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Review Symposium: Retrospective on the Work of Hendrik Hartog

Pigs and Positivism: Between Jurisprudence and Politics

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HARTOG, HENDRIK. "Pigs and Positivism." *Wisconsin Law Review* (1985): 899–935.

Hendrick Hartog's Pigs and Positivism *is well known as an investigation of legal pluralism. The legal pluralism angle of the article focuses on the multiplicity of legal sources. In that sense, it reads "positivism" through the sources thesis: the idea that only those social facts recognized by the legal system as sources of law can exert an impact on the validity of a legal norm. This Essay highlights a different aspect of the article, which is the "definition of law as an arena of conflict within which alternative social visions contended, bargained, and survived." Crucially, the alternative social visions at stake have different roles for the law itself. In other words, the conflict is not limited to a particular social arrangement (will there or won't there be pigs on the streets); it is at least in part a conflict over the question of how law will fit into social conflict, or politics.*

Pigs and Positivism is an opportunity to consider the relationship between pluralism and positivism. The plurality of pluralisms has been widely noted. Legal pluralism could be a description of a factual or a normative situation; it could be a mode of scholarship that analyzes such situations; and it could be a theoretical argument about the nature of law that tells us how to make sense of such situations. The factual or normative situation has different interpretations, but the common feature that gives "legal pluralism" its name is the multiplicity that infects the normative plane. Note the terminology: the imagined starting point is the pure theory of law, sterile normativity emerging from a single presupposed source and followed by a singular chain of norms, created in accordance with a singular set of rules for the norms' creation and their identification. But the observed normative body is impure; perhaps the infection is so widespread that the normative body is diseased. The infection arises, potentially, in several forms. It may be because different *legal* systems exert some claim to apply at once; it may be because there are different kinds of sources vying for normative status with no clear mechanism for deciding among them; it may be because people's experience of what binds them may collide with what others (perhaps officials, perhaps legal scholars) believe does or ought to bind them.

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The literature includes a debate over the relevant elements, and it has shifted over time, or perhaps more accurately, added new focal points. Without suggesting that there is any one thing that is pluralism, I will note some different scholarly projects—ranging from legal anthropology to jurisprudence to private international law in a transnational world—that have found the word useful or worth fighting about.

In 1973, Sally Falk Moore published an article in the *Law and Society Review* that would be widely cited, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study" (Moore 1973). That article did two important things, both of them methodological: first, it tried to make the law-society nexus manageable by focusing on what it called the semi-autonomous social field, an area that "has rule-making capacities and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, invade it." (720) The second thing was to note that while the classic place to look for these semi-autonomous fields was in tribal societies (especially at the point of contact with colonial law), they actually existed everywhere: "The analytic problem of fields of autonomy exists in tribal society, but it is an even more central analytic issue in the social anthropology of complex societies. . . . The analytic problem is ubiquitous" (ibid.). And the article showed the payoff of the methodological insight by juxtaposing two studies, one of the Chagga tribe of Mount Kilimanjaro (where Moore did her fieldwork), and the expensive ready-made women's dress industry in New York. Sally Engle Merry would later label work based on this second insight "new legal pluralism," the central tenet of which was that "plural normative orders are found in virtually all societies" (Merry 1988, 873).

Moore's article was important in drawing the parallelism between tribal and complex or industrialized settings, but it did not take that parallelism very far. The Chagga of Kilimanjaro had a relatively complete legal system whose formal structures had been eroding over time, and Moore concentrates on the meeting of this system with the 1963 legislation on land law promulgated by the socialist government now committed to central planning. This is a pluralism of two systems of official law meeting one another, and an account of the staying power of many features of the old system. The pluralism of the better dress line in New York, on the other hand, is very different. It consists of a thick set of relatively well understood *informal* obligations of reciprocity:

> All these extra-legal givings can be called "bribery" if one chooses to emphasize their extra-legal qualities. One could instead use the classical anthropological opposition of moral to legal obligations and call these "moral" obligations, since they are obligations of relationship that are not legally enforceable, but which depend for their enforcement on the values of the relationship itself (Moore 1973, 727).

Moore went on to discuss the operation of law within the social field, as a sort of background or shadow that structures the interactions of unofficial (but experientially binding) obligation. This left a sort of sociologically productive fuzziness, which was fine for someone trying to figure out what the regularities of behavior might be. It was less satisfying for someone trying to figure out how law works. And after years of seeing additional research, Moore herself became slightly frustrated with the fuzziness. Recently she complained,

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> Legal pluralism designates multiple forms of *official* legal order, while unofficial law means just that. But what has happened in the years since the 60s is that the term "legal pluralism" has come to refer to both official and unofficial legal order, to refer to any multiplicity of normative orders in a given social setting, and also to their interaction (Moore 2014, 7).

The frustration surrounding the issue of conceptual clarity was especially acute for people with developed jurisprudential sensibilities. So much so, for example, that Brian Tamanaha reflecting in 1993 on twenty years of pluralism scholarship was prompted to claim that: "The concept of legal pluralism is constructed upon an unstable analytical foundation which will ultimately lead to its demise" (Tamanaha 1993, 192). Interestingly, Tamanaha has apparently since changed his mind, writing several articles and editing a book on legal pluralism (Tamanaha 2012).

With limited exceptions, law professors were not especially attentive to what was going on among sociologists and anthropologists. But in the 1990s, the outburst of post-communist law generated some legal pluralism discourse for people who had not been close to the anthropological literature. It dovetailed closely with the literature on legal transplants, and the recognition that globalization was bringing about contact among advanced systems of law created an opening for law professors with no anthropology background. Pluralism was the new face of private international law, and of all the branches of law that deal with the interaction among transnational norms and municipal law (Teubner 1997; Michaels 2009).

Often in the background, pluralism was becoming a mainstream issue. Finally, in the 2000s and especially over the past decade, the question has come home to roost—right in the heart of the metropole: constitutionalism for Europe and federalism in the United States—mainstream issues by any measure, are now often discussions of legal pluralism (Krisch 2010; Berman 2012). If one were to risk an overly linear story of the development of legal pluralism scholarship, the sweep of this movement is that the analytical questions of identifying governing law have become more central, thus pushing for a more overt jurisprudential grappling with the situation of normative plurality.

Pigs and Positivism was ahead of its time in combining the historical with the jurisprudential questions, and it would take legal theory quite some time to catch up. The article begins with a focused question: did the residents of early nineteenth-century New York have a right to keep pigs in the streets? The background is that at least until 1849, pigs unmistakably ran the streets. And yet the right to run pigs in the streets was contested, so Hartog sets out on two paths to examine the contest. It will turn out that both these paths are richer (and more irony-filled) than might be expected.

The first tracks what might be called standard adjudicative practice, something along the lines of a search for the legal rule with its proper pedigree. Like Hartian positivists, we search for the cognizable source that grants validity, or in other words, a source that makes a legal rule into a rule. The search begins with local ordinances: seventeenth-century legislation is either forgotten or not relevant to the city. In 1809, the City passes a law fining owners of un-ringed pigs, suggesting that at least ringed pigs are allowed. In 1816 a local law forbidding swine running at large is proposed, and after a delay, defeated in June 1817; in October the Common Council of the City of New York

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reconsiders and passes the law; in early 1818 it thinks better of the matter and repeals. Pig foes are not discouraged, and by June they re-propose the law, which is again defeated. So, there is no statutory bar to running one's pigs in the streets. But the Mayor does not see this as an obstacle, and later the same year he impanels a grand jury to indict pig runners on a misdemeanor of public nuisance. One pleads not guilty and the trial of *People v. Harriet* is on.

Here, then, is an odd moment: one might have imagined the contest between pig owners and the Mayor could have been one between claimants of customary right (say, the way we might imagine tenants before enclosure) against a legislative or regulatory innovator. Custom as a source of law versus legislation—where the traditional trouble for those claiming custom is that direct legislation normally defeats custom. But it does not shape up this way at all. Instead, in the case at hand, it is the prosecutor who relies on a customary understanding of the common law, and the defendant who tries to place limitations on that unwieldy source of law. The defendant does not raise the claim of customary right, and Hartog explains why such a claim would have been at best a tough uphill battle. Instead, Harriet looks to legislative process, sees that it recognized the ostensible mischief and chose consciously not to forbid pig running (by repealing a statute prohibiting it). In turn, he looks to the structure of powers embedded in state versus city government, and claims that without statutory authority, the city's court has no power to draw on ostensible custom-based common law in order to charge a citizen with a crime. The jury apparently does not care much for the niceties of authority: if the Mayor obtained an indictment, he can also have a conviction. In any case, the fine is minimal (one dollar), and apparently no one expects much enforcement. But in defining the legal situation, clarity has been achieved: a case declaring running pigs a public nuisance has been handed down, no appeal taken, judgment final. If we are interested in tracing the sources of positive law, an ambiguity has been dissolved, "a legal reality" has been established (Hartog 1985, 920).

Granted, for the positivist reader this is a strange, perhaps somewhat ironic victory in discovering the lineage of this clearly recognized legal rule. That rule, with its trappings of legal certainty, has drawn on the least certain sources of its own, the kind of customary vision of the common law held in deep suspicion by early Americans. And to top it all off, it is a clear rule announced in the face of widespread routinized disobedience—New York City's artisan butchers, and perhaps many others, continued to run their pigs in the streets. Common law public nuisance wins a local battle in receiving a court's recognition; at the same time, the social practice that the rule forbids continued unabated for the next thirty years. A clear rule with little or no effectivity, or two systems of normativity in equipoise. Multiple normativities compete and coexist, which could be a challenge to the sources thesis, or what Raz in *The Authority of Law* calls the strong version of the social thesis (Raz 1977, 45–52). This would be to read history as analogous to anthropology, and to set those apart from legal theory (with standard analytical jurisprudence as its paradigmatic case).

Hartog's second path of analysis draws out the stakes differently. It begins where the previous analysis ends, with an element of undecidability, but not about the sources in a simple way. The confirmation by a court of a particular rule is just one parry, returned by many a thrust. The ensemble may include many things that traditional positivism does not accord the status of accepted social fact cognizable as a legal source.

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This is only the beginning, because it fits within positivist discourse: it is a conflict over the flexibility of the rule of recognition. The extension, however, is more significant, because it takes on the stakes of a larger question, which is not a question of legal reasoning at all, it is not a question of how to find the law—it is a larger question of what the law is doing, what it is for.

The legal positivist would like to assume that the law is about establishing order, about constituting the norms that make a society rule bound, i.e, that make it into a rule of law society. That is why the command of the sovereign shorthand is so appealing: it provides a singular chain of command idea as the basis for the possible critique of coercive power, separated from open-ended politics. *Pigs and Positivism* offers us something else: law as an arena, or better, a theater of engagement. Particular conflicts are episodes. This is a self-consciously unusual word for legal analysis, and we should dwell on it a bit. Here is a definition: Episode, n., "commentary between two choric songs in a Greek tragedy," also "an incidental narrative or digression within a story, poem, etc.," coming in from the side.

But if *Harriet* is a "digression within," what is the larger drama? One of the things at stake in these conflicts is bigger than the results of the particular episode, which is the way the episode fits into a story about the changing mechanisms of the legal drama itself. To escape that abstract formulation, we should go back to the context, where the question is the extent to which legality in the city will continue as a popularly inflected mode of self-government as opposed to a bureaucratically managed relation of administrators and clients. In other words, to read *Pigs and Positivism* successfully, we really need to read *Public Property and Private Power* (Hartog 1983). The point here, for legal theory, is that this episode fits into a different story, one that has to do with the very function of law. This is not (just) the search for a line of authority; it is closer to the stage for politics, for a vying for authority among groups, or one of the ways the groups negotiate living together. And importantly, it is not only a contest for any single bottom line; the "rule" regarding running pigs is not the main event. Instead, the real question is the rules of engagement, the types of politics available on that stage—those rules are in flux. We are actually witnessing a particular moment, in something we will be able to locate after the fact as a shift in the form of governance the City employs, and therefore a shift in the function of law itself.

The story of *Public Property and Private Power* is that of a shift "from a government insistent on governing through its personal, private estate, to one dedicated to using a public bureaucracy to provide public goods for public consumption" (Hartog 1983, 8). A story, then, of two different visions of governance: one links property in a direct sense with responsibility (so for example, the City grants water-lots, and the grantees must build and maintain public wharfs and roads—responsibility to the public is entailed in ownership). The second is bureaucratic management, legislatively dictated, financed by taxation. Moving from one to the other means giving up much of the autonomy of the City vis-à-vis the state, even as it gains certain powers to administer life in the City more independently. If once the City had property, in the new vision, it will have jobs.

The role of law in these visions of governance is different. For the property-based vision, law is a deep substructure, a sort of constitutional bedrock. It is a mode of ensuring the autonomy of corporate communities, while at the same time limiting the ways they can activate people. This is property as propriety, or property "as the material

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foundation for creating and maintaining the proper social order, the private basis for the public good" (Alexander 1997). These property-holding communities can offer people responsibilities; they are much less apt to innovate new tasks on their own. In contrast, the bureaucratic managerial city (and state) see tasks for improvement all around them, and they create new instrumentalities to deal with them. They build new structures on their own, funding themselves with taxes, and setting up a regulatory apparatus to ensure that what has remained under private initiative is run in accordance with its imposed rules. For the nineteenth-century state moving into liberalism, and ever moreso for the twenty-first-century neoliberal state, this is law as regulation writ large. And to get a sense of the stakes, consider how transnational rulemaking (World Trade Organization, Basel Accords, International Financial Reporting Standards, Financial Action Task Force, environmental soft law) works: thoroughly rule based, hierarchical to the core, accountable to internally defined procedures, answerable to no one in particular.

The issue of pig keeping is peripheral to this story, but fits, truly an episodic aside, even functionally: once upon a time street cleaning is left to property owners, including that moving property—the scavenging and street-cleaning pig. And the Mayor indeed announces that the City can use people to clean, rather than pigs. But this is not the major issue; we are not talking about establishing the sanitation department (yet). This is not the story of the turning point—it is one detail among many in the shift of vision. And it is a tricky detail at that. In part, the trickiness lies in the flipping of expected positions regarding sources of law: we are likely to imagine that the bureaucratic vision will always look to legislation or regulatory action, to the standard positivistic model, while the proprietary vision will look to custom. In this case, the actors do not quite play their roles.

At this point we can glance back to the pluralism debate. We see plural normativity too narrowly when we try to limit plurality to the type of sources that might grant law its validity. The fact that the parties to a conflict might shift their argumentation should remind us that legal reasoning is beautifully plastic. Once a mode of argument has been mastered, it is likely to be employed instrumentally on both sides of almost any debate. The key for a good theory of pluralism is to see beyond the embeddedness of particular arguments, to note what kinds of politics are on or off the table. Harriet could lose a very small battle as pig keepers would win a slightly bigger battle, but the proprietary vision—of city government, and of law more generally, was surely losing a war.

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