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Article

The Disputed Roots of Legal Pluralism

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Abstract
It has been claimed that Felix S. Cohen, one of the leaders of the American legal realism movement of the 1930s, introduced legal pluralism to America. This article argues that this assessment is controversial and depends on the definition of legal pluralism. In its analysis of the concepts of legal pluralism advanced by Cohen and his contemporaries Karl Llewellyn and A. Arthur Schiller, the impact of the different traditions of legal pluralism is demonstrated. In fact, Schiller was the first to introduce many of the basic tenets of current legal pluralism such as the preservation of indigenous law in American legal discourse.

Keywords
Legal pluralism, indigenous law, legal history, Indian law, colonialism, legal anthropology, Felix S. Cohen, Karl N. Llewellyn, A. Arthur Schiller

I. Introduction

In her book *Architect of Justice*, Dalia Tsuk Mitchell claims that legal pluralism was introduced into American legal discourse by Felix S. Cohen, a legal scholar and administration official in the 1930s and 1940s.[1] Tsuk maintains that Cohen was the first legal scholar to seek to give Native Americans a say in the law that was applied to them. An advocate of group autonomy within the political and legal structures of democracy, Cohen argued for a diversity of values and a rejection of universal norms that would curtail diversity. According to Tsuk, as the son of Jewish immigrants Cohen would have

1. Dalia Tsuk Mitchell, *Architect of Justice: Felix S. Cohen and the Founding of American Legal Pluralism* (Ithaca, NY and London: Cornell University Press, 2007).

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felt like an outsider in American society, and "found his sense of belonging in legal pluralism."[2]

However, there are other claims to the title of the founder of American legal pluralism. For example, Ajay Mehrotra maintains that Karl Llewellyn should be considered the pioneer of legal pluralism for producing "an original work in the field of legal pluralism."[3] It would appear that either one or the other author is mistaken, or that there were not one but many diverging traditions of legal pluralism, each with their respective founder.

The purpose of this article is to explore the roots of legal pluralism in American legal thought through three examples: Felix S. Cohen, Karl N. Llewellyn, and A. Arthur Schiller. The aim is to position these examples in the general development of legal pluralistic thought and to reject a single, overarching interpretation of legal pluralism.

Why we need to determine a tradition's pioneer or founder is an interesting issue. Selecting a person to be the founder of a tradition implies that by this choice one defines the content of the tradition. Thus the construction of a foundation myth is both an attempt to legitimize the tradition by giving it an ancient pedigree and to impose an interpretation of the tradition's meaning. Such a historical interpretation is inevitably aimed at controlling the future through the past.[4] The main question regarding the pioneers of legal pluralism is the plurality of traditions. Thus the actual answer to the question of who founded American legal pluralism follows the question of what one means by legal pluralism. What this article seeks to demonstrate is that while Cohen and Llewellyn were active in pursuits that according to contemporary standards may fall under legal pluralism, canonizing either of them obscures the fact that there followed a rich tradition of legal pluralism that had little or nothing to do with their actions. This forgotten field is the comparative law tradition of legal pluralism, pioneered by Schiller.

Legal pluralism was initially a concept of comparative law used to describe situations where several legal systems may apply, but the notion has since been primarily linked with legal anthropology and indigenous law. It should be noted that the concept of legal pluralism is purely anachronistic in relation to Cohen as it gained currency only in the 1960s, a decade after his death.[5] In contemporary scholarship, the term legal pluralism has been increasingly substituted by the concept of normative pluralism.[6]

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2. Tsuk Mitchell, *Felix S. Cohen*, pp. 1–3.
3. Ajay K. Mehrotra, "Law and the 'Other': Karl N. Llewellyn, Cultural Anthropology, and the Legacy of The Cheyenne Way," *Law and Social Inquiry*, 26 (2001), pp. 741–75, quote p. 771.
4. Kaius Tuori, *Ancient Roman Lawyers and Modern Legal Ideals: Studies on the impact of contemporary concerns in the interpretation of ancient Roman legal history* (Frankfurt am Main: Vittorio Klostermann, 2007), pp. 46–52.
5. On the earlier comparative law tradition of legal pluralism, see the first book to carry the concept in its title: M. B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-colonial Laws* (Oxford: Clarendon Press, 1975). For a more recent assessment, see Leon Sheleff, *The Future of Tradition: Customary Law, Common Law and Legal Pluralism* (London and Portland, OR: Frank Cass, 2000).
6. William Twining, "Normative and Legal Pluralism: A Global Perspective," *Duke Journal of Comparative and International Law*, 20 (2010), pp. 473–517.

The cause for much of the conceptual debate over legal pluralism is that the comparative law tradition, legal anthropological tradition and what has been labeled as the global legal pluralistic tradition are products of idiosyncratic schools of thought that are in many ways incompatible. The controversy over legal pluralism or normative pluralism stems mainly from the fact that different authors speaking from their respective traditions use the same concept with diverging meanings.

In the present article, speaking of different traditions does not necessarily imply a dramatic disparity of background or location. The diverse interests of legal scholars will be presented using as examples three lawyers whose careers crossed paths in the 1930s at Columbia Law School. Felix Cohen wished to give Indians laws of their own making in the modern world, while Karl Llewellyn wanted to record the legal consciousness of Native Americans, and A. Arthur Schiller sought to preserve the native legal customs as living law in legal pluralistic settings.

Of these three figures, Llewellyn has attracted the most scholarly consideration, the major contribution still being Twining's biography from 1973.[7] There are a number of studies on Cohen, mostly by Tsuk,[8] while Schiller has not previously been a focus of attention beyond limited obituaries.[9] The result has been that the history of legal pluralism has been biased and, in certain aspects, seriously lacking. In addition to scholarship, the current study is based on two sets of primary sources, the Karl N. Llewellyn papers from the University of Chicago and the A. Arthur Schiller collection at Columbia.

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7. E. Adamson Hoebel, "Karl Llewellyn: Anthropological Jurisprude," *Rutgers Law Review*, 18 (1963–1964), pp. 735–44; William Twining, *Karl Llewellyn and the Realist Movement* (Norman, OK: University of Oklahoma Press, 1973); William Twining, "Law and Anthropology: A Case Study in Inter-Disciplinary Collaboration," *Law and Society Review*, 7 (1973), pp. 561–84; James Q. Whitman, "Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code," *Yale Law Review*, 97 (1987–1988), pp. 156–75; Michael Ansaldi, "The German Llewellyn," *Brooklyn Law Review*, 58 (1992–1993), pp. 705–77; N. E. H. Hull, *Roscoe Pound and Karl Llewellyn. Searching for an American Jurisprudence* (Chicago: University of Chicago Press, 1997); David Ray Papke, "How the Cheyenne Indians Wrote Article 2 of the Uniform Commercial Code," *Buffalo Law Review*, 44 (1999), pp. 1457–85; Mehrotra, "Llewellyn," pp. 741–75; John M. Conley and William M. O'Barr, "A Classic in Spite of Itself: *The Cheyenne Way* and the Case Method in Legal Anthropology," *Law and Social Inquiry*, 29 (2004), pp. 179–216; Peter Dinunzio, Elinor Kim, and Robert Whitman, "Karl N. Llewellyn, How Icelandic Saga Literature Influenced the Scholarship and Life of an American Legal Realist," *Connecticut Law Review*, 39 (2007), pp. 1923–76.
8. Dalia Tsuk, "The New Deal Origins of American Legal Pluralism," *Florida State University Law Review*, 29 (2001–2002), pp. 189–268; Dalia Tsuk, "'A Double Runner': Felix S. Cohen and the Indian New Deal," *PoLAR: The Political and Legal Anthropology Review*, 25 (2002), p. 48; Tsuk Mitchell, *Felix S. Cohen*; Jeremy Paul, "Felix Cohen's Brand of Legal Realism," *Connecticut Law Review*, 38 (2005–2006), pp. 593–604.
9. Peter Stein, "Obituary," in Roger S. Bagnall and William V. Harris, eds., *Studies in Roman law in memory of A. Arthur Schiller* (Leiden: Brill, 1986), pp. xv–xviii; Robert Hellawell, Robert Seidman and Jeswald Salacuse, "In memoriam Arthur Schiller," *African Law Studies*, 15 (1977), pp. 3–5.

Section II will examine the foundations of the claim that Felix Cohen would have brought legal pluralism to the US with his work on the Indians. Section III will address the issue of the different traditions and definitions of legal pluralism. Then, the article will bring forward two alternatives, Llewellyn and Schiller, who may be better suited to be called the founders of American legal pluralism. Finally, a re-examination of Cohen on the basis of neo-colonialism will further illustrate the difficulty of discussing and describing historical figures with anachronistic concepts.

II. Felix Cohen as the Founder of Legal Pluralism

Tsuk's portrait of Cohen is one of a change agent, an outsider who sought to transform American society and its legal culture. She describes Cohen as the founder of American legal pluralism mostly due to his work in connection with American Indians.[10]

Cohen promoted Indian self-government through two policies that he pioneered: the first was the drafting of tribal constitutions as the basis for tribal self-rule and the second was the assertion of the tribal control of land. While the federal government has since independence wavered between policies of separation and assimilation, it has always recognized, in principle, the jurisdiction of Indian tribes over their own members.[11] Despite the interest of the government from the early nineteenth century onwards in legally controlling the Indian population, curiosity in the traditional laws of the Indians remained limited and there appears not to have emerged the idea to utilize Indian tribal law in the administration. There has been a growing tendency to describe the relationship between the United States and the Indian tribes as colonial and the assimilation policies of the 1880s and 1890s as a shift from indirect to direct rule. Though a number of traditional Indian legal acts such as marriages were approved by the US courts, the popular imagery of barbaric punishments allowed for a rejection of indigenous law in general.[12] In fact, even quite recently Chief Justice Robert Yazzie wrote how his presentation on traditional Navajo justice was met with comments about people staked to anthills and other imagery derived from old Western movies.[13]

A legal philosopher, law professor, and administration official, Felix S. Cohen (1907–1953) was the son of philosopher Morris R. Cohen. He graduated from City College of New York at the age of 18, finished his Ph.D. in philosophy at Harvard at age 22 in 1929, and received a law degree from Columbia in 1931. From 1933, and for the bulk of his career, he was Assistant and later Associate Solicitor for the Department of

10. Tsuk Mitchell, *Felix S. Cohen*.
11. *Worcester* v. *Georgia*, 31 U.S. 515 (1832); Sidney L. Harring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* (New York: Cambridge University Press, 1994); Felix S. Cohen, "Indian Rights and the Federal Courts," *Minnesota Law Review*, 24 (1940), pp. 145–200.
12. Deborah A. Rosen, *American Indians and State Law: Sovereignty, Race, and Citizenship, 1790–1880* (Lincoln, NB and London: University of Nebraska Press, 2007), p. 205.
13. Robert Yazzie, "The Navajo Response to Crime," *Justice as Healing*, 3 (1998), p. 2, now in Carrie E. Garrow and Sarah Deer, eds., *Tribal Criminal Law and Procedure* (Walnut Creek, CA: Altamira Press, 2004), p. 53.

the Interior. He resigned from government service in 1948 and entered private practice while also teaching law at City College and Yale. For most of his career Cohen was involved in American Indian affairs, first as an administrator and later as counsel for Indian organizations.[14]

According to Tsuk, Cohen projected a generous amount of his own hopes for the future of American society on the Indians:

> Cohen held a stereotypical, sentimental view of the "Indian." Informed by it, Cohen believed that Indian reservations held a promise for a better national future, a future premised on group self-government, centralized planning at the federal level, and protection for individual rights.[15]

These aspirations combined his interests in socialism, theories of pluralism and his background as the son of a Jewish immigrant.[16] Tsuk sees two intellectual developments behind the Indian New Deal and Cohen's involvement in it. First, Franz Boas's studies had shown by the 1920s that scientific racism was not tenable, and that a distinction between civilized and primitive was no longer respectable. Second, during the 1920s intellectuals sought an alternative to American capitalist culture. To some, the answer could be found among the Indians. For example John Collier, the radical commissioner of Indian affairs since 1933, thought that the Indians had found a way to be communists and individuals at the same time.[17] Though some of the things Tsuk reads into Cohen's thinking are perhaps derivative, Cohen was a visionary and an original scholar who had a tremendous impact on legal realism and Indian law.

Entering Columbia Law School in the fall of 1929, Cohen studied the new curriculum instituted to give social sciences a greater role.[18] It is hardly surprising that he emerged as a staunch legal realist, who later condemned the Harvard-led *Restatement of the Law* project as "… the last long-drawn-out gasp of a dying tradition."[19] A consummate stylist, Cohen drafted one of the best-known pieces of legal realist scholarship, the *Transcendental nonsense and the functional approach*. In it, he enthusiastically described the new functional anthropology of Boas, Malinowski, and Lowie as a way to "trace the social consequences of diverse customs, beliefs, rituals, social arrangements, and patterns of human conduct."[20] On a theoretical level, Cohen embraced the realists' criticism of the futility of legal formalism and its quest for uniformity in the face of the plurality of human experience.

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14. Gerard R. Moran et al., eds., "Biography of Felix S. Cohen," *Rutgers Law Review*, 9 (1954–1955), 345–50; Tsuk, "Double Runner," p. 49. On his involvement in litigation, see also Christian W. McMillen, *Making Indian Law: The Hualapai Land Case and the Birth of Ethnohistory* (New Haven, CT and London: Yale University Press, 2007).
15. Tsuk, "Double Runner," p. 49.
16. Tsuk, "Double Runner," p. 49.
17. Tsuk Mitchell, *Felix S. Cohen*, p. 70. Franz Boas, *The Mind of Primitive Man* (New York: Macmillan, 1938), p. v: "There is no fundamental difference in the ways of thinking of primitive and civilized man."
18. Tsuk Mitchell, *Felix S. Cohen*, p. 42.
19. Felix S. Cohen, "Transcendental Nonsense and the Functional Approach," *Columbia Law Review*, 35 (1935), p. 833.
20. Cohen, "Transcendental Nonsense," p. 831.

In addition to being a leading American legal realist, Cohen is known among lawyers for his work on the Federal Indian Law project. From the late nineteenth century to 1932, US policy towards Native Americans was that of forced assimilation.[21] Instead of the old tribal organization, Indians were encouraged to accept private ownership of land. According to its critics, the aim of this policy was to open Indian reservations to non-Indian use. As a result, Indians lost two-thirds of their lands to white exploitation.[22] The so-called Indian New Deal sought to halt this development of allotment and assimilation by giving Indian tribes more authority in matters of policy, essentially to make them self-governing units. According to Tsuk, Cohen was the "chief legal architect" of the Indian New Deal, helping draft the Indian Reorganization Act (IRA) (1934) that reestablished tribal governments, as well as the Indian Claims Commission Act. He is currently best known for co-authoring the *Handbook of Federal Indian Law* (1942), which is still the basic reference work on federal Indian law, republished under the eponymous title *Felix S. Cohen's Handbook of Federal Indian Law*.[23] In the United States, questions concerning indigenous law have long revolved around Indian law, Indian tribal law and the legal sovereignty of the tribes. The term Indian law is currently used exclusively to refer to federal laws that govern Indians, including legislation, Bureau of Indian Affairs (BIA) regulations and federal case law, while Indian tribal law refers to laws fashioned by the Indian tribes, consisting of tribal legislation, tribal case law and customary law.[24]

Cohen wrote that the Indian constitutions are a key tool for Indian self-government. Without them, almost all municipal functions would be performed by Indian Service employees, whereas with a constitution the tribe becomes the main administrative unit and thus a source of financial security and the object of a sense of community and loyalty. The maintenance of law and order would rest upon the tribe, by virtue of appointing judges and legislating municipal codes. Important enough, the incorporated tribe could become a protector of the rights of its members.[25]

It is clear that Cohen was a staunch defender of the rights of Indians and the principle of self-government. It is, however, unclear how these actions and qualities would amount to something that could be described as legal pluralism and which tradition of legal pluralism that would be. It is even harder to grasp how this would amount to the founding of American legal pluralism. In order to explore the issue, it is necessary to first delve

21. A similar policy was adopted in Canada, see John Borrows, "Indian Agency: Forming First Nations Law in Canada," *PoLAR*, 24 (2001), p. 10.
22. Stuart Banner, *How the Indians Lost Their Land* (Cambridge, MA: Belknap Press of Harvard University Press, 2005).
23. Tsuk, "Double Runner," p. 48; Tsuk Mitchell, *Felix S. Cohen*, pp. 468–9. Already a reviewer of the 1982 edition was curious about the book's title because the contents of the book bear little resemblance to Cohen's 1942 edition. Joseph Rarick, "Book Review: Felix S. Cohen's *Handbook of Federal Indian Law*," *American Indian Law Review*, 11 (1983), p. 85: "I simply do not understand why this book bears the name it does."
24. Robert D. Cooter and Wolfgang Fikentscher, "American Indian Law Codes: Pragmatic Law and Tribal Identity," *American Journal of Comparative Law*, 56 (2008), pp. 30–31.
25. Felix S. Cohen, "How Long Will Indian Constitutions Last?," in Lucy K. Cohen, ed., *The Legal Conscience: The Selected Papers of Felix S. Cohen* (New Haven, CT: Yale University Press, 1960), pp. 222–8.

further into the roots of the various traditions and definitions of legal pluralism and then look at the different options.

III. Alternate Legal Pluralisms

Legal pluralism is an important and complex theme in contemporary scholarship. It has often been used as a catchword to describe efforts to empower indigenous communities and to give recognition to customary rules and dispute resolution processes. Perhaps the difficulty one faces with a concept like legal pluralism is that it is a term that can be given meanings according to the tradition and agenda of the author. This is especially true in historical research in the interwar period, where the term is anachronistic. Of the three scholars under examination, only Schiller used the term in his writings, Llewellyn and Cohen being too early to do so.

Though the divisions are debatable,[26] for the sake of simplicity two main currents may be isolated in the development of legal pluralism: state legal pluralism and non-state normative pluralism. Of these, state legal pluralism is the most discussed, and only it possesses considerable evidence concerning judicial practice, while normative pluralism rests mostly on scholarship and is presented as its alternative. Historical studies on legal pluralistic settings abound from Antiquity to the Middle Ages and onwards, but for reasons of convention they tend to be seen as a separate field from legal pluralism that deals with indigenous peoples. The same can be applied to political pluralism, which was also an important phenomenon at the time.

The various strands of state legal pluralism have as their uniting factor a consideration of the centrality of the state legal system.[27] State legal pluralism has commonly been the specialty of the comparative law tradition of pluralism, consisting mainly of legal scholars who have focused on the practical and theoretical aspects of legal pluralism within existing legal systems. Although state centrism is often presented as a way of accusation, in this case it is an observable fact in cases ranging from ancient historical examples to modern societies in which normative systems exist alongside the state legal system: the system revolves around the state because the state legal system has the ultimate say in what is applied as law as well as the coercive power to implement its decisions. Monikers such as customary law,[28] weak legal pluralism,[29] legal polycentrism,[30] semi-autonomous normative orders[31] and so on have been advanced to describe a situation in which other

26. Twining, "Normative and Legal Pluralism," summarizes the vast literature that has emerged on the matter of legal pluralism. He uses normative pluralism as a general concept with legal pluralism as its subfield.
27. See Sally Engle Merry, "Legal Pluralism," *Law and Society Review*, 22 (1988), pp. 872–4 on the transformation away from state centrism.
28. T. W. Bennett, "Re-introducing African Customary Law to the South African Legal System," *American Journal of Comparative Law*, 57 (2009), pp. 8–10.
29. John Griffiths, "What is Legal Pluralism," *Journal of Legal Pluralism and Unofficial Law*, 24 (1986), pp. 1–7.
30. Hanne Petersen and Henrik Zahle, eds., *Legal Polycentricity* (Aldershot: Dartmouth, 1995).
31. Sally Falk Moore, *Law as Process: An Anthropological Approach* (London: Routledge, 1978).

normative systems operate with the tacit or explicit approval of the state legal system. An illustrative example of the transformation of state legal pluralism is South Africa's transition from state legal pluralism to deep legal pluralism. During the colonial and Apartheid periods, legal pluralism in South Africa meant that each ethnic group was governed according to its legal traditions, but this took place within the bounds of the overarching state legal system which recognized but also controlled it. With the post-Apartheid concept of deep legal pluralism, it is held that normative cultures exist independently and unattached to the state legal system and whether or not it chooses to recognize them.[32]

The old South African system was an extreme form of colonial legal pluralism, which took different forms in Africa, Asia and elsewhere. The colonial systems recognized traditional indigenous customary law as long as it fulfilled the *ordre public* test of not violating the fundaments of the state legal system. This was ensured by the application of various tests, such as the British repugnancy principle,[33] which ruled that native law may be used unless it is repugnant to the principles of the legal system that are found in natural justice, morality or legislation. As Lauren Benton has claimed, the colonial system subsumed the indigenous systems in such a form that it accepted and incorporated them as appendages of the state legal system.[34] With mechanisms reminiscent of those used in private international law, indigenous law was reduced to the position of foreign law in a universal state legal system. Because most of the indigenous laws were customary, a system of native courts, law panels consisting of tribal chiefs and elders as well as collections of rules were created. Martin Chanock maintains that while collections of rules were made by colonial administrators and anthropologists, the process of recording customs fundamentally changed the nature of customary law. Previously versatile and changeable customary law, where the process was more important than the rules, was transformed into a collection of old and immutable rules that no longer adapted to changing conditions. The legal formalism of colonialism reduced living traditions of problem solving to rigid rules adapted to state courts.[35]

Even though this was true in places like South Africa, Shadle has noted that in many regions the colonial administration was keenly aware of the dangers of petrifying customary law and sought to preserve its fluid and changeable nature. For example in Kenya the colonial administration from the 1920s onwards rejected efforts to codify and reduce to writing customary law in order that one could have a sense of public opinion in the region instead of old law.[36] A new attempt at verifying indigenous customary law was a

32. Gardiol van Niekerk, "Legal Pluralism," in J. C. Bekker, C Rauterbach, and N. M. I. Goolam, eds., *Introduction to Legal Pluralism in South Africa* (Durban: LexisNexis Butterworths, 2006), pp. 5–10.
33. Outlined first in the Nigeria and the Gold Coast Supreme Court Ordinance, 1876, p. 19.
34. Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (New York: Cambridge University Press, 2002), pp. 164–5.
35. Martin Chanock, *Law, Custom and Social Order* (Cambridge: Cambridge University Press, 1985), pp. 2, 9, 28; Martin Chanock, *The Making of South African Legal Culture 1902–1936: Fear, Favour and Prejudice* (Cambridge: Cambridge University Press, 2001).
36. Brett L. Shadle, "Changing Traditions to Meet Current Altering Conditions: Customary Law, African Courts and the Rejection of Codification in Kenya, 1930–60," *The Journal of African History*, 40 (1999), pp. 411–31.

project to collect restatements of native law from the late 1950s to the late 1970s. These restatements, pioneered by Antony Allott, were meant to provide independent, authoritative scientific statements of the content of customary law.[37]

The tradition of non-state legal pluralism or normative pluralism is mostly present in anthropological scholarship. Even the early classics of legal anthropological fieldwork such as those by Malinowski or Barton show how much colonial rule interfered with native legal culture. The ideal of early ethnography was to record as much as possible the original state of affairs, the pre-contact phase, but because colonial law affected the lives of the natives at the time the ethnographic study was made, the studies became examples of rather reluctant depictions of legal pluralism. Though anthropological studies on indigenous law were also commissioned by the colonial administrations, from the 1960s onwards the tradition of non-state pluralism has in many cases taken an emancipatory agenda. Pluralism was a way of asserting indigenous tradition, safeguarding the rights and culture of the indigenous peoples against the encroachment of the state. The emancipatory roots of this type of study are less obvious in contemporary scholarship, but the focus and the aims – such as protecting the traditional way of life, and the rights to land, water and other resources – remains.[38] Common factors of the anthropological works on normative pluralism are that they often have a view from below with a focus on small communities and their problem-solving methods.

In current discussions on legal pluralism a third variant, that of global legal pluralism, has recently emerged. It is somewhat removed from the other traditions with its emphasis on multiple normative orders, the influence of human rights and the fragmentation of international law.[39]

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37. Antony Allott, "The recording of customary law in British Africa and the Restatement of African Law project," in John Gielissen, ed., *La redaction des coutumes dans le passé et dans le présent* (Bruxelles: Institut de sociologie, 1962), 206–10. The restatements published by the project were: Eugene Cotran, *Restatement of African Law: Volume 1. Kenya I, Marriage and Divorce* (London: Sweet and Maxwell, 1968); Eugene Cotran, *Restatement of African Law: Volume 2, Kenya II, The Law of Succession* (London: Sweet and Maxwell, 1969); J. O. Ibik, *Restatement of African Law: Vol. 3. Malawi I, The Law of Marriage and Divorce* (London: Sweet and Maxwell, 1970); J. O. Ibik, *Restatement of African Law: Vol. 4. Malawi II, The Law of Land, Succession, Movable Property, Agreements and Civil Wrongs* (London: Sweet and Maxwell, 1971); S. Roberts, *Restatement of African Law: Vol. 5. Botswana I, Tswana Family Law* (London: Sweet and Maxwell, 1972); K. P. Kludze, *Restatement of African Law: Vol 6. Ghana I, Ewe law of property* (London: Sweet and Maxwell, 1973).
38. For example R. F. Barton, *Ifugao Law* (Berkeley and Los Angeles: University of California Press, 1969), p. 113 records the case of a 1913 patricide which was justified under Ifugao law but the American court sentenced the culprit to life imprisonment. The intense juxtaposition of state law and unofficial law in studies is noted already in Peter Fitzpatrick, "Introduction: Competition between state and unofficial law," in Antony Allott and Gordion R. Woodman, eds., *People's Law and State Law: The Bellagio Papers* (Dordrecht: Foris, 1985), p. 167.
39. Brian Z. Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global," *Sydney Law Review* 30 (2008), 375–411; Paul Schiff Berman, "Global Legal Pluralism," *Southern California Law Review*, 80 (2007), pp. 1155–1237.

To sum up, we have outlined here three different traditions of legal pluralism of which two, state legal pluralism and normative pluralism, are relevant to the present inquiry. State legal pluralism and normative pluralism differ mostly in terms of the involvement of state structures, in which the first sees the state legal system as a universal system and the non-state normative orders having validity only through the acceptance of the state system, and the second gives precedence to the local, viewing the state structures as interferences. The common uniting factor is the plurality of the normative orders under scrutiny. The differences between traditions have been exaggerated by the fact that the practitioners of the traditions are from different backgrounds. State legal pluralism has been the realm of comparative law, and normative pluralism that of legal anthropologists.

IV. Karl N. Llewellyn and the Pluralism of Legal Anthropology

If Felix Cohen was not the founder of American legal pluralism, who was? Karl Nickerson Llewellyn (1893–1962) was one of the first lawyers to have scientifically studied traditional Indian tribal law and the only one to have produced a radical change in legal anthropology.

The Cheyenne Way (1941), by Llewellyn, a legal realist from Columbia Law School, and anthropologist E. Adamson Hoebel (1906–1993), a student of Franz Boas, is a study of the legal customs of the Cheyenne. The most famous example of the study of indigenous law by an American law professor, *The Cheyenne Way* is currently one of the canonical works in the history of legal anthropology, with a profound influence on the genre.[40] As often is the case in the history of science, the fact that this book has been seen as a classic is in part based on the fact that Hoebel kept promoting it during his long subsequent career.[41] The trouble-case method advocated in *The Cheyenne Way* was not the panacea its formulators intended, but still it proved to be a vital change agent in the methodology of legal anthropology.

Whether or not that makes Llewellyn a pioneer in legal pluralism is again a question of definition. The pervasiveness of the rhetoric of legal pluralism is highlighted by the fact that even a scholar as idiosyncratic as Llewellyn has been evaluated against the backdrop of legal pluralism. Ajay K. Mehrotra claimed that Llewellyn practiced legal pluralism, but with evolutionary limitations and overtones.[42] However, as Mehrotra rightly accepts, legal pluralism was not on the agenda when Llewellyn wrote the outline for *The Cheyenne Way*.

40. Karl Llewellyn and E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman, OK: University of Oklahoma Press), 1941; Twining, "Llewellyn," pp. 166–7; Conley and O'Barr, "Cheyenne Way," p. 203.
41. See E. Adamson Hoebel, *The Law of Primitive Man* (Cambridge, MA: Harvard University Press, 1964).
42. Mehrotra, "Llewellyn," pp. 769–70.

The pluralism of Llewellyn is not evident and requires a fair amount of supposition into it. What Llewellyn describes is an essentially unitary system of tribal law, which could be used as a cultural transplant from an unspoiled past to the modern world. In this sense, Llewellyn is within the ambit of legal primitivism, which operated on the dualism of the modern and the primitive. The primitive as a concept referred to an original and uncorrupted form of human experience and revealed the natural tendencies or the reality of being human, while the modern was tempered by civilization and the modern society's complexities.[43]

The contemporary relevance of primitive cultures was the central question in the original research plan of the book that was to become *The Cheyenne Way* as formulated by Llewellyn: "1) What can modern society, and modern law, contribute to study of law in primitive culture? 2) What can primitive law contribute to the understanding of modern culture?"[44]

The Cheyenne Way was meant to be a study based on anthropological fieldwork with material gathered by interviewing native informants. Llewellyn can be situated between the tradition of primitive law and the new functionalist anthropology. The actual fieldwork among the Cheyenne was done mostly by Hoebel during the summers of 1935 and 1936. As Llewellyn was in Montana for only 10 days during the first summer conducting the interviews from the back of his car, the division of labor among the team was clear: Llewellyn constructed the theoretical framework, Hoebel gathered the data.[45]

The original intended form of *The Cheyenne Way* was a much more theoretical book with the working title *Primitive Law*, of which a chapter plan can be found among the early manuscripts for *The Cheyenne Way*.[46] Llewellyn's plan called for a large evolutionary study of legal institutions based on tribal law. In the memos written during the fieldwork, Llewellyn envisions a new methodology for the study of indigenous law that could then be applied to comparative work on material from the Philippines and Africa. According to Llewellyn, the study had developed "for the first time a coherent and comparable body of native law from civilizations which do not rest upon agriculture."[47] The purpose of the larger Columbia University "Research in Indian Law" project was to combine the results of Llewellyn and Hoebel's work along with other research such as Julius Lips's study on the Montagnais Naskapi, also funded through the project. The result would be a general treatise on primitive law, which would merge the data gathered through fieldwork with existing literature.[48]

Llewellyn and Hoebel were certain that in the Cheyenne they had discovered a people who had a natural talent for law: "We did not expect, or even suspect, the juristic beauty

43. Steven Wilf, "The Invention of Legal Primitivism," *Theoretical Inquiries in Law*, 10 (2009), pp. 485–509.
44. Llewellyn, "L.I.P.C. outline," Karl Llewellyn Papers, Special Collections Research Center, The University of Chicago Library, section I, folder 5.
45. Conley and O'Barr, "Cheyenne Way," pp. 185–86; Mehrotra, "Llewellyn," p. 757.
46. Karl Llewellyn papers I.5.
47. Karl Llewellyn Papers I.4, Llewellyn to Chamberlain, Dec. 20, 1935.
48. Karl Llewellyn Papers I.4, Llewellyn to Council for Research in the Social Sciences at Columbia University, Nov. 18, 1935.

which Cheyenne work was to reveal."[49] They were also convinced that their findings were unique "… one finds no ready parallel to this legal genius of the Cheyennes among primitives."[50] In one of the early manuscripts Llewellyn describes this legal genius as "a capacity for legal invention, a sense for the spirit and purpose of ceremonial or institution which seems to have been well-nigh unfailing, a capacity for generalization at need, a marked bent for case by case development of principle which like the principle of our own case-law tends into felt consistency around a central purpose rather than into any fixed form from which deduction is attempted."[51]

This unexpected native talent should naturally be studied by lawyers, Llewellyn and Hoebel claimed. Lawyers could make valuable contributions to the study of indigenous law and in the process learn how law works: "Modern American jurisprudence can thus enrich, and be enriched by, the study of non-literate legal cultures."[52] The idea that the natural talent of the Cheyenne for communal conflict resolution and juristic skills could be utilized for the benefit of contemporary American law is very similar to the often-presented myth of the harmonious communality of indigenous communities. How much American jurisprudence was enriched by *The Cheyenne Way* is hard to estimate. Based on how little it is referred to in legal literature, some scholars claim that it is all but forgotten by the legal community.[53]

Modern law was also an indispensable skill in the study of native law. The fact that the Cheyenne legal system appears to very much resemble the modern Western legal system led already contemporary reviewers like Cairns to suspect that Llewellyn had read into the material much that was not there. The same has been suggested by Conley and O'Barr with regards to the use of anticipatory wrongs and other Common Law concepts.[54]

It is difficult to assess how much Llewellyn's own work was enriched by the work done in anthropology. This is due to the fact that Llewellyn's contacts with German legal scholarship such as the work of Ehrlich, Weber, and others, operated with a similar conception of culture as anthropology, as both derived from similar sources in German romanticism. On the subject of the Uniform Commercial Code (UCC), James Whitman has traced the conception of the "law merchant" of Section 59 of Llewellyn's draft to the conception of *Volk* and its innate feel for the law as the basis of law, while Papke read Article 2 of UCC as a way to synchronize law with cultural norms in the way Cheyenne law matched Cheyenne culture. The quest for Llewellyn's sources of inspiration has recently been widened by Dinunzio, Kim, and Whitman to include medieval Iceland and its saga literature. The fundamental difficulty with these attempts is the fact that the arguments mostly rely on circumstantial evidence: with the exception of James Whitman they describe the interest that Llewellyn showed in the field, but fail to demonstrate a concrete transfer of ideas.[55]

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49. Llewellyn and Hoebel, *Cheyenne Way*, p. ix.
50. Llewellyn and Hoebel, *Cheyenne Way*, p. 313.
51. Karl Llewellyn, "Law Ways and the Cheyenne," p. 1, Karl Llewellyn papers I.5.
52. Llewellyn and Hoebel, *Cheyenne Way*, p. viii.
53. Mehrotra, "Llewellyn," p. 742; Conley and O'Barr, "Cheyenne Way," p. 215.
54. Conley and O'Barr, "Cheyenne Way," pp. 191, 198; Mehrotra, "Llewellyn," p. 766.
55. Whitman, "Commercial Law"; Papke, *Cheyenne Indians*, p. 1476; Dinunzio, Kim, and Whitman, "Llewellyn," also claim that the trouble-case method originated in part from the Icelandic sagas.

Though Llewellyn had been influenced by sociology scholars such as Sumner and Keller, his universalistic agenda can be seen to have its roots in the German tradition of legal ethnology, whose founder A. H. Post wrote, "when we fully understand legal ethnology, we will have uncovered a universal system of law, an expression of the will and power of man." The aim of these studies was to produce a unitary theory for all societies following the best traditions of the Historical School of Jurisprudence.[56] Though in the early manuscripts Llewellyn recognized the value of abandoning all preconceptions as advocated by Boasian anthropology in discrediting the nineteenth-century fixation on early legal institutions as *a priori* categories, he saw nothing further to be gained from this "program of no-preconception," and especially when the program claims to accomplish something that is, according to Llewellyn, "psychologically impossible," since all perception is based on experience. Thus using modern law as a yardstick is cautiously recommended.[57] Actually, he claimed that even in modern societies "the great bulk of that legal system is layered in various stages of legal primitivity," because of the basic primitiveness of the human as an animal.[58]

Llewellyn and Hoebel's exotism and romantic idealization of the Cheyenne as naturally adept conflict managers is not necessarily an indication of the pervasive myth of early egalitarian harmony in simple societies.[59] More probable is that Llewellyn used the old German Historical School of Law's ideal of law as something existing in the common conviction of the people. According to Hoebel, Llewellyn combined Rudolf von Jhering's view of law with the anthropologist's instrumental view of culture.[60]

The system that Llewellyn and Hoebel sought to recreate was an ancient one, existing at an earlier time before European influence had corrupted the original Indian ways. They thought that in the interviews of tribal elders they were recording an original indigenous custom. However, from the very particular material Llewellyn drew very wide-ranging and universal conclusions. Similarly, the trouble-case method was meant to be a universal method that could be applied anywhere.[61]

Although he is best known for his very universal *The Cheyenne Way*, Llewellyn was long involved in Indian affairs in general. He advised tribes in legal matters, participated in litigation on behalf of Indian communities, and drafted tribal constitutions. Llewellyn helped prepare three draft codes for three Pueblo nations, of which only the Santana

56. Translation in Norbert Rouland, *Legal Anthropology*, transl. P. G. Planel (Stanford, CA: Stanford University Press, 1994), p. 29. As Andrew Lyall notes in "Early German Legal Anthropology: Albert Hermann Post and His Questionnaire," *Journal of African Law*, 52 (2008), note 14, Rouland has both Post's initial and the name of the book wrong. The citation is from the introduction in Albert Herman Post, *Grundriss der Ethnologischen Jurisprudenz* (Oldenburg and Leipzig: Schulze, 1894).
57. Karl Llewellyn, "Primitive Law: Notes Aug 19, 1935," pp. 1–3, Karl Llewellyn papers I.5.
58. Karl Llewellyn, "Primitive Law: Ch. VII or VI," pp. 3–4, Karl Llewellyn papers I.5.
59. Chanock, *Law*, p. 7, describes the same phenomenon in African studies. One could argue that the descriptions of gang rape as a traditional way to resolve conflicts in *The Cheyenne Way* (pp. 202–10) would not have strengthened the argument.
60. Hoebel, "Llewellyn," p. 742.
61. Conley and O'Barr, "Cheyenne Way," p. 189.

actually adopted it.[62] The Pueblo study was the initiative of William A. Brophy, who felt that Pueblo self-government could be better defended if their law was recorded and published.[63]

As for the idea of Llewellyn as a legal pluralist, there is no evidence in the book of a coexistence of legal systems or normative fields. The only signs of legal pluralism were in Llewellyn's work on the tribal constitutions. However, because Llewellyn and Hoebel were such foundational figures in the study of legal anthropology, they have been included in the tradition of normative pluralism. Through the introduction of methodological advances like the trouble-case method, Llewellyn and Hoebel brought a critical new understanding of law to anthropological research, which had thus far been marred by concentrating on discovering laws. Together with Malinowski, they are definitely among the founders of functionalistic legal anthropology and thus of the tradition that later produced normative pluralism.

V. A. Arthur Schiller and the Comparative Law Tradition of Legal Pluralism

The second alternative for the fictional role of founding father of American legal pluralism is A. Arthur Schiller (1902–1977). Schiller studied how indigenous law, with examples from Indonesia and Africa, could be preserved and incorporated in a modern legal system. He is in many ways the most traditional example of legal pluralistic scholarship, with areas of interest like Coptic law, Indonesian *Adat* law and African law where state law was not constitutive to the validity of indigenous law.

Schiller, a professor of law at Columbia, had original and wide-ranging areas of specialization: particularly Roman law, African law, and military law. In 1965 he founded at Columbia and directed until his retirement in 1971 the first Institute of African Law in the United States. He is also the founder of what is currently known as the *Journal of Legal Pluralism and Unofficial Law*.[64]

Schiller's thinking was a product of his rather unusual interests. In the field of Roman law, he specialized in Coptic legal texts, a small subfield mostly concerned with Egyptian material. In comparative and indigenous law, he spent over a decade studying Indonesian *Adat* law and then over two decades involved in African law. All of these three fields included legal pluralism of different kinds, beginning with the situation in Roman Egypt, in which a number of competing legal systems coexisted.[65]

It is in Roman law where Schiller's connection with legal realism is most obvious. The study of Roman law in American law schools had been mostly an exercise in the civilian tradition that looked at law as a formal system which could be reconstructed

62. Twining, *Llewellyn*, pp. 546–53.
63. Twining, "Law and Anthropology."
64. A. Arthur Schiller folder, Historical Biographical Files Collection, Box 282, Folder 3, University Archives, Rare Book & Manuscript Library, Columbia University in the City of New York; *NY Times*, July 12, 1977.
65. A. Arthur Schiller, *Ten Coptic Legal Texts* (New York: Metropolitan Museum of Art, 1932), pp. 3–6.

from passages in the Digest of Justinian. Because there was very little material on the practice of law in Rome, due to the poor preservation of written material in the western Empire, scholarship tended to emphasize the abstract rules over the role law played in society. In contrast, the papyrological study of Roman law in Egypt, which was Schiller's specialty, drew from a vast reservoir of texts such as wills, contracts, and other legal documents that shed light on the law in action.

Schiller was Llewellyn's colleague at Columbia, and shared his interest as well as his contacts in the German scientific world.[66] He spent the 1930s engaged mostly in projects concerning Roman law. Papyri discovered from Roman Egypt during the nineteenth century led to the crumbling of the belief that the Roman Empire would have been a unitary legal area. The interaction of state law and local laws or folk law separated legal papyrology from the dogmatic study of Roman law.[67] Schiller's first book, *Ten Coptic Legal Texts*, explored Egyptian legal culture after the Arab conquest of 641 AD. The Egyptian legal system became over time exceedingly complex, with elements of Egyptian, Greek, Hellenistic, Ptolemaic, Roman, Byzantine, and Arab law being mixed with Coptic law. Unlike what is known generally of ancient law, Schiller's book dealt not with the ruling classes, but rather the peasants of Upper Egypt and their transactions. What these documents reveal is how a native legal culture was permeated by formulaic transplants from different state laws but remained essentially autonomous.[68] Schiller shows how the local peasants adapted and adopted, using the various legal systems in different contexts to their advantage.

Another revealing example of Schiller's study of legal pluralism through Coptic legal culture is his article on how the courts ceased to exist. From the fact that there are no records of cases involving Copts during the Late Byzantine and Early Arabic period, Schiller comes to the conclusion that the Copts, facing religious persecution, harsh foreign administration, and economic exploitation, simply no longer resorted to the state court system after the beginning of the sixth century. Instead of courts and advocates, arbitration by trusted members of the community was used to solve disputes within the Coptic population.[69] Thus Schiller found examples of deep legal pluralism at work in which groups essentially operated their own legal systems, which were independent of the state.

The study of Indonesian *Adat* law was the first of Schiller's departures from his background in Roman and American law. The first sign of his interest in indigenous law was his participation in the Seminar in Primitive Law organized by Professor Julius Lips at Columbia's anthropology department in 1934–35. Besides Schiller, who spoke of

66. A. Arthur Schiller Papers 1897–1977, MS#1125 Rare Book & Manuscript Library, Columbia University in the City of New York, box 4, Llewellyn, Karl, postcard from Leipzig Aug. 16, 1932: "Dear Art, greetings from Koschaker + me, the former of whom has been plaguing the latter with a [undecipherable scribbles] How goes? Karl." Koschaker refers to Paul Koschaker, a leading German Roman law scholar.
67. Ludwig Mitteis, *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs* (Leipzig: Teubner, 1891).
68. Schiller, *Ten Coptic*, pp. 3–5, 18–20.
69. A. Arthur Schiller, "The Courts are No More," in *Studi in onore di Eduardo Volterra, vol. 1* (Milano: Giuffrè, 1971), pp. 469–502.

Indonesian *Adat* law, guest speakers included Hoebel, Franz Boas, Ruth Benedict, and Llewellyn.[70]

The *Adat* system of law was a good example of practical legal pluralism and its challenges. *Adat*, from the Arabic word for custom, was the customary law of the indigenous population of the Dutch East Indies, now Indonesia. Because the Dutch colonial rule was originally mostly a commercial venture, the Dutch had little interest in meddling in the internal affairs of the local communities, including their laws. There were nineteen *Adat* law areas, called circles, with each operating according to its own rules. However, the Dutch did produce a considerable body of scholarship on *Adat* during the late nineteenth and early twentieth centuries.

In addition to his own studies in *Adat* law, Schiller translated with Hoebel from Dutch the standard textbook on the subject, *Adat Law in Indonesia*, by Barend ter Haar. Contact with *Adat* and the Dutch approach to it was informative in the way it showed how multiple legal regimes could exist in a single geographic area. Though it is often forgotten in English-language scholarship, the Netherlands was the leading center for the study of indigenous law during the first half of the twentieth century. Inspired by the studies of ter Haar and his teacher Cornelis van Vollenhoven, Schiller developed the idea that the preservation of indigenous law and its incorporation and application in the legal system were projects of significance.[71] Working on *Adat* law, van Vollenhoven in 1901 developed the basic tenets of legal pluralism, i.e. that subgroups in a society created their own law. As the concept of legal pluralism was, according to Rouland, coined only in 1939, it is likely that Schiller was the first to introduce it in America.[72] After the publication of the book, Hoebel moved on to other fields. Schiller, however, continued to work on Indonesia for a number of years, producing a book on the newly independent Indonesian federation.[73]

The Dutch East Indies was a plural society where various ethnic groups lived side by side but followed their own legal systems. According to Schiller, the Dutch had a policy

70. Schiller papers, box 31, African Law, file Lips, Seminar in Primitive Law.
71. E. Adamson Hoebel and A. Arthur Schiller, "Introduction," in B. ter Haar, *Adat Law in Indonesia* (New York: Institute of Pacific Relations, 1948), p. 13. On *Adat* law and van Vollenhoven, see C. Fasseur, "Colonial Dilemma: van Vollenhoven and the Struggle Between Adat Law and Western Law in Indonesia," in W. J. Mommsen and J. A. De Moor, eds., *European Expansion and Law: The Encounter of European and Indigenous Law in 19th and 20th Century Africa and Asia* (Oxford: Berg, 1992), pp. 239–56; Albert Trouwborst, "Anthropology, the Study of Islam, and Adat Law in The Netherlands and the Netherlands East Indies, 1920–1950," Franz von Benda-Beckmann and Keebet von Benda-Beckmann, "Anthropology of Law and the Study of Folk Law in The Netherlands after 1950" and Léon Buskens and Jean Kommers, "The Delayed Reception of Colonial Studies on Adat Law and Islamic Law in Dutch Anthropology," all in Han Vermeulen and Jean Kommers, eds., *Tales from Academia: History of anthropology in the* Netherlands (Saarbrucken: Verlag für Entwicklungspolitik Saarbrucken, 2002).
72. Rouland, *Legal Pluralism*, p. 47.
73. Schiller papers, box 39, Indonesian Law, file ter Haar book, letter by E. Adamson Hoebel to Bruno Lasker, Southeast Asia Institute, Oct. 5, 1947, and file Geography and Adat Law, Chicago March 1951; A. Arthur Schiller, *The Formation of Federal Indonesia, 1945–1949* (The Hague: W. van Hoeve, 1955).

of non-assimilation, which resulted in pluralism being evident in political, social, and economic structures, and in which Europeans, foreign orientals, and natives were held separate. Though in the Netherlands legal pluralism was a hotly contested issue, with the opponents of A*dat* law calling for modernization and harmonization through the abolition of native customary laws, according to Schiller plurality was a source of social and economic stability and served best to protect the rights of minorities.[74]

The Dutch experiment with pluralism was unique in colonial-era Asia. The British produced codifications and applied Hindu law to Hindus and Muslim law to Muslims, despite neither existing in India as customary law. The French opted for a codified dualism of native law codes and the French codification of law in Indochina, although the native codes were not an attempt to preserve traditional indigenous law but codifications devised from a French viewpoint. Only the Dutch appreciated the value of preserving native laws and customs, however much the policy was originally founded on opportunism and neglect. The nineteen *Adat* law circles had their own laws, though they were subject to the limitation that when in conflict with "natural rules of equity and justice" they could not be applied. Because the majority of *Adat* law was customary, knowledge of it must be derived from court documents, publications of an official and scholarly nature, and native literature.[75]

According to Schiller, the opponents of pluralism in Indonesia claimed that "eventually the higher, more moral, European law will prevail over the more primitive eastern law." Independent Indonesia later opted to develop Western-style law codes, while *Adat* law would still apply in rural areas at the village level.[76]

Schiller continued with issues of indigenous law and legal pluralism, working on African law from the early 1950s to the 1970s and leading a project on restatements of the customary laws of land tenure in Eritrea and Ethiopia.[77] Despite his considerable achievements in introducing the study of legal pluralism to America, Schiller has been largely forgotten beyond the limited circles of Roman, Indonesian and African legal studies.

A. Arthur Schiller, working on material that had little or no direct connection with American law, took a view of legal pluralism which could best be described as comparative law. In the context of Late Antiquity and the Middle Ages, scholars had for some time been studying plural legal orders, but Schiller applied this to the study of contemporary legal cultures. His solution to the problem of indigenous law was legal pluralism,

74. A. Arthur Schiller, "Native Customary Law in the Netherlands East Indies," *Pacific Affairs*, 2 (1936), pp. 261–3; A. Arthur Schiller, "Conflict of Laws in Indonesia," *The Far Eastern Quarterly*, 2 (1942), p. 31.
75. Schiller, "Native Customary Law," pp. 254–60.
76. Schiller, "Conflict of Laws," p. 37; Fasseur, "Colonial Dilemma," pp. 255–6.
77. Schiller's involvement in African law and the restatement projects in the 1950–1970s falls outside the timeframe of this article (1930–1950s). It has been explored in Kaius Tuori, "Legal Pluralism and Modernization: American Law Professors in Ethiopia and the Downfall of the Restatements of African Customary Law," *Journal of Legal Pluralism*, (forthcoming), available at SSRN in the Helsinki Legal Studies Research Paper No. 3 (http://ssrn.com/abstract=1814997).

in which the task of the jurist was to ensure that the law of the natives could be prepared in a form that could be applied by the courts. He developed the theoretical idea of legal pluralism, yet his work mostly concerned practice, and how plural legal orders would be and have been realized. Schiller may thus be considered the founder of the comparative law tradition of studying indigenous law in America.

VI. The Neo-Colonial View of Cohen

Contemporaneous and later assessments of Felix S. Cohen were very positive, but it is possible to portray him in a completely different light through the lens of neo-colonial thought. Cohen was, as is commonly known, an unfailing champion of the rights of American Indians, supporting their property rights, voting rights, and civil rights in general.[78] He is currently lauded as the father of Indian law as a separate field of study. Through the assertion of tribal sovereignty he laid the foundation of the current legal claims of tribal self-government against the incursions of the federal government.[79]

However, he was also an administration official employed by the US government. As a consequence, his point of view was that of a federal government official who sought to solve the inequities of the Indian policy by amending it. Despite the fact that Tsuk portrays him as something of a founder of American legal pluralism, Cohen was advocating a unified policy in which the Indian tribes would be told to draft a constitution that would be ratified by the government. In Cohen's scheme the tribes were given limited autonomy under the authority of the federal government. Even when talking about colonialism as an institution to be abolished, Cohen did not draw parallels between the US government's contemporary treatment of Indians and the European colonial experience.[80] The fact that Cohen did not perceive the US Indian policy as colonial is understandable at the time. However, the colonial interpretation has validity in that the US Indian policy and the actions of individuals such as Cohen may be analyzed within the framework of colonialism.[81] Not only is the traditional operation of expropriation and subjugation of indigenous peoples fitting, but also the enlightened policies of aid and education find parallels in the later European colonial experience.

The success of the reorganization of Indian administration advocated by Cohen was questionable: 97[82] of 252 groups adopted constitutions. Because of the unified policy in

78. Cohen, "Indian Rights," pp. 145–200.
79. Frank Pommersheim, *Braid of Feathers: American Indian Law and Contemporary Tribal Life* (Berkeley, CA: University of California Press, 1995), pp. 53–4.
80. Felix S. Cohen, "Colonialism: A Realistic Approach," *Ethics*, 55 (1945), pp. 167–81. This is in stark contrast to contemporary studies, cf. Pommersheim, *Braid of Feathers*, p. 49; Robert Odawi Porter, *Sovereignty, Colonialism and the Indigenous Nations: A Reader* (Durham, NC: Carolina Academic Press, 2005), p. 731, speaks of decolonization of colonial Indian control law and policy.
81. Rosen, *American Indians*, p. 205 suggests that the colonialistic interpretation is becoming mainstream.
82. Cohen, "Constitutions," p. 222, speaks of constitutions approved between 1935 and 1939.

the reorganization, both assimilated and unassimilated tribes had trouble with the program, beginning with understanding the legal language and translating it to the Indian languages that often lacked a technical vocabulary. On their part, the assimilated tribes opposed the IRA and the system it would have imposed on them.[83]

In fact, most of the tribal constitutions were drafted by the BIA with little or no tribal input and thus there was little effort to reinstate traditional law. Currently tribal governments have used this legislative power to develop tribal law, using both statutory law and traditional customary law.[84] Cohen wrote elsewhere that "a dozen Zulu princes picked by a British official and removable by that official are instruments of British, not Zulu, sovereignty." He also noted that the diseases of colonialism included native toadyism, in which native politicians aspire to power by becoming sycophants; blablaism, in which positions of leadership are given to those who speak the best; and noitis, in which the natives continually complain. To expect that in such a situation the natives would welcome self-government was, according to Cohen, childish.[85] The irony of the situation, should one compare the British and American policies, was apparently lost on him.

Though Tsuk lauds him as the founder of American legal pluralism, Cohen's notion of Indian self-government could hardly be described as fitting any of the definitions of legal pluralism, as in his scheme tribal constitutions were mostly imposed on the tribes with little participation by the tribes themselves.

Thus Cohen was not only an enlightened jurist determined to improve the lot of the Indians, he was in many respects no different from a colonial administrator. Cohen adopted the practical viewpoint of an American lawyer: the Indians should be helped to fulfill their rights within the limits and with the tools of contemporary American law. Native law was of interest and applicable only within the bounds of self-government by the Indian tribes. The tribes were told to draft their own constitutions, but these were subject to the ratification by the US government. While Tsuk claims that in the 1940s Cohen wished to demonstrate that "Indians were neither slaves nor victims; they were active agents, indeed sovereign peoples, with histories, tradition, and legal systems of their own, coexisting with the American system,"[86] the system he created was one of state-led pluralism in which subjected groups were given self-rule in minor matters only.

The fact that Cohen was sympathetic to the Indian cause and wished to improve their lot is not incompatible with the colonial interpretation. It has been increasingly recognized how much the interwar colonial policies of, say, Britain and France were development oriented and sought to improve the economic and social position of natives.[87]

The policy Cohen created was also quite short-lived because after the war termination became the official US policy with regard to the Indian tribes, and according to Tsuk the *Handbook* was rewritten to reinstate the "wards of the state" conception of Indians as

83. Tsuk Mitchell, *Felix S. Cohen*, pp. 108–109, mentions that 97 constitutions were adopted.
84. Pommersheim, *Braid of Feathers*, pp. 65–6.
85. Cohen, "Colonialism," pp. 176–7.
86. Tsuk, "Double Runner," p. 58.
87. Frederick Cooper, "Development, Modernization, and the Social Sciences in the Era of Decolonization: The Examples of British and French Africa," *Revue d'histoire des sciences humaines*, 10 (2004), pp. 9–38.

racially inferior.[88] On a scale of universalism versus pluralism, the federal government moved back to the old universalist policy of integrating Indians by removing the separate entities which were formed by incorporation.

Tsuk criticizes Cohen for naïveté in his belief that tribes as corporations would be able to bring self-rule to the Indians. It is ironic that instead of imposed capitalism, Cohen, a pluralist and a Jewish American who feared forced assimilation, sought to impose socialism on the Indians with the IRA. The *Handbook*, however, supported the view that the Indian nations had originally been sovereign nations whose rights were still recognized by the federal government.[89] According to Tsuk, even the radical Cohen could not escape the dilemma of legal pluralism, the contradictory endorsement of both group autonomy and general reform. He was also naïve about how the Indians would accept his corporate model.[90]

An alternative way of looking at Cohen could be to compare him to the colonial policies of the era. Despite this reading being in stark contrast with the established heroic model of Cohen prevalent in the literature, it has its merits. Compared to the enlightened colonial policies of indirect rule, the legal pluralism Cohen represented was essentially less liberal and gave less power to the Indians than the legal pluralism practiced by the British colonial administration and the South African government at the same time. The system he composed is, in effect, a version of the British native court system, with its own version of the repugnancy test and the same kind of liberal paternalism of supporting the natives as long as they adhered to Western principles of justice.[91]

VII. Conclusions: Legal and Political Pluralisms

The purpose of this article was to explore the ramifications of the idea that a founding figure of American legal pluralism may be identified, either Felix S. Cohen as claimed recently, or someone else. As legal pluralism is a concept that gained currency only in the 1960s, the quest for a founder in the interwar era is in itself anachronistic, but the discussion provides an interesting perspective on the different traditions and schools of thought concerning legal pluralism.

In the case of Cohen, the moniker legal pluralist raises questions. Tsuk's claim that Cohen was the founder of legal pluralism rests upon Cohen's work on the Indian New Deal, an attempt to strengthen tribal organization with constitutions and the tribal ownership of land, reversing the long-standing US policy of assimilation and termination. Behind these reforms Tsuk sees the intellectual liberalism of the 1920s and the antiformalistic school of legal realism. It could be argued that with the criteria used to define him as a legal pluralist, one could describe county ordinances or by-laws as legal pluralism.

The content and meaning of legal pluralism has been the subject of intense debate for the last three decades. Relevant to this study are the traditions of state legal pluralism

88. Tsuk, "Double Runner," p. 59.
89. Tsuk, "Double Runner," p. 54.
90. Tsuk Mitchell, *Felix S. Cohen*, p. 78.
91. Of the British paternalism, see Chanock, *Law*, p. 51.

and normative pluralism, in which the first describes the plural legal orders from the viewpoint of the state, while the second has its focus on the local indigenous normative orders and their function and interaction with other systems. In general, state legal pluralism has been the orientation of legal scholars while normative pluralism that of legal anthropologists.

What Tsuk gives as Cohen's achievements is best described as working for the emancipation of Indians and the defense of indigenous rights within the state framework. However, within the framework of pluralism, what Cohen advocated was a very restrictive mode of legal pluralism in which Indian involvement was minor and state approval was constitutive of the validity of the constitutions.

Such a strict application of criteria based on situations in developing countries may seem unreasonable because here we are talking about the United States, and carving a role for indigenous law in a developed legal system is different from operating within a colonial or post-colonial legal system. Thus we may see Cohen as a realistic political pluralist, who strived to make sure that the Indian constitutions were applicable in a court of law and that tribal sovereignty would continue to be recognized.

In the case of Llewellyn the background is different, that of early legal anthropology and legal primitivism, which favored the illusion of an indigenous system prior to contact with the developed world. Llewellyn was one of the most famous legal minds of his time and wrote with Hoebel *The Cheyenne Way*, in which they outlined the study of disputes as a way to examine law in non-literate societies. The book had a tremendous impact on legal anthropology, making Llewellyn and Hoebel founding figures of functionalistic legal anthropology. However, Llewellyn was not a legal pluralist but rather in the ambit of legal primitivism, which juxtaposed primitive and modern and promoted an essentialistic view of legal culture. Thus what Llewellyn is describing is not actually a pluralistic system but rather a single culture. However, this notion was shared by almost all of his contemporaries and was the foundation of normative pluralism and its emphasis on emancipatory pluralism.

Schiller was the only one in the group who actually examined how plural legal orders interacted, producing studies in vastly different fields such as Coptic law and Indonesian law. Schiller pioneered the comparative law approach to legal pluralism in America, studying indigenous legal systems that operated under the shadow of a state system. His work was very much influenced by colonialism, and like many of his contemporaries he was slow to understand the dangers posed to indigenous legal systems by actions such as restatements. However, he was quite clear that the existence of plural legal orders was not a question to which the state system could pose preconditions. Though he relied on the framework built by scholars from European colonial powers, Schiller stressed how indigenous laws had independent validity without the need for state recognition. Although he was state-centered in the manner of most lawyers, Schiller advocated for an early version of deep legal pluralism because in his construction indigenous culture was primary and state structures were destined to adapt to that.

Though it is obvious that Cohen was an activist dedicated to the advancement of the American Indian's rights, naming him a legal pluralist is hardly appropriate. Instead, Cohen finds a ready parallel in Europe's enlightened colonial administrators during the

era of indirect rule. Autonomy and self-rule were the virtues that Cohen advocated, the virtues of political pluralism.

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