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How legal pluralism is and is not distinct from liberalism: A response to Dennis Patterson and Alexis Galán

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Paul Schiff Berman*

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As Dennis Patterson and Alexis Galán correctly summarize,¹ my book, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders*,² has two principal components.

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First, I argue that legal pluralism is a useful descriptive framework for understanding the interaction among the multiple legal and quasi-legal normative systems at play in our globally interconnected world. Legal pluralism is a useful lens partly because it gets us beyond the endless and rather fruitless debates about how to define what counts as law and what does not. Instead, we can direct our gaze to efficacy: what do populations come to view as binding and what seeps into legal consciousness over time. In addition, if we use legal pluralism as our framework, we are more likely to recognize the potential impact of non-state normative assertions, from religious law to ethnic codes to industry standards to accreditation regimes, and so on. Thus, legal pluralism offers a richer and more complex picture than other models that tend to focus on sovereignty and formal law-making power.

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Second, turning from the descriptive to the normative, I suggest that state and non-state communities might consciously consider designing procedural mechanisms, institutions, and discursive practices that at least attempt to maximize the opportunity for plural voices to be heard. Doing so provides more ports of entry for more alternative law-making communities. This “juris-generative” approach,³ I argue, can at least sometimes produce better substantive decisions, but in any event it is more likely to cause decision-makers to take a restrained view of their own power, leading to greater tolerance, inclusion, and the development of harmonious processes because even losing parties feel that their voices were heard and taken seriously.

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¹ Denis Patterson & Alexis Galán, *The Limits of Normative Legal Pluralism*, 11(3) Int'l J. Const. L. XXX (2013).

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² PAUL SCHIFF BERMAN, *GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS* (2012).

³ See Robert Cover, *Foreword: Nomos and Narrative, The Supreme Court 1982 Term*, 97 HARV. L. REV. 4, 11–15 (1983).

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Patterson and Galán, in their thoughtful review of the book, largely accept the first argument and reserve most of their critique for the second. Accordingly, I too will focus on the normative aspects of the book, but before I do, I think it is important to pause for a moment and consider just how significant it is that scholars such as Patterson and Galán now so easily accept the descriptive usefulness of the legal pluralist framework. Indeed, Patterson and Galán appear to treat this argument as sufficiently self-evident, or “commonplace”⁴ (to use their word) that it does not even merit much discussion. That is remarkable in and of itself, and it represents a sea change from the status quo circa 2000 when I began pursuing these issues, joining with a handful of scholars to push for the application of legal pluralist insights to the international and transnational arena. Certainly, there were no mainstream international law scholars in the United States at that time advocating legal pluralism as a descriptive framework. Even those who were sympathetic to the idea that less informal transnational legal processes were significant shapers of norms did not explicitly draw on legal pluralism. And the responses of both international law triumphalists and nation-state sovereigntists to pluralist arguments were equally hostile, the former because pluralism was seen as contributing to “fragmentation” and the undermining of hard-won victories for international legal regimes, and the latter because of fear that pluralism would trench on the assumed prerogatives of nation-states. Thus, the idea that legal pluralism could be accepted, without much debate, as “a convincing” way of “describing the current state of global affairs”⁵ is a major advance.

Turning now to the normative argument I make regarding legal pluralism, it is important to start with a clear understanding of the claim I seek to advance. Crucially, I attempt to provide a middle ground between sovereigntist territorialism, on the one hand, and universalist harmonization, on the other. To my mind, both sovereigntist territorialism and universalist harmonization try to wipe out pluralism by insisting on one authoritative set of governing substantive norms that will resolve a dispute. In the sovereigntist territorial model, one community’s substantive norms trump all others, usually based on the primacy of a nation-state in a territorial location that is somehow (and sometimes arbitrarily) tied to a dispute. Thus, the norms of other nation-states and the norms of non-state actors—whether transnational, international, or subnational—are often rejected or ignored entirely. In contrast, a universalist harmonization strategy tries to dissolve normative difference by subsuming the multiple community norms at play into one over-arching set of substantive rules or standards. But despite their differences, both approaches retreat from the idea that there are multiple norm-generating communities who should have their voices heard and perspectives considered.

Instead, the pluralist approach I advance advocates the development of procedural mechanisms, institutional designs, and discursive practices that seek to articulate and maintain a balance between sovereigntist territorialism and universalist harmonization. As such, successful mechanisms, institutions, or practices will be those that

⁴ See Patterson & Galán, *supra* note 1, at [manuscript p. 1].

⁵ *Id.* at [manuscript at 17].

simultaneously celebrate both local variation and international order, and recognize the importance of preserving both multiple sites for contestation and an interlocking system of reciprocity and exchange. Of course, as I repeatedly acknowledge in the book, actually doing that in difficult cases is a Herculean and perhaps impossible task. Certainly, mutual agreement about contested normative issues is unlikely and possibly even undesirable. Thus, the challenge is simply to try for a more proceduralist pluralism, by developing ways of seeking mutual accommodation while keeping at least some “play” in the joints so that diversity is respected as much as possible. Such play in the joints also allows for the juris-generative possibilities inherent in having multiple lawmaking communities and multiple norms. Always the focus is on trying to forge a shared social space for taming normative conflict while respecting difference. The crucial point is that these pluralist practices seek to inculcate habits of mind in decision-makers that will cause them to think in a restrained and deferential way about their own “jurispathic” power,⁶ at least to the extent possible.

Interestingly, the criticism I usually receive in expounding this normative approach is that my vision gives too much space to plural norms. Thus, sovereigntists tend to object to the idea that nation-states should ever take into account international, transnational, or non-state norms. Meanwhile, international law triumphalists chafe at the idea that international norms should ever be subordinated to local practices that may be less liberal or less rights-protecting. But both positions are principally concerned that my approach would result in too much fragmentation and too much deference to what are viewed as illegitimate norms.

In contrast, Patterson and Galán criticize the book from precisely the opposite perspective. They suggest that, at heart, my argument is simply liberalism in another guise, that my soft procedural pluralism is essentially conventional and not truly pluralist enough to radically reshape the space provided to multiple normative communities. Accordingly, I am in some sense happy to welcome this new critique because it offers a response to those who claim that my position is too extreme and destabilizing. After all, a position cannot easily be simultaneously too radical and not radical enough. Thus, I am tempted to simply embrace the critique, allow for the fact that my procedural pluralism is more liberal than a full-on embrace of pluralism would be, and end the discussion there.

This is especially true because my book is not, and does not attempt to be, a work of political philosophy. Accordingly, for me very little turns on whether my vision of legal pluralism is or is not consonant with one or more of the many variant strands of liberalism articulated by political theorists. Nevertheless, while there is clearly a liberal bias at its core, I don’t think it’s true that the pluralist vision I advocate is *solely* liberalism in disguise. So perhaps it will be helpful in this response to sketch out what I see as both the core of liberalism in my book as well as the ways in which the proceduralist vision of pluralism I advocate, while it is not necessarily incompatible with liberalism, at least shifts the emphasis to a set of values that are not always fully captured in the design of liberal procedures and institutions.

⁶ See Cover, *supra* note 3, at 11–15.

Patterson and Galán argue that my reading of pluralism is “unmistakably liberal.”⁷ Although they do not precisely define what they mean by liberalism, I think my proceduralist version of pluralism is liberal to the following extent: what I am seeking are procedures, institutions, and practices that bring multiple norm-generating communities into greater dialogue with each other. To take an example from the book,⁸ I believe that the mere fact that the European Court of Human Rights (ECtHR) has a margin of appreciation doctrine that requires some deference both to state constitutional courts and to local variation will tend to cause the judges of the ECtHR to consider those local variations in articulating a right, even as the judges simultaneously push towards the acceptance of a universalist human rights norm. Thus, the margin of appreciation doctrine creates an iterative interactive process among communities that would not exist as strongly if the Court simply tried to impose an international norm hierarchically on the one hand, or fully deferred to local norms on the other. Likewise, a hybrid court or tribunal with members of multiple communities sitting next to each other will likely tend to create more dialogue among those communities in reaching an outcome. Or a choice of law doctrine that requires decision-makers to look to norms other than those of their own community as possible rules of decision will result in more thoughtful consideration of those alternative communities, regardless of the ultimate outcome of the case. In each of these circumstances, the goal is to make decision-makers more restrained in their exercise of jurisprudential power and more accommodating of difference. And of course these same principles could be, and sometimes are, adopted by non-state communities in developing ways of managing their interactions with others.

But it is obviously true that some communities don’t even want to join the dialogue. Or that some communities wish to exclude certain segments of the population (e.g., women) from the conversation. Some might even question whether rational dialogue is what is needed to make decisions. For example, if a religious leader seeks merely to impose an asserted universal truth by fiat, there is little room for the conversation, deference, and accommodation that I hope a more pluralist mechanism will engender. Accordingly, my proceduralist vision of pluralism contains a Habermasian bias favoring inclusion, participation, and conversation, and some illiberal communities will reject it on that basis. On the flip side, liberal jurisprudence might not always be able to accommodate some absolutist exclusionary views, thereby limiting the range of normative pluralism somewhat.

However, just because there is a core of liberalism in the idea of fostering dialogue across difference does not mean that the pluralist approach adds nothing. For example, consider a governing council of decision-makers popularly elected by citizens of a community. Assume that every council member happens to be a member of the same majority ethnic, racial, or religious group within that broader community. If the election were conducted fairly and the governing body does not unduly infringe minority rights in its substantive decisions, then under most theories of liberalism of

⁷ Patterson & Galán, *supra* note 1, at [manuscript p. 18].

⁸ See Berman, *supra* note 2, at 161–163.

which I am aware there is at least some justification for saying that this is a legitimate arrangement. If one embraces the vision of legal pluralism I pursue, however, one might reach the conclusion that even if this rule solely by members of the dominant group is *legitimate*, it is likely not *preferable*. This is because the procedural pluralist approach adds to the mix a preference for greater dialogue among multiple communities to improve the quality of decision-making, to build habits of mind that inculcate tolerance, and to make it more likely that the minority will acquiesce in whatever substantive decisions are ultimately reached. Accordingly, following a more pluralist approach, one might decide to set aside certain seats on the governing council for the minority group. Either of these arrangements is likely compatible with liberalism; however, the pluralist perspective adds an additional set of considerations to weigh in the institutional design decision. Of course, there are liberal theorists who would similarly seek structural accommodation to minority groups of this sort, and as Patterson and Galán point out,⁹ Will Kymlicka is a prominent example. But I did not invoke Kymlicka in my book because I did not understand my project to be either defending or attacking any particular vision of liberalism. Rather, my aim was simply to point to the prudential reasons that more pluralist mechanisms might be desirable. 5.5
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Another example from the book¹⁰ concerns the US Supreme Court's decision in *Employment Div., Dep't of Human Resources of Oregon v. Smith*.¹¹ Here, the Court ruled that a general state statute forbidding certain narcotics should be applied to a native tribal community's religious practice that included the use of peyote. I am concerned, however, less with the outcome of the case than with the structures of decision-making. If the Court merely sees a hierarchy whereby federal law wins, that is a fundamentally jurisprudential approach because it never considers alternative normative communities. Instead, I suggest that the question be viewed through a choice-of-law framework and that the Court should seriously consider whether it can defer to the tribal normative assertion without sacrificing its own deeply held constitutive commitments. This is a fundamentally different approach I believe, again even if both are consonant with the basic tenants of liberalism. And again the actual outcome of this inquiry is far less important to me than the framework of engagement that is deployed. 5.20
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Indeed, part of the critique Patterson and Galán launch stems from the fact that they are seeking from my project something I explicitly state I am not offering: a prescriptive determination of how various substantive normative conflicts should be resolved in specific cases. Thus, they ask: "Does the acceptance of communities entail the total elimination of individual rights? Do communities bear rights and duties independently of individuals?"¹² And so on. These are difficult—and likely impossible—questions to resolve definitively in individual cases. But in any event, I do not believe that there is a position outside of a particular culture and sociolegal system where one can stand and even try to provide a definitive answer to such questions. Accordingly, Patterson and 5.40

⁹ See Patterson & Galán, *supra* note 1, at [manuscript at 19–21].

¹⁰ See Berman, *supra* note 2, at 290.

¹¹ 494 U.S. 872 (1990).

¹² Patterson & Galán, *supra* note 1, at XXX. 5.44

Galán crucially misread the book when they offer a statement such as: “For him pluralism is acceptable so long as it does not breach certain minimum standards.”¹³ This is because, although I *personally* may prefer regimes based on minimum individual rights standards, that is not something I am taking a stand on one way or the other. I simply note as a descriptive matter that embracing procedural mechanisms, institutional designs, and discursive practices that allow for plural voices needs not necessarily commit one to a position that abandons individual rights. It only requires that the various normative voices be *considered*, not that they necessarily win. And if some of those communities are sufficiently illiberal, then a decision-maker committed to liberalism will reject the norms of illiberal communities on that basis. My approach neither advocates in favor or against such judgments. Different decision-makers will reach different conclusions under different factual scenarios, and I personally will agree with some decisions and disagree with others based on my own political, moral, and ethical commitments. All I am advocating in my proceduralist vision of legal pluralism is that we seek to inculcate habits of mind that will tend to cause us to seriously consider multiple normative frameworks and communities before reaching whatever decisions we reach.

Next, Patterson and Galán contend that my embrace of cosmopolitanism means that I necessarily privilege the individual over the community. This is because cosmopolitanism arguably includes the idea that human beings can belong to a single overarching world community, and that this community should be cultivated. However, that is not quite the way in which I use the idea of cosmopolitanism. I focus on cosmopolitanism not as a universalist belief in world citizenship above all, but simply as a recognition of multiple attachments from the most local to the most global (and many attachments not based on place at all). So, a cosmopolitan approach to jurisdiction, for example, would not necessarily defer to the idea of a party as a world citizen over other possible community affiliations, but it would ask decision-makers to consider the range of possible community affiliations that might be salient. There is probably nothing in this vision that is inconsistent with liberalism, but I think that is not the same thing as saying that nothing has been added.

Finally, we come to what is perhaps the crux of the matter. Patterson and Galán point out that the sorts of procedural mechanisms, institutional designs, and discursive practices I advocate require “a larger normative environment in which pluralism has to be negotiated.”¹⁴ This is true, and as noted above that normative environment is one in which reasoned discourse among multiple worldviews is both accommodated and fostered as much as possible. Accordingly, there must at least be agreement among the different normative communities to participate in the common enterprise. If they refuse to participate then there is little that can be done within the legal arena, it seems to me.

In the book,¹⁵ I draw on theorist Chantal Mouffe’s distinction between “adversaries” and “enemies.”¹⁶ Adversaries are willing to enter the same social space and contest

¹³ *Id.* at XXX.

¹⁴ *Id.* at [manuscript at 26].

¹⁵ See Berman, *supra* note 2, at 145–146.

¹⁶ CHANTAL MOUFFE, *THE DEMOCRATIC PARADOX* 13 (2000).

substantive normative disagreements; enemies are unwilling even to engage. The goal of my procedural pluralism is to encourage as many normative communities as possible to be adversaries rather than enemies. I argue that a system that routinely squelches alternative voices is likely to create more enemies over time, whereas one that seeks to allow multiple voices to be heard and tries for accommodation as much as possible will be more successful at turning at least some of those enemies into adversaries. Again, if this simply means bringing more enemies into the ambit of a liberal legal order that seeks maximum accommodation and deference to plural norms from plural communities, then I am happy to embrace that form of pluralism (and that form of liberalism). 7.5

But Patterson and Galán want legal pluralism to be something far more radical (and far more impractical). So, for example, in the book I make what I think is a relatively moderate and restrained argument that liberal communities might try to open limited space for sharia courts to operate so long as those courts do not trench upon fundamental values of the liberal community.¹⁷ And it should be noted that even that moderate and restrained version of the argument draws fire from critics across the political spectrum, from rights advocates worried about illiberal practices to nation-state sovereigntists worried about giving any authority at all to non-state communities. Patterson and Galán, in contrast, want to push much farther. They claim that it's not really pluralism unless I go all the way and advocate that liberal communities allow sharia courts to operate *regardless* of whether or not they violate fundamental values of the liberal community. This strikes me as absurd. Just because one embraces insights from legal pluralism, after all, does not mean that the values of pluralism must necessarily and always trump any other values a community might hold. It simply cannot be that legal pluralism is only a true normative position if it is pursued to the exclusion of all other values, interests, and commitments. 7.10
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Patterson and Galán treat my balancing of the values of pluralism with other values as ambivalence. They correctly note that my book celebrates pluralism as a descriptive fact, that I appreciate the existence of multiple overlapping communities, and that I resist universalizing tendencies that reduce diversity. But they see all that as inconsistent with my effort to encourage the creation of legal mechanisms to manage this pluralism. However, these positions are not inconsistent at all. Indeed, they are likely to be our only hope of addressing the reality of pluralism without either squelching all alternative views on the one hand, or having no legal order at all, on the other. 7.30

I acknowledge that striking this balance is extraordinarily difficult and perhaps impossible to achieve fully. But that does not mean it is incoherent or analytically inconsistent to try. And most importantly my book simply argues that it is normatively desirable for communities to make the effort. Indeed, as noted above, I am far less concerned with how individual cases are decided or how individual institutions or mechanisms are designed than I am in trying to ensure that whoever reaches those decisions considers the values of legal pluralism as part of the calculus. So, yes, legal pluralism gets subsumed within a broader set of values held by any given decision-maker or community, but that does not mean that factoring in the values of pluralism 7.35
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¹⁷ See Berman, *supra* note 2, at 225. 7.44

does not create long-term changes in the way the decision-maker or community tackles procedural or institutional design challenges.

8.5 Because my approach is not fundamentally concerned with prescribing outcomes in specific cases, when I do provide examples of how such cases might be tackled within a framework that takes pluralism seriously, I do so for illustrative purposes only, not to provide definitive right answers. Indeed, part of the pluralist insight is that any answer provided by a decision-maker is inevitably partial and subject to contestation, resistance, and revision over time. Thus, Patterson and Galán miss the point when they complain that my particular suggestions about these illustrative cases seem arbitrary and do not provide

8.10 definitive guidance to decision-makers. Indeed, it would be hubris for me to provide prescriptive rules of decision (and very un-pluralist at that!). Instead, I merely suggest that decision-makers might take the insights of legal pluralism into account and that doing so could change jurisprudential outcomes or institutional designs in some instances.

8.15 Whether this results in a system that is too open-ended and unpredictable is a matter of personal opinion. Certainly, the system of federalism that the United States has negotiated since its founding makes life and law far more unpredictable and contested than if we had a single government based in Washington, DC. Yet, we live with the uncertainty and constant tension created by a system of 51 different sovereign entities because the values of legal pluralism trump certainty and predictability, at least to

8.20 some degree. Where one places the divide between pluralism and certainty is an individual judgment and is beyond the scope of my book. Again, all I advocate is for people to embrace the independent values of pluralism and provide as much scope for those values as they can, recognizing that what they think they can accommodate will vary from person to person, context to context, community to community.

8.25 If this more measured and contextualized approach fails to meet the criteria for the philosophically pure vision of legal pluralism Patterson and Galán want me to advocate, then so be it. Perhaps my vision of legal pluralism is itself pluralist: it recognizes that the values of pluralism—accommodating multiple voices, recognizing multiple community affiliations, considering multiple norms—are themselves only one set of

8.30 values among many. And so, as with any other values, the values of legal pluralism should not always win. The essence of law is that it strikes balances among competing visions. All my book seeks to suggest is that the descriptive reality and normative benefits of accommodating legal pluralism should always be part of that balance, not that they should necessarily prevail in all circumstances. Moreover, communities that keep

8.35 legal pluralism in their calculus when reaching decisions and designing institutions will tend to reach different decisions and design different kinds of institutions at least some of the time. These decisions and institutions will tend to be more tolerant of multiple worldviews and more restrained in the imposition of their own power. They will build more play in the joints so that different voices can be heard and considered. And

8.40 they will have a better chance of turning enemies into adversaries. That is a vision I think deserves consideration, regardless of whether it counts in abstract terms as an independent philosophical position or not.

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