still sees law as fundamentally functional in nature. He states this in the clearest terms when asserting in the above quotation that the 'multiple of orders of legal pluralism *always* produce normative expectations', and when all of the functions he recites revolve around the control and co-ordination of behaviour. Under autopoietic theory, as in classical functionalist theory, law is essential to the survival and functioning of the overall social system that provides its environment. Thus Teubner's approach suffers from the same limitations of all function-based approaches. It eliminates from view the effects or consequences of law which are not functional in nature. Moreover, while it does allow for the possibility that specific instances of law might be dysfunctional or non-functional, it cannot accept the possibility that law in its totality is dysfunctional without necessarily resulting in societal collapse. The view

54 N. Luhmann, *A Sociological Theory of Law* (1985); N. Luhmann, *The Differentiation of Society* (1982).
55 id. (1985), p. 82.
56 G. Teubner, *Autopoietic Law: A New Approach to Law and Society* (1988) 218.
57 Teubner, op. cit., n. 52, pp. 1451–2.

that law is crucial to the equilibrium of society is what makes this an essentialist concept of law; the theory posits fundamental aspects of the relationship between law and society as a part of the nature of law (as an autopoietic system) and its relationship to its environment.

Beneath the surface, Teubner's approach to law contains a deep tension grounded in the fact that he relies upon conventionalism to identify law (law is whatever people code as law), while at the same time having a function-based view of the relationship between law and society. This combination harbours a potentially serious internal schism for Teubner because: 'Conventionalism is markedly at odds with traditional Functionalist explanations of social practices.'[58] Owing to the existence of functional alternatives or equivalents, conventional practices are underdetermined by functional needs. A given function can be satisfied by any number of conceivable conventional practices, regardless of whether they happen to be coded as 'law'. Nor is there any reason to assume that the social practices that are coded in this way in fact serve the function autopoiesis designates for law in society. The emergence of the actual conventional practices that exist in a given situation, and the terms in which they happen to be encoded, are the result of many factors – social and historical – besides just functional needs. Teubner makes the precarious assumption that a conventional coding will correctly identify as 'law' phenomena that will take part in a function-based 'structural coupling' with society.

The problems with Teubner's version of law extend beyond its functionalism. While his method of separating law from non-law does provide a sharper distinction than previous attempts, it nevertheless gives rise to serious objections of a different kind with regard to delimitation. The first problem is that his manner of line-drawing produces shifting and overlapping boundaries, even within a single conversation or within a single sentence. Imagine the following dialogue between two stock traders considering whether to use insider information:

Smith: 'The value of NEWCORP's stock will increase by at least 50 per cent, and perhaps 100 per cent, when this takeover bid is made public tomorrow. If we buy now we will make millions.'

Jones: 'You're right, we could easily double our assets. But it's illegal, and we might get caught. We could go to prison.'

Smith: 'Sure it's illegal, but the risk of being prosecuted is small. We'll be rich if we do it, so it's worth taking the chance.'

Jones: 'Okay, we probably won't go to prison, but it's still illegal, and furthermore it's immoral. It's wrong to break the law, and even if it weren't illegal it would be wrong and unfair to everyone else to use this information. Crime and immorality never pay.'

58 A. Marmor, 'Legal Conventionalism' (1998) 4 *Legal Theory* 509, 526.

Perhaps aside from the exaggerated moral sensibilities expressed by Jones, this dialogue is realistic. The question is how Teubner would break down the communicative codes involved in this conversation. Before addressing this, it must be said, those readers whose initial reaction is that this conversation has nothing to do with being a part of law do not appreciate the radical nature of autopoiesis's grounding in communication:

> *Any act or utterance* that codes social acts according to this binary code of lawful/unlawful may be regarded as part of the legal system, *no matter where it was made and no matter who made it*. The legal system in this sense is not confined, therefore, to the activities of formal legal institutions.[59]

In the above dialogue, the participants are invoking the binary code of legal/illegal, and thus according to autopoiesis this communication is a part of the legal system.

Smith's first observation is a purely economic calculation, so it would involve economics, not law. Jones's response is first economic, then legal, so the first sentence is not a part of the legal sub-system while the second and third are.

Smith's second observation begins as legal, then ends as economic. But it's a bit more complicated than that, because even his invocation of illegality is made in the context of an economic calculation. He discusses the illegality in terms of a transaction cost, which would appear to render it simultaneously economic in nature.

Jones's second response is similarly complicated. In the first sentence he invokes both law and morality. Moreover, in the second sentence, he makes the compound assertion that it is immoral to break the law, intertwining the moral and legal codes of communication in a single expression. Similarly, the third sentence, that crime and immorality never pay, intertwines the moral, legal, and economic.

To build a further twist into this already messy scenario, let's modify it to assume that Smith was actually an undercover investigator for the Securities and Exchange Commission, and this conversation was a part of a sting operation designed to catch Jones, who was suspected of being a dirty dealer. Furthermore, assume that Jones was aware of Smith's true identify and purpose (which explains Jones's sanctimonious stance), and he was merely playing along. Recall that Teubner includes the implicit as well as explicit invocation of the legal code as a part of law. Since both Jones and Smith would have legal/illegal in the back of their minds during the entire conversation, it would seem that it could be considered law in its entirety.

What appears to be a rather simple conversation is extraordinarily complex when analysed from an autopoietic standpoint. How each of these utterances is to be characterized - whether they are a part of 'law' or not – is

59 M. King, 'The Truth about Autopoiesis' (1993) 20 *J. of Law and Society* 218, 223–4 (emphasis added).

debatable. Theorists of autopoiesis recognize that 'one communication may exist and have meaning in more than one system',[60] so they would not necessarily be troubled by this analysis. But it does lead one to wonder what legal pluralists would gain by travelling down this path. Teubner has provided a relatively clear criterion for separating the legal from non-legal but in the process created other equally difficult analytical problems, and also ends up including aspects – like the above conversation, or sub-parts thereof – which most people would not consider 'law'.

The final problem with Teubner's approach to legal pluralism has to do with the autopoietic isolation upon communication as the embodiment of law. Characterizing law exclusively in terms of communication loses direct touch with the material power and effects of law. As Teubner puts it, with the shift to communication as the locus of law, sanction recedes 'into the background', 'losing the place it once had as the central concept for the definition of law'.[61] One may agree that sanction need not be the touchstone of law without going to the opposite extreme of banishing it from law. Integral to the authority of law, especially state law, often lies the threat and application of force. Reducing law to communication, as autopoiesis does, eliminates raw physical violence from within law – thereafter it may at most be considered an effect or consequence of law as communication, or a part of law's environment. It would be more true to the social reality of certain manifestations of law, certainly at least state law, to formulate an analytical apparatus which would include the material power of law as central to its existence while excluding such marginal phenomena as the private conversation between two individuals contemplating a criminal course of action.

The foregoing objections to Teubner's account are all linked to its autopoietic and functionalist intellectual underpinnings. These can be bracketed, however, to uncover an important insight contained within Teubner's version of law alluded to earlier. He delimited law in terms how the social actors themselves identified law – law includes all instances of communication invoking the binary code of legal/illegal. Although Teubner called his formulation a 'definition',[62] a better way to view it is that he articulated a criterion for the identification of law. His criterion is parasitic. In effect, it identifies as law whatever social actors themselves discuss in legal terms. This key insight, entirely shorn of the rest of Teubner's theoretical edifice, is the point of departure for the forthcoming non-essentialist account of law.

60 id., p. 224.
61 Teubner, op. cit., n. 16, p. 12.
62 id.

A NON-ESSENTIALIST VERSION OF LAW AND LEGAL PLURALISM

1. A conventionalist approach to law and legal pluralism

For more than a century, legal theorists and social scientists have conceptualized law by asserting that 'law is . . .', usually filling in the remainder of the phrase with some variation of an institutionalized, function-based abstraction of law, such as: law is institutionalized norm enforcement, law is institutionalized dispute resolution, law maintains social order, law co-ordinates behavioural expectations, law integrates society, law is governmental social control, and so forth. This approach implicitly presupposes an essentialist view of law because it assumes that law is some particular phenomenon that can be captured in a formulaic description. From these efforts, socio-legal scholars have learned that there are many kinds of norms and rule systems, that many kinds of institutions enforce norms, that there are many ways of resolving disputes, and that a variety of sources co-ordinate behaviour, integrate society, and contribute to the maintenance of social order.[63]

Each formula, though intended to define law, is instead best understood to create a function-based category. This can be observed by simply deleting the words 'law is . . .' from each proffered definition. That move immediately transforms the definitions into categories, like 'institutionalized norm enforcement' (which includes everything from baseball leagues to corporations, to state law); or 'institutionalized dispute resolution' (everything from community mediation to business arbitration, to state law); or the 'co-ordination of behavioural expectations' (everything from habits to language, to state law); or 'maintains social order' (everything from socialization to language, to customs and morality, to state law); or 'governmental social control' (everything from government sponsored education and advertising to selectively subsidizing or cost increasing taxing regimes, to state law). It is correct that each category includes state law as one of its members. But that is merely evidence of the versatile nature of state law, and it is a product of the fact that state law served as the model for most theorists when formulating their abstract concept of law. While each category may contain one or more members which overlaps with those of other categories (like state law), no overlap is complete, and other than state law no single member falls in every category. Each category consists of a different set of members. These findings demonstrate that each category goes beyond state law, while at the same time no single category encompasses every facet of state law (keeping in mind that state law does and is used to do many things that fall outside the categories recited above).

The essential points, which have already been made in several different ways, are that every attempt to define law in functional terms has suffered

63 See Tamanaha, op. cit., n. 25.

from being either too broad or too narrow. They have been too broad by including phenomena like the normative regulation within a corporation or the family, ultimately expanding to encompass virtually all social regulation within the term 'law'. They have been too narrow in two respects. First, when law is defined in terms of a particular function, like social control, everything else law does (or is used for) falls outside the scope of that definition, artificially constricting our ability to study and observe these other activities and functions. Secondly, it is too narrow in the sense that these definitions often exclude what many people would think should qualify as law. Natural law, for example, as well as certain manifestations of religious law or customary law which do not involve institutions, or are not focused on social order, would not qualify as 'law' under most of these definitions despite the fact that the people involved see them as such.

The long history of failed attempts at articulating an essentialist concept of law should be taken as instructive – there is something wrong with the ways in which the question of what law is has been posed and answered. The source of the intractable difficulty lies in the fact that law is a thoroughly cultural construct. What law is and what law does cannot be captured in any single concept, or by any single definition. Law is whatever we attach the label law to, and we have attached it to a variety of multifaceted, multifunctional phenomena: natural law, international law, state law, religious law and customary law on the general level, and an almost infinite variety on the specific level, from *lex mercatoria* to the state law of Massachusetts and the law of the Barotse, from the law of Nazi Germany to the Nuremberg trials, to the Universal Declaration of Human Rights and the International Court of Justice. Despite the shared label 'law', these are diverse phenomena, not variations of a single phenomenon, and each one of these does many different things and/or is used to do many things. There is no 'law *is* . . .'; there are these kinds of law and those kinds of law; there are these phenomena called law and those phenomena called law; there are these manifestations of law and those manifestations of law.

No wonder, then, that the multitude of concepts of law circulating in the literature have failed to capture the essence of law – it has no essence. A non-essentialist concept of law thus requires that law be conceived in a way that is empty, or that at least does not presuppose any particular content or nature. But that is impossible – a concept with no content is not a concept at all. Formulating a concept of law, therefore, won't work. Instead what is needed is a way to identify law that is not itself a concept of law, but rather, like Teubner's approach, the specification of criteria for the identification and delimitation of law. Here it is:

> *Law is whatever people identify and treat through their social practices as* '*law' (or recht, or droit, and so on).*

This is a conventionalist way of identifying law. Commonly, this involves state law (usually identified at some level of specificity, like the law of New

York State, US federal law), but in certain social arenas (especially in post-colonial societies) people also commonly refer to customary law and indigenous law (or specifically, to *adat*, or to Yapese customary law); and in certain social arenas people refer to international law or the law of human rights or the *lex mercatoria*; and people refer to religious law (or specifically, to Islamic Law, or the *Sharia*, or the Talmud, or canon law), or to natural law. And in some social arenas, all of these forms of law are referred to. This list is not exhaustive, as other or new forms of 'law' can be said to exist whenever recognized as such by social actors. Thus, what law is, is determined by the people in the social arena through their own common usages, not in advance by the social scientist or theorist.

A key component of this conventionalist approach to law is the notion of a social practice, developed in detail elsewhere.[64] A social practice, as I use the term, involves an activity that contains aspects of both meaning and behaviour, linked together by a loosely shared body of (often internally heterogeneous) norms and activities:

> To enter into a practice is to accept the authority of those standards and the inadequacy of my own performance as judged by them. It is to subject my own attitudes, choices, preferences and tastes to the standards which currently and partially define the practice.[65]
>
> [T]o think within the practice is to have one's very perception and sense of possible and appropriate action issue 'naturally' – without further reflection – from one's position as a deeply situated agent.[66]

A wide range of social activities can be seen in terms of practices, from playing chess to doing socio-legal theory. Many institutions are internally comprised of complex clusters of practices that they support and build around.

One must keep in mind that the notion of a social practice is a heuristic device that helps frame and isolate activities within the social field for the purposes of study. Paying heed to this reminder, the use of social practices as a primary tool for the identification of law has several beneficial effects. It insures that the particular convention regarding the existence of law is sufficiently shared, and hardy enough, to surpass a threshold of substantiality that would qualify it as a social practice. It recognizes and understands that a particular social practice generating a given manifestation of law has a history, and therefore it can change, and it may differ from other practices going by the same name. Most important, it views meaning and activity, as they give rise to a particular instance of law, as inseverably connected. This integrated approach avoids Teubner's artificial separation of communication about law from the material activities connected to law (that is, violence).

64 B. Tamanaha, 'The Internal/External Distinction and the Notion of a Practice in Legal Theory and Sociolegal Studies' (1996) 30 *Law and Society Rev.* 163.

65 A. MacIntyre, *After Virtue: A Study in Moral Theory* (1984) 190.

66 S. Fish, *Doing What Comes Naturally* (1989) 386–7.

2. *The implications of this approach to law and legal pluralism*

A state of 'legal pluralism,' then, exists whenever more than one kind of 'law' is recognized through the social practices of a group in a given social arena, which is a relatively common situation. This approach is different from most approaches to legal pluralism in a fundamental respect. In the typical legal pluralist approach, say, defining law as the institutionalized enforcement of norms, or as the self-regulation of the semi-autonomous social field, law is 'plural' because in a given social arena there are many manifestations of institutionalized norm enforcement (corporations, sports leagues) or many self-regulated semi-autonomous social fields (the garment industry, a university, a family). This kind of plurality involves the coexistence of more than one manifestation of a single basic phenomenon. In contrast, I assume that the label law is applied to what are often quite different phenomena, sometimes involving institutions or systems, sometimes not; sometimes connected to concrete patterns of behaviour, sometimes not; sometimes using force, sometimes not. Thus, the plurality I refer to involves different phenomena going by the label 'law,' whereas legal pluralism usually involves a multiplicity of one basic phenomenon, 'law' (as defined).

Traditional social scientists and theorists often reject conventionalist, subject-generated accounts of law as unscientific or insufficiently analytical. That is why all such attempts have been over-inclusive and under-inclusive, respectively, including phenomena most people would not consider to be law, and excluding phenomena many would consider to be law. The approach I suggest draws from existing social views of law, so such conflicts will not routinely arise. Under my account, the normative relations within the family will be considered 'law' only if the people within that social arena conventionally characterize them in terms of 'law'. This approach is based upon the recent interpretive turn in social theory and the social sciences,[67] which insists that greater attention and respect be paid to the meaningful orientations and categories of ordinary social actors.

The fact that this approach relies upon conventionalist accounts to identify 'law' does not mean that we are trapped in such accounts. Usage cannot dictate the construction of analytical categories nor appoint their membership. The label 'customary law', for example, has in various social arenas been conventionally applied to a range of phenomena with markedly different characteristics, so there cannot be a coherent single category called 'customary law'. Typologies and categories are analytical devices that are designed to meet the purposes of the social scientist or theorist who constructs them. In this case, categories of kinds of law can be formulated following an investigation of the various social practices and the phenomena

67 See Tamanaha, op. cit., n. 46, ch. 3.

to which people conventionally attach the label 'law'. These social phenomena can be abstracted from, and their distinctive features identified, then placed into broader categories based upon complexes of shared features. In interpretive theory, as articulated by Alfred Schutz and Clifford Geertz, these categories are 'second-level' or 'experience-far' constructs, the products of social scientists built upon, but not limited to, the 'first-level' or 'experience-near' conceptions of the social actors being studied.[68]

The result of this category construction may well give rise to a category encompassing publicly approved institutionalized norm enforcement, for example, but it will now be viewed in much different terms. It will not be a concept or definition of law as such. Under the approach I suggest, this will merely represent a category for the purposes of analysis, derived from the abstracted features of one kind of law (state law), constituting just one category among other types or kinds of law. Once a range of categories (abstracting from the various manifestations of international law, the *lex mercatoria*, natural law, customary law, and so on) are constructed (after much study and careful analysis), useful comparisons based upon specific empirical investigations can be made. These investigations may reveal that certain manifestations of what is called state law might lack the features of the category derived from state law, and that certain phenomena not called state law possesses the core features of the state law category, and so forth. Following this process, it will also be possible to compare the features of the various categories of kinds of law with one another. These comparisons and contrasts, at both the category level and the empirical level, promise to raise interesting questions and provide fruitful insights that extend far beyond those now generated by the current legal pluralist practice of tagging of lots of very different things with the same label: law.

This version immediately overcomes the primary defect that plagues other accounts of legal pluralism – the inability to distinguish legal from social norms. Legal norms are whatever people in the social group conventionally recognize as legal norms through their social practices.[69] Under my account, the normative relations within the family or a private conversation between two people regarding illegal conduct, for example, will be considered 'law' only if existing social practices within that social arena conventionally characterize them in terms of 'law.'

It is superior in another important respect – it allows for more refined distinctions to be made among the objects of study. Many legal pluralists are unable to speak simultaneously about rule system pluralism or normative

68 See A. Schutz, *The Problem of Social Reality* (1962) 5–7; C. Geertz, *Local Knowledge* (1983) 57–8; see, generally, B. Tamanaha, *Understanding Law in Micronesia: An Interpretive Approach to Transplanted Law* (1993) ch. 3.

69 This approach, it should be noted, has direct parallels with H.L.A. Hart's characterization of law in terms of social practices, though he too had an essentialist view of law. See B. Tamanaha, 'Socio-Legal Positivism and a General Jurisprudence' *Oxford J. of Legal Studies* (forthcoming, 2000).

pluralism *as well* as about legal pluralism, because they conflate the latter with the former when they define law as institutional norm enforcement. This conflation is reflected in Santos's acknowledgement that 'legal' pluralism could also be called 'rule-system' pluralism, and in frequent suggestions by legal pluralists that legal pluralism is equivalent to 'normative' pluralism: 'the coexistence of plural *legal or normative* orders is a universal fact of the modern world'.[70] The inability to distinguish law from rule system and normative regulation, however, results in a less nuanced view of the various phenomena at play in the social arena. In the approach I suggest, law is identified in terms of an entirely different axis. For example, certain kinds of law (like natural law and versions of customary law) often do not amount to rule 'systems'; and rule systems that are not conventionally identified as 'law' (and the overwhelming majority are not so identified) are rule systems but not 'law.' Social analysts can thus identify normative pluralism, rule-system pluralism, and legal pluralism in terms of separate criteria, talk about them together, and observe where they overlap or intersect and how they interact. Furthermore, in the approach I suggest, one can say not only that there is a pluralism of kinds of law, but also a pluralism of kinds of rule systems, as well as a pluralism of kinds of normative regulation (which ranges from social disapprobation, to rule systems, to most kinds of 'law'). A much richer picture of the social situation is available under this approach.

This approach to law and legal pluralism also opens up old questions from new angles. For example, an informative question will be to ask why, in a given social arena, the label 'law' has been appended to a particular social phenomenon – that is, what political, moral, rhetorical, symbolic, power, and so on, benefits follow from the label – and what relationship it has to other phenomena going by the same name. A telling example of this is the notion of customary law. In post-colonial societies, it is common for state courts to draw upon what they call 'customary law'.[71] Legal anthropologists have pointed out that, at least in certain instances, 'customary law' norms often are inventions made up in the context of colonial legal systems.[72] People in these societies also often refer to certain bodies of norms as 'customary law', which are not always the same bodies of norms as those recognized by the state legal system. In addition, there are also lived customs within these societies that have not been identified as forms of customary law by anyone. Legal pluralists have labelled the recognition of customary law by the state a form of 'weak' legal pluralism, the study of which they reject in favour of the study of 'strong' legal

70 C. Fuller, 'Legal Anthropology, Legal Pluralism and Legal Thought' (1994) 10 *Anthropology Today* 9, 10.

71 See Tamanaha, op. cit., n. 68.

72 See F. Snyder, 'Colonialism and Legal Form: The Creation of "Customary Law" in Senegal' (1981) 19 *J. of Legal Pluralism* 49.

pluralism (the version described in this article).[73] This artificial separation of kinds of legal pluralism limits the phenomena to be studied and the kinds of questions that can be asked. The non-essentialist version of legal pluralism reopens all of these questions in a way which cuts across the weak/strong dichotomy. Social investigators can ask *who* (which group in society, which social practices) identifies *what* as 'customary law,' *why*, and under what circumstances? What is its interaction with state law, and what relationship does it have, if any, with actual customs circulating within society? The same kinds of investigations can occur in a social arena with regard to religious law, natural law, the *lex mercatoria*, and so forth.

Religious law provides another instructive example. Recall that Santos's typology of six clusters of legal pluralism does not specifically account for religious law despite its prevalence in many different societies today. In certain societies (theocracies like Iran and Afghanistan), religious law *is* state law; in other societies, state law incorporates from religious law selected bodies of norms (like in the Republic of Ireland), or even complete institutions (as in Israel); in many societies, religious law stands entirely apart from state law (as with canon law in the past and today), as a separate and sometimes competing source of legal authority for the populace. The approach to legal pluralism I suggest recognizes all of these as forms of law – assuming existing social practices within the social arena treats them as such – and urges that they be studied in their specific manifestation, and in their relations with other kinds of law in that social arena, and as they compare to general categories of kinds of law or manifestations of law in other social arenas.

Finally, this approach to legal pluralism, as with existing approaches, continues to challenge the notion that 'law' is exclusively the law of the state. The non-essentialist version of legal pluralism easily recognizes forms of law that may have little or no connection to the state. No one version of law is placed in a hierarchy above any other – the degree of actual influence in a given social arena can be determined only following investigation, based upon the results of the inquiry. No presuppositions are made about the normative merit or demerit of a particular kind of law, or about its efficacy or functional or dysfunctional tendencies or capacities (if any).[74] Indeed, one merit of this approach – what makes it non-essentialist – is that it is entirely free of presuppositions about law (beyond the negative one that it has no essence). Everything is left open to empirical investigation, and category construction and analysis following such investigation. Another significant merit of this approach is that its lack of content and presuppositions regarding law creates a critical distance that facilitates study as well as evaluation. It directs an equally sharp-eyed, unsentimental view at all

73 See Griffiths, op. cit., n. 7; Merry, op. cit., n. 2.

74 For an extended argument building to the same position from within legal positivism, see Tamanaha, op. cit., n. 69.

manifestations and kinds of law. Whether the claims of a particular social practice regarding 'law' are made by a criminal gang, a band of revolutionary zealots, a husband who beats his wife to enforce 'the law of the household', or the state legal apparatus, each will be subjected to the same scrutiny, which includes examining what is gained by use of the label law. This equalizing approach to all claims to constitute law does more than contest legal centralism; owing to its lack of presuppositions and its distance, it is much more amenable to Santos's critical evaluative objectives than is his own complicated and fuzzy scheme.

3. The problems with this approach to law and legal pluralism

As with any approach, several costs are incurred by my strategy. For one, there is no single phenomenon, 'law', about which information can be accumulated and measured. This inability will offend certain social scientific sensibilities. But this is the cost of staying true to the social reality of our use of the label law, which cannot be reduced to any single phenomenon. On the positive side, now information can be gathered on a number of different phenomena going by the name of 'law', which can then be studied and compared with one another, and compared with the situation in different social arenas. The distorting but pleasing simplicity of the monotypical model of legal pluralism will be traded in for a richer and more accurate, albeit less comfortable and familiar, portrait of legal pluralism as a plurality of kinds of law.

Two additional problems to the approach I suggest are inherent to relying upon conventionalism for the identification of law. The first problem involves resolving the question of *who* must identify a phenomenon as law through their social practices for it to qualify as such. Consistent with an expansive conventionalism, the answer is *any* group within the social arena. A related second question that must be resolved – ultimately on an arbitrary basis, though not without reasons – is *how many* people must view something as 'law' for it to qualify as such. My reliance upon social practices to identify law insures, at least, that there be some minimal degree of continuous social presence; transient or idiosyncratic identifications of law do not amount to social practices. As a general matter, although other cut-off points may be selected, a minimum threshold to qualify is if sufficient people with sufficient conviction consider something to be 'law', and act pursuant to this belief, in ways that have an influence in the social arena. This admittedly vague test is intended to set a low threshold for inclusion. Law, pursuant to this non-essentialist approach, is whatever people recognize and treat as law through their social practices. This general test is formulated to be consistent with this assertion, while screening out the lone lunatic who considers his every wish to be the law.

This relatively low conventionalist standard might be unpalatable to socio-legal scholars, first, because it threatens a proliferation of kinds of law in a social arena, and, secondly, because it seems to grant remarkable

authority to social actors to give rise to the existence of law. Neither concern has merit. Socio-legal scholars interested in legal pluralism should not shrink from the possibility of a profusion of social practices identifying kinds of law. If such a situation exists, it would be a fascinating social development that must be studied and understood. The reality, however, is that the fear is unfounded. Such a profusion of kinds of law will seldom occur, since as a matter of general social practice people do not lightly apply the label law. Indeed, legal pluralists currently tend to see law in far more places than general social practices would support.

The apparent authority conventionalism grants to social actors to give rise to new kinds of law is also a misplaced concern. In fact, social actors already possess this authority, since law is and has always been a social creation. Conventionalism merely recognizes this reality. The real threatening adjustment conventionalism brings about is its frontal challenge to the authority of social and legal theorists – the champions of essentialism – to dictate for everyone else what law (properly understood) is.[75] As Zygmunt Bauman observed, 'Concern with the right to speak with authority is an artifact of academic life.'[76] Appeasing this concern is not a compelling ground to reject a conventionalist approach to the identification of law. Furthermore, the social analyst is still free to develop the second-level constructs, and do the empirical investigation and analytical work. Admittedly, this is less glorious than the traditional essentialist task of identifying the nature of law, but it is worthy, none the less.

These problems, I should point out, are the result of giving up an essentialist view of law and becoming truer to the actual social presence of law(s), and they should be considered informative and challenging rather than troubling.

CONCLUSION

A recent theoretical exploration of the concept of legal pluralism ended with the following claim:

> Legal pluralism is, in fact, the approach to law and legal theory that offers most hope for understanding the role of diverse normative regimes not connected to the State and conceiving them in a language and vocabulary that does not presuppose the State as the standard case.[77]

75 As evidence of this strong tendency to dictate for others, many legal pluralist works are filled with claims that they alone hold to the correct view of law, and that those who disagree are suffering from ideologically induced delusion. See Tamanaha, op. cit., n. 22.

76 Z. Bauman, 'Hermeneutics and Modern Social Theory' in *Social Theory of Modern Societies*, eds. D. Held and J.B. Thompson (1989) 53.

77 R. Macdonald, 'Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism' (1998) 15 *Arizona J. of International and Comparative Law* 69, 91.

Whether this claim is correct depends upon which version of legal pluralism one adopts. Prevailing versions of legal pluralism that are built upon essentialist concepts of law, I have argued, lead to hopeless confusions and complexities, and flatten out diverse phenomena in ways which obscure important differences between diverse normative regimes. Legal pluralists have made many bold declarations like the one above, but after almost twenty years there has been little real progress. A non-essentialist version of legal pluralism, for all the reasons stated, has greater potential to live up to these claims.