

*Ehrlich's Legacies:
Back to the Future
in the Sociology of Law?*

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Social research on law has been characterised by a repeated discovery of the other hemisphere of the legal world. This rediscovery is often associated with Ehrlich.¹

INTRODUCTION

WHAT IS MEANT by 're-considering' Ehrlich—and why should we want to? In this chapter, I shall be discussing this question in relation to the influence Ehrlich's work has had on later writers—what can be called Ehrlich's legacy—or, as we shall see, legacies.² I shall first contrast two reasons for studying classical writers. I will then go on to provide examples of the ways in which Ehrlich's writings have been used by later scholars in the light of changing conditions and perspectives. In order to show how his work has served as a point of reference to deal with problems in the sociology of law, I describe how Ehrlich continues to inspire research into the evolving phenomena of the 'living law'. Then, as an illustration of the way in which scholars try to update his ideas so as to make them relevant as theory advances, I discuss the way he is currently being re-read and re-written in the light of Luhmann's social theory of law.

¹ M Galanter, 'Justice in many rooms: Courts, private ordering and indigenous law' (1981) 19 *Journal of Legal Pluralism* 1 at 20.

² This will necessarily be a selective overview of the influence of some of Ehrlich's key ideas about law in society, and will not touch, for example, on the influence or implications of his arguments about free law-finding. Even so, following up their influence will take us across a range of interdisciplinary approaches to law, including comparative law, international law, conflicts of law, legal philosophy, law and economics, and social theory. For a brief previous effort to show Ehrlich's influence in different disciplines see KA Ziegert, 'A Note on Eugen Ehrlich and the Production of Legal Knowledge' (1998) *Sydney Law Review* 4–17.

I conclude by suggesting that the process of interpreting the message of a 'founding father' is never ending. Without pretending that we can find in Ehrlich's work ready-made answers to our current challenges, I do hope to show why the questions he asked are still of contemporary relevance.

WHY STUDY A CLASSICAL AUTHOR? CONTEXTUALISATION, DE-CONTEXTUALISATION AND RE-CONTEXTUALISATION

Why should we still be interested in Ehrlich's controversial philosophical, historical, psychological or sociological propositions? There are many reasons to be concerned with the work of great writers of the past, but for our purposes it is helpful to contrast the aim of seeking to get *a writer's ideas right* with that of trying to decide whether the ideas themselves *were right*. These certainly seem like relatively distinct exercises. Put most sharply, the first of these approaches could be said to aim at adding to the footnotes on Ehrlich, while the second focuses on the way in which Ehrlich figures as a footnote in the work of later writers.

The importance of context varies for the two enquiries. For the first approach it is of the essence to understand Ehrlich in his time and place. We might, for example, try to explain how a scholar of Roman law could have come to make this sort of breakthrough to sociological fieldwork, or examine the similarities and differences between his idea of living law and the ideas about 'social law' in the work of earlier writers such as Savigny or Tonnies. In the second type of enquiry, however, our interest is more about what has been made of a scholar's ideas—and on what can still be made of them. So the point would be more the need to get Ehrlich 'out of context' in the sense of describing how his work has been (or can be) made to transcend his setting in Bukovina at the beginning of the twentieth century.³ If, in the one case, we would engage in careful exegesis in order to grasp what Ehrlich *meant*, in the other we would be more concerned with showing what Ehrlich *means* for us today.

In practice, however, although there are important differences in emphasis, these enquiries cannot entirely be kept apart. Even if our research is focused on the way in which Ehrlich's work influenced later authors, we will still need to engage in some exegesis of what he actually said. It would be question-begging to speak of *Ehrlich's* influence unless we can be sure that the ideas used by others are those *actually* espoused by Ehrlich. In fact, writers who try to get Ehrlich right are frequently motivated by the desire to show that the way in which other commentators have got him wrong is

³ This is over-simplifying. It could be argued—it has been argued—that it was the marginality of Ehrlich's context—'on the periphery' of the Austro-Habsburg empire—that enabled him to see 'more' than his contemporaries.

not merely a matter of mere antiquarian interest. Thus, in an earlier paper, I devoted considerable attention to distinguishing Ehrlich's ideas from the ways in which they had been re-presented by Roscoe Pound.⁴ However, at the same time, I also argued that the reason why this mattered was that Pound's summary obscured the way in which Ehrlich's contribution could still be of value for us. Clearing up the misconceptions about what Ehrlich was supposed to have argued was therefore a prerequisite to going on to reveal the relevance of what he actually said for current debates. As I shall seek to show later, a return to the text not only—typically—accompanies the claim to have uncovered the 'true' or 'real' historical Ehrlich, it can also serve as a take-off point when searching for new meaning in older texts.

Our interest in relating Ehrlich to his context will also depend on our conception of how the sociology of law progresses. On one (scientific?) view of sociology of law as a 'science', our prime task is to subject Ehrlich's de-contextualised hypotheses to empirical testing. To contextualise him involves making an imaginative leap back before not only the birth of the discipline of sociology of law, but also before there were studies of 'law and psychology' or 'law and economics'. Ehrlich's contribution would then have to be considered as of mainly historical interest on a par with other writings in the sciences of his period. If the sociology of law can 'progress' scientifically, or rather, just because it can progress, we should not expect the founder of the discipline to do more than set out directions to follow. We can learn from Ehrlich only by leaving him behind.

However, most writers (including major textbook writers such as Treves or Cotterrell) see the sociology of law as less assimilable to this idea of scientific progress.⁵ They would encourage us to return to Ehrlich, as to other founding fathers, such as Durkheim, Weber or Marx, less because of the empirical validity of their specific claims and more because of the continuing relevance of the fundamental issues they dealt with and the way in which they dealt with them. On this view, Ehrlich's arguments, as also the criticisms made of them at the time, may be as relevant today as they were then. The earliest reviewers of his work wondered about the relationship between legal sociology and legal history,⁶ but the issue of disciplinary boundaries is as problematic now as it was then. Critics complained about Ehrlich using the term 'law' in talking of living law—most notably in Kelsen's controversial attack on what he saw as Ehrlich's failure to defend the rights of citizens as declared by state law.⁷ Furthermore, there are still

⁴ D Nelken, 'Law in Action or Living Law? Back to the Beginning in Sociology of Law' (1984) 4 *Legal Studies* 157.

⁵ See, eg L Friedman, 'The Law and Society Movement' (1986) *Stanford Law Review* 763–80.

⁶ P Vinogradoff, 'The Crisis of Modern Jurisprudence' (1920) 29 *Yale Law Journal* 312–20.

⁷ See ch 6 of this volume.

heated debates about the normative implications, if any, of claiming that societies are characterised by regimes of legal pluralism.⁸

Even where Ehrlich gets things ‘wrong’, this can be instructive. Many of the early comments, both on the original German edition and on the later American translation, echo those still being made today. Max Rheinstein, a hard though not unsympathetic critic, applauded Ehrlich for opening jurists’ eyes to the relations that actually exist between family members, the way in which wealth is actually transferred from the dead to the living, and how people actually buy and sell. However, he also accused him of peddling half truths. He considered it a (politically motivated!) mistake to describe custom as law; social behaviour patterns do not always coincide with what people really believe are the right values. It was important to see that law does make space for other normative systems, which it may then incorporate. However, it was wrong to treat this as the general rule. Ehrlich’s arguments applied mainly, Rheinstein claimed, to what can be called ‘stop gap law’, the rules people make for themselves in private transactions. In terms of legal practice, he argued, it was misleading to reduce legal science to sociology. In addition, whilst legal sociology can be of assistance to judges, questions of justice involve matters of political prudence which do not and often should not be resolved by appealing to popular sentiment.⁹

The philosopher and jurist Morris Cohen, for his part, thought Ehrlich was overreacting against the historical school.¹⁰ He too criticised Ehrlich for confusing law with custom. The practice of tipping waiters, he pointed out, is custom not law, and there is nothing to be gained by calling it law. By contrast, the arcane details of wills are law—and not custom. Businesses may make their own agreements irrespective of the law, but they always act (in his prescient words) in its shadow. The state may not dictate everyday life, but its importance should never be underestimated. It would otherwise be difficult to understand why such hard battles are fought over who should control the government.¹¹

The fact that many of the issues raised by his work still do not seem to have found agreed solutions shows how far Ehrlich’s ideas do transcend their original context. Nonetheless, it is important to see that any ‘return’ to Ehrlich also involves a process of re-contextualisation. Later writers give *new* meaning to older authors as they ‘appropriate’ classical texts so as to make them speak to and for present purposes. Furthermore, it is this use which makes them classics in the same way that ‘traditions’ enable ‘the past

⁸ See, eg later in this chapter, the arguments Michaels deployed against Teubner and others.

⁹ M Rheinstein, ‘Sociology of law, Apropos Moll’s translation of Eugen Ehrlich’s *Grundlegung der soziologie des Rechts*’ (1938) 48 *Journal of Ethics* 232–9.

¹⁰ MR Cohen, ‘Recent philosophical-legal literature in French, German, and Italian’ (1912–14) 26 *International Journal of Ethics* 528–46 at 535–7.

¹¹ MR Cohen, ‘On Absolutisms in Legal Thought’ (1936) 84 *University of Pennsylvania Law Review* 681–715 at 684.

to live in the present'.¹² Even if we were to set out only to repeat exactly what Ehrlich is thought to have said, introducing his ideas can have different 'meaning' depending on the changing context in which he is quoted. They would, for example, likely have a different impact at a time when there is concern about too much state intervention or 'juridification', as compared to a period of extensive privatisation. However, most returns to classical authors in any case, to a greater or lesser extent, also involve explicit attempts at (re)interpretations. Since any interpretation of what a past writer has written is contestable, other commentators will often allege that the new interpretation represents a departure from the correct meaning—and it is through such debates that traditions develop and earlier scholars' arguments are given new life.

A given response to Ehrlich often tells us as much if not more about the interpreter than it does about what is being interpreted. Rheinstein, for example, thought Ehrlich's arguments were vitiated by their political sub-text. The desire to legitimate only the kind of law that was popularly accepted—what he described as the 'postulate of complete and homogenous democracy'—was being disguised as science. For him:

Ehrlich's basic proposition that the norms of law are nothing but the actual customs and habits of the people does not withstand the scrutiny of methodological analysis. It is the statement not of a scientific truth but of a political postulate. Nevertheless, Ehrlich's work occupies a high rank in legal sociology.¹³

By contrast, Maoist writers in China (first introduced to Ehrlich's sociology of law by Pound) wrote of 'the reactionary essence of Ehrlich's sociology of law'.¹⁴ In addition, as we shall see, Ehrlich's ideas have been pressed into service both within a framework of Pound's common-law cultural presuppositions and projects, and in terms of Luhmann's continental and civil law assumptions.

This raises the question of what yardstick to use in order to decide whether the work of an earlier writer has been interpreted (or misinterpreted) to such an extent as not to deserve to count as an example of his or her influence. It would have been possible, as in my earlier discussion of Pound on Ehrlich, to write this chapter in the form of a protest at the way in which Ehrlich continues to be 'appropriated' by later scholars in ways that often pay scant attention to what he really said. As we shall have cause to note, there is indeed more than a little special pleading in the more recent accounts of Ehrlich offered by leading authors such as Alex Ziegert (again) or Gunther Teubner. However, my main purpose in this revisiting of Ehrlich

¹² M Krygier, 'Law as Tradition' (1986) 5 *Law and Philosophy* 237–62.

¹³ Rheinstein, above n 9, 238–9.

¹⁴ JW Dong, 'Sociology of law in China: Overview and trends' (1989) 23 *Law and Society Review* 5 at 903–14 at 904.

is *not* to try, yet again, to ‘save’ Ehrlich from his interpreters by offering a better reading of his text. If we are concerned with the usefulness of Ehrlich’s contribution to the discipline, we need also to ask questions about which interpretations have more heuristic value. However, once we do this, to insist that we are only interested in setting the record ‘straight’ about what Ehrlich actually said smacks not only of pedantry, but ingenuity.

If the meaning of an author is inevitably subject to different interpretations, the search for the most useful interpretation will often tread a fine line between misinterpretation and creative reinterpretation. Questions about interpretation can arise not only where scholars claim to be explaining what Ehrlich really meant, but also where they argue that he got things wrong. And they of course also apply to our efforts to ‘correctly’ interpret Ehrlich’s interpreters. So we need always to ask how any given interpretation *becomes* authoritative. This does not mean that any interpretation of Ehrlich is as good as any other. There must be some limits to how far we are entitled to rewrite past thinkers in the light of current concerns. However, it does suggest that the heuristic value of an interpretation may change from one context of time and place to another.

I may have been justified in trying to prise Ehrlich away from the embrace of Pound’s socio-legal engineering if, at the time I wrote, such an interpretation of his work was as serving as a block on the development of sociology of law. However, that still leaves open the question of whether Pound may have made ‘good’ use of Ehrlich in his own time. Under current conditions, it is arguable that attempts to re-read Ehrlich in the light of a major sociological theorist of the range and sophistication of Niklas Luhmann should not be rejected *tout court*, even if, again, these interpretations do require some straining of Ehrlich’s prose. In other words, we also need to ask if reading Ehrlich’s work in the light of autopoietic theory of law as a communicative sub-system of society may be helpful in advancing the discipline.

When dealing with Teubner’s recent reinterpretation of Ehrlich’s ideas in his influential paper about Global Bukowina,¹⁵ it would be inappropriate, for my purpose of understanding Ehrlich’s legacies, to concentrate only on the question of whether Teubner captures what Ehrlich meant at the time he wrote. We also need to see why his paper also represents a highly creative effort to apply Ehrlich’s ideas to new challenges in the light of new ways of theorising social change. Moreover, as we shall see when discussing his arguments in detail, the question of how we should respond to Teubner’s presentation of Ehrlich’s work becomes even more complicated because he *admits* that he is also changing the ideas that he has borrowed from him. As this, and the other examples I shall be presenting, will illustrate, efforts at

¹⁵ G Teubner, ‘Global Bukowina: Legal Pluralism in the world society’ in G Teubner (ed), *Global Law Without a State* (Dartmouth, Aldershot, 1997) 3–28.

re-contextualisation produce an unstable compromise between the aims of contextualisation and de-contextualisation—between getting Ehrlich right and claiming that he is right.¹⁶

THREE ASPECTS OF LIVING LAW

The canonical definition of what is meant by 'living law' is usually taken to be Ehrlich's statement that:

The living law is the law which dominates life itself even though it has not been posited in legal propositions. The source of our knowledge of this law is, first, the modern legal document; secondly, direct observation of life, of commerce, of customs and usages and of all associations, not only those that the law has recognised but also of those that it has overlooked and passed by, indeed even of those that it has disapproved.¹⁷

However, this definition has some remarkable features. In the first place it is in large part mainly an indication of method. It tells us where to look (and how to look) for something, but the existence of that something is predicated on unspecified theoretical grounds. It is also difficult to see what his examples have in common other than the fact that they may all be illustrations of normative phenomena that elite lawyers in Vienna may not know about—or even want to know about. In any case, as is usual in the development of academic disciplines, what is presented by Ehrlich as one theoretical category is seen by later writers as grouping together a number of not necessarily homogenous phenomena. Following up the later reception of Ehrlich's work in the relevant secondary literature, we will find that we have to deal with different legacies rather than assume that scholars have all taken the same message from what he wrote.

In his description of living law, Ehrlich puts together the creation or employment of law by lawyers (and others), the rules and usages of associations that are 'recognised' by or will develop into (state) law, as well as, most remarkably, the shared practices of associations that are disapproved of by the state and have no aspiration to be included in the sway of its law. Some later scholars who follow him have mainly shown interest in what else law does—the actual practice of legal officials, administrators as well as all those who use or are affected by the law. Others have focused more on what else does law, even to the extent of detecting the existence of rival legal systems. Finally, yet others are searching for the sources of normative order, what

¹⁶ My 1984 paper on Ehrlich was no exception. In the final footnote, I proposed drawing on Ehrlich to construct a more 'ecological' approach to law reform (something which Gunther Teubner later asked me to elaborate on).

¹⁷ E Ehrlich, *Fundamental Principles of the Sociology of Law*, WL Moll (tr), with introduction by Roscoe Pound (New York, Russell and Russell, 1936/62) 493.

Durkheim called ‘the pre-contractual basis of contract’.¹⁸ For the purposes of illustration, it may be helpful to distinguish developments in the study of law beyond the law (law other than that contained in statutes and judgments), law without the state (especially the co-existence of plural legal regimes) and order without law (the implicit norms that make order possible).

There is certainly some overlap between the phenomena that are studied under each of these rubrics, and this goes beyond the common denominator that we cannot afford to restrict ourselves to the study of legal codes and court decisions if we want to understand ‘law in society’. However, there are also important differences in the issues that each of them raise. We may wonder how far Ehrlich was justified in combining into one category examples such as youngsters giving over the pay for their work to their parents, and businessmen not insisting on being paid by their debtors. But the situation becomes even more complex when we seek to include as examples of living law an even greater variety of phenomena, including the avoidance of legal relations by automobile dealers, the alternative sanctioning mechanisms used by diamond merchants and the typical practices of queuing for the cinema.

The Law Beyond the Law

The first part of Ehrlich’s definition reminds us, as he would put it, that law ‘cannot be imprisoned in a code’. We need to go ‘beyond’ the law books so as to take into account both the role of society in generating state law and judicial sentences and the way in which it shapes laws and decisions as they seek to influence social life. Ehrlich’s exemplar, the ‘modern legal document’, might not at first sight seem to be the most obvious starting point for grasping this aspect of living law. However, those who engage in the sociology of substantive areas of law certainly can learn a great deal from focusing on legal documents. Many of the books in the path-breaking ‘law in context’ series (published in the United Kingdom from the 1960s onwards) did exactly this, gathering information about the contracts used by consulting engineers, or the standard-form contracts of hire purchase or dry cleaners, so as to reveal a world of law at variance with that presupposed by the more traditional textbooks. Giving attention to documents is also crucial to understanding the construction of transnational legal agreements and regulatory modes by legal professionals.

It is impossible to trace the full influence of Ehrlich’s insights here—these are now woven into the warp and woof of sociology of law. Ehrlich’s claim that ‘the centre of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself’ could well

¹⁸ E Durkheim, *The Division of Labour in Society* (New York, Free Press, 1964).

be taken as the leitmotiv of the contributions to the field by Lawrence Friedman, one of the most distinguished contemporary social historians of law. More generally, the argument that there is more to law than what can be found in statutes and court decisions is constitutive of any interdisciplinary approach to law. All of the most famous studies over the last 50 years (mainly, it has to be said, coming from the United States), such as those by Macaulay 'on the non-reliance on contracts'¹⁹ or Galanter 'on why "the haves" come out ahead'²⁰ mainly concern the way in which non-legal factors shape the use of law.

However, the idea that there is 'law beyond the law' has not always been taken in the same direction. Many have followed Pound and the Legal Realists in studying the 'Law in action' so as to explore the practical implementation of laws or of judicial and administrative decisions.²¹ But others have sought rather to understand the 'legal consciousness' of those who use or are affected by the law, showing how ideas of legality and what it represents circulate and shape such consciousness at least as much as they are its product.²² Marc Hertogh has recently sought to integrate Pound's common law and Ehrlich's more continental approach in order to investigate the interaction between law in action and legal consciousness. His case study of the use of discretion by housing officials shows how they mediate between the legal principle of formal equality enshrined in the *Rechtsstaat* and a wider popular legal consciousness which values responsiveness and material equality.²³

At the same time, the claim that law has more to do with its given local context than with the wider process of rule production in the legislature and courts has never been uncontroversial. As Rheinstein pointed out in an early appraisal of Ehrlich's work,²⁴ this is likely to vary by types of law. Later empirical research showed that forms of law, such as that to do with labour relations, did not necessarily correspond to particular forms of social organisation in ways that would be expected.²⁵ There have also been some attempts to break out of the whole paradigm of trying to fit 'law' to

¹⁹ S Macaulay, 'Non-contractual relations in Business' (1963) 28 *American Sociological Review* 55.

²⁰ M Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) *Law and Society Review* 9 at 95–160.

²¹ The alleged equation between 'law in action' and 'living law' is examined critically in Nelken, above n 4.

²² S Silbey and P Ewick, *The Common Place of Law* (Chicago, University of Chicago Press, 1998); and S Silbey, 'After Legal Consciousness' (2005) 5 *Annual Review of Law and Social Science* 323–68.

²³ M Hertogh, 'A "European" Conception of Legal Consciousness: Rediscovering Eugen Ehrlich' (2004) 31 *Journal of Law and Society* 457–81.

²⁴ M Rheinstein, above n 9.

²⁵ S Henry, *Private Justice: Toward Integrated Theorizing in the Sociology of Law* (London, Routledge and Kegan Paul, 1983); D Nelken, 'Beyond the Study of "Law and Society"' (1986) *American Bar Foundation Research Journal* 11.2 at 323–38; and G Iskowitz, 'Social Theory and Law: The Significance of Stuart Henry' (1988) 22 *Law & Society Review* 949–62.

‘society’.²⁶ Most radically, Luhmann, first in his systems theory approach, and even more in his autopoietic social theory, insisted that law could only relate to its own communicative constructions of its environment rather than actually have direct connections with it.

Legal historians and comparative lawyers have often stressed that law can be out of step with society, or be linked to foreign sources rather than being embedded in the society in which it is found.²⁷ The obvious response is that the law that ‘really’ matters will always be that which is actually operating and therefore being shaped locally. However, this risks being tautological. On the other hand, for others, including both critical legal scholars and some post-modern social theorists, law is even more tightly bound up with society than Ehrlich thought. It is state law, official law, which shapes society’s deepest conceptions quite as much as the reverse. Some speak here of law’s ‘constitutive’ role. In a recent discussion of intellectual property law, for example, Rosemary Coombe and Jonathan Cohen argue that:

... a critical cultural legal studies reveals that law is fully imbricated in shaping lifeworld activities, bestowing propriety powers, creating markets, establishing forms of cultural authority, constraining speech, and policing the public/private distinction (that protects corporate authors from social accountability).²⁸

As they go on to say:

Law is a palpable presence when people create their own alternative standards and sanctions governing the use of corporate properties in the moral economies that emerge in law’s shadows.

Intellectual property law does not function in a rule-like fashion as a regime of rights and obligations, but also acts as ‘a generative condition and prohibitive boundary for practices of political expression, public-sphere formation, and counter-public articulations of political aspiration’.²⁹

For Ehrlich, the key to the unfolding of law was to be looked for in the role of associations. Amongst the many important developments of this idea may be noted Karl Renner’s demonstration—this time as seen from Vienna, rather than from the periphery—that codified property law could easily become no more than a dead husk in respect of the actual developments in

²⁶ D Nelken, above n 25; and D Nelken, ‘Changing Paradigms in the Sociology of Law’ in G Teubner (ed), *Autopoietic Law: A New Approach to Law and Society* (Berlin, De Gruyter, 1987) 191–217; D Nelken, *Beyond the Study of Law in Context* (Aldershot, Ashgate, forthcoming).

²⁷ D Nelken, ‘Comparativists and Transferability’ in P Legrand and R Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge, Cambridge University Press, 2003) 437–66.

²⁸ R Coombe with J Cohen, ‘The law and late modern culture: Reflections on “between facts and norms” from the perspective of critical legal studies’ (1999) 76 *Denver University Law Review* 1029 at 1031.

²⁹ *Ibid* 1043.

the actual organisation of capitalist firms or large rented tenements.³⁰ From the 1950s onwards, the work of Lon Fuller at Harvard and Philip Selznick at Berkeley examined the roots of (and the need for) 'legality' within the structure of organisational life.³¹ The most recent studies by Lauren Edelman and her collaborators, also based in Berkeley, using the approach of institutional sociology to focus on the role of organisations, confirm Ehrlich's ideas about the role of associations in creating the living law. On the other hand, they also show that official norms and those of the organisations themselves are (now) far more intertwined and interdependent than Ehrlich envisaged when first contrasting living law and 'norms for decision'.

In one recent paper, which deals with organisationally constructed symbols of compliance following the 1964 Civil Rights Act,³² Edelman *et al* coin the term 'legal endogeneity'. This refers, they say, to 'a subtle and powerful process through which institutionalized organizational practices and structures influence judicial conceptions of legality and compliance'. They argue that:

... organizational structures such as grievance procedures, anti-harassment policies, evaluation procedures, and formal hiring procedures become symbolic indicia of compliance with civil rights law...as they become increasingly institutionalized, judges begin to use their presence or absence in evaluating whether or not an organization discriminated. Ultimately, these structures become so closely associated with rationality and fairness that judges become less likely to scrutinize whether they in fact operate in a manner that promotes non-discriminatory treatment.

As Rheinstein suggested, however, we should be careful before generalising too much from intellectual property law or anti-discrimination law. As Edelman *et al* themselves note, law-making that sets forth broad and often ambiguous principles gives organisations particularly wide latitude to construct the meaning of compliance.

Law Without the State

The second approach to living law that we can trace back to Ehrlich is one less focused on how official law is shaped or reshaped, and more interested in uncovering the existence of legal regimes that do not have or appear to

³⁰ K Renner, *The Institutions of Private Law and their Social Function* (London, Routledge and Kegan Paul, 1949).

³¹ L Fuller and K Winston, *The Principles of Social Order* (Oxford, Hart, 2001); and P Selznick, *Law, Society and Industrial Justice* (New York, Russel Sage, 1968).

³² LB Edelman, LH Krieger, SR Eliason, C Albiston and VA Mellema, 'When Organizations Rule: Judicial Deference to Institutionalized Employment Structures', 21 June 2006, 1st Annual Conference on Empirical Legal Studies Paper <<http://ssrn.com/abstract=910940>> accessed 24 July 2008.

need the backing of the state. The key problem here is how to take into account the fact that there can (also) be non-state law and sub-state private legal regimes. As Teubner puts it, for this literature, ‘law or not law is the question’.³³ Although Gurvitch has stronger claims than Ehrlich to having developed a rich (even over rich) sociological theory of plural legal orders,³⁴ discussions about legal pluralism often refer to Ehrlich’s writings and current debates continue to make explicit reference to his ideas. Unfortunately, however, many writers still tend to reduce Ehrlich’s contribution to the importance he allegedly attributed to preserving ethnic and cultural pluralism. However, the varied examples of living law he offered, which included businessmen not insisting on claiming their debts, give the lie to such reductivism.

Ehrlich famously argued that the state does not have a monopoly over the law. He would also have agreed with Llewellyn (who in fact was an admirer of his work) when the latter argued later that ‘law jobs’ do not have to be done by state institutions. Although Ehrlich focused mainly on the juris-generative propensities of communities and associations, his writing has also rightly been taken as inspiration for those who have gone on to argue, more broadly, that more or less autonomous ‘social fields’ can create their own set of norms and sanctioning mechanisms.³⁵ The focus of more recent writing, however, is on the way in which globalisation is increasingly ‘uncoupling’ law from the state. Transnational enterprises and transnational forms of communication and regulation have thus emerged as an important new source of legal pluralism.

Two key examples of such new forms of legal pluralism which have provided the occasion for rediscovering Ehrlich’s ideas about living law are *lex mercatoria*, as discussed for example in Teubner’s collection *Global Law without a State*,³⁶ and the governance of the internet, as in Rowland’s discussion of ‘Law in Cyberspace’.³⁷ For these authors, as for many other commentators, the question of whether these regimes can be described as law is strongly linked to the issue of whether they *should* be so recognised (as if ‘calling’ them law will help make them so). And the answer is not necessarily the same for each of these examples. Whilst the first has to do more with norm-making by or for businessmen as an attempt to create

³³ G Teubner, ‘Foreword: Legal Regimes of Global Non-state actors’ in G Teubner (ed), *Global Law without a State* (Dartmouth, Aldershot, 1997) xiii.

³⁴ G Gurvitch, *Sociology of Law* (London, Routledge Kegan Paul, 1947).

³⁵ SF Moore, ‘The Autonomous Social Field as an Appropriate Subject of Study’ (1973) 7 *Law & Society Review* 719–46; and L Bernstein, ‘Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry’ (1992) 21 *Journal of Legal Studies* 115.

³⁶ Teubner, n 15 above.

³⁷ D Rowland, ‘Cyberspace—A Contemporary Utopia?’ (1998) 3 *The Journal of Information, Law and Technology* <http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1998_3/rowland> (last accessed 11 Aug 2008).

interstitial order for their interests, the other has to do with an allegedly virtual space open to all.

In a valuable article in which he examines both phenomena from the point of view of an expert on conflicts of law, Ralf Michaels compares them in relation to the different criteria that can be used for defining law.³⁸ He accepts that both *lex mercatoria* and the internet can promote social ordering and social control. However, he claims that whilst the new law merchant also aims at dispute resolution, this is less clear with the internet. Moving to the structural criterion, law merchant imposes binding obligations on tradesmen, while the internet, he rightly suggests, 'controls rather through its technology, its architecture'.³⁹ Law merchant is referred to by some (although not all) participants as law; this again, is less true for the internet. Certainly, merchants consider themselves to be some kind of 'community'; the same may be true of users of the internet. He concludes that while the new law merchant has a good claim to qualify as 'law' under most named criteria, proponents of an autonomous internet law have a more difficult case to make.

Nonetheless, Michaels insists that, from a juristic perspective, neither of these regimes, nor any other legal system that can be shown to be only semi-autonomous, can be rightly described as law. The crucial point for him is that they all require the state to 'recognise' their legal validity. The state has three ways to cope with other normative orders: incorporation, delegation and deference. Through incorporation, which applies, for example, to *lex mercatoria*, rules count as law only in so far as they become part of the law of the state. This, he argues:

... is perfectly compatible with Ehrlich's insight that the production of law mainly happens on the periphery, within society. Yet the insight loses its revolutionary potential. The state is able to domesticate this potentially subversive development through the incorporation of the norms that are created. It recognizes non-state communities as generators of norms, but it denies these norms the status of autonomous law. Instead, by incorporating these norms into state law, the state reiterates its own monopoly on the production of legal norms.⁴⁰

Michaels also refers to Ehrlich's arguments when discussing the strategy of deference. '(T)he state', he explains:

... may leave it to commercial practices and professional standards to develop the appropriate standard of care, the typical expectations necessary for interpreting contracts, etc.⁴¹ This is the approach most frequently seen as an answer to Ehrlich's 'living law'. Again, living law is not ignored by the law of the state, but

³⁸ R Michaels, 'The Re-Statement of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism' (2005) *Duke Law school working papers series paper 21*.

³⁹ *Ibid* 18.

⁴⁰ *Ibid* 28.

⁴¹ *Ibid* 24.

neither is it recognized as law. The state and its law do not conceptualize their relation to such spaces of private ordering as a relation to foreign laws, to be handled by rules of conflict of laws. Rather, the state refrains from interfering, or, put differently, it defers to the private interactions of individuals. The whole public/private distinction, as we know well by know, takes place within the framework of the state's law. Private ordering enters the substantive law of the state at the time of enforcement as fact—as customs, general expectations, etc, that must be taken into account in the application of the state's laws, but that do not constitute such norms in themselves.

Finally, Michaels tells us:

A third operation, somewhat similar to deference, treats such orders as legal orders separate from the state's own law, but still denies them full autonomy. This process can be called delegation. Instead of regulating on its own, the state defers to the self-regulation by interested groups. Examples of delegation abound. Autonomous labour agreements between unions and employers have the force of law; codes of conduct of regulated or unregulated industries substitute possible regulation by the state, etc. Indeed, this idea of the contract was one basis for the idea of the new law merchant ('*contrat sans loi*'). In the very moment in which they are attached and subordinated to the state and its law ... Non-state law turns into sub-state law.⁴²

Michaels is very wary of crediting 'communities and fields with the power to create law'. However, he admits that his juristic perspective, one 'intrinsic to operations of the legal system itself', is not the only way to look at the question. '[L]egal pluralism, legal sociology and legal anthropology', he explains, 'may well have different definitions of law, because they are interested in different aspects of law'.⁴³ Furthermore, for their part, even those sociologists and anthropologists most committed to the idea of legal pluralism will concede that the state does usually seek to deny the legitimacy of rival regimes. Michaels is quite willing to admit that, from a sociological or anthropological perspective, it may (or may not) make sense to refer to all normative orders in communities as 'law'.

In fact, like legal scholars, social theorists are to be found on both sides of the divide regarding whether we should describe rival or sub-state legal regimes as law. Legal scholars such as Berman (with whom Michaels polemicalises) argue that communities have the power of 'jurispersuasion'.⁴⁴ Anthropologists have been amongst those most convinced that state law is far too narrow a perspective for many of the societies they study.⁴⁵ In a

⁴² *Ibid.*

⁴³ *Ibid.* 30.

⁴⁴ PS Berman, 'From International Law to Law and Globalization' (2005) 43 *Columbia Journal of Transnational Law* 485.

⁴⁵ For a strong statement, see F Von Benda-Beckmann, 'Comment on Merry' (1988) 22 *Law & Society Review* 897–902.

provocative recent essay, Melissaris even extends the notion of communities to aggregates such as queues, arguing that:

Only when the legal commitment of clubbers who queue patiently at a bouncer's orders is treated as seriously as the legal commitment of communities with religious or other moral bonds will the pluralistic study of the law be able to move away from the essentially positivistic external study of groups to the study of legal discourses.⁴⁶

However, on the other hand, many would say this was a *reductio ad absurdum*.⁴⁷ Social theorists such as Brian Tamanaha argue that what is crucial is the way in which people use the term 'law'—which usually privileges state law.⁴⁸ It has even been argued that extending the label 'law' to non-state regimes means imposing a state-like definition of law. For Simon Roberts:

Law, long so garrulous about itself, is now, in its contemporary enlargement, graciously embracing others in its discourse, seeking to tell those others what they are.⁴⁹

However, whether or not social scientists are entitled to use the term 'law' as they wish, a more important question concerns how far Ehrlich's notion of living law helps or hinders our understanding of these emergent phenomena. Take, for example, law-making by cyber communities. In a relatively early paper on this topic, which explicitly takes its inspiration from Ehrlich, Rowland makes an effort to tease out the living law of such communities. She argues that:

... [the] impact of new communications technology on both social relationships and law-making processes is still in its infancy ... [t]here are myriad political processes at work in all societies but the decentralized nature of the Internet makes it particularly difficult to understand either the manner in which power can be exercised, by whom and within what limits.

For her, we need to face the fact that cyber communities 'challenge state-based models of lawmaking as well as many of our preconceptions of the attributes of society and community'.⁵⁰

Rowland expresses concern about 'imposing on the organization and use of the Internet a social construct which is entirely inappropriate both in idea and substance'. 'Thus far', she argues:

... legal rules external to Cyberspace have not been conspicuously successful at regulating the global computer network ... [and] ... may only succeed in regulating

⁴⁶ E Melissaris, 'The More the Merrier? A new take on Legal Pluralism' (2004) 13 *Social and Legal Studies* 57–79 at 75.

⁴⁷ However, see the views of Reisman discussed in the next section.

⁴⁸ BZ Tamanaha, 'The Folly of the "Social Scientific" Concept of Legal Pluralism' (1993) 20 *Journal of Law & Society* 192; and BZ Tamanaha, 'A Non-Essentialist Version of Legal Pluralism' (2000) 27 *Journal of Law and Society* 296.

⁴⁹ S Roberts, 'Against Legal Pluralism' (1998) 42 *Journal of Legal Pluralism* 95.

⁵⁰ Rowland, n 37 above, 7.

Cyberspace when the social conditions pertaining in cyber communities are acknowledged and understood.

One can imagine Ehrlich sharing such cautions. At the same, however, she suggests, law may be forming itself 'from below'. Legal rules, she tells us:

... may already be emerging from amidst the chaos of Cyberspace ... in some respects the cyber community, at this juncture, could be regarded as a 'pre-legal' world and the change to a legal world will inevitably involve the creation of rules dealing with change, adjudication and recognition of rights. Most communities will regulate themselves, in practice, by a combination of formal or 'book law' ('top-down' rule formation) and also by acknowledgement of the customary rules which have evolved to supplement this source of law and to cater for what 'actually happens' ('bottom-up' regulation). Examples are the rites of passage, initiation or induction for newcomers to that community which either enable them to integrate more easily, or, conversely, create a barrier to entry to the society which must be successfully negotiated.⁵¹

For Rowland, progress towards a self-regulating internet law is at best uneven. Although certain customs in cyber communities:

... appear to be in the process of being elevated to the status of customary rules ... many rules remain purely customary, having no enforceable sanction attached to their non-adherence, indeed it is doubtful whether a universally enforceable sanction can be applied in Cyberspace.

Rowland concedes that we do not have to:

... measure the success of custom as a regulatory mechanism purely by the availability of express sanctions. Successful customs may be obeyed, not so much because of the threat of sanctions, but for fear of standing out from the crowd. Such rules may be adhered to not out of personal conviction, but, rather, as an indication that such conduct is conventionally accepted and so participants are happy to accept it as a standard of assessment. People may also accept rules not necessarily because of any issue of morality but possible out of fear, self-interest, coercion or habit.

Nonetheless:

... what is not apparent in cyber communities is such an assurance of acceptable behaviour, at least as judged by the prevailing standards and mores of the physical world. In comparison, the range of norms and values in cyber communities seems to cover a much wider and more diverse range. What may be absent in the virtual world is the necessary degree of uniformity and unanimity defining a custom which has the capacity to metamorphose into a legal rule and become both binding and obligatory.⁵²

⁵¹ *Ibid.*

⁵² *Ibid.*

The literature on internet law has grown exponentially since Rowland posted her reflections (although it does not, as far as I am aware, make much reference to Ehrlich). The question of what norms are appropriate for cyberspace (and providing them with a history or legitimacy) has changed as the internet itself has developed from an idealised utopia of caring and sharing—with its folkloristic evolution of norms of good manners—to an ever-expanding site for commercial activities as well as the exploitation of the less attractive aspects of human sociability. It is less and less possible to think of users mainly in terms of online communities—and some of the communities that do exist in this space use the internet to disseminate hate propaganda aimed at others.⁵³ However, net users continue to surprise. Pressed into service by the market, they can sometimes rise up against property rights as where users collectively reveal trade secrets. Seemingly feeble in the face of the armed might of the state, the diffusion of video photographs provides the evidence to protest at the conduct of military operatives and secret police from that in US military installations to police stations in Egypt.

The internet is not a world apart. It belongs to and helps further those economic developments by which consumers (those who can afford to consume) come more and more to play the role of producers. The real and virtual worlds intersect as shown through the application of copyright law or privacy protections. The problems it throws up mirror many of the crimes and civil wrongs found in the real world. What goes on in the virtual world of 'second life' is all too reminiscent of what happens in ordinary life. The internet provides occasions for blogging feuds, cyber bullying, defamatory Google bombing, misuse of 'spiders' or cookies, and the all-too-evident spread of spamming. Enforcement of norms is complicated by the use of anonymity and the difficulty of knowing when users can be assumed to be informed of norm changes. On the other hand, sanctions from which there is no appeal, for example, where users are banishing users from given sites, may be considered too severe to be left to private parties.

In so far as the internet does maintain a sort of autonomy, there is scope for more investigation into how far group exercises in rule making and rule application are constructing a distinctive form of living law. The collective encyclopaedia Wikipedia, for example, does use law-like procedures for rule making and fact finding as ways of deciding whether an article's content is sufficiently evidenced, whether links to other entries are justified, what counts as an insult, and so on. However, there is a need here too for protection from the guardians. In March 2007, for example, there were reports about a fake professor known as Essjay whose 'authority' to arbitrate disputes and remove site vandalism about articles on religion turned

⁵³ A Roversi, *Hate on the Net* (Aldershot, Ashgate Press, 2008).

out to be based on false credentials: he was obliged to resign from his role because, as the co-founder explained, the encyclopaedia relies on ‘trust and tolerance’.

Order Without Law

The third literature that can be connected to Ehrlich’s ideas about living law is one less interested in how associations impose their norms and more in how patterned behaviour gives rise to the working orders of associations. Order, rather than law, is the focus here, as seen in such titles as Robert Ellickson’s celebrated *Order without law—How neighbours settle disputes*,⁵⁴ or Eric Posner’s *A theory of norms*.⁵⁵ The same is true even of Michael Reisman’s *Law in Brief encounters*—despite having law in its title.⁵⁶ This line of enquiry can be distinguished from the previous literatures considered so far in so far as it refuses legal centralism not by contrasting the centre and the periphery or by hypothesising the existence of rival legal regimes, but by questioning the centrality of law as compared to norms. Writers seek to explain the origin and content of norms, in particular they develop theories of norms in the context of cooperation, collective solutions and welfare maximisation. Even if not all writers on these topics take their cue from Ehrlich, at least some of this work can also be traced back to him. Especially relevant is his advice to move from studying conflict to understanding order, to distinguish situations ‘at war’ from those ‘at peace’, and to think about expectations as much as sanctions—or of expectations as sanctions. His controversial attempt to distinguish legal from other types of norms also shows him addressing these issues.

There is by now an enormous multi-disciplinary library—ranging across evolutionary biology, psychology, philosophy, law, economics—and sociology—which deals with the source and efficacy of norms. Sociology of law alone will not be able to master this subject. However, once Ehrlich’s ideas about living law are seen to embrace a wide range of normative phenomena, this leads to a richer set of questions than merely whether the norms of semi-autonomous associations count as law. We are led to investigate the relationship between law and norms. How and when do norms turn into law (as in the case of the internet or *lex mercatoria*)? How does law become normative? When do norms mandate not following or using law? How far do norms depend on associational life? How big or amorphous must such associations be? What about the fact that we are simultaneously members of very many associations? As this suggests, research on order without law tends to be

⁵⁴ R Ellickson, *Order without law: How Neighbours settle disputes* (Cambridge, Harvard University Press, 1991).

⁵⁵ E Posner, *Law and Social Norms* (Cambridge, Harvard University Press, 2000).

⁵⁶ WM Reisman, *Law in Brief Encounters* (New Haven, Yale University Press, 1999).

more radical than merely looking for 'the law beyond the law'. Take, for example, Macaulay's famous findings about the extent to which businessmen did not conduct their exchanges on the basis of contract law, relying instead on the shared norm of 'keeping one's promises' and 'standing behind your product', which provide the underpinnings of normal business behaviour.⁵⁷ Those interested in norms would then want to go further and ask about the social origins of such norms and the way in which they are reproduced.

Whatever plausible links can be drawn between this sort of work and Ehrlich's writings, in practice it can often be difficult to assess his actual influence. This can be well illustrated by considering the reference made by Ellickson to Ehrlich in his book, *Order without law*. Ellickson's claim is that 'impersonal norms are among the most magnificent of cultural achievements'.⁵⁸ To understand them better, he sets out to synthesise insights from the sociology of law and economics and law. He criticises sociologists of law for treating the content of norms as exogenous and being too satisfied with thick descriptions rather than cumulative testable theory. He argues that we must learn what norms are, not just how they are transmitted. Law and economics writers, on the other hand, he sees as too obsessed with the relationship of norms to wealth maximisation and the problems of how groups can overcome the problem of 'free riders'. Ellickson's goal is to produce a 'general theory of social control', one that could predict, on the basis of independent variables describing society, the content of the society's rules. These would in turn need to be distinguished as substantive, remedial, procedural and controller-selecting.

In this book, however, he settles for the more modest aim of illustrating the logic of one social sub-system, that of 'informal social control'. To develop his predictions, Ellickson draws on his own empirical study of rancher's communities as well as historical research into dispute resolution in whaling communities. To explain the rationality of cooperation in the absence of law, he describes the details of dispute processing, the events that trigger sanctions, and how relevant information is gathered. What is of interest for us is that it is not until page 150 that he actually makes any reference to Ehrlich. At this point, he tells us blithely that 'Ehrlich believed that law is relatively unimportant and that social forces tend to produce the same norms in all human society'.⁵⁹ Ellickson then goes on to explain that Ehrlich (like Durkheim) is to be seen as a functionalist who saw the sanctioning of norms as the way in which social groups maintained their solidarity. And he complains that functionalist arguments are circular because they do not say for which groups the function is being performed and assume that organisms have an objectively determinable state of health.

⁵⁷ Macaulay, above n 19.

⁵⁸ Ellickson, above n 54, 184.

⁵⁹ *Ibid* 150, fn 62.

Ellickson is not obliged to provide us with a rounded analysis of Ehrlich work. However, it is still surprising to find such a superficial reading coming from such an eminent scholar. Did Ehrlich really believe that ‘law is unimportant’? Ellickson just assumes that whatever Ehrlich is talking about it is not law, because he (along with many others) insists that state law is likely to be inefficacious unless backed up by other norms. However, it could as well be argued that by introducing the concept of ‘living law’, Ehrlich exaggerates the importance of law by finding it everywhere. Certainly, this is the interpretation favoured by those legal pluralists who take Ehrlich as a warrant for characterising rival normative schemes as law, to all effects. As far as the charge of functionalism is concerned, Ehrlich may indeed be interested in showing us how associations use law-like norms to solve problems of functioning and reproduction, but he also offers examples of behaviour, as for example where businessmen do not insist on collecting their debts, which go beyond this role. More fundamentally, his book also contains discussions of how norms reflect changing interests, which is the judges’ task to reconcile in the direction of progressive social change.

Ellickson’s synthesis of economics and law and sociology of law leans towards a rational actor perspective. Most of the many other recent studies of norms tend to be even more influenced by the individualistic bias of economics of law and game theory. A recent study by Eric Posner, for example, also links norms to the question concerning the rationality of cooperation.⁶⁰ Posner sees norms as rules that distinguish desirable from undesirable behaviour and give third parties authority to punish. He is particularly interested in showing how norms play a role in allowing actors to avoid dilemmas of non-cooperation by signalling their willingness to be reliable collaborators rather than act as free riders. He offers some valuable insights into how and when the following of norms can help participants distinguish genuine from false signals. He also discusses how law tries to harness the strength of norms and when legal regulation should or should not be used instead of relying on norms.

However, for all its plausibility, the claim that order relies more on shared norms than on official legal processes has also been criticised. In so far as Ellickson’s arguments are based on empirical research, they are open to counter-examples based on other case studies. Some research has shown that resort may be made to official law even in what would appear to be ideal conditions for maintaining order without law. Eric Feldman, an expert on Japanese law, has recently offered a fascinating and finely grained account of the workings of what he calls the tuna court in the Tokyo fish market.⁶¹ Here, post-auction disputes between dealers and buyers, mainly regarding

⁶⁰ Posner, above n 55.

⁶¹ E Feldman, ‘The Tuna Court: Law and norms in the world’s premier fish market’ (2006) 94 *California Law Review*: 2.

hidden defects in the fish, are routinely and expeditiously resolved by judges in ways that reinforce rather than substitute for the cooperation between the participants. Feldman claims that his case study goes against what Bernstein, Ellickson and others would predict, given that these participants form a community of continually interacting players who could be expected to create their own informal normative order. In Ehrlich's language, we see here an illustration of the way in which 'norms for decision' can also guarantee peaceful co-existence. What is more, this preference for court-like procedures is found in a culture which many (though not Feldman himself) see as one normally geared to the avoidance of law.

Ellickson's work and, in general, the arguments of the so-called 'new norms jurisprudence', have also been subjected to more fundamental theoretical objections. As we have already noted in discussing 'the law beyond the law', it is also (increasingly) difficult to draw the line between sources of order within and outside a given setting. Even if it is not official law that produces order, there is likely to be some symbiosis between its projected order and the actual order shaped by and within the association or organisation. It can be a mistake to credit the idea that norms produce order independent of models in the larger enviroining framework. Mitchell, for example, has recently complained that:

... there is little attention paid to the way in which group norms or private law systems relate to or are influenced by either legal, moral or customary norms that permeate the society as a whole ... norms—whether the norms of the Elks Club, the New York Diamond Merchants Exchange, various religious groups, or the automobile insurance industry, are at some level inseparable from the web of norms that influences the behaviour of each of the members of these groups.⁶²

Mitchell proposes that we speak not of 'order without law', but 'order within law'.⁶³ As he says:

The private law systems noted by Ellickson and Bernstein are grounded on the notion of legal obligation and legal order that pervades our society. Or, to put the claim more modestly, the legal systems which these private law systems mimic have been so pervasive in our society for so long that it seems unlikely that the new norms theorists can separate out the influence of the legal order upon the creation of private law norms.⁶⁴

Mitchell's point is that official law serves as a model even when its details are unknown or misunderstood. 'The problem with Ellickson's work', he says:

... is not the valuable field study but rather the conclusions he draws. Ellickson found what he took to be a startling conclusion. When neighbours had border

⁶² LE Mitchell, 'Understanding Norms' (1999) 49 *University of Toronto Law Review* 177–258 at 255.

⁶³ *Ibid* 237.

⁶⁴ *Ibid*.

disputes or arguments over fences or over trespassing livestock; they didn't sue each other—they negotiated out their difficulties in a way that—given the repetitive nature of the issues—became regularized. This he viewed as the spontaneous generation of order and the irrelevance of law, supported by the fact that, when surveyed, most of his interviewees either didn't know the governing law or got it wrong.

Ellickson's ranchers might not have known the law. They might have thought they knew the law but gotten its principles wrong. They might have made up their own rules to avoid litigation. But there is one thing that I am certain that they did know; there was law, that law governed the kinds of disputes in which they engaged, and that law was available to them should they choose to use it (as sometimes they did). In other words, Ellickson's ranchers were resolving their disputes on the broad background of an understanding of legal obligation that is immanent in our society and derives from the notion of a society governed by a system of laws—when one person causes damage to another's person or property, there are circumstances under which the law (if invoked by lawsuit) will hold that party to account. The idea of legal order already existed in Shasta County—what Ellickson found that was different were the principles that were applied.⁶⁵

The fact that the literature about norms is so vast also means that it is riven by almost as many disagreements as is the case for arguments about the nature of law. Differences in definitions, regarding, for example, how far norms should be seen more as instruments or as cultural constraints on action, tend to reproduce major divisions in sociological approaches to society. Others reflect the choice between privileging a more macro or micro focus on social life. Some efforts to locate the source of normative order go beyond the level of Ehrlich's focus on associations or the interactions of people involved in repeated relationships. Michael Reisman, a leading professor of international law, claims to have discovered what he calls the micro-law of relatively fleeting relationships. In a series of well-observed descriptions, Reisman shows that people handle the problems of everyday life as if they were small-scale analogies of the larger problems of legal order.⁶⁶ He explains how norms enable people to have a sense of what is and is not appropriate in situations such as those of looking at others, in talking with equals or with the boss, in making queues and holding places for others in line. Decisions about such matters cannot be and are not arbitrary or else such valuable institutions as the queue would break down.⁶⁷

Although he entitles his book *Law in brief encounters*, what Reisman actually sets out to describe is (only) a form of de facto 'living law'. He cannot mean that the rules generated in these situations are already (official)

⁶⁵ *Ibid* 236.

⁶⁶ However, it has been objected that the individuals Reisman discusses tend to be middle-class people with middle-class responses.

⁶⁷ Reisman, above n 56, 59.

law because he goes on to ask when law should recognise or interfere in these micro-legal orders. In general, he is favour of keeping state bureaucracy out of such matters. However, (because of his background as an international lawyer?) he also suggests that there are some standards that micro-law must pass and 'that the practices of all groups must be appraised in terms of the international code of human rights' so that 'practices inconsistent with the international standard be adjusted'.⁶⁸ As this suggests, though Reisman does not seek to anchor his insights in older writers, there are certainly many parallels with Ehrlich's concerns. It is interesting too to find that Reisman insists that the norms he discusses are kept alive not so much by the sanctioning of breaches (albeit that this can and does take place), but by the decision of the norm-abider to reaffirm the existence of the norm despite the breach.

If authors such as Reisman emphasise the parallels between legal order and micro-order in society, others, such as Jutras, think it important to ask 'does the normative structure of everyday life mirror the architecture of official law?'⁶⁹ They urge us to look for differences as well as similarities. It may be instructive, for example, that the everyday 'feels' non-legal, whilst the law appears self-contained. Tamanaha, too, considers it is an error to confuse legal and social order.⁷⁰ It is important, he argues, to see that law is not necessarily a source of social order and social order is not necessarily law-like.⁷¹ This leads him to be ambivalent about Ehrlich's claims concerning normative order.

In an important sense, Ehrlich's observations raised a sharp critique of the mirror thesis and the social order function of law ... In another important sense, however, Ehrlich's work is the ultimate extension of the mirror thesis and the social order function of law. In effect his argument is that if positive law does not mirror social norms and does not in fact maintain social order, it has lost its superior entitlement to the claim of being the law, and the label must be given back, or at least shared with the 'living law', the actually lived social norms that do satisfy these criteria.⁷²

Tamanaha argues that:

The traditionally assumed relationship gets things precisely upside down. It is state law that is dependent on these other sources of social order if it is to have a chance of exerting an influence.⁷³

⁶⁸ *Ibid* 158.

⁶⁹ D Jutras, 'The legal dimensions of everyday life' (2001) 16 *Canada Journal of Law and Society* 45–65.

⁷⁰ BZ Tamanaha, *A General Jurisprudence of Law and Society* (Oxford, Oxford University Press, 2001).

⁷¹ I am relying on the thorough re-analysis in W Twining, 'A Post-Westphalian Conception of Law' (2003) 37 *Law and Society Review* 199–258.

⁷² Tamanaha, above n 70, 31.

⁷³ *Ibid* 224.

But, of course, this exactly takes us back to what it is that Ehrlich was trying to tell us!

RE-WRITING EHRLICH: FROM 'LAW IN ACTION'
TO LEGAL AUTOPOIESIS

We have dealt so far with authors who use Ehrlich's work as a precedent or inspiration without necessarily going into detail about what he actually wrote. In this section, I want to discuss more elaborate appropriations of Ehrlich, and show how they shape efforts to 'go back to the beginning' or 'back to the future' in the sociology of law. For a long time, there was a tendency (especially, but not only, in English-language discussions) to assimilate Ehrlich's arguments to Anglo-American ways of talking about 'law in society'. This certainly facilitated drawing on him in dealing with socio-legal problems as they are posed in common law jurisdictions. This is most clearly seen in Pound's original introduction to the first translation of Ehrlich's *Grundlegung*.⁷⁴ However, what we are now witnessing is in some respects an opposite trend, one which treats Ehrlich's work as belonging to the world view of Continental legal systems and adopts him as a forerunner of one of the most advanced schools of continental sociology of law, that associated with Niklas Luhmann. Curiously, this re-presentation is again expounded in the introduction, this time to the new English translation of Ehrlich's magnum opus.⁷⁵ In this novel framing of Ehrlich's ideas, we are told that Ehrlich represents an approach for which Luhmann's sociology of law can be seen 'the continuation'⁷⁶ if not the sociological culmination. All of this even though Luhmann himself does not even refer to Ehrlich!

When I last wrote about Ehrlich, more than 20 years ago, my main goal was to set out the differences between his ideas and those of Pound. Ziegert (one of the few to appreciate the continuing relevance of this then half-forgotten pioneer) argued then that Pound's distinctions between 'law in books' and 'law in action' 'could only be' that put forward by Ehrlich.⁷⁷ In my article, I claimed that, on the contrary, the ideas were different. In fact, even Pound himself, in a retrospective towards the end of his career, admitted that he had (as he put it) 'developed' living law into the somewhat

⁷⁴ R Pound, 'Introduction to Ehrlich, E.' in *Fundamental Principles of the Sociology of Law*, WL Moll (tr) (New York, Russell and Russell, 1936/62). Pound's use of Ehrlich was endorsed by Alex Ziegert in his 'The Sociology behind Eugen Ehrlich's Sociology of Law' (1979) 7 *International Journal of the Sociology of Law* 225.

⁷⁵ KA Ziegert, 'Introduction' in E Ehrlich, *The Fundamental Principles of Sociology of Law* (New Brunswick, Transaction Publishers, 2001) 19–44.

⁷⁶ *Ibid* xxxi.

⁷⁷ Ziegert, above n 74.

different concept of 'law in action'.⁷⁸ Whilst acknowledging that there was some overlap between the concepts of 'law in action' and 'living law', I set out to show that Ehrlich's original idea of living law should be considered a more promising and richer starting point for an approach more open to mainstream sociological concerns and less geared to the problem of legal effectiveness.

I was convinced then of the overriding importance of correcting Pound's misinterpretations: getting Ehrlich 'right' was the only way that his valuable insights could be recovered. I would still argue that Pound's use of Ehrlich limits the potential contribution of the idea of living law. However, whilst it is good that more scholars (including Ziegert) have come to agree that it is important to recognise the differences between these two authors, I would now add that simply claiming that Pound got Ehrlich 'wrong' oversimplifies the issue of how classical authors are made relevant to contemporary problems. To a great extent, it is impossible to read a past author except through current lenses.⁷⁹ What Pound took from Ehrlich can be seen as having special relevance for his own time—and may be an interpretation that could still be salient in other times and places. Equally, alternative 'readings' have to 'prove' their superiority, now and in the future.

Ziegert in his new introduction aims both to present a faithful picture of Ehrlich and also to show that he is a forerunner of Luhmannian thinking. This leads to interesting, if sometimes surprising, reformulations. We are told that Ehrlich is the founder of the 'genuine social level apart from the individual'. For Ehrlich, like Luhmann, in thinking about law, 'expectations not sanctions matter'. What Ehrlich was trying to say in speaking of living law was that:

... the norm structure in inner order of associations is what individuals need as a reference point to construct themselves as 'behaving individuals' and to expect from others what they can reasonably expect from themselves ... this reflexive domain is the domain of law and has nothing to do with the state governance [sic] or sovereignty.⁸⁰

Likewise, the account of Ehrlich's policy sympathies, although put in unfamiliar language, is not implausible. He is said to be against the self-aggrandisement of lawyers and state functionaries, but to believe that 'society' will keep these in check. Ehrlich, we are told, shows law's 'blind spot' which results from the fact that law is 'a trade', and lawyers refer back only to legal practice and so don't see what else is happening. In a few

⁷⁸ Pound, above n 74. In his introduction to Ehrlich's book, he had already complained that 'Europeans had a phobia of the state'. However, he was living in the new deal United States of the 1930s, not as a citizen of strong—and soon to be totalitarian—European states.

⁷⁹ HG Gadamer, *Truth and Method* (New York, The Seabury Press, 1975).

⁸⁰ Ziegert, above n 75, xii.

cases though, Ziegert's interpretations seem particularly forced ones. For Ehrlich, we are told:

... [the] evolution of legal decision-making through legal practice conditions the social order for further evolution and specialises the court-based decision-making system as the effective hub of the living law.

However, whilst it is fair to say that Ehrlich did admire the common law and the (somewhat idealised) way he assumed it operated, describing what courts do as 'the hub of the living law' seems a strange way of re-presenting a book that (pace Luhmann) sought to describe how living law was actually rooted in the everyday life of associations.

Arguably, Ziegert's reformulations of Ehrlich also do a disservice to Luhmann by blurring the way in which his approach to socio-legal theorising has involved a 'paradigm' shift from 'open system' to 'closed system' theorising about law in society.⁸¹ On this point, Ziegert explains that 'Ehrlich does not deny the need for, or the fact of, legal specialisation (differentiation)'.⁸² However, 'non denial' is hardly the equivalent of the theoretical breakthrough which Luhmann builds on the back of his radical differentiation of legal and other communicative systems. Ziegert goes on to say that, for Ehrlich:

What makes legal propositions legal is not a higher normativity but the specialised differentiated performance of a subject of social operations responding to pressures of uncertainty.⁸³

Here, too, it would seem more correct to say that, unlike Luhmann, Ehrlich mixes discussions of law and morals at the level of social pressures, but seeks to distinguish them in terms of the psychology of the individuals deciding whether to recognise their legitimacy.

The same applies when Ziegert tells us that, 'like Luhmann, Ehrlich is a scientific observer of law in its social context'.⁸⁴ Again, it would seem better to recognise that 'context' has more of a technical meaning for Luhmann, at least as explained by Teubner, his leading interpreter in legal sociology. Law *makes* its own context—and there are a series of contexts depending on what subsystem we start from. Likewise, when Ziegert affirms that, for Ehrlich, '[l]aw can never control the factual order itself', we need to avoid confusing two senses of 'control'. Ehrlich thinks that only a better informed form of legal decision making could—and should—do justice to the facts of the living law (this was his legacy to the American Legal Realists). However, for Luhmann, order comes from, or is imposed on the 'noise', of the outside world, and law's role includes maintaining normative expectations by 'not

⁸¹ Nelken, above n 26.

⁸² Ziegert, above n 75, xxxiii.

⁸³ Ziegert, *ibid*, xxiii.

⁸⁴ *Ibid* xv.

learning' from the antinomian facts of social life. If Ehrlich's message is that we must stop buying into jurists' way of seeing the world, for Luhmann 'scientists' must make a 'second-order' assessment of law's way of observing the world—or as Teubner puts it, of 'how the law thinks'.⁸⁵

Although we should appreciate the effort to make Ehrlich speak to present concerns, we need also, I think, be cautious about assimilating him to conventional wisdom rather than using him to gain a perspective on it. Whereas Ziegert once told us that Ehrlich's work could provide a valuable resource for improving efforts at social engineering,⁸⁶ he now tells us that Ehrlich, like Luhmann, is sceptical about such efforts and that time has shown the sense of this scepticism.⁸⁷ However, the current period is different from the early 1980s. An obsession with the limits of 'legal effectiveness' can easily become a theoretical dead-end in a period where everyone assumes an instrumentalist role for law and exaggerates its ability to produce social change. However, matters may be different at a time where there is too much cynicism about law's ability to deliver social progress. The same applies to the closely related research obsession with the so-called 'gap' between law's promise and achievement.⁸⁸ What is a tired approach within pragmatic, technically oriented, Anglo-American legal cultures may be much more heuristically useful in places, such as some continental European jurisdictions, where the 'gap' between legal promise and implementation is typically so wide that it is just taken for granted.⁸⁹ In such societies, filtering Ehrlich's message through Luhmann's formulas may be less innovative than it might otherwise seem.

However, all depends on what is done with these ideas. In this respect, it is interesting to contrast Ziegert's re-presentation of Ehrlich with Gunther Teubner's argument about 'Global Bukowina'.⁹⁰ Teubner, like Ziegert, is engaged in a rewriting of Ehrlich in Luhmannian terminology. However, whereas, for Ziegert, Ehrlich's ideas were right when they were first put forward and (when properly reformulated) are still valuable now, Teubner, more surprisingly, argues that Ehrlich was actually wrong in his own time and only really comes into his own now at a time of globalisation. In addition, whereas both Ziegert and Teubner treat Ehrlich as a forerunner of the Luhmannian doxa, Teubner is explicit about the need also to change and 'update' Ehrlich's arguments.

These differences are linked to the topics which these authors use Ehrlich to address. Ziegert is concerned with his relevance to law in the nation

⁸⁵ G Teubner, 'How the Law Thinks' (1989) 23 *Law and Society Review* 727–57.

⁸⁶ Ziegert, above n 74.

⁸⁷ Ziegert, above n 75.

⁸⁸ D Nelken, 'The gap problem in the sociology of law' (1981) *Windsor Yearbook of Access to Justice* 35–62.

⁸⁹ D Nelken, 'Law's Embrace' (2001) 3 *Social and Legal Studies* 444–60.

⁹⁰ Teubner, above n 15.

state, the context Ehrlich was originally writing about. Teubner, on the other hand, in developing a highly original autopoietic excursus on global law, explores Ehrlich's relevance in examining the role of law in the international arena in exchanges mainly involving private actors—matters about which Ehrlich said little in his *Grundlegung*. According to Ziegert, Ehrlich is not to be understood primarily as concerned with legal pluralism. Indeed, he uses Luhmannian language to show how different elements of Ehrlich's scheme of thought such as living law and norms for decisions are integrally related. Teubner, on the other hand, takes Ehrlich to be a forerunner in the study of legal pluralism, but gives this a very different meaning when re-examined in the light of the Luhmannian theory of autopoiesis.

Ziegert wants us to accept that Luhmannian insights can help get us to the heart of what Ehrlich was really trying to say. In assessing his interpretation, the question we need to ask ourselves is the relatively straightforward one of whether we find his reading Ehrlich convincing and suggestive. However, with Teubner, it is difficult to know how seriously he wants us to take his argument as an actual interpretation of Ehrlich. Does his use of the term 'Global Bukovina' represent a genuine effort to apply Ehrlich's ideas to the new global context? Or is it no more (and no less) than a playful—and paradoxical—metaphor?⁹¹ After all, if everywhere is now a periphery, where is the centre? (Can there be only periphery?) What, if anything, is there in common between Ehrlich's Bukovina and the world being remodelled by globalisation? Between a province waiting for ethnic nationalism and a world in which state borders lose meaning? On the one hand, Teubner's audacious proposal that Bukovina has now gone global lays a direct challenge to those who say Ehrlich's ideas necessarily relate to specific space and time conditions of a province in the defunct Austro-Hapsburg empire. However, at the same time, the use of this phrase itself perpetuates the misconception that Ehrlich's ideas get their sense from the (relative) lack of state presence in Bukovina. Ehrlich is seen as able to be relevant now (only) because we have a new situation of normative life again being formed *beyond* the reach of state. Yet it seems more faithful to Ehrlich to say that his arguments concerned the possibilities of normative life being formed *outside* of the state, even if not necessarily *beyond* its jurisdiction.

In any case, Teubner is also quite explicit about what he sees as the need to correct and 'develop' Ehrlich's ideas if we are to grasp the new form

⁹¹ However, metaphors can be real in their effects. Bukovina in the Americas—the active website for those (overwhelmingly ethnic Germans) nostalgic about their roots in Bukovina—describes features of life there in the past. But whilst it makes no mention of Ehrlich, someone has written in to ask what others think of Teubner's paper on 'Global Bukovina'. See D Nelken, 'An e mail from Global Bukovina' (2007) 3 *International Journal of Law in Context* 103–22. (And the Brazilian Professor in question has since got in touch with me).

of global law beyond the state. This makes it difficult to decide how far Teubner's 'updating' is intended to be true to what Ehrlich might himself have said if asked to theorise *lex mercatoria*. What evidence there is on this point does not go in Teubner's favour.⁹² What is more clear is that Teubner finds Ehrlich convincing on some points even if he also sees the need for revisions. Thus he agrees with Ehrlich that the basis of law is in society and not in legal dogmatics—placing Ehrlich's formulation of this truth as the head note of his paper. He also sees merit in the fact that, as he puts it, Ehrlich 'asks where are norms actually produced and treats politics and social on equal footing'.⁹³ There are also happy parallels in their endeavours. Where Ehrlich's idea of living law, as he says, 'breaks a taboo' that law must be identified with the state, so too does the idea that there can be a *lex mercatoria* independent from all nation states.

However, as with Ziegert, the process of translating Ehrlich's ideas into the theoretical language of Luhmannian autopoietic theory can also make it difficult to know where Ehrlich ends and Luhmann begins. Most important, the source of living law for Teubner is not that hypothesised by Ehrlich. Teubner does not anchor this in the order of associations as such (except in so far as he sees law as 'closely coupled' with economic processes). Rather, he relies on the autopoietic theory of law which takes law to be one of a number of self-referring discursive sub-systems, each constructing their own environment. However, as we noted when discussing Ziegert's recent work, this Luhmannian idea has no real trace in Ehrlich. Nor was Ehrlich, unlike Teubner, trying to explain how law in general or contract law in particular succeeds in keeping the paradoxes of its self-validation latent. If anything, he observed a lack of wider social validity of much state law.

Teubner talks about law being produced 'at the boundary with economic and technological processes'. He tells us that, likewise, according to Ehrlich, 'living law is produced in the periphery of the legal system in close contact with the external social process of rule formation'. It is true that Ehrlich too suggested that economic development has and will transform law from within (the theme taken up later by Karl Renner).⁹⁴ However, it is far from obvious that Ehrlich sees the distinction between the centre and the periphery as Teubner does. For example, his definition of 'living law' included lawyers' contracts, which would have been a productive source of law even in imperial Vienna. What is more, the notion of periphery, as employed by Teubner, is ambiguous as between, on the one hand, Ehrlich's

⁹² Michaels (2005) quotes a little-known paper by Ehrlich concerning the history of private international law from which it seems likely that he would then have denied the status of law to *lex mercatoria*. On the other hand, we do not know what Ehrlich would say now and, on our interpretation, it is that which interests Teubner more than what Ehrlich actually said then.

⁹³ Teubner, above n 15, 11.

⁹⁴ Renner, above n 30.

location in the province of Bukovina on the edges of the Austro-Hapsburg empire and, on the other, everyday life which is *everywhere* peripheral to what goes on in the courts.

Teubner's focus is on the legal regimes created by and for global non-state actors by invisible social networks and invisible professional communities which transcend territorial boundaries. He sees these new forms of global law as growing up in a world characterised by a highly globalised economy and a weakly globalised politics. Even if Ehrlich's own examples were domestic ones, many of the regimes Teubner wishes to analyse do come near to what Ehrlich meant by living law. Transnational contracting, arbitration and the other processes of *lex mercatoria* could be so characterised, as could 'intra organizational regulation in multinational companies'. It would also seem fair to assume that Ehrlich's concept can be applied to 'all forms of rule making by private governments' and 'professional rule production', although it should also be noted that Ehrlich's interest was less in rule making as such and more in the way in which such rule systems are actually applied in practice.

On the other hand, Teubner's example of 'technical standardization' as an instance of living law has a more dubious pedigree. The whole phenomena of so-called 'bureaucratic administrative law'⁹⁵ seems far from Ehrlich's concerns, and his account of living law gives little indication that he realised that a form of normativity based on technical standards and conventions would become so important. Even Teubner's example of human rights law is not a straightforward case of living law. Much human rights law is actually promoted or underwritten by state or international law. Even if non-state actors such as NGOs, etc play a crucial activist role, it still seems crucial to recognise the extent to which these associations are making rules for others,⁹⁶ not, as in Ehrlich's account, only for their own members. As far as these two key elements of global law are concerned, the idea of living law may obscure more than it reveals about them.

Why then bring Ehrlich into it, given that he had little to say about such transnational legal regimes? Teubner arrives there by a process of elimination. We cannot, he says, understand legal globalisation via political theories, there is no world constitution to 'structurally couple' law and politics: these legal regimes are governed less by international courts or worldwide legislation than by multinational law firms. So Ehrlich's 'living law' is the best candidate for describing how the globalisation of law 'creates a multitude of de-centred law making processes in various sectors of civil society

⁹⁵ D Nelken, 'Is there a crisis in law and legal ideology?' (1982) *Journal of Law and Society* 177–89.

⁹⁶ D Nelken, 'Signaling Conformity: Changing Norms in Japan and China' (2006) 27 *Michigan JIL* 933–72.

independently of national states'.⁹⁷ On the other hand, the way in which Ehrlich himself characterised living law in Bukovina will not as such suffice for understanding these new forms of global living law. Teubner, therefore, draws a strong contrast between the sense of Ehrlich's arguments in their time and place, and the updating of his ideas for today's world.

As against Ehrlich's idea of living law, Teubner advises, law is 'not drawing its strength now from ethnic communities as the old living law was supposed to do'.⁹⁸ 'Ehrlich', Teubner goes on, 'was of course romanticizing the law-creating role of customs, habits and practices in small-scale rural communities'. The global world, by contrast, relies on 'cold technical processes not on warm communal bonds'. However, the assumption that Ehrlich is putting forward a thesis of legal pluralism rooted in ethnic communities—even if Teubner is certainly not the only commentator to take such a line—rests on a tendentious interpretation which has poor support in the text itself. This way of reading Ehrlich also displays the genetic fallacy by confusing factors that may have helped give rise to his argument, with the substance and validity of his ideas themselves. In fact, Ehrlich's claims were intended to be potentially universalisable ones, applicable well beyond Bukovina, and had less to do with ethnic differences than with the way in which laws, like norms, are created through the life of 'associations'. This helps to explain why the question of ethnic pluralism was not the main issue for early critics of Ehrlich such as Kelsen, whose objection was more to Ehrlich linking law to the actual normative practices of groups even when these were inconsistent with the Austrian code.

Teubner's revisions go much further, however. For him, the problem with applying Ehrlich's ideas is not merely the non-universability of the contingencies of ethnic pluralism in Bukovina. It is the link between the law and people's social experiences which needs to be broken if we are to understand how law reproduces itself. We must recognise that 'the lifeworld of different groups and communities is not the principal source of global law'. Instead, he argues, we should shift:

... from groups and communities to discourses and communicative networks, the proto law of specialized organisational and functional networks nourished not by stores of tradition but from the ongoing self-reproduction of highly specialized and often formally organized and rather narrowly defined global networks of an economic, cultural, academic or technological nature.

⁹⁷ Teubner, above n 15, xiii.

⁹⁸ The formulation of this sentence is somewhat ambiguous and it is therefore not entirely clear whether Teubner himself totally endorses this account of Ehrlich's ideas. Does 'supposed to do' here mean 'as commonly thought'? However, then, if Teubner knows better, why does he make it seem as if this does represent Ehrlich's views? Or does 'supposed to do' mean what living law 'should' reflect the different laws of ethnic communities? This would be a different claim having less to do with where law comes from than with the need to recognise cultural diversity.

Teubner inserts Ehrlich's ideas into what he (unlike Ziegert) acknowledges to be a new and unfamiliar framework. We must, he argues, replace:

... rule, sanction and social control with speech acts, coding transformation of differences and paradox. It is not rules but communicative events that should be our focus and it is the self-organising process of rules that is important in understanding the symbolic reality of legal validity, not the possibility of imposing sanctions.⁹⁹

However, at the same time, he suggests that it is only if we make this move towards autopoiesis theory that we can come to discover how, in some respects, Ehrlich's approach is now *more valid* than it was in the past. As he puts it:

... although Eugen Ehrlich's theory turned out to be wrong for the national law of Austria, I believe that it will turn out to be right, both empirically and normatively, for the newly emerging global law.¹⁰⁰

Once again, however, such striking arguments need to be carefully unpacked. In what sense does the truth of Ehrlich's (many) ideas depend on what happened in the past or on what the future brings? Should scientific claims be judged in the light of historical events? What exactly is Teubner referring to when he asserts that Ehrlich 'turned out' to be 'wrong'? This cannot, for example, include his claims about the centre of gravity of law being in society since Teubner takes this as his starting point. Have Ehrlich's ideas about living law been discredited? Must we really go beyond the boundaries of state law in order to find merit in Ehrlich's theses? When exactly did Ehrlich's theory 'turn out to be wrong'? When the First World War caused the Austrian empire to collapse? Or when he was forced to teach in Rumanian in the last years of his life (before the Nazis and communists then tried to cancel his memory)? Arguably, the rise of ethnic nationalism could actually prove Ehrlich's point about the importance of more local loyalties rather than those to the imperial state (and it is strange for Teubner to call the law of the Austro-Hungarian empire 'the national law of Austria').

What evidence, on the other hand, does Teubner have that Ehrlich will eventually turn out to be right? Even if we choose to look beyond state law, it is not obvious why the growth of *lex mercatoria* proves Ehrlich to be 'right'. It certainly shows that there can be forms of normative ordering that some call law, even though they are not based on state recognition. However, Ehrlich was not mainly concerned with whether normative orderings were (already) actually called law, but with whether scientific observers had reasons to call them law. And there are, of course, with due respect to

⁹⁹ Teubner, above n 15, 13.

¹⁰⁰ *Ibid* 3.

Teubner, still many who argue that *lex mercatoria* is not really law whatever it is called. Even though Teubner tells us that Ehrlich has been proven right through having 'predicted' the rise of non-state global law, he himself asserts that it is only a question of time before these new forms of global law will be, as he says, 're-politicized' (although admittedly he considers that this will not take place through traditional political institutions, but via 'structural coupling' with specialised discourses). Once this takes place, would this mean that Ehrlich will again have 'turned out 'to be wrong'? Is his a thesis that only works for periods of transition—for interstitial times as well as places?

CONCLUSION: INTERPRETATION AS APPROPRIATION

In this review of Ehrlich's legacies—the way in which his work has influenced and been taken up by later scholars—we have sought to provide examples of inquiries inspired by Ehrlich's ideas as well as efforts to revitalise his work. We have shown the difficulty of maintaining any simple distinction between efforts to place Ehrlich's work in its context and attempts to get it out of its context, and suggested that a degree of 'rewriting' forms an important part of re-contextualising projects whether these be carried out by Pound, Ziegert or Teubner. Once we accept that interpretation is a form of appropriation, it becomes more difficult (although not impossible) to distinguish between the appropriation and misappropriation of a previous writer's ideas.

For the purpose of tracing Ehrlich's legacy, it makes sense to ask first of all how far Teubner is faithful to Ehrlich. However, we should not be surprised if Teubner's account of what is right and wrong about Ehrlich's arguments tells us at least as much about Teubner—and his desire to show the value of the autopoietic approach to law and society—as it does about Ehrlich. Any discussion of Teubner on Ehrlich which is only interested in Ehrlich is therefore going to miss the point of what Teubner is doing. We are dealing with an author who has openly chosen to 'use' Ehrlich as a pretext to introduce a series of papers about non-state law. Therefore, the more pertinent question here, as in other cases of appropriation, is to ask how far Teubner's reading of Ehrlich's work has helped him to throw new light on *lex mercatoria*.

Teubner begins his paper by contrasting a top-down political global order based on American policing (he refers to Clinton's 'humanitarian' peace-keeping) to one constructed by means of an Ehrlich-type bottom-up 'peaceful' legal order. The latter, which he sees as more important, he equates with a range of developments in global non-state law. As it happens, after 9/11 things have 'turned out' differently with respect of the extent of American military engagements than Teubner or anyone else could have anticipated.

However, we can also question whether Global Bukowina really represents the alternative to the imposed Pax Americana that Teubner claims it does. Is *lex mercatoria*, for example, actually emancipated from politics—or is it precisely political by pretending not to be so? It is after all the genius of the common law that it ‘appears’ to be more geared to bottom-up economic necessities than top-down political projects. Hence the growth of *lex mercatoria* can be seen as helping to promote American ideas about the relationship between state and market and spread ways of doing law which privilege the symbolic capital of their professional elites.¹⁰¹

What of the political and practical implications of Teubner’s rewriting of Ehrlich? As is not uncommon in his writings, Teubner deliberately blurs the line between describing and advocating.¹⁰² Here he argues that *lex mercatoria* should be legally recognised for what it is, the prototype of non-state law that is inevitably replacing that of the nation state. As against this, Ralf Michaels, for example, has recently insisted that:

... instead of moving the state to the periphery of our analyses and thereby ignoring its importance for our problems, we should move it into the center of our analysis, so we can critique its role in globalization.

According to him:

... if we want to emancipate non-state law vis-à-vis the state, then it is not enough to look at the requirements on the side of non-state law. We must also look at what is necessary on the side of the state to make such emancipation possible. And we must ask what kind of emancipation this will be.¹⁰³

For Michaels:

The simple idea that because globalization brings about a plurality of legal orders the state should recognize all these orders as law is either too radical or not radical enough. The idea is too radical if it expects the state to do things that run counter to what the state, as it exists right now, is about. In a nutshell, the state will always react as state to the challenges of globalization, including the challenge from non-state communities and their laws. The idea is not radical enough if it believes that such a change could be brought about without changing the role of the state. In order to overcome the state-focus of conflict of laws, we must, ultimately, overcome the state itself. Ultimately, by acknowledging the right of everyone to make law, we accept that no one has the right to make law anymore. If everyone is able to claim jurisdiction, no one will have a superior position to mediate between conflicting regulations of conflicting communities anymore, at least not from a superior basis.¹⁰⁴

¹⁰¹ Y Dezalay and B Garth, *Dealing in Virtue* (Chicago, University of Chicago Press, 1996).

¹⁰² D Nelken, ‘Beyond the Metaphor of Legal Transplants?: Consequences of Autopoietic Theory for the Study of Cross-Cultural Legal Adaptation’ in J Priban and D Nelken (eds), *Law’s New Boundaries: The Consequences of Legal Autopoiesis* (Dartmouth, 2001) 265–302.

¹⁰³ Michaels, above n 38, 56.

¹⁰⁴ *Ibid* 53.

If Teubner is entitled to appropriate Ehrlich for his purposes, the same applies to those who have in turn been stimulated by Teubner's ideas. Some of these writers have in fact gone on to develop his creative 'reworking' of Ehrlich in unexpected directions. Whilst Teubner himself counterposed Global Bukowina to the idea of a global political government, Thomas Mathiesen, for example, takes Teubner's idea and uses it to chart the recent growth of a global control system, what he describes as a menacing '*lex vigilatoria*' of surveillance removed from the political control of individual nation-states.¹⁰⁵ According to Mathiesen, the signs of this global control without a state may be seen in the ties between, for example, the SIRENE exchange, Eurodac, communication control through retention and tapping of telecommunications traffic data, the spy system Echelon, and so on. Mathiesen's account shares with Teubner's a focus on the way in which legal regimes are becoming increasingly untied or 'de-coupled' (to use Teubner's term) from nation-states, but the idea of imposed international normative order represented here is a far cry from that described by Teubner—or for that matter by Ehrlich.

As we see, Mathiesen cites Teubner on Global Bukowina in order to make an argument that he would probably not recognise. However, other authors offer even more contestable interpretations of Teubner on Ehrlich. In an original discussion of the spread of transgenic technologies through 'timespace', Paul Street draws on the disciplinary resources of critical human geography, post-structuralism and actor network theory. His aim in large part is to show how new developments are challenging the boundaries of existing academic disciplines. Thus he describes modes of ordering that weave together legal and other normative systems through what are made to seem inanimate material technologies. For these technologies to flourish, he argues, a range of interrelationships must occur that cut across social and legal boundaries and mobilise farmers, government departments, texts, individuals, international organisations, corporations, non-governmental organisations, lawyers, as well as the seeds themselves and a host of other 'actants' (as Latour describes them). Law in the form of intellectual property rights plays a special role in bringing together dispersed actors in polymorphic social networks and maintaining the meaning of biotechnologies through time and space so as to enrol farmers into social networks necessary for the purposes of producers.

In the course of developing his argument, Street takes aim at Luhmann, who, he alleges, denies that 'law comes out of the social'. He likewise criticises Teubner for his 'attempt to give law an autonomy beyond society'.¹⁰⁶

¹⁰⁵ T Mathiesen, 'Lex Vigilatoria—Towards a control system without a state?', *Essays for civil liberties and democracy, European Civil Liberties Network* (2005).

¹⁰⁶ P Street, 'Stabilizing flows in the legal field: Illusions of permanence, intellectual property rights and the transnationalisation of law' (2003) 3 *Global Networks* 7–28 at 9.

His case study, he says, shows rather that all law is always social and that there is no 'global law'. Specific companies invent genetically modified seeds, and use text objects, private policing and copyright law with the help of the state so as to enforce their vision of the facts about seeds and the appropriateness of exploiting their property rights. In the end, even (even?) Ehrlich is seen to have got things wrong. Street concludes his article saying that:

... only through examining the particular practices and processes can we glimpse the performative power not of law itself, but of those networks that successfully manage to mobilise law. For law to be successful it must in one sense be living law. It must be a law that exists beyond the proclamations and practices of lawyers and the state. But this is not Ehrlich's conception of living law. While it is a law that dominates life itself it is a law that lives within, and a law that leads to convergent habitual behaviour, but only for so long as it continues to be mobilized.¹⁰⁷

Unlike Teubner, therefore, who tries to anchor his concept of Global Bukowina in Ehrlich's pioneering scholarship, Street prefers to emphasise how new developments require a radical new way of thinking, starting from scratch. It is not entirely clear what Street finds lacking in Ehrlich's approach—his exegesis of what Ehrlich wrote is even more tangential to the real point of his paper than Teubner's use of him. But let us assume, for argument's sake, that Street is right to say that what he is describing does not correspond to what Ehrlich was talking about when he introduced the concept of 'living law'. It would be all too easy to explain this by saying that Ehrlich did not really anticipate the developments described by Street. With due respect to Ziegert and Teubner, we could also wonder why anyone should have expected him to. On the other hand, matters are different if, like them, we are interested not only in what Ehrlich once meant, but also in what Ehrlich means now. In that case, we could argue that his legacy includes all that his work has inspired, including efforts to go beyond him.

¹⁰⁷ *Ibid* 28.