GLOBAL LEGAL PLURALISM

PLURALISMO JURÍDICO GLOBAL

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ABSTRACT

This Article grapples with the complexities of law in a world of hybrid legal spaces, where a single act or actor is potentially regulated by multiple legal or quasi-legal regimes. In order to conceptualize this world, I introduce literature on legal pluralism, and I suggest that, following its insights, we need to realize that normative conflict among multiple, overlapping legal systems is unavoidable and might even sometimes be desirable, both as a source of alternative ideas and as a site for discourse among multiple community affiliations. Thus, instead of trying to stifle conflict either through an imposition of sovereigntist, territorially-based prerogative or through universalist harmonization schemes, communities might sometimes seek (and increasingly are creating) a wide variety of procedural mechanisms, institutions, and practices for managing, without eliminating, hybridity. Such mechanisms, institutions, and practices can help mediate conflicts by recognizing that multiple communities may legitimately wish to assert their norms over a given act or actor, by seeking ways of reconciling competing norms, and by deferring to other approaches if possible. Moreover, when deference is impossible (because some instances of legal pluralism are repressive, violent, and/or profoundly illiberal), procedures for managing hybridity can at least require an explanation of why a decision maker cannot defer. In sum, pluralism offers not only a more comprehensive descriptive account of the world we live in, but also suggests a potentially useful alternative approach to the design of procedural mechanisms, institutions, and practices. The Article proceeds in three parts. First, I summarize the literature on legal pluralism and suggest ways in which this literature helps us understand the global legal environment. Second, drawing on pluralist insights, I offer an analytical framework for addressing normative conflicts, one that provides an alternative both to territorially-based sovereigntism and to universalism, and instead opens space for the "jurisgenerative" interplay of multiple normative communities and commitments. This framework generates a series of values and principles that can be used to evaluate the efficacy of procedural mechanisms, institutional designs, and discursive practices for managing hybridity. Third, I survey a series of such mechanisms, institutions, and practices already in use in a wide variety of doctrinal contexts, and I discuss how they work (or sometimes fail to work) in actual practice. And though each of these mechanisms, institutions, and practices has been discussed individually in the scholarly literature, they have not generally been considered together through a pluralist lens, nor have they been evaluated based on their ability to manage and preserve hybridity. Thus, my analysis offers a significantly different approach, one that injects a distinct set of concerns into debates about global legal interactions. Indeed, although many of these mechanisms, institutions, and practices are often viewed as "second-best" accommodations between hard-line sovereigntist and universalist positions, I argue that they might at least sometimes be preferable to either. In the Conclusion, I suggest implications of this approach for more general thinking about the potential role of law in identifying and negotiating social and cultural difference.

KEY WORDS: Legal pluralism. Global legal order.

RESUMO

Este artigo aborda as complexidades do Direito em um mundo de espaços legais híbridos, onde um único ato ou ator é potencialmente regulado por regimes jurídicos múltiplos ou quase-legais. A fim de conceituar este mundo, eu introduzo literatura sobre o pluralismo jurídico, e sugiro que, após a sua compreensão, precisamos perceber que o conflito normativo entre múltiplos, sobrepostos sistemas jurídicos são inevitáveis e, por vezes, pode até ser desejável, tanto como fonte de idéias alternativas e como um lugar para o discurso entre múltiplas afiliações comunitárias. Assim, ao invés de tentar abafar o conflito através de imposição de soberania, prerrogativa de base territorial ou através de esquemas de harmonização universalista, às vezes comunidades devem procurar (e cada vez mais estão criando) uma grande variedade de mecanismos processuais, instituições e práticas de gestão, sem eliminar o hibridismo. Tais mecanismos, instituições e práticas podem ajudar a mediar conflitos, reconhecendo que várias comunidades podem legitimamente pretender fazer valer suas normas sobre determinado ato ou ator, procurando formas de conciliar as normas concorrentes, e cedendo espaço a outras abordagens, se possível. Além disso, quando deferência é impossível (porque alguns exemplos de pluralismo jurídico são repressivos, violentos e/ou profundamente não liberais), procedimentos para a gestão hibridismo podem, pelo menos, exigir uma explicação do porquê não se decidir pelo seu acatamento. Em suma, o pluralismo não só oferece uma visão descritiva mais abrangente do mundo em que vivemos, mas também sugere uma abordagem alternativa potencialmente útil para a concepção de mecanismos processuais, instituições e práticas. O artigo desenvolve-se em três partes. Primeiro, vou resumir a literatura sobre o pluralismo jurídico e sugerir maneiras pelas quais essa literatura nos ajuda a compreender o ambiente jurídico global. Em segundo lugar, com base em insights pluralistas, ofereço um quadro analítico para a resolução dos conflitos normativos, que oferece uma alternativa tanto para a visão baseada na soberania de base territorial como para o universalismo, e ainda abre espaço para a ação "jusgenerativa" recíproca de múltiplas comunidades normativas e compromissadas. Esse quadro gera uma série de valores e princípios que podem ser usados para avaliar a eficácia dos mecanismos processuais, projetos institucionais e práticas discursivas para a gestão do hibridismo. Terceiro, estudo uma série de mecanismos, instituições e práticas já em uso em uma ampla variedade de contextos doutrinários, e discuto como eles funcionam (ou às vezes não funcionam) na prática. E embora cada um desses mecanismos, instituições e práticas tenha sido discutido individualmente na literatura acadêmica, eles geralmente não têm sido considerados em conjunto através de uma lente pluralista, nem foram avaliadas com base em sua capacidade de gerir e preservar o hibridismo. Assim, minha análise oferece uma abordagem significativamente diferente, que insere um conjunto distinto de preocupações no debate sobre as interações jurídicas globais. Na verdade, embora muitos desses mecanismos, instituições e práticas são muitas vezes vistos como acomodações secundárias entre a linha-dura baseada na soberania e as posições universalistas, defendo que elas possam, pelo menos, às vezes, ser preferíveis a qualquer uma delas. Na Conclusão, sugiro as implicações dessa abordagem para um pensamento mais geral sobre o papel potencial do Direito na identificação e negociação da diferença social e cultural.

PALAVRAS-CHAVE: Pluralismo jurídico. Ordenamento jurídico global.

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I. INTRODUCTION

We inhabit a world of multiple normative communities.[1] Some of those communities impose their norms through officially sanctioned coercive force and formal legal processes. These are the nation-state governments and courts familiar to legal scholars. But of course many other normative communities articulate norms without formal state power behind them. Indeed, legal pluralists have long noted that law does not reside solely in the coercive commands of a sovereign power.[2] Rather, law is constantly constructed through the contest of these various normgenerating communities.[3] Thus, although "official" norms articulated by sovereign entities obviously count as "law," such official assertions of prescriptive or adjudicatory jurisdiction are only some of the many ways in which normative commitments arise.

Hartog, Mark W. Janis, Vicki Jackson, Stan Katz, Ha rold Hongju Koh, Stephen Kotkin, David Luban, Chibli Mallat, Jamie Mayerfeld, Sally Engle Merry, Naomi Mezey, Andrew Moravcsik, Noah Novagrodsky, Mark Osiel, Hari Osofsky, Deborah N. Pearlstein, Jeremy Paul, David G. Post, Catherine Powell, Margaret Jane Radin, Balakrishnan Rajagopal, Judith Resnik, Lawrence Rosen, Kim Lane Scheppele, David Schneiderman, Kathryn Sikkink, Brian Z. Tamanaha, Gunther Teubner, Cora True-Frost, Wibren van der Burg, Carlos Vázquez, Kay B. Warren, and Carol Weisbrod. This paper also appears in Southern California Law Review, Vol. 80, p.1155, 2007.

[1]See Robert M. Cover, The Supreme Court, 1982 Term—Foreword: Nomos and Narrative, 97 HARV. L. REV. 4, 4 (1983) [hereinafter Cover, Nomos and Narrative] ("We inhabit a nomos—a normative universe.").

[2]See, e.g., Sally Falk Moore, Legal Systems of the World: An Introductory Guide to Classifications, Typological Interpretations, and Bibliographical Resources, in LAW AND THE SOCIAL SCIENCES 11, 15 (Leon Lipson & Stanton Wheeler eds., 1986) [hereinafter Moore, Legal Systems of the World] ("[N]ot all the phenomena related to law and not all that are lawlike have their source in government."). For further discussions of legal pluralism, see BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION (2d ed. 2002); LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2005); CAROL WEISBROD, EMBLEMS OF PLURALISM: CULTURAL DIFFERENCES AND THE STATE (2002); Keebet von Benda-Beckmann, Transnational Dimensions of Legal Pluralism, in BEGEGNUNG UND KONFLIKT: EINE KULTURANTHROPOLOGISCHE BESTANDSAUFNAHME 33 (2001); Gunther Teubner, 'Global Bukowina': Legal Pluralism in the World Society, in GLOBAL LAW WITHOUT A STATE 3 (Gunther Teubner ed., 1997); Franz von Benda-Beckmann, Who's Afraid of Legal Pluralism?, 47 J. LEGAL PLURALISM & UNOFFICIAL L. 37 (2002); David M. Engel, Legal Pluralism in an American Community: Perspectives on a Civil Trial Court, 5 AM. B. FOUND. RES. J. 425 (1980); Marc Galanter, Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law, 19 J. LEGAL PLURALISM 1, 28–34 (1981); John Griffiths, What Is Legal Pluralism?, 24 J. LEGAL PLURALISM & UNOFFICIAL L. 1 (1986); Sally Engle Merry, International Law and Sociolegal Scholarship: Toward a Spatial Global Legal Pluralism, STUD. IN L. POL. & SOC'Y (forthcoming 2007) [hereinafter Merry, Spatial Legal Pluralism]; Sally Engle Merry, Legal Pluralism, 22 L. & SOC'Y REV. 869, 870 (1988) [hereinafter Merry, Legal Pluralism]; Sally Falk Moore, Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study, 7 L. & SOC'Y REV. 719 (1973) [hereinafter Moore, The Semi-Autonomous Social Field]; Balakrishnan Rajagopal, The Role of Law in Counter-hegemonic Globalization and Global Legal Pluralism: Lessons from the Narmada Valley Struggle in India, 18 LEIDEN J. INT'L L. 345 (2005); Brian Z. Tamanaha, A Non-Essentialist Version of Legal Pluralism, 27 J.L. & SOC'Y 296 (2000).

[3]See Cover, Nomos and Narrative, supra note 1, at 43 ("The position that only the state creates law . . . confuses the status of interpretation with the status of political domination."). See also Robert Cover, The Folktales of Justice: Tales of Jurisdiction, in NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 173, 176 (Martha Minow, Michael Ryan, & Austin Sarat eds., 1992) [hereinafter Cover, Folktales of Justice] (arguing that "all collective behavior entailing systematic understandings of our commitments to future worlds" can lay "equal claim to the word 'law'") (emphasis added); Perry Dane, The Maps of Sovereignty: A Meditation, 12 CARDOZO L. REV. 959, 963– 64 (1991) ("This Article belongs to a body of legal scholarship that refuses to limit the domain of law to the law of the state.").

[4]See Moore, The Semi-Autonomous Social Field, supra note 2, at 720.

Moreover, legal pluralists have sought to document hybrid legal spaces, where more than one legal, or quasi-legal, regime occupies the same social field.[4] Historically, such sites were most prominently associated either with colonialism—where the legal system imposed by empire was layered on top of indigenous legal systems[5] —or the study of religion—where canon law and other spiritual codes have often existed in an uneasy relationship with the state legal system.[6] Legal pluralists explored the myriad ways that overlapping legal systems interact with each other and observed that the very existence of multiple systems can at times create openings for contestation, resistance, and creative adaptation[7].

In this Article, I apply a pluralist framework to the global arena and argue that this framework is essential if we are to more comprehensively conceptualize a world of hybrid legal spaces. International law scholars have not often paid attention to the pluralist literature, nor have they generally conceived of their field in terms of managing hybridity. Instead, the principal emphasis has been on formal state-to-state relations, the creation of overarching universal norms, or the resolution of disputes by locating them territorially in order to choose a single governing law to apply[8]. All of these approaches attempt to eliminate hybridity altogether by imagining that disputes can and should be made susceptible to a single governing normative authority. Yet, it is now clear that the global legal system is an interlocking web of jurisdictional assertions by state, international, and non-state normative communities[9]. And each type of overlapping jurisdictional assertion (state versus state; state versus international body; state versus non-state entity) creates a potentially hybrid legal space that is not easily eliminated[10].

With regard to state versus state conflicts, the growth of global communications technologies, the rise of multinational corporate entities with no significant territorial center of gravity, and the mobility of capital and people across borders mean that many jurisdictions will feel effects of activities around the globe, leading inevitably to multiple assertions of legal authority over the same act, without regard to territorial location. For example, a French court asserted jurisdiction over U.S.-based Internet service provider Yahoo! because French users could download Nazi memorabilia and Holocaust denial material via Yahoo!'s auction sites, in violation of French law[11]. Yahoo! argued in response that the French assertion of jurisdiction was impermissibly extraterritorial in scope because Yahoo!, as a U.S. corporation transmmit-

[5]See, e.g., Leopold Pospisil, Modern and Traditional Administration of Justice in New Guinea, 19 J. LEGAL PLURALISM 93 (1981).

[6]See, e.g., CAROL WEISBROD, THE BOUNDARIES OF UTOPIA (1980) [hereinafter WEISBROD, UTOPIA] (examining the contractual underpinnings of four nineteenth-century American religious utopian communities: the Shakers, the Harmony Society, Oneida, and Zoar). As Marc Galanter has observed, the field of church and state is the "locus classicus of thinking about the multiplicity of normative orders." Galanter, supra note 2, at 28. See also Carol Weisbrod, Family, Church and State: An Essay on Constitutionalism and Religious Authority, 26 J. FAM. L. 741 (1988) (analyzing churchstate relations in the United States from a pluralist perspective).

[7]See, e.g., Merry, Legal Pluralism, supra note 2, at 878 (noting room for resistance and autonomy within plural systems).

[8]See infra text accompanying notes 82–83.

[9]As one commenter puts it: The nation-state and the interstate system are the central political forms of the capitalist world system, and they will probably remain so for the foreseeable future. What has happened, however, is that they have become an inherently contested terrain, and this is the central new fact on which the analysis must focus: the state and the interstate system as complex social fields in which state and non-state, local and global social relations interact, merge and conflict in dynamic and even volatile combinations. SANTOS, supra note 2, at 94.

[10]In that sense, we might more accurately refer to the "global legal system" as a "multiscalar legal system." See, e.g., Hari M. Osofsky, Climate Change Litigation as Pluralist Legal Dialogue?, 43 STAN. J. INT'L L. 181, 187 n.19 (2007) (arguing that the term "multiscalar" more accurately captures the variety of normative communities with input at different "levels" of the legal hierarchy than does the word "global").

[11]Tribunal de Grande Instance De Paris [T.G.I.] [ordinary court of original jurisdiction] Paris, May 22, 2000, Ordonnance de refere, UEJF et Licra c/ Yahoo! Inc. et Yahoo France, available at http:// www.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm. For a more detailed discussion of the case, see Paul Schiff Berman, The Globalization of Jurisdiction, 151 U. PA. L. REV. 311, 337–42, 516–20 (2002) [hereinafter Berman, Globalization of Jurisdiction].

ting material uploaded in the United States, was protected by the First Amendment of the U.S. Constitution[12]. Yet, the extraterritoriality charge runs in both directions. If France is not able to block the access of French citizens to proscribed material, then the United States will effectively be imposing First Amendment norms on the entire world. And whatever the solution to this problem might be, a territorial analysis will not help because the relevant transaction is both "in" France and not "in" France simultaneously. Cross-border environmental[13], trade[14], intellectual property[15], and tax regulation[16] raise similar issues.

Multiple states asserting jurisdiction over the same activity is just the tip of the iceberg, however, because nation-states must also often share legal authority with one or more international and regional courts, tribunals, or regulatory entities. Indeed, the Project on International Courts and Tribunals has identified approximately 125 international institutions, all issuing decisions that have some effect on state legal authority[17], though those decisions are sometimes deemed binding, sometimes merely persuasive, and often fall somewhere between the two. For example, under the North American Free Trade Agreement ("NAFTA") and other similar agreements, special panels can pass judgment on whether domestic legal proceedings have provided fair process[18]. And though the panels cannot directly review or overturn local judgments, they can levy fines against the federal government signatories of the agreement, thereby undermining the impact of the local judgment[19]. Thus, now that a NAFTA tribunal has ruled that a particular decision of the Mississippi Supreme Court violated norms of due process[20], it is an open question as to what legal rule will govern future cases in Mississippi raising similar issues[21]. Meanwhile, in the realm of human rights, we have seen criminal defendants convicted in state courts in the United States proceed (through their governments) to the International Court of Justice ("ICJ") to argue that they were denied the right to contact their consulate, as required by treaty[22]. Again, although the ICJ judgments are technically unenforceable in the United States, at least one state court followed the ICJ's command anyway[23].

Finally, non-state legal (or quasi-legal) norms add to the hybridity. Given increased migration and global communication, it is not surprising that people feel ties to, and act based on affiliations with, multiple communities in addition to their territorial ones. Such communities may be ethnic, religious, or epistemic, transnational, subnational, or international, and the norms asserted by such communities frequently challenge territorially-based authority. Indeed, as noted previously, canon law and other religious

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[12]Tribunal de Grande Instance De Paris [T.G.I.] [ordinary court of original jurisdiction] Paris, May 22, 2000, Ordonnance de refere, UEJF et Licra c/ Yahoo! Inc. et Yahoo France, available at http:// www.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm.

[13]See, e.g., TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION (Rebecca M. Bratspies & Russell A. Miller eds., 2006); Philippe Sands, Turtles and Torturers: The Transformation of International Law, 33 N.Y.U. J. INT'L L. & POL. 527 (2001).

[14]See, e.g., Richard W. Parker, The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict, 12 GEO. INT'L ENVTL. L. REV. 1 (1999).

[15]See, e.g., Barcelona.com, Inc. v. Excelentisimo Ayuntamiento de Barcelona, 330 F.3d 617 (4th Cir. 2003); GlobalSantaFe Corp. v. GlobalSantaFe.com, 250 F. Supp. 2d 610 (E.D. Va. 2003); Graeme B. Dinwoodie, A New Copyright Order: Why National Courts Should Create Global Norms, 149 U. PA. L. REV. 469 (2000).

[16]See, e.g., Berman, Globalization of Jurisdiction, supra note 11, at 334–37.

[17]See PROJECT ON INT'L COURTS AND TRIBUNALS, THE INT'L JUDICIARY IN CONTEXT (2004), available at http://www.pict-pcti.org/publications/synoptic_chart/Synop_C4.pdf.

[18]See North American Free Trade Agreement, U.S.-Can.-Mex., art. 1135, Jan. 1, 1994, 107 Stat. 2057.

[19]Id.

[20]Loewen Group, Inc. v. United States, ICSID (W. Bank) Case No. ARB(AF)/98/3. Publicly released documents on all NAFTA disputes are available online at http://www.naftalaw.org (last visited Sep. 1, 2007).

[21]See generally Robert B. Ahdieh, Between Dialogue and Decree: International Review of National Courts, 79 N.Y.U. L. REV. 2029 (2004) (discussing case).

[22]See Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 43 I.L.M. 581 (2004).

[23]See Torres v. Oklahoma, No. PCD-04-442, 2004 WL 3711623 (Okla. Crim. App. May 13, 2004) (granting stay of execution and remanding case for evidentiary hearing).

community norms have long operated in significant overlap with state law. And in the Middle East and elsewhere, conflicts between a personal law tied to religion and a territorial law tied to the nation-state continue to pose constitutional and other challenges[24]. Bonds of ethnicity can also create significant normative communities. For example, some commentators advocate regimes that give ethnic minorities limited autonomy within larger nation-states[25]. And transnationally, when members of an ethnic diaspora purchase securities issued by their "home" country, one might argue that, regardless of where, territorially, the bonds are purchased, the transactions should be governed by the law of the "homeland[26]." Finally, we see communities of transnational bankers developing their own law governing trade finance[27] and the use of modern forms of lex mercatoria[28] to govern business relations[29]. Such non-state legal systems often influence (or are incorporated into) state or international regimes[30].

These spheres of complex overlapping legal authority are, not surprisingly, sites of conflict and confusion. In response to this hybrid reality, communities might seek to "solve" such conflicts either by reimposing the primacy of territorially-based (and often nation-state-based) authority or by seeking universal harmonization[31]. Thus, on the one hand, communities may try to seal themselves off from outside influence, either by retreating from the rest of the world and becoming more insular (as some religious groups seek to do[32]), by building walls both literal[33] or regulatory[34] to protect the community from outsid-

[24]See, e.g., Chibli Mallat, On the Specificity of Middle Eastern Constitutionalism, 38 CASE W.

[25]See, e.g., Henry J. Steiner, Ideals and Counter-Ideals in the Struggle Over Autonomy Regimes for Minorities, 66 NOTRE DAME L. REV. 1539, 1541–42 (1991) (identifying three different types of autonomy regimes for ethnic minorities).

[26]See Anupam Chander, Diaspora Bonds, 76 N.Y.U. L. REV. 1005, 1060–74 (2001) (describing debt instruments offered by the Indian government to raise capital principally from its diaspora).

[27]See Janet Koven Levit, A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments, 30 YALE J. INT'L L. 125 (2005).

[28]See, e.g., Clayton P. Gillette, The Law Merchant in the Modern Age: Institutional Design and International Usages Under the CISG, 5 CHI. J. INT'L L. 157, 159 (2004) (noting that the Convention "explicitly incorporates trade usages into contracts that it governs, permits usages to trump conflicting [Convention] provisions, and authorizes courts to interpret and complete contracts by reference to usages"). But see Celia Wasserstein Fassberg, Lex Mercatoria—Hoist with Its Own Petard?, 5 CHI. J. INT'L L. 67 (2004) (arguing that the modern revival of lex mercatoria departs significantly from the historical conception).

[29]See, e.g., Amitai Aviram, A Paradox of Spontaneous Formation: The Evolution of Private Legal Systems, 22 YALE L. & POL'Y REV. 1 (2004) (using game theory to argue that the existence of pre-existing networks enhances a private legal system's ability to enforce norms); Lisa Bernstein, Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry, 21 J. LEGAL STUD. 115 (1992) (discussing the system of "private lawmaking" in the New York Diamond Dealers Club); Lisa Bernstein, Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions, 99 MICH. L. REV. 1724 (2001) (describing the non-state legal system used to govern commercial transactions in the cotton industry); Eric A. Feldman, The Tuna Court: Law and Norms in the World's Premier Fish Market, 94 CAL. L. REV. 313 (2006) (discussing a "Tuna Court" in Japan that adjudicates disputes about sale prices in a tuna market).

[30]See, e.g., Levit, supra note 27, at 165 (describing ways in which formal lawmaking institutions such as the World Trade Organization have, over time, appropriated non-state trade finance norms into their official legal instruments). See generally Carol Weisbrod, Fusion Folk: A Comment on Law and Music, 20 CARDOZO L. REV. 1439 (1999) (using the incorporation of folk music into "high culture" classical compositions as a metaphor for understanding the relationship between state and nonstate law).

[31]One could, of course, also attempt to impose a single, nonterritorial authority. See, e.g., Ga. High Sch. Ass'n v. Waddell, 285 S.E.2d 7, 9 (Ga. 1981) (holding that a dispute over a referee's decision affecting the outcome of a high school football game was nonjusticiable). But see PGA Tour, Inc. v. Martin, 532 U.S. 661, 690 (2001) (ruling that a golf association had violated the Americans with Disabilities Act by preventing a partially disabled golfer from using a golf cart to compete); Bart Aronson, Pinstripes and Jailhouse Stripes: The Case of "Athlete's Immunity," FINDLAW.COM, Nov. 3, 2000, at http://writ.corporate.findlaw.com/aronson/20001103.html (criticizing the blanket refusal to apply criminal law sanctions to athletes' actions during sporting events). For further discussion of the "folk

ers, by taking measures to limit outside influence (proposed U.S. legislation seeking to discipline judges for citing foreign or international law is but one prominent example[35]) or by imposing territorially-based jurisdictional or choice-oflaw rules[36]. At the other extreme, we see calls for harmonization of norms[37], more treaties[38], the construction of international governing bodies[39], and the creation of "world law.[40]"

I argue that both sovereigntist territorialism and universalist harmonization will at least sometimes offer normatively unattractive options and will, in any event, only succeed partially, if at all. These are not, however, the only two approaches available for responding to hybridity. In addition, following the descriptive insights of legal pluralism, we might draw a normative lesson and deliberately seek to create or preserve spaces for conflict among multiple, overlapping legal systems. Indeed, developing procedural mechanisms, institutions, and practices along pluralist lines may sometimes be a useful strategy for managing, without eliminating, hybridity[41]. Such mechanisms, institutions, and practices can help mediate conflicts by recognizing that multiple communities may legitimately wish to assert their norms over a gi-

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law of games or sports," see J. Griffiths, Introduction, in PEOPLE'S LAW AND STATE LAW: THE BELLAGIO PAPERS 13, 18 (Antony Allott & Gordon R. Woodman eds., 1985) (quoting Gordon R. Woodman).

[32]See, e.g., WEISBROD, UTOPIA, supra note 6 (discussing such communities).

[33]See, e.g., Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (authorizing the creation of a 700-mile-long, 15-foot-high fence along the U.S.-Mexico border); Gwynne Dyer, World Full of Mined and Monitored Walls, GUELPH MERCURY (Ontario), Feb. 10, 2007, at A11, available at 2007 WLNR 2679139 (discussing border fences being built in Israel, Thailand, India, Pakistan, Uzbekistan, United Arab Emirates, and Saudi Arabia) (Westlaw NewsRoom).

[34]See, e.g., Ben Elgin & Bruce Einhorn, The Great Firewall of China, BUSINESSWEEK ONLINE, Jan. 12, 2006, at http://www.businessweek.com/technology/content/jan2006/tc20060112_4340 51.htm (describing China's efforts to control Internet content entering the country).

[35]See, e.g., Reaffirmation of American Independence Resolution, H.R. Res. 568, 108th Cong. (2004).

[36]See, e.g., Paul Schiff Berman, Conflict of Laws, Globalization, and Cosmopolitan Pluralism, 51 WAYNE L. REV. 1105 (2005) (criticizing a territorialist approach).

[37]See, e.g., Jagdish Bhagwati, The Demands to Reduce Domestic Diversity Among Trading Nations, in 1 FAIR TRADE AND HARMONIZATION 9, 32–34 (Jagdish Bhagwati & Robert E. Hudec eds., 1996) (outlining how concerns about a regulatory "race to the bottom" leads to calls for international harmonization of regulatory standards).

[38]See, e.g., Erin Ann O'Hara, Choice of Law for Internet Transactions: The Uneasy Case for Online Consumer Protection, 153 U. PA. L. REV. 1883 (2005) (calling for international harmonization of online consumer protection laws through the vehicle of a United Nations convention).

[39]For an example of such thinking, consider this statement by Markus Kummer, Executive Coordinator, Secretariat of the United Nations Working Group on Internet Governance: Governments now feel that the Internet has become so important that it should be regarded as a matter of national interest. And so they see the need for getting involved. …The governments who want to play a more active role also see a need for closer international cooperation. They feel that the United Nations is the natural system of global governance and they hold the view that a UN umbrella would be a prerequisite to give the necessary political legitimacy to Internet governance. Interview with Markus Kummer, Executive Coordinator, Secretariat of the United Nations Working Group on Internet Governance (July 30, 2004), available at http://www.circleid.com/posts/interview_with_united_nations_head_secretariat_of_wgig/.

[40]See, e.g., Harold J. Berman, World Law: An Ecumenical Jurisprudence of the Holy Spirit 5 (Emory Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Paper No. 05-4, 2005), available at http://ssrn.com/abstract=666143 ("[I]t is obvious that there cannot be a world community without a body of world law to maintain both order and justice among its different constituents."). See generally Harold J. Berman, World Law, 18 FORDHAM INT'L L.J. 1617 (1995) [hereinafter Berman, World Law].

[41]Throughout this Article, I refer to mechanisms, institutions, and practices. By mechanisms, I mean doctrinal or procedural elements that seek to manage hybridity, such as margins of appreciation or mutual recognition regimes. By institutions, I refer to an entire legal or regulatory body, such as a hybrid court, that is designed in part to respond to pluralism concerns. And by practices, I mean discursive patterns, professional roles, or shared customs that tend to provide a common language or social space for disparate groups, even ones that disagree with each other. For example, arguably the practice of constitutional adjudication unites even those in the United States who radically disagree about the scope of abortion rights.

ven act or actor, by seeking ways of reconciling competing norms, and by deferring to alternative approaches if possible. And even when deference is impossible (because some instances of legal pluralism are repressive, violent, and/or profoundly illiberal[42]), procedures for managing hybridity can at least require an explanation of why a decision maker refuses to defer.

The excruciatingly difficult case-by-case questions concerning how much to defer and how much to impose are probably impossible to answer definitively and are, at any rate, beyond the scope of this Article. The crucial antecedent point, however, is that although people may never reach agreement on norms, they may at least acquiesce in procedural mechanisms, institutions, or practices that take hybridity seriously, rather than ignoring it through assertions of territorially-based power or dissolving it through universalist imperatives. Processes for managing hybridity seek to preserve the spaces of opportunity for contestation and local variation that legal pluralists have long documented, and therefore a focus on hybridity may at times be both normatively preferable and more practical precisely because agreement on substantive norms is so difficult. And again, the claim is only that the independent values of pluralism should always be factored into the analysis, not that they should never be trumped by other considerations.

This approach, I realize, is unlikely to be fully satisfying either to committed nation-state sovereigntists or committed universalists. Sovereigntists will object to the idea that nation-states should ever take into account international, transnational, or non-state norms[43]. Universalists, for their part, will chafe at the idea that international norms should ever be subordinated to local practices that may be less liberal or less rightsprotecting. And even hard-line pluralists will complain that a view focusing on how official actors respond to hybridity is overly state-centric. All I can say to such objections is that if a perspective displeases everyone to some extent, it is, for that very reason, also likely to be a perspective that manages hybridity in the only way possible: by forging provisional compromises that fully satisfy no one but may at least generate grudging acquiescence. And, in a world of multiple norms, such provisional compromises may ultimately be the best we can do. In any event, the central argument of this Article is that hybridity is a reality we cannot escape, and a pure sovereigntist or universalist position will often be unsustainable as a practical matter. Thus, pluralism offers both a more accurate descriptive account of the world we live in and a potentially useful alternative approach to the design of procedural mechanisms and institutions.

Of course, one thing that a pluralist approach will not do is provide an authoritative metric for determining which norms should prevail in this messy hybrid world. Nor does it answer the question of who gets to decide.Indeed, pluralism fundamentally challenges both positivist and natural rights-based assumptions that there can ever be a single answer to such questions. For example, as pluralists have documented in the colonial context, the state's efforts to squelch a non-state community are likely only to be partial[44], and so the state's assertion of its own trumping authority is not the end of the debate, but only one gambit in an ongoing normative discourse that has no final resolution. Likewise, there is no external position from which one could make a definitive statement as to who is authorized to make decisions in any given case. Rather, a statement of authority is itself inevitably open to contest. Power disparities matter, of course, and those who wield coercive force may be able to silence competing voices for a time. But even that sort of temporary silencing is rarely the end of the story either. Thus, instead of the unitary answers assumed by both universalism and sovereigntism, pluralism provides a "jurisgenerative" model[45] that fo-

[42]See, e.g., SANTOS, supra note 2, at 89 ("To my mind, there is nothing inherently good, progressive, or emancipatory about 'legal pluralism.' Indeed, there are instances of legal pluralism that are quite reactionary. Suffice it to mention here the . . . legal orders established by armed groups—e.g., paramilitary forces in connivance with repressive states—in the territories under their control.").

[43]In part, this objection is grounded in concerns about loss of democratic accountability and legitimacy. I address some of these concerns in Part III.A infra.

[44]See, e.g., Lauren Benton, Making Order Out of Trouble: Jurisdictional Politics in the Spanish Colonial Borderlands, 26 LAW & SOC. INQUIRY 373, 375–76 (2001) (describing jurisdictional politics in seventeenth-century New Mexico and observing that, while "the crown made aggressive claims that royal authority and state law superseded other legal authorities," in reality "[j]urisdictional disputes became not just commonplace but a defining feature of the legal order").

cuses on the creative interventions made by various normative communities drawing on a variety of normative sources in ongoing political, rhetorical, and legal iterations[46].

Certainly individual communities may decide that their norms should trump those of others or that their norms are authoritative. So, for example, a liberal democratic state might decide that certain illiberal community practices are so beyond the pale that they cannot be countenanced and therefore the state may invoke its authority to stifle those practices. But a pluralist approach recognizes that such statements of normative commitment and authority are themselves subject to dispute. Accordingly, instead of clinging to the vain hope that unitary claims to authoritative law can ever be definitive, pluralism recognizes the inevitability (if not always the desirability) of hybridity. Pluralism is thus principally a descriptive, not a normative, framework. It observes that various actors pursue norms and it studies the interplay, but it does not propose a hierarchy of substantive norms and values.

Nevertheless, while it does not offer substantive norms, a pluralist approach may favor procedural mechanisms, institutions, and practices that provide opportunities for plural voices. Such procedures can potentially help to channel (or even tame) normative conflict to some degree by bringing multiple actors together into a shared social space. This commitment can, of course, have strong normative implications because it asks decision makers and institutional designers to at least consider the independent value of pluralism. For example, as discussed in more detail below, we might favor a hybrid domestic-international tribunal over either a fully domestic or fully international one because it includes a more diverse range of actors, or we might favor complementarity or subsidiarity regimes because they encourage dialogue among multiple jurisdictions, and so on. In any event, pluralism questions whether a single world public order of the sort often contemplated both by nation-state sovereigntists and international law triumphalists is achievable, even assuming it were desirable.

At the same time, mechanisms, institutions, and practices of the sort discussed in this Article require actors to at least be willing to take part in a common set of discursive forms. This is not as idealistic as it may at first appear. Indeed, as Jeremy Waldron has argued, "[t]he difficulties of intercultural or religious-secular dialogue are often exaggerated when we talk about the incommensurability of cultural frameworks and the impossibility of conversation without a common conceptual scheme. In fact conversation between members of different cultural and religious communities is seldom a dialogue of the deaf...[47]" Nevertheless, it is certainly true that some normative systems deny even this limited goal of mutual dialogue. Such systems would (correctly) recognize the liberal bias within the vision of procedural pluralism I explore here[48], and they may reject the vision on that basis. For example, while abortion rights and antiabortion activists could, despite their differences, be said to share a willingness to engage in a common practice of constitutional adjudication, those bombing abortion clinics are not similarly willing, and accordingly there may not be any way to accommodate such actors even within a more pluralist framework. Likewise, communities that refuse to allow even the participation of particular subgroups, such as women or minorities, may be difficult to include within the pluralist vision I have in mind. Of course, these groups are undeniably important forces to recognize and take account of as a descriptive matter. But from a normative perspective, an embrace of pluralist mechanisms, institutions, and practices need not commit one

[45]See Cover, Nomos and Narrative, supra note 1, at 11–15.

[46]Cf. SEYLA BENHABIB, ANOTHER COSMOPOLITANISM 49 (2006) ("Whereas natural right philosophies assume that the principles that undergird democratic politics are impervious to transformative acts of popular collective will, and whereas legal positivism identifies democratic legitimacy with the correctly generated legal norms of a sovereign legislature, jurisgenerative politics is a model that permits us to think of creative interventions that mediate between universal norms and the will of democratic majorities.").

[47]Jeremy Waldron, Public Reason and "Justification" in the Courtroom, J.L. PHIL. & CULTURE (forthcoming 2007) (manuscript at 5–6).

[48]This is not to say that the vision of pluralism I explore should be taken as synonymous with liberalism, though they share many attributes. Pluralism arguably assigns an independent value to dialogue among communities and an importance to community affiliation that is absent from (or at least less central to) liberal theory.

to a worldview free from judgment, where all positions are equivalently embraced. Thus, I argue not necessarily for undifferentiated inclusion, but for a set of procedural mechanisms, institutions, and practices that are more likely to expand the range of voices heard or considered, thereby creating more opportunities to forge a common social space than either sovereigntist territorialism or universalism[49].

Finally, a pluralist framework suggests a research agenda that emphasizes the micro-interactions among different normative systems. Such a case study approach would serve as a contrast to rational choice and other forms of more abstract modeling, by focusing instead on thick description of the ways in which various procedural mechanisms, institutions, and practices actually operate as sites of contestation and creative innovation. Thus, applying pluralism to the international arena illuminates a broader field of inquiry and asks scholars to consider studying in more depth the processes whereby normative gaps among communities are negotiated.

The Article proceeds in three parts. First, I summarize the literature on legal pluralism and suggest ways in which this literature helps us understand the global legal environment. Second, drawing on pluralist insights, I offer an analytical framework for addressing normative conflicts, one that provides an alternative both to territorially-based sovereigntism and to universalism, and instead opens space for the jurisgenerative interplay of multiple normative communities and commitments. This framework generates a series of values and principles that can be used to evaluate the efficacy of procedural mechanisms, institutional designs, and discursive practices for managing hybridity. Third, I survey a series of such mechanisms, institutions, and practices already in use in a wide variety of doctrinal contexts, and I discuss how they work (or sometimes fail to work) in on-the-ground settings. And though each of these mechanisms, institutions, and practices has been discussed individually in the scholarly literature, they have not generally been considered together through a pluralist lens, nor have they been evaluated based on their ability to manage and preserve hybridity. Thus, my analysis offers a significantly different approach, one that injects a distinct set of concerns into debates about global legal interactions. Indeed, although many of these mechanisms, institutions, and practices are often viewed as "second-best" accommodations between hard-line sovereigntist and universalist positions, I argue that they might at least sometimes be preferable to either. In the Conclusion, I suggest implications of this approach for more general thinking about the potential role of law in identifying and negotiating social and cultural difference.

II. LEGAL PLURALISM AND THE GLOBAL LEGAL ORDER

Scholars seeking to understand the multifaceted role of law in an era of globalization[50] must take seriously the insights of legal pluralism. In general, theorists of pluralism start from the premise that peo-

[49]This focus on jurisgenerative structure, rather than on the necessary inclusion of, or deference to, all points of view, may differentiate legal pluralism as I use it here from multiculturalism.

[50]Of course, the idea of an "era of globalization" is contested. Indeed, the vast debates concerning globalization's meaning, its importance, and even its existence could fill many volumes. For purposes of this Article, I do not attempt to articulate a single definition because part of the premise of law and globalization is that multiple definitions and meanings for globalization will be salient for different populations. See, e.g., SANTOS, supra note 2, at 178 ("There is strictly no single entity called globalization. There are, rather, globalizations, and we should use the term only in the plural."). Thus, I use the term to refer generally to the intensification of global interconnectedness, in which capital, people, commodities, images, and ideologies move across distance and physical boundaries with increasing speed and frequency. See, e.g., ANTHONY GIDDENS, RUNAWAY WORLD: HOW GLOBALIZATION IS RESHAPING OUR LIVES 24–37 (2000) (pointing to the increased level of trade, finance, and capital flows, and describing the effects of the weakening hold of older nation-states). Indeed, I am content to acknowledge that the existence of many different visions of globalization is a fundamental part of globalization itself. Even some who acknowledge globalization nevertheless question whether globalization is really a new phenomenon. Certainly, interrelations among multiple populations across territorial boundaries have existed for centuries. For example, some argue that the pre-1914 era was in fact the high-water mark for economic interdependence, although there is also evidence that the post-1989 era surpasses that period. See Miles Kahler & David A. Lake, Globalization nevertheless

ple belongto (or feel affiliated with) multiple groups and understand themselves to be bound by the norms of these multiple groups[51]. Such groups can, of course, include familiar political affiliations, such as nation-states, counties, towns, and so on. But many community affiliations, such as those held by transnational or subnational ethnic groups, religious institutions, trade organizations, unions, Internet chat groups, and a myriad of other "normgenerating communities"[52] may at various times exert tremendous power over our actions even though they are not part of an "official" state-based system. Indeed, as scholars of legal pluralism have long noted, "not all the phenomena related to law and not all that are lawlike have their source in government.[53]"

Just as importantly, legal pluralists have studied those situations in which two or more state and non-state normative systems occupy the same social field and must negotiate the resulting hybrid legal space[54]. Historically, anthropologically-oriented legal pluralists focused on the overlapping normative systems created during the process of colonization[55]. Early twentieth-century studies of indigenous law among tribes and villages in colonized societies noted the simultaneous existence of both local law and

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question whether globalization is really a new phenomenon. Certainly, interrelations among multiple populations across territorial boundaries have existed for centuries. For example, some argue that the pre-1914 era was in fact the high-water mark for economic interdependence, although there is also evidence that the post-1989 era surpasses that period. See Miles Kahler & David A. Lake, Globalization and Governance, in GOVERNANCE IN A GLOBAL ECONOMY: POLITICAL AUTHORITY IN TRANSITION 10–14 (Miles Kahler & David A. Lake eds., 2003). Again, I do not think such arguments need detain us. First, it seems clear that something is going on, given the pervasiveness of the ideology of market capitalism, the speed of commodity, capital, and personal movement, the ubiquity of global media, and so on. Whether such developments are truly new (or greater than ever before) seems less important than understanding the consequences of the phenomena. Second, I see the term "globalization" as also signifying the attitude about the world that tends to come into being as a result of frequent use of the term itself. Indeed, in a certain sense it does not really matter whether, as an empirical matter, the world is more or less "globalized" than it used to be. More important is the fact that people—whether governmental actors, corporations, scholars, or general citizens—think and act as if the world is more interconnected and treat globalization as a real phenomenon. In addition, there is at least some evidence that global "scripts" are exerting a broad impact at least in the officially sanctioned discourse of governmental bureaucrats. See, e.g., John W. Meyer et al., World Society and the Nation-State, 103 AM. J. SOC. 144, 145 (1997) ("Worldwide models define and legitimate agendas for local action, shaping the structures and policies of nation-states and other national and local actors in virtually all of the domains of rationalized social life . . . ."). For further discussion of "the problematics of globalization," see Paul Schiff Berman, From International Law to Law and Globalization, 43 COLUM. J. TRANSNAT'L L. 485, 551–55 (2005) [hereinafter Berman, From International to Global].

[51]See, e.g., AVIGAIL I. EISENBERG, RECONSTRUCTING POLITICAL PLURALISM 2 (1995) (defining pluralist theories as those that "seek to organize and conceptualize political phenomena on the basis of the plurality of groups to which individuals belong and by which individuals seek to advance and, more importantly, to develop, their interests").

[52]Cover, Nomos and Narrative, supra note 1, at 43.

[53]Moore, Legal Systems of the World, supra note 2, at 15. See also Gunther Teubner, The Two Faces of Janus: Rethinking Legal Pluralism, 13 CARDOZO L. REV. 1443, 1443 (1992) ("[L]egal pluralism is at the same time both: social norms and legal rules, law and society, formal and informal, rule-oriented and spontaneous."). But see Brian Z. Tamanaha, The Folly of the 'Social Scientific' Concept of Legal Pluralism, 20 J.L. & SOC'Y 192, 193 (1993) (arguing that such a broad view of "law" causes law to lose any distinctive meaning).

[54]See, e.g., sources cited supra note 2.

[55]See Merry, Legal Pluralism, supra note 2, at 869–72 (summarizing the literature).

European law[56]. Indeed, British colonial law actually incorporated Hindu, Muslim, and Christian personal law into its administrative framework[57]. This early pluralist scholarship focused on the hierarchical coexistence of what were imagined to be quite separate legal systems, layered one on top of the other. Thus, for example, when Leopold Pospisil documented the way in which Kapauku Papuans responded to the imposition of Dutch law, it was relatively easy to identify the two distinct legal fields since Dutch law and Kapauku law were extremely different[58]. As a result, Pospisil could readily identify the degree of penetration of Dutch law, both those areas in which the Kapauku had appropriated and transformed Dutch law, and those areas in which negotiations between the two legal systems were part of broader political struggle[59]. Despite the somewhat reductionist cast of the model, these pioneering studies established the key insights of legal pluralism: a recognition that multiple normative orders exist and a focus on the dialectical interaction between and among these normative orders[60].

In the 1970s and 1980s, anthropological scholars of pluralism complicated the picture in three significant ways. First, they questioned the hierarchical model of one legal system simply dominating the other and instead argued that plural systems are often semiautonomous, operating within the framework of other legal fields, but not entirely governed by them[61]. As Sally Engle Merry recounts, this was an extraordinarily powerful conceptual move because it placed "at the center of investigation the relationship between the official legal system and other forms of ordering that connect with but are in some ways separate from and dependent on it.[62]" Second, scholars began to conceptualize the interaction between legal systems as bidirectional, with each influencing (and helping to constitute) the other[63]. This was a distinct shift from the early studies, which had tended only to investigate ways in which state law penetrated and changed indigenous systems and not the other way round. Third, scholars defined the idea of a "legal system" sufficiently broadly to include many types of nonofficial normative ordering, and therefore argued that such legal subgroups operate not just in colonial societies, but in advanced industrialized settings as well[64].

Of course, finding non-state forms of normative ordering is sometimes more difficult outside the colonial context because there is no obvious indigenous system, and the less formal ordering structures tend to "blend more readily into the landscape.[65]" Thus, pluralists argued that, in order to see non state law, scholars would first need to reject what John Griffiths called "the ideology of legal centralism," the exclusive positivist focus on state law and its system of lawyers, courts, and prisons[66]. Instead, pluralists turned to documenting "forms of social regulation that draw on the symbols of the law, to a greater or lesser extent, but that operate in its shadows, its parking lots, and even down the street in mediation offices.[67]"

Meanwhile, scholars drawing more from political theory than anthropology have long focused on the fact that, prior to the rise of the state system, much lawmaking took place in autonomous institutions and within smaller units such as cities and guilds, while large geographic areas were left largely unregu-

[56]See, e.g., BRONISLAW MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY (1926).
[57]Merry, Spatial Legal Pluralism, supra note 2, at 12. See infra Part III.C.
[58]See Pospisil, supra note 5.
[59]See id.
[60]See Merry, Legal Pluralism, supra note 2, at 873.
[61]See, e.g., Moore, The Semi-Autonomous Social Field, supra note 2; Robert L. Kidder, Toward an Integrated Theory of Imposed Law, in THE IMPOSITION OF LAW 289 (Sandra B. Burman & Barbara E. Harrell-Bond eds., 1979).
[62]Merry, Legal Pluralism, supra note 2, at 873.
[63]See, e.g., Peter Fitzpatrick, Law and Societies, 22 OSGOODE HALL L.J. 115 (1984).
[64]See Merry, Legal Pluralism, supra note 2, at 870–71 (summarizing some of the literature).
[65]Id. at 873.
[66]Griffiths, supra note 2, at 3.
[67]Merry, Legal Pluralism, supra note 2, at 874.

lated[68]. And, like the anthropologists, they have observed a whole range of non-state lawmaking even in modern nation-states: in tribal or ethnic enclave[69], religious organizations[70], corporate bylaws, social customs[71], private regulatory bodies, and a wide variety of groups, associations, and non-state institutions[72]. For example, in England bodies such as the church, the stock exchange, the legal profession, the insurance market, and even the Jockey Club opted for forms of self-regulation that included machinery for arbitrating disputes among their own members[73]. Moreover, "private, closely knit, homogeneous micro-societies can create their own norms that at times trump state law and at other times fill lacunae in state regulation but nonetheless operate autonomously.[74]" Finally, such scholars have sometimes focused on religious communities and their ongoing tensions with state authorities[75].

More recently, a new group of legal pluralists has emerged under the rubric of social norms theory. Interestingly, however, these scholars rarely refer to the anthropologists and political theorists who have long explored pluralism, perhaps because social norms theory has emerged as a branch of behavioral law and economics. The study of social norms, in its most capacious formulation, focuses on the variety of "rules and standards that impose limits on acceptable behavior.[76]" Such social norms "may be the product of custom and usage, organizational affiliations, consensual undertakings and individual conscience.[77]" In addition, "norm entrepreneurs," defined as individuals or groups who try to influence popular opinion in order to inculcate a social norm, may consciously try to mobilize social pressure to sustain or create social norms[48]. And while some pluralists think that this broader category of social norms dilutes legal plural-

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[68]See EUGEN EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 14–38 (Walter L. Moll trans., Russell & Russell 1962) (1936) (analyzing and describing the differences between legal and nonlegal norms). See generally OTTO GIERKE, ASSOCIATIONS AND LAW: THE CLASSICAL AND EARLY CHRISTIAN STAGES (George Heiman ed. & trans., Univ. of Toronto Press 1977) (n.d.) (setting forth a legal philosophy based on the concept of association as a fundamental human organizing principle); OTTO GIERKE, NATURAL LAW AND THE THEORY OF SOCIETY: 1500 TO 1800 (Ernest Barker trans., Cambridge Univ. Press 1934) (presenting a theory of the evolution of the state and non-state groups according to the principle of natural law).

[69]See, e.g., Walter Otto Weyrauch & Maureen Anne Bell, Autonomous Lawmaking: The Case of the "Gypsies," 103 YALE L.J. 323 (1993) (delineating the subtle interactions between the legal system of the Romani people and the norms of their host countries).

[70]See sources cited supra note 6.

[71]See, e.g., LON L. FULLER, ANATOMY OF THE LAW 43–49 (1968) (describing "implicit law," which includes everything from rules governing a camping trip among friends to the customs of merchants).

[72]See, e.g., ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991) (drawing on an empirical study of relations among cattle ranchers to develop a theory of nonlegal norms as a source of social control); Stewart Macaulay, Images of Law in Everyday Life: The Lessons of School, Entertainment, and Spectator Sports, 21 LAW & SOC'Y REV. 185 (1987) (discussing the concept of legality as reflected in popular culture); Stewart Macaulay, Non-Contractual Relations in Business: A Preliminary Study, 28 AM. SOC. REV. 55 (1963) (presenting empirical data on nonlegal dispute settlement in the manufacturing industry); Stewart Macaulay, Popular Legal Culture: An Introduction, 98 YALE L.J. 1545 (1989) (surveying the sources of popular perceptions of the law).

[73]See F.W. MAITLAND, Trust and Corporation, in MAITLAND: SELECTED ESSAYS 141, 189–95 (H.D. Hazeltine, G. Lapsley & P.H. Winfield eds., Cambridge Univ. Press 1936) (1905) (describing the sophisticated nonlegal means of enforcing order among members of these institutions).

[74]Levit, supra note 27, at 184. For some examples, see supra note 29.

[75]See supra note 6.

[76]William K. Jones, A Theory of Social Norms, 1994 U. ILL. L. REV. 545, 546 (1994).

[77]Id. See also, e.g., David Charny, Illusions of a Spontaneous Order: "Norms" in Contractual Relationships, 144 U. PA. L. REV. 1841, 1841 (1996) (noting that norms are said to evolve from the repeated dealings of contracting parties or industry consensus and that these norms are enforced both privately and through legal mechanisms).

[78]see Ethan A. Nadelmann, Global Prohibition Regimes: The Evolution of Norms in International Society, 44 INT'L ORG. 479, 482 (1990) (defining "transnational moral entrepreneurs" as nongovernmental transnational organizations who (1) "mobilize popular opinion and political support both within their host country and abroad"; (2)

lism's historic focus on more stable religious, ethnic, or tribal groupings[79], social norms theory has the benefit of theorizing larger transnational communities that may be based on long-term rhetorical persuasion rather than face-to-face interaction[80]. Indeed, social norms theory tends to emphasize processes whereby norms are internalized through guilt, self-bereavement, a sense of duty, and a desire for esteem, or simply by slowly altering categories of thought and the set of taken-forgranted ideas that constitute one's sense of "the way things are.[81]"

Those who study international public and private law have not, historically, paid much attention either to legal pluralism or social norms theory. This is because the emphasis traditionally has been on state-to-state relations. Indeed, international law has generally emphasized bilateral and multilateral treaties between and among states, the activities of the United Nations, the pronouncements of international tribunals, and (somewhat more controversially) the norms that states had obeyed for long enough that such norms could be deemed customary[82]. This was a legal universe with two guiding principles. First, law was deemed to reside only in the acts of official, state-sanctioned entities. Second, law was seen as an exclusive function of state sovereignty[83].

"stimulate and assist in the creation of like-minded organizations in other countries"; (3) "play a significant role in elevating their objective beyond its identification with the national interests of their government"; and (4) often direct their efforts "toward persuading foreign audiences, especially foreign elites, that a particular prohibition regime reflects a widely shared or even universal moral sense, rather than the peculiar moral code of one society"). See, e.g., Martha Finnemore & Kathryn Sikkink, International Norm Dynamics and Political Change, 52 INT'L ORG. 887 (1998); Harold Hongju Koh, The 1998 Frankel Lecture: Bringing International Law Home, 35 HOUS. L. REV. 623, 647 (1998).

[79]See, e.g., Dane, supra note 3, at 991–92 ("There must . . . be some way to tell a true competing sovereign from any other assemblage. . . . If every social order that the state confronts is a legal order, there is no legal order. If every legal thought is law, there is no law.").

[80]Rex D. Glensy, Quasi-Global Social Norms, 38 CONN. L. REV. 79, 84 (2005) ("[T]he group can consist of cattle ranchers in a county who interact on a regular basis or of millions of people who live on separate continents who, when taken individually, have a virtual statistical impossibility of interacting with each other even once in their lifetimes.").

[81]Such unexamined ideas about legal reality are part of what sociolegal scholars describe as "legal consciousness." See, e.g., PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE (1998). See also JEAN COMAROFF, BODY OF POWER, SPIRIT OF RESISTANCE: CULTURE AND HISTORY OF A SOUTH AFRICAN PEOPLE 4–5 (1985) (arguing that consciousness is "embedded in the practical constitution of everyday life, part and parcel of the process whereby the subject is constructed by external sociocultural forms"); Robert W. Gordon, Critical Legal Histories, 36 STAN. L. REV. 57, 109 (1984) ("[T]he power exerted by a legal regime consists less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live."); David M. Trubek, Where the Action Is: Critical Legal Studies and Empiricism, 36 STAN. L. REV. 575, 604 (1984) ("Law, like other aspects of belief systems, helps to define the role of an individual in society and the relations with others that make sense."). For a discussion of how international legal norms can have real impact by shaping legal consciousness over time, see Paul Schiff Berman, Seeing Beyond the Limits of International Law, 84 TEX. L. REV. 1265 (2006) [hereinafter Berman, Seeing Beyond the Limits] (reviewing JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005)).

[82]See, e.g., Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1055, 1060 (stating that the primary sources of international law are international treaties and conventions, customary practices of states accepted as law, and general principles of law common to most legal systems).

[83]Of course, this is an over-simplified vision of international law. Obviously, non-state sources—including the idea of natural law itself—have long played a key role in the development of international legal principles. See generally David J. Bederman, Religion and the Sources of International Law in Antiquity, in THE INFLUENCE OF RELIGION ON THE DEVELOPMENT OF INTERNATIONAL LAW 3 (Mark W. Janis ed., 1991) (tracing the role of religion in the Near East during the empires of Egypt, Babylon, Assyria, Hittites, Mittani, Israelites, Greek city-states, Indian states before 150 B.C., and Mediterranean powers from 338 to 168 B.C.). Indeed, prior to Bentham, these non-state sources, including the universal common law of jus gentium, were arguably far more important than

Both principles, however, have eroded over time. The rise of a conception of international human rights in the post-World War II era transformed individuals into international law stakeholders, possessing their own entitlements against the state[84]. But even apart from individual empowerment, scholars have more recently come to recognize the myriad ways in which the prerogatives of nation-states are cabined by transnational and international actors. Whereas F.A. Mann could confidently state in 1984 that "laws extend so far as, but no further than the sovereignty of the State which puts them into force,[85]" many international law scholars have, at least since the end of the Cold War, argued that such a narrow view of how law operates transnationally is inadequate. Thus, the past fifteen years have seen increasing attention to the important—though sometimes inchoate—processes of international norm development[86]. Such processes inevitably lead scholars to consider overlapping transnational jurisdictional assertions by nation-states, as well as norms articulated by international bodies, nongovernmental organizations ("NGOs"), multinational corporations and industry groups, indigenous communities, transnational terrorists, networks of activists, and so on.

Yet, while international law scholars are increasingly emphasizing the importance of these overlapping legal and quasi-legal communities, there has been surprisingly little attention paid to the pluralism literature[87]. This is a shame, because this literature could help international law find a more comprehensive framework for conceptualizing the clash of normative communities in the modern world. Consider, for example, Sally Falk Moore's idea of the "semiautonomous social field," which she describes as one that:

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the norms generated by states. See Harold Hongju Koh, Why Do Nations Obey International Law?, 106 YALE L.J. 2599, 2605 (1997) (reviewing ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995) and THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995)) (noting that medieval legal scholars viewed the law of nations, understood as jus naturae et gentium, as a universal law binding upon all mankind). For example, during the Middle Ages, treaties— which are usually viewed today as the positive law of state interaction—were deemed subject to the overarching jurisdiction of the Church because they were sealed by oaths. See ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 24 (1947). Even later, no less a theorist than Vattel, while repudiating natural law's religious underpinnings, see MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 61 (4th ed. 2003), continued to ground international law in the laws of nature. See E. DE VATTEL, THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE: APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS lviii (London, G.G. & J. Robinson 1797) (1792). In the nineteenth century, though positivism reigned both in the United States and abroad, transnational non-state actors nevertheless played important roles. See Koh, supra, at 2612 (noting the work of William Wilberforce and the British and Foreign Anti-Slavery Society; Henry Dunant and the International Committee of the Red Cross; and Christian peace activists, such as America's William Ladd and Elihu Burritt, "who promoted public international arbitration and permanent international criminal courts"). And, of course, natural law principles continue to undergird many international law doctrines, such as jus cogens norms. See JANIS, supra, at 64. Thus, the focus on non-state normgeneration is not a new phenomenon, but I argue that it is reemerging as a significant branch of scholarship within international law and might even call for a reclassification of international law itself.

[84]See, e.g., W. Michael Reisman, Introduction, in JURISDICTION IN INTERNATIONAL LAW, xi, xii (W. Michael Reisman ed., 1999) (noting that "since the Second World War, an increasing number of international norms of both customary and conventional provenance . . . now restrict or displace specific law-making and applying competences of states"); Louis Henkin, Human Rights and State "Sovereignty," 25 GA. J. INT'L & COMP. L. 31, 33 (1995–1996) ("At mid-century, the international system began a slow, hesitant move from state values towards human values."). But see JANIS, supra note 83, at 5–6; GEORG SCHWARZENBERGER, 1 INTERNATIONAL LAW 34–36 (3d ed. 1957) (both noting that even after Nuremberg, international law derived primarily from state practice).

[85]F.A. MANN, THE DOCTRINE OF INTERNATIONAL JURISDICTION REVISITED AFTER TWENTY YEARS, in 3 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL
LAW 20 (1985).

[86]See Berman, From International to Global, supra note 50, at 488–89 (summarizing some of this literature).

[87] There are some exceptions. See, e.g., William W. Burke-White, International Legal Pluralism, 25 MICH. J. INT'L L. 963 (2004); Benedict Kingsbury, Confronting Difference: The Puzzling Durability of Gentili's Combination of

> *can generate rules and customs and symbols internally, but that . . . is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded. The semi-autonomous social field has rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance*[88].

Notice that, following Moore's idea, we can conceive of a legal system as both autonomous and permeable; outside norms affect the system, but do not dominate it fully. The framework thus captures a dialectical and iterative interplay that we see among normative communities in the international system, an interplay that rigidly territorialist or positivist visions of legal authority do not address.

Even more fundamentally, legal pluralists have observed ways in which state law and other normative orders mutually constitute each other. Thus, for example, the family and its legal order are obviously shaped by the state, but the state in turn is shaped by the family and its legal order because each is part of the other[89]. And though pluralists were historically thinking of the state's relationship to internal non-state law within its borders, the framework is equally cogent in studying external dialectical interactions both with other states, and with various international or transnational legal communities. Indeed, recent international law scholarship emphasizes ways in which states are changed simply by the fact that they are part of an international network of states[90]. Such an insight echoes pluralism's co-constitutive approach.

In addition, pluralism offers possibilities for thinking about spaces of resistance to state law. Indeed, by recognizing at least the semiautonomy of conflicting legal orders, pluralism necessarily examines limits to the ideological power of state legal pronouncements. Pluralists do not deny the significance of state law and coercive power, of course, but they do try to identify places where state law does not penetrate or penetrates only partially, and where alternative forms of ordering persist to provide opportunities for resistance, contestation, and alternative vision. Such an approach encourages international law scholars to treat the multiple sites of normative authority in the global legal system as a set of inevitable interactions to be managed, not as a "problem" to be "solved." And again, though pluralists historically looked only at non-state alternatives to state power, the international law context adds state-to-state relations and their overlapping jurisdictional assertions to the mix, providing yet another set of possible alternative normative communities to the web of pluralist interactions.

Finally, pluralism frees scholars from needing an essentialist definition of "law." For example, with legal pluralism as our analytical frame, we can get beyond the endless debates both about whether international law is law at all and whether it has any real effect. Indeed, the whole debate about law versus non-law is largely irrelevant in a pluralism context because the key questions involve the normative commitments of a community and the interactions among normative orders that give rise to such commitments, not their formal status. Thus, we can resist positivist reductionism and set nation-state law within a broader context[81]. Moreover, an emphasis on social norms allows us to more readily see how it is that non-state legal norms can have significant impact in the world. After all, if a statement of norms is ultimately

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Pragmatic Pluralism and Normative Judgment, 92 AM. J. INT'L L. 713 (1998); Nico Krisch, The Pluralism of Global Administrative Law, 17 EUR. J. INT'L L. 247 (2006).

[88]Moore, The Semi-Autonomous Social Field, supra note 2, at 720.

[89]See, e.g., Peter Fitzpatrick, Law, Plurality and Underdevelopment, in LEGALITY, IDEOLOGY AND THE STATE 159 (David Sugarman ed., 1983).

[90]See, e.g., Ryan Goodman & Derek Jinks, How to Influence States: Socialization and International Human Rights Law, 54 DUKE L.J. 621 (2004).

[91]For those who are inclined to reify state law as law and to deny all other forms of social ordering the use of the word law, Santos argues that law is like medicine. Thus, he observes that: side by side with the official, professionalized, pharmochemical, allopathic medicine, other forms of medicine circulate in society: traditional, herbal, community-based, magical, non- Western medicines. Why should the designation of medicine be restricted to the first type of medicine, the only one recognized as such by the national health system? Clearly, a politics of definition is at work here, and its working should be fully unveiled and dealt with in its own terms. SANTOS, supra note 2, at 91.

internalized by a population, that statement will have important binding force, often even more so than a formal law backed by state sanction[92]. Accordingly, by taking pluralism seriously we will more easily see the way in which the contest over norms creates legitimacy over time, and we can put to rest the idea that norms not associated with nation-states necessarily lack significance[93]. Indeed, legal pluralists refuse to focus solely on who has the formal authority to articulate norms or the coercive power to enforce them. Instead, they aim to study empirically which statements of authority tend to be treated as binding in actual practice and by whom.

Of course, there are differences among forms of ordering, particularly given that some legal forms have coercive state power behind them and some do not[94]. And, obviously, disparities in political and economic power strongly affect how much influence any particular normative community is likely to have. But even those differences are not completely determinative. After all, even if formal legal institutions have a near monopoly on legitimate use of force, there are many other forms of effective coercion and inducement wielded by non-state actors[95]. In addition, official legal norms that are contrary to prevailing customary or community norms will often have little or no real world effect, at least without the willingness (or capability) of coercive bodies to exercise sustained force to impose such norms. Thus, obedience to norms frequently reflects sociopolitical reality more than the status of those norms as "law." As a result, "[d]efining the essence of law or custom is less valuable than situating these concepts in particular sets of relations between particular legal orders in particular historical contexts.[96]"

In any event, the important point is that scholars studying the global legal scene need not rehash long and ultimately fruitless debates (both in philosophy[97] and anthropology[98]) about what constitutes law and can instead take a non-essentialist position: treating as law that which people view as law[99].
This formulation turns the what-is-law question into a descriptive inquiry concerning which social norms are recognized as authoritative sources of obligation and by whom[100]. Indeed, the question of what constitutes law is itself revealed as a terrain of contestation among multiple actors[101]. And, by broadening the scope of what counts as law, we can turn our attention to a more comprehensive investigation of how best to mediate the hybrid spaces where normative systems and communities overlap and clash. It is to that question that this Article now turns.

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[92] For a discussion of the importance of legal consciousness scholarship to international law thinking, see Berman, Seeing Beyond the Limits, supra note 81, at 1280–95.

[93]See id. (critiquing a positivist rational choice approach to international law on this ground).

[94]See, e.g., SANTOS, supra note 2, at 91 (arguing that we must "counteract the romantic bias of much legal pluralistic thinking" and "avoid equating simplistically all legal orders coexisting in a given geopolitical unit, and particularly . . . avoid denying the centrality of state law in modern sociolegal fields").

[95]See Moore, The Semi-Autonomous Social Field, supra note 2, at 721. See also LEOPOLD POSPISIL, ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY 97–126 (1971); MAX WEBER, LAW IN ECONOMY AND SOCIETY 18–19 (Max Rheinstein ed., 1954) (describing means of coercion applied by "private" organizations); WEBER, supra at 38 (describing the limits of state power to regulate activities in the economic sphere).

[96]Merry, Legal Pluralism, supra note 2, at 889.

[97]Compare, e.g., H.L.A. HART, THE CONCEPT OF LAW (1961), with LON. L. FULLER, THE MORALITY OF LAW (1964), and RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

[98]Compare, e.g., MALINOWSKI, supra note 56, with E. ADAMSON HOEBEL, THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS (1954).

[99]For a statement of this approach, see Tamanaha, supra note 2.

[100]Such an approach echoes Paul Bohannan's focus on "double institutionalization," the process whereby secondary institutional arrangements are developed to assess which primary norms are deemed authoritative. See Paul Bohannan, Law and Legal Institutions, in 9 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 73 (David L. Sills ed., 1968). See also PHILIPPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW 13 (1978) (adopting a similar formulation).

[101]This is one of the reasons anthropologists turned away from the essentialist debate. See LAURA NADER, THE LIFE OF THE LAW: ANTHROPOLOGICAL PROJECTS 31 (2002).

III. A PLURALIST FRAMEWORK FOR MANAGING LEGAL CONFLICTS

Instead of assuming that states provide the only possible relevant normative systems and instead of thinking only about "solving" legal disputes by identifying a single relevant legal authority, we need a framework for conceptualizing normative conflict that is more pluralist. Such an approach recognizes that, in a multivalent world, many communities are likely to be affected by a single act and will therefore seek to regulate it. Thus, as a purely descriptive matter, hybridity cannot be wished away.

More normatively, we might sometimes prefer procedural mechanisms, institutions, and practices that seek to manage, without eliminating, hybridity. Such a pluralist approach would aim to create or preserve spaces where normative conflicts can be constructively addressed and opportunities for contestation can be retained. This Part therefore draws on legal pluralism to develop a set of principles that should guide the design of these sorts of procedural mechanisms, institutions, and practices. First, though, I consider two alternative responses to a world of plural norms: reasserting territorialist state prerogative on the one hand, and seeking universal harmonization on the other. I argue that both approaches are at least sometimes normatively unattractive, and—perhaps more importantly—they are also likely only ever to be partially successful at best.

A. SOVEREIGNTIST TERRITORIALISM

One response to plural assertions of norms is simply to reject the legitimacy of all communities but the territorially-defined nation-state. This argument tends to take a variety of forms. With respect to immigration, for example, we may see calls to close or restrict borders to keep out foreign influence[102]. In the judicial context, critics argue that it is illegitimate for judges to consider norms expressed by non-state legal communities, particularly those located outside the territorial bounds of the state[103]. And in the discourse of conflict of laws—jurisdiction, choice of law, and judgment recognition—rules for establishing legal authority might be (and historically have been) demarcated along territorialist and statist lines[104].

Of course, there may well be occasions when nation-states can ill afford to defer to non-state normative assertions. For example, substate communities—whether separatist ethnic groups or local warlords—may so threaten the authority of the state that no viable legal order is possible without attempting to eliminate the alternative norm altogether. In addition, there can be little doubt that, even short of exercising such authority, nation-states play dominant roles within the geopolitical order because they can deploy coercive force and therefore often wield tremendous power. Thus, an embrace of pluralist possibilities in no way commits one to a belief that the nation-state is dying or should be deemed unimportant.

Nevertheless, in many instances there is no intrinsic reason to privilege nation-state communities over others. If, to use Benedict Anderson's famous phrase, nation-states are "imagined communities[105]" then nation-state bonds are neither natural nor inevitable; they are merely one particular way of imagining community among many. As such, we must turn our attention to the ways in which conceptions of "community" are constructed within social life, on how membership in a community is marked and attributed, and on how notions of community are given meaning[106]. In doing so, we recognize that community forma-

[102]See sources cited supra note 33.

[103]See, e.g., Roger P. Alford, Misusing International Sources to Interpret the Constitution, 98 AM. J. INT'L L. 57 (2004).

[104]See Paul Schiff Berman, Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era, 153 U. PA. L. REV. 1819 (2005) [hereinafter Berman, Towards a Cosmopolitan Vision] (criticizing this approach).

[105]BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGINS AND SPREAD OF NATIONALISM 6 (rev. ed. 2006) (arguing that nation-states are imagined communities "because the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion").

[106]See NIGEL RAPPORT & JOANNA OVERING, SOCIAL AND CULTURAL ANTHROPOLOGY:THE KEY

tion is a psychological process, not a naturally occurring phenomenon based on external realities[107].

"Community," of course, is a notoriously difficult world to define, and I will not attempt to do so here[108]. But we need not agree upon a definition of community to recognize that, whatever the definition is, we can no longer think of communities as culturally unified groups naturally tied to a territory[109].And while such a definition may never have been entirely accurate, the dissolution of this tie remains an important trend.

Acknowledging community affiliations that exist apart from the nation-state therefore becomes crucial. And by analyzing the social meaning of our affiliations across space, we can think about various alternative conceptions of community that are subnational, transnational, supranational, or epistemic[110]. This is not to deny the symbolically significant, constantly-reinforced, and sometimes historically-rooted power of the nation-state in the collective imagination of its citizens. Nor is it to deemphasize the importance of nation-state communities. It is only to say that these are not the only potentially relevant community associations people might feel. Moreover, although "the scale of the nation-state may once have enabled it to respond to many human problems, . . . national boundaries no longer correspond (if they ever did) to capital formation, personal opportunities, or risk.[111]" Thus, we should recognize the possibility that other affiliations may sometimes be more deeply felt than bonds of loyalty to nation-states.

Meanwhile, if territorial location is of less significance now than it once was, we increasingly face normative questions about whether legal rules based on territory are desirable. Again, this is not to say that territory is unimportant, but it is difficult to deny that we are increasingly affected by activities and decisions that take place far from us in a spatial sense[112]. Such deterritorialized effects have always been present to some extent, of course. One need only look at the history of empire to realize that the strings of governance were often pulled by far-off rulers. But at least in the pre-modern world such political arrangements, perhaps because of the slow pace of transportation and communications, rarely meant strong centralized control of distant realms.

Rather, the social construction of space was organized around many centers, with a patchwork of overlapping and incomplete rights of government[113]. And, although cross-border interaction obviously is not a new phenomenon, in an electronically connected world the effects of any given action may immediately be felt elsewhere with no relationship to physical geography at all.

Indeed, the globalization of capital, the movement of people and goods across borders, the reach of global corporate activity, the impact of worldwide NGOs, and the development, in recent decades, of

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CONCEPTS 62 (2000) (discussing modern anthropological views regarding community).

[107]See, e.g., Akhil Gupta & James Ferguson, Culture, Power, Place: Ethnography at the End of an Era, in CULTURE, POWER, PLACE: EXPLORATIONS IN CRITICAL ANTHROPOLOGY 1, 13 (Akhil Gupta & James Ferguson eds., 1997) (arguing that "community" is "a categorical identity that is premised on various forms of exclusion and constructions of otherness").

[108]I do make a more systematic attempt to discuss various definitions of community in Berman, Globalization of Jurisdiction, supra note 11, at 459–72.

[109]See JEAN-MARIE GUÉHENNO, THE END OF THE NATION-STATE 17 (Victoria Elliott trans., 1995) ("The spatial solidarity of territorial communities is disappearing, to be replaced by temporary interest groups. . . . From the beginning, since the Greek city (polis), politics has been the art of governing a collectivity of people defined by their rootedness in a location, city, or nation. [But] solidarity can no longer be locked into geography . . . .").

[110]For further discussion of these multiple forms of community, see id. at 527–46.

[111]Judith Resnik, Foreign as Domestic Affairs: Democratic Federalism and the Sovereigntism of the Nation-State, 56 EMORY L.J. (forthcoming 2007) (manuscript at 5, on file with author) [hereinafter Resnik, Foreign as Domestic Affairs].

[112]See supra note 50.

[113]See, e.g., John Gerard Ruggie, Territoriality and Beyond: Problematizing Modernity in International Relations, 47 INT'L ORG. 139, 149 (1993) (noting that pre-modern states were not based principally on territorial sovereignty and that, instead, medieval Europe was in some ways an archetype for nonexclusive territorial rule; its "patchwork of overlapping and incomplete rights of government . . . [was] inextricably superimposed and tangled") (internal quotations and citation omitted).

over a hundred international or transnational tribunals[114] all make it far more likely that local communities will be affected by activities and entities with no local presence. As a thought experiment, one can imagine an "effects map," in which one identifies a territorial locality and plots on a map every action that has an effect on that locality[115]. Five hundred years ago, such effects would almost surely have been clustered around the territory, with perhaps some additional effects located in a particular distant imperial location. A hundred years ago, those effects might have begun spreading out. But today, while locality is surely not irrelevant, the effects would likely be diffused over many corporate, governmental, technological, and migratory centers.

In a world of such extraterritorial effects, it is unrealistic to expect legal rules based on territory to be satisfactory. Indeed, it was in part the realization of the many distant acts and actors causing local effects that spurred the loosening of territorial rules for jurisdiction and choice of law in the twentieth century. For example, U.S. rules for allocating jurisdictional authority have shifted from a territorialist vision that gave states complete authority within their territorial boundaries and no authority beyond them to a more flexible approach[116]. Likewise, choice of law rules that once used the territorial location of a significant act or actor as the only relevant factor now generally include a broader range of considerations[117]. Yet, such rules still arguably overemphasize contacts with a territoriallybased legal authority, and it would not be surprising to see such rules evolve in the course of the increasingly deterritorialized twenty-first century[118].

Of course, some maintain that only territorially defined nation-state communities can legitimately claim to exercise democratically grounded power. Such arguments have been much rehearsed in the scholarly literature[119], and a full explication of these debates is far beyond the scope of this Article. Here I make only a few observations, which I think are sufficient to at least complicate the claim that the imperatives of democratic sovereignty necessarily render consideration of transnational, international, or non-state jurisdictional assertions illegitimate.

First, it is no threat to sovereignty for a nation-state to decide that its sovereign interests are advanced overall by making agreements with other nations that limit what it can otherwise do. Thus, international jurisdictional assertions that derive from such agreements do not implicate concerns about democratic sovereignty.

Second, both international human rights norms and international institutions may actually strengthen domestic democracy, properly understood. This is because constitutional democracy already includes within it the idea that "all people (and not merely the majority) can associate themselves with the project of self-government.[120]" Thus, obedience to human rights norms that minimally protect minority interests or multilateral institutions that help guard against capture of government by majority factions actually enhance democracy rather than subvert it[121]. And while such international regimes will not always have

[114]See supra text accompanying note 17.
[115]This thought experiment is derived from David G. Post, Against "Against Cyberanarchy," 17 BERKELEY TECH. L.J. 1365, 1371–73 (2002).
[116]Compare Pennoyer v. Neff, 95 U.S. 714 (1877), with Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).
[117]Compare RESTATEMENT (FIRST) OF THE LAW OF CONFLICT OF LAWS § 378 (1934), with RESTATEMENT (SECOND) OF THE LAW OF CONFLICT OF LAWS § 6 (1971).
[118]For an extended argument along these lines, see Berman, Globalization of Jurisdiction, supra note 11.
[119]See, e.g., Eric A. Posner & Cass R. Sunstein, The Law of Other States, 59 STAN. L. REV. 131, 133 n.4 (2006) (citing articles).
[120]CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 19 (2001). See also RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996) (criticizing what he terms "the majoritarian premise"—the idea that when a group must make a collective decision, fairness requires the decision favored by a majority of its members—and arguing instead for a "constitutional" conception of democracy that requires rights to autonomy and equality as a precondition to democratic legitimacy); Lawrence G. Sager, The Incorrigible Constitution, 65 N.Y.U. L. REV. 893, 897–909 (1990) (criticizing majoritarian theories of popular sovereignty on the ground that they are irreconcilable with the Constitution itself, which explicitly places limits on majoritarianism).

these salutary effects, that is an argument to amend those regimes, not to reject international norms or institutions altogether.

Third, at least when foreign, international, or non-state norms are formally incorporated into domestic law, such incorporation usually occurs through the actions of domestic political actors on either the national or local level. Indeed, as Judith Resnik has documented, at least in the United States local actors are, and have been, major sources through which "foreign" law has become part of U.S. traditions[122] . Moreover, when city councils or state legislatures debate and enact provisions incorporating foreign or international norms, there can be no objection from a majoritarian or federalist perspectiv[123] . And while the actions of judges tend to be more controversial, once one accepts the basic democratic legitimacy of countermajoritarian judges exercising judicial review, then it is difficult to see why there is an additional democratic legitimacy argument against those same judges issuing opinions that may sometimes be influenced by non-state norms, such as international or foreign law (there may be normative objections to the content of particular rulings, but that is not an argument about democratic legitimacy). As Mark Tushnet has argued, "The rules made by supranational institutions become domestic U.S. law only through the operation of U.S. domestic institutions subject to the checks-and-balances system.[124]" Thus, there seems to be little reason to think that the sky is falling.

For similar reasons, because the judges involved are domestic political actors, it is unclear why there are sovereignty or democracy objections to judges considering the law of a foreign jurisdiction when resolving a choice-of-law question with multistate elements[125]. Indeed, there should be even fewer objections in the choice-of-law context because statutory rules promulgated by legislatures are rarely enacted with an eye to international disputes or conduct[126]. And, even when legislators do consider activities abroad, they do so to pursue domestic policy priorities, with little consideration of multistate implications. Yet, the mere fact that a dispute is multinational necessarily means that it implicates interests that are different from a purely domestic dispute, including the state's interest in being part of a well-functioning, interlocking global system. Accordingly, judges may actually be effectuating broader sovereign interests by incorporating nonstate norms into their decisions in multistate cases[127].

Finally, and most fundamentally, legal norms have always migrated across territorial boundaries, and precepts that come to be thought of as constitutive of a community can often be traced historically to ideas borrowed from foreign sources[128]. Accordingly, even as some seek legislatively to enjoin judges from relying on foreign or international law, others deploy foreign and international law in legal and po-

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[121]See generally, e.g., Robert O. Keohane, Stephen Macedo & Andrew Moravcsik, Democracy- Enhancing Multilateralism (Int'l Law & Justice Working Papers, Paper No. 2007/4, 2007) (discussing international institutions), available at http://www.iilj.org/working%20papers/2007-4KMMGA.htm; Jamie Mayerfeld, Does International Human Rights Law Subvert Democracy? (2007) (unpublished manuscript, on file with author) (discussing international human rights).

[122]See Resnik, Foreign as Domestic Affairs, supra note 111 (manuscript at 44–68).

[123]See id. (manuscript at 7) ("Once attention is paid to the degree to which local actors are major source[s] through which 'foreign' law becomes part of United States traditions, one can see that sovereigntism has no special relationship either to majoritarianism or to federalism.").

[124]Mark Tushnet, Transnational/Domestic Constitutional Law, 37 LOY. L.A. L. REV. 239, 263 (2003).

[125]See Dinwoodie, supra note 15, at 577 ("The national courts that develop international norms are connected to a national legislative or political unit that can revisit apparent judicial over-reaching.").

[126]Id. at 548–49.

[127]See Berman, Towards a Cosmopolitan Vision, supra note 104, at 1864 ("[A]s courts consider multiple community affiliations and develop hybrid rules for resolving multistate disputes, they do so not because they are ignoring the policy choices of their home state, but because they are effectuating their state's broader interest in taking part in a global community.").

[128]See Resnik, Foreign as Domestic Affairs, supra note 111 (manuscript at 34) ("Certain legal precepts are now seen to be foundational to the United States, and proudly so. But one should label them 'made in the USA' knowing that—like other "American" products—their parts and designs are produced abroad.").

litical arguments, or they formally announce solidarity with international treaties as a way of cementing transnational community affiliations. "Ideas, norms, and practices do not stop at the lines that people draw across land,[129]" and international norms are always translated into local vernacular. This process of "vernacularization,[130]" and the debate about ideas, norms, and practices that go along with it, are and always have been part of democratic discourse, not in opposition to it[131] . As Seyla Benhabib has argued,

> *The spread of cosmopolitan norms . . . has yielded a . . . political condition [in which] the local, the national and the global are all imbricated in one another. Future democratic iterations will make their interconnections and interdependence deeper and wider. Rather than seeing this situation as undermining democratic sovereignty, we can view it as promising the emergence of new political configurations and new forms of agency . . . .*[132]

These points about nation-state communities, territoriality, and democratic legitimacy are sure to be convincing to some and unconvincing to others. But regardless of where one comes down concerning these various normative arguments, the most important point to remember is that a total rejection of foreign, international, or non-state influence and authority is unlikely to be fully successful in a world of global interaction and cross-border activity. Indeed, seen from the point of view of U.S. historical practice, "sovereigntists have a dismal track record, in that American law is constantly being made and remade through exchanges, some frank and some implicit, with normative views from abroad. Laws— like people—migrate. Legal borders, like physical ones, are permeable, and seepage is everywhere.[133]"

Even a country as economically and militarily powerful as the United States cannot go it alone[134]. Consider the examples discussed at the beginning of this Article. After the French court issued judgment against Yahoo![135], the service provider filed suit in federal district court in California seeking a declaration that the judgment would be unenforceable pursuant to the First Amendment[136]. Leaving aside the merits of this suit[137] (which was ultimately dismissed on procedural grounds[138]), what would it mean, in practical terms, for the United States to declare its unwillingness to enforce the French order? As it turns out, very little. Certainly if Yahoo! wants to continue to operate in France or the European Union or anywhere else that recognizes the French judgment, it will need to comply with the French ruling, regardless of U.S. judi-

[129]Id. (manuscript at 34).
[130]See SALLY ENGLE MERRY, HUMAN RIGHTS & GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 1 (2006) ("In order for human rights ideas to be effective . . . they need to be translated into local terms and situated within local contexts of power and meaning. They need, in other words, to be remade in the vernacular.").
[131]See Resnik, Foreign as Domestic Affairs, supra note 111 (manuscript at 68) ("[O]ne must learn not to equate 'the foreign' with democratic deficits because democratic iterations are a regular route by which 'the foreign' becomes domestic."). For an example of such democratic iterations, see id. (manuscript at 86–89) (describing activities surrounding efforts to encourage divestment from Sudan).
[132]BENHABIB, supra note 46, at 74.
[133]Resnik, Foreign as Domestic Affairs, supra note 111 (manuscript at 69).
[134]See, e.g., JOSEPH S. NYE JR., THE PARADOX OF AMERICAN POWER: WHY THE WORLD'S ONLY SUPERPOWER CAN'T GO IT ALONE 17 (2002).
[135]Tribunal de Grande Instance De Paris [T.G.I.] [ordinary court of original jurisdiction] Paris, May 22, 2000, Ordonnance de refere, UEJF et Licra c/ Yahoo! Inc. et Yahoo France, available at http:// ww.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm.
[136]Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisémitisme, 169 F. Supp. 2d 1181 (N.D. Cal. 2001), rev'd en banc, 433 F.3d 1199 (9th Cir. 2006).
[137]For discussion of the merits, see Berman, Towards a Cosmopolitan Vision, supra note 104, at 1877–79.
[138]See Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisémitisme, 433 F.3d 1199 (9th Cir. 2006).

cial or governmental declarations. Indeed, given Yahoo!'s professed desire to build a company with a "global footprint,[139]" it is not surprising that the company "voluntarily" complied with the French order[140] , while still continuing to challenge its legitimacy. Even from a governmental perspective, the United States would need to step gingerly lest other countries begin to refuse to enforce U.S. judgments, thus impeding U.S. regulatory interests. The reality of global commercial activity means that simply refusing to pay attention to the regulatory decisions of other countries is not feasible.

Moreover, there will be many occasions when a pure territorialist scheme will thwart U.S. regulatory interests. For example, the federal government has doggedly pursued efforts to shut down and/or prosecute Internet sites operating from foreign locations that send unsolicited commercial e-mail, offer online gambling, distribute child pornography, and disseminate online viruses, among others[141]. Adhering to a regulatory environment that reifies territory will tend to hinder such efforts. Antitrust and securities regulation pose other prominent examples[142].

What about the decisions of international bodies? Recall the NAFTA ruling that Mississippi courts had violated international standards of due process in adjudicating a dispute between a U.S. and a Canadian company[143]. While such a ruling has no binding authority on Mississippi, will Mississippi simply ignore it in future cases raising similar issues? Probably not. First, although the NAFTA panel cannot literally overrule Mississippi civil procedure, it can assess fines against the federal government[144], which in turn can put pressure on the states to change their policies. And though the United States could, theoretically, simply refuse to pay, such an action would effectively scuttle NAFTA itself, to the detriment of U.S. business interests. Second, Mississippi may face economic hardship if Canadian and Mexican businesses refuse to locate there for fear of being sued on a tilted playing field. Thus, there may also be internal pressure to modify local practices. Third, perhaps more speculatively, it is difficult to believe as a matter of legal consciousness that Mississippi judges could be completely unaffected by a judicial ruling that they violated international due process standards, even if that judicial ruling were issued in a distant location. Such effects are likely to increase as international and domestic judges interact more, both in formal and informal settings[145]. After all, if one actually knows the judges leveling the criticism or will need to face them in social settings in the near future, it becomes that much harder to ignore their disapprobation.

Finally, one might think it easier to ignore the rules or decisions of non-state actors who probably have the least leverage over official governmental policy. But even here, a refusal to recognize or accept other normative communities may be impossible. After all, what would it mean for even a powerful state to refuse to recognize the quasi-legal norms articulated and enforced through yearly meetings of a small group of international trade finance bankers?[146] The bankers will meet regardless of U.S. pronouncement

[139]See Press Release, Yahoo! Inc., Yahoo! Reports Fourth Quarter, Year End 2000 Financial Results (Jan. 10, 2001), at http://docs.yahoo.com/docs/pr/4q00pr.html (stating that Yahoo! "remained committed to broadening its global footprint and maintaining a leadership position worldwide").

[140]See Press Release, Yahoo! Inc., Yahoo! Enhances Commerce Sites for Higher Quality Online Experience (Jan. 2, 2001), at http://docs.yahoo.com/docs/pr/release675.html (announcing new product guidelines for its auction sites that prohibit "items that are associated with groups deemed to promote or glorify hatred and violence").

[141]See, e.g., The FBI's Cyber Division: Hearing Before the Subcomm. on Courts, the Internet and Intellectual Property of the H. Comm. on the Judiciary, 108th Cong. (2003) (testimony of Jana D. Monroe, Asst. Dir., Cyber Division, FBI), available at http://www.fbi.gov/congress/congress03/Monroe 071703.htm (detailing such efforts).

[142]See, e.g., F. Hoffmann-LaRoche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (limiting the extraterritorial scope of the Sherman Act).

[143]See Loewen Group, Inc. v. United States, ICSID (W. Bank) Case No. ARB(AF)/98/3.

[144]See North American Free Trade Agreement, U.S.-Can.-Mex., art. 1135, Jan. 1, 1994, 107 Stat. 2057 (outlining remedies available).

[145]See, e.g., Anne-Marie Slaughter, Judicial Globalization, 40 VA. J. INT'L L. 1103 (2000) (describing potential impact of such interactions).

[146]For a discussion of the creation of these banking norms, see Levit, supra note 27.

still set rules for trade finance, and U.S. bankers will continue to comply with those rules, at least if they want to be part of the global marketplace. The objection of a nation-state is therefore largely irrelevant.

Of course, there are many times when a nation-state can ignore the wishes of foreign regulatory entities, particularly if there is a great disparity of wealth or power in the relationship among the entities. For example, the Bush administration has defied international law and opinion in its continued worldwide detention and rendition practices[147]. But even such defiance has not been without substantial consequences. Thus, it may become more difficult to achieve security in Iraq[148], get cooperation from potential allies in tracking down and extraditing terrorism suspects[149], or use moral suasion to convince repressive governments to obey human rights norms[150], among many other consequences. And that is not even counting the possibility that other countries may attempt to initiate prosecutions against U.S. government operatives who engaged in such controversial practices[151]. In short, if one wants to be a player on the world geopolitical scene and wishes to secure a favorable climate for one's own business interests in the world, it will be difficult to insist on pure sovereignty-based territorialist prerogatives for long. And, of course, countries with less military or economic power will tend to be even more buffeted by the activities of international, foreign, and non-state entities physically dispersed around the globe.

B. UNIVERSALISM

In contrast to a reassertion of territorial prerogative, a universalist vision tends to respond to normative conflict by seeking to erase normative difference altogether[152]. Indeed, international legal theory has long yearned for an overarching set of commitments that would establish a more peaceful and harmo-

[147]See, e.g., Leila Nadya Sadat, Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law, 37 CASE W. RES. J. INT'L L. 309, 309–11 (2006) (summarizing the detention and rendition policies and international reaction).

[148]See, e.g., Scott Wilson & Sewell Chan, As Inusrgency Grew, So Did Prison Abuse, WASH. POST, May 10, 2004, at A1 (stating that Brigadier General Mark Kimmitt, spokesman for the U.S. military in Iraq, acknowledged that "the evidence of abuse inside Abu Ghraib has shaken public opinion in Iraq to the point where it may be more difficult than ever to secure cooperation against the insurgency. . . . [and] that winning over Iraqis before the planned handover of some sovereign powers next month had been made considerably harder by the photos").

[149]See, e.g., Laura A. Dickinson, Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law, 75 S. CAL. L. REV. 1407, 1450 (2002) (discussing the reluctance of some nations to cooperate with the United States due to their perceptions of the illegitimacy of the use of military tribunals); Craig Whitlock, Testimony Helps Detail CIA's Post- 9/11 Reach: Europeans Told of Plans for Abductions, WASH. POST, Dec. 16, 2006, at A1 (quoting State Department legal adviser John B. Bellinger III's statement that ongoing disputes with U.S. allies about detention practices have "undermined cooperation and intelligence activities").

[150]For a discussion of how U.S. practices have undermined American effectiveness in promoting human rights abroad, see Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 163 (D.D.C. 2004), rev'd, 415 F.3d 33, 43 (D.C. Cir. 2005) (citing LAWYERS COMM. FOR HUMAN RIGHTS, ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES (2003)), and DEBORAH PEARLSTEIN & PRITI PATEL, HUMAN RIGHTS FIRST, BEHIND THE WIRE: AN UPDATE TO ENDING SECRET DETENTIONS (2005). See also Brief of Diego C. Asencio et al. as Amici Curiae in Support of the Petitioners, Rasul v. Bush, 542 U.S. 466 (2004) (Nos. 03-334, 03-343) (filed by former U.S. diplomats, making this argument).

[151]See, e.g., Tracy Wilkinson & Maria De Cristofaro, Italy Indicts 33 in Abduction Case; 26 Americans Charged in Alleged CIA Rendition, CHI. TRIB., Feb. 17, 2007, at 11, available at 2007 WLNR 3186956 (Westlaw NewsRoom).

[152]It is, perhaps, possible to have a universalist vision that focuses exclusively on developing overarching procedural mechanisms, institutions, and practices for managing hybridity. Indeed, one might see the effort to construct global administrative law principles as an initiative along these lines. See, e.g., Krisch, supra note 87. That sort of universalism would, of course, be more compatible with the pluralist perspective offered in this Article.

nious global community[153]. More recently, some have suggested that the nation-state legal regimes of the world are increasingly converging and developing a "world law.[154]" This supposed new world order variously focuses on the religiously-based natural law principles of international human rights or the neoliberal ideology of free trade and its need to harmonize rules that regulate commerce.

As with territorialism, one cannot discount the importance of universalism. Certainly since World War II we have seen the creation of a dizzying array of international institutions, multilateral and bilateral treaties, conventions, cross-border regulatory coordination efforts, and the like. In one way or another, all of this activity represents the desire to harmonize conflicting norms. And on many fronts, both in public and private law, norms are in fact converging to a degree, whether through hegemonic imposition or global embrace. Moreover, such harmonization has important benefits because it tends to lower transaction costs and uncertainty as to what norms will be applied to any given activity. Yet, again as with territorialism, there are reasons to question both the desirability and—more importantly—the feasibility of universalism, at least in some contexts.

As to desirability, it is not at all clear that universalism is an unalloyed good. Indeed, if we think of ourselves solely as citizens of the world, we might tend to dissolve the multirootedness of community affiliation into one global community. Thus, universalism may fail to capture the extreme emotional ties people still feel to distinct transnational or local communities[155] and therefore ignore the very attachments people hold most deeply.

In addition, universalism inevitably erases diversity. This is a problem for three reasons. First, such erasure may involve the silencing of less powerful voices. Thus, the presumed universal may also be the hegemonic. Second, preserving legal diversity can be seen as a good in and of itself because it means that multiple forms of regulatory authority can be assayed in multiple local settings. Just as states in a federal system function as "laboratories" of innovation[156], so too the preservation of diverse legal spaces makes innovation possible. Third, a legal system that provides mechanisms for mediating diversity without dissolving difference necessarily also provides an important model for mediating diversity in day-to-day social life. For example, one argument for a strongly speechprotective interpretation of the First Amendment is that the effort required to tolerate the provocative speech of others is the same effort required to tolerate others more generally[157]. Thus, a legal system that demands tolerance of diversity rather than its erasure is more likely to create the context for a tolerant society than one that, in contrast, seeks uniformity as its goal.

Nevertheless, even if one rejects these normative arguments and embraces universalism as a goal, it is difficult to believe that, as a practical matter, harmonization processes will ever fully bridge the

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[153]See, e.g., IMMANUEL KANT, PERPETUAL PEACE (Helen O'Brien trans., Grotius Soc'y Publ'ns 1927) (1795).

[154]See, e.g., Berman, World Law, supra note 40. See also Harold J. Berman, Is Conflict of Laws Becoming Passé? An Historical Response 44 (Emory Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Paper No. 05-42, 2005), available at http://ssrn.com/abstract=870455 ("[W]ill increasing harmonization of the civil and criminal law of the nation-states of the world substantially reduce the scope of that branch of law that we call conflict-of-laws?").

[155]See, e.g., Thomas M. Franck, Clan and Superclan: Loyalty, Identity and Community in Law and Practice, 90 AM. J. INT'L L. 359, 374 (1996) ("The powerful pull of loyalty exerted by the imagined nation demonstrates that, even in the age of science, a loyalty system based on romantic myths of shared history and kinship has a capacity to endure . . . .").

[156] See, e.g., United States v. Lopez, 514 U.S. 549, 580–81 (1995) (Kennedy, J., concurring) ("[T]he theory and utility of our federalism are revealed" when "considerable disagreement exists about how best to accomplish [a] goal" because "the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.").

[157]See, e.g., THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 14 (1966) (arguing that free speech "contemplates a mode of life that, through encouraging toleration, skepticism, reason and initiative, will allow man to realize his full potentialities. It spurns the alternative of a society that is tyrannical, conformist, irrational and stagnant. It is this concept of society that was embodied in the first amendment").

significant differences that exist among states, let alone the variety of non-state orders at play in the world. This is because many differences both in substantive values and attitudes about law arise from fundamentally different histories, philosophies, and worldviews. People are therefore likely to be either unable or unwilling to trade in their perspectives for the sake of universal harmony. Moreover, even if they were so inclined, it would be difficult to develop a process for determining which norms should be elevated to universal status and which should give way. Thus, when harmonization is possible, it is usually a slow, laborious undertaking, limited to codifying normative convergences that have already occurred over time. As a result, harmonization is generally backward-looking, and in a rapidly-changing world, harmonization processes will tend to lag behind social, technological, and economic realities[158]. Accordingly, even the most optimistic universalist would have to acknowledge that normative conflict is at the very least a constant transitional reality that will require hybrid processes to address.

C. PLURALISM

Although sovereigntist territorialism and universalism are obviously different strategies, they both represent a retreat from hybridity. Of course, as noted previously, sometimes such a rejection of hybridity may be deemed necessary. Yet, hybridity is difficult to escape in a world of overlapping jurisdictions and normative diversity, where—as the pluralists would say—multiple conflicting legal systems occupy the same social field. The question therefore often becomes: are there other approaches to managing hybridity? And though the next Part surveys a range of specific procedural mechanisms, institutions, and discursive practices for doing so, here I briefly outline some principles that would underlie a more pluralist approach.

First, as should be obvious by now, a pluralist approach to managing hybridity should not attempt to erase the reality of that hybridity. Indeed, arguably the desire to "solve" hybridity problems is precisely what has made conflict of laws such a conceptually dissatisfying field for so long. Each generation seeks a new way (or often the revival of an old way) to divine an answer to what is at its root an unanswerable question: which territorially-based state community's norms should govern a dispute that, by definition, is not easily situated territorially and necessarily involves affiliations with multiple communities?

Second, and relatedly, a pluralist framework recognizes that normative conflict is unavoidable and so, instead of trying to erase conflict, seeks to manage it through procedural mechanisms, institutions, and practices that might at least draw the participants to the conflict into a shared social space. This approach draws on Ludwig Wittgenstein's idea that agreements are reached principally through participation in common forms of life, rather than agreement on substance[159]. Or, as political theorist Chantal Mouffe has put it, we need to transform "enemies"—who have no common symbolic space—into "adversaries.[160]" Adversaries, according to Mouffe are "friendly enemies": friends because they "share a common symbolic space but also enemies because they want to organize this common symbolic space in a different way.[161]" Ideally, law—and particularly legal mechanisms for managing hybridity—can function as the sort of common symbolic space that Mouffe envisions and can therefore play a constructive role in transforming enemies into adversaries.

Of course, Mouffe might well disagree with my application of her idea to law. Indeed, in The Democratic Paradox, she writes that "one cannot oppose, as so many liberals do, procedural and substantial justice without recognizing that procedural justice already presupposes acceptance of certain values.[162]" Her

[158]See Dinwoodie, supra note 15, at 569 (bemoaning the lack of dynamism in classical public international law-making and advocating an alternative approach to mediating legal diversity).
[159]LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 241 (G.E.M. Anscombe trans., 3d ed. 1958).
[160]CHANTAL MOUFFE, THE DEMOCRATIC PARADOX 13 (2000).
[161]Id.
[162]Id. at 68.

point is well-taken; certainly my focus on procedural mechanisms, institutions, and practices necessarily limits the range of pluralism somewhat because it requires participants to accept the principles underlying the values of procedural pluralism itself. This is, to a large extent, a vision consonant with liberal principles, and many may reject it on that basis. Alas, there is no way to extricate oneself from this concern if one wants to have any type of functioning legal system for negotiating normative difference. Thus, I argue only that a pluralist framework is more likely able to bring participants together into a common social space than a territorialist or universalist framework would. As philosopher Stuart Hampshire has argued, because normative agreement is impossible, "fairness and justice in procedures" are the only virtues that offer even the possibility for broader sharing . Accordingly, the key is to create spaces for such broader sharing[163], spaces for turning enemies into adversaries, without insisting on normative agreement[164].

Third, in order to help create this sort of shared social space, procedural mechanisms, institutions, and practices for managing hybridity should encourage decision makers to wrestle explicitly with questions of multiple community affiliation and the effects of activities across territorial borders, rather than shunting aside normative difference. As a result, a pluralist framework invites questions that otherwise might not be asked: How are communities appropriately defined in today's world? To what degree do people act based on affiliations with non-state or supranational communities? How should the various norm-generating communities in the global system interact so as to provide opportunities for contestation and expression of difference? Such questions must be considered carefully in order to develop mechanisms that will take seriously the multifaceted interactions of such communities.

Fourth, thinking in more pluralist terms forces consideration of so- called "conflicts values," particularly the independent benefit that may accrue when domestic judicial and regulatory decisions take into account a broader interest in a smoothly functioning overlapping international legal order, reflecting what Justice Blackmun called "the systemic value of reciprocal tolerance and goodwill.[165]" For example, U.S. courts give full faith and credit to judgments rendered in other states even if those judgments would be illegal if issued by the crediting state[166]. Thus, the conflicts value of respecting an interlocking national system outweighs individual parochial interests. And though the domestic example is made easier by the existence of a constitutional command[167], such considerations should always be part of any mechanism for addressing the overlap of plural legal systems. Moreover, taking account of these sorts of systemic values should be seen as a necessary part of how communities pursue their interests in the world, not as a restraint on pursuing such interests. After all, if it is true that communities cannot exist in isolation from each other, then there is a long-term parochial benefit from not insisting on narrow parochial interest and instead establishing mechanisms for trying to defer to others' norms where possible.

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[163]STUART HAMPSHIRE, JUSTICE IS CONFLICT 53 (2000).

[164]Cf. Waldron, supra note 47 (manuscript at 6) ("Humans are enormously curious about each other's ideas and reasons, and, when they want to be, they are resourceful in listening to and trying to learn from one another across what appear to be insurmountable barriers of cultural comprehensibility, often far beyond what philosophers and theorists of culture give them credit for.").

[165]Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part).

[166]See, e.g., Estin v. Estin, 334 U.S. 541, 546 (1948) (stating that the Full Faith and Credit Clause "ordered submission . . . even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it"). See also Milwaukee County v. M.E. White Co., 296 U.S. 268, 277 (1935) ("In numerous cases this Court has held that credit must be given to the judgment of another state, although the forum would not be required to entertain the suit on which the judgment was founded . . . ."); Fauntleroy v. Lum, 210 U.S. 230, 237 (1908) (stating that the judgment of a Missouri court was entitled to full faith and credit in Mississippi even if the Missouri judgment rested on a misapprehension of Mississippi law).

[167]U.S. CONST., art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.").

Fifth, even a system that respects conflicts values will, of course, sometimes find a foreign law so anathema that the law will not be enforced. Or a local religious practice may be so contrary to state values that it will be deemed illegal. Or creating a zone of autonomy for a particular minority group might so threaten the stability of the larger community that it cannot be countenanced. Thus, embracing pluralism in no way requires a full embrace of illiberal communities and practices or the recognition of autonomy rights for every minority group across the board. But when such "public policy" exceptions are invoked within a pluralist framework, they should be treated as unusual occasions requiring strong normative statements regarding the contours of the public policy[168]. This means that, as Robert Cover envisioned, a jurispathic act that "kills off" another community's normative commitment[169] is always at least accompanied by an equally strong normative commitment. The key point is to make decision makers self-conscious about their necessary jurispathic actions[170]. Only such an approach has any chance of keeping adversaries from turning into enemies[171].

Finally, a pluralist framework must always be understood as a middle ground between strict territorialism on the one hand and universalism on the other. The key, therefore, is to try to articulate and maintain a balance between these two poles. As such, successful mechanisms, institutions, or practices will be those that simultaneously celebrate both local variation and international order, and recognize the importance of preserving both multiple sites for contestation and an interlocking system of reciprocity and exchange. Of course, actually doing that in difficult cases is a Herculean and perhaps impossible task. Certainly, mutual agreement about contested normative issues is unlikely and, as discussed previously, possibly even undesirable. Thus, the challenge is to develop ways to seek mutual accommodation while keeping at least some "play" in the joints so that diversity is respected as much as possible. Such play in the joints also allows for the jurisgenerative possibilities inherent in having multiple lawmaking communities and multiple norms[172]. Always the focus is on trying to forge the sort of shared social space that Mouffe describes for transforming enemies into adversaries.

Taken together, these principles provide a set of criteria for evaluating the ways in which legal systems interact. In addition, the principles could inform a community (whether state-based or not) that wishes to design mechanisms, institutions, or practices for addressing hybrid assertions of norms. Of course, such criteria are not exclusive. For example, a procedure or practice that manages hybridity well but denies certain norms of fundamental justice might be deemed problematic, regardless of its embrace of hybridity. Thus, my goal is not to say that embracing pluralism always overrides other concerns. After all, as mentioned previously, many legal and quasi-legal orders are repressive and profoundly illiberal, and their norms may be resisted on other grounds. Instead, the important point is simply that pluralist questions should always at least be part of the debate. In order to see what this would entail, the next Part surveys a broad range of jurisdictional, regulatory, institutional, and doctrinal arrangements that are not usually grouped together and that are not usually evaluated based on the criteria set forth above. Nevertheless, despite the very different doctrinal contexts in which these mechanisms, institutions, and practices arise, they can usefully be understood and evaluated as approaches to the management of hybridity.

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[168]See, e.g., Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (requiring courts to enforce the judgment or arbitral award unless there is fraud or if doing so would be repugnant to the public policy of the enforcing forum).

[169]See Cover, Nomos and Narrative, supra note 1, at 53 (describing judges as inevitably "people of violence" because their interpretations "kill" off competing normative assertions).

[170]Judith Resnik, Living Their Legal Commitments: Paideic Communities, Courts, and Robert Cover, 17 YALE J.L. & HUMAN. 17, 25 (2005) [hereinafter Resnik, Legal Commitments] ("[Cover] wanted the state's actors . . . to be uncomfortable in their knowledge of their own power, respectful of the legitimacy of competing legal systems, and aware of the possibility that multiple meanings and divergent practices ought sometimes to be tolerated, even if painfully so.").

[171]See supra text accompanying notes 160–62.

[172]See supra note 46.

IV. PROCEDURAL MECHANISMS, INSTITUTIONAL DESIGNS, AND DISCURSIVE PRACTICES FOR MANAGING HYBRIDITY

Given the reality of hybridity, we should not be at all surprised to find, across a wide variety of doctrinal areas, the development of procedural mechanisms, institutions, and discursive practices that attempt to manage the overlapping of legal or quasi-legal communities. In this Part, I survey nine such mechanisms, institutions, and practices. Each has been the subject of scholarship (sometimes voluminous) in its own right, but they have not, to date, been viewed collectively, nor have they, for the most part, been considered through a pluralist lens. Indeed, just thinking of them as mechanisms for managing hybridity may offer a different perspective on their efficacy or functionality. For example, these mechanisms, institutions, and practices are often the product of necessary political compromise between sovereigntist territorialism and universalism, and they are therefore deemed "half a loaf" solutions by advocates on both sides: less attractive than what they were hoping for, but better than nothing. Viewing such mechanisms, institutions, and practices through a pluralist lens, however, might cause us to consider whether they are not, instead, "loafand- a-half" solutions which, through their compromises, actually result in a better set of procedures for managing hybridity than if either sovereigntist territorialism or universalism had prevailed in toto. In any event, though I provide no more than brief summaries here, I believe that, taken together, these examples demonstrate the importance of global legal pluralism as an intellectual framework for studying law and globalization in the twentyfirst century.

One point is necessary before proceeding, however. Describing mechanisms for managing hybridity does not tell us how best to actually manage hybridity in particular cases. Thus, each of the mechanisms described in this Part encounter excruciatingly difficult and probably impossible to resolve problems as to how best to determine when norms of one community should give way to norms of another and when, in contrast, pluralism can be maintained. This sort of line-drawing question can never be resolved definitively or satisfactorily because there is at root level no way to "solve" problems of hybridity; the debates are ongoing. But in any event it is beyond the scope of this Article to suggest solutions to specific cases of plural conflict. Instead, I argue that creating (or preserving) mechanisms, institutions, and practices that self-consciously acknowledge the reality of hybridity and seek provisional compromises may sometimes be the best we can do. In addition, simply recognizing the importance of these mechanisms as sites for continuing debates about hybridity, legal conflicts, and mutual accommodation is a crucial first step.

A. DIALECTICAL LEGAL INTERACTIONS

Some who study international law fail to find real "law" there because they are looking for hierarchically-based commands backed by coercive power[173]. In contrast, a pluralist approach understands that interactions between various tribunals and regulatory authorities are more likely to take on a dialectical quality that is neither the direct hierarchical review traditionally undertaken by appellate courts, nor simply the dialogue that often occurs under the doctrine of comity[174]. In the international context, for example, we may see treaty-based courts exert an important influence even as national courts retain formal independence, much as U.S. federal courts exercising habeas corpus jurisdiction may well influence state court interpretations of U.S. constitutional norms in criminal cases[175]. In turn, the decisions of national courts may also come to influence international tribunals. This dialectical and iterative process[176], if it emerges, will exist without an official hierarchical relationship based on coercive power.

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[173]See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 3 (2005).

[174]For a detailed analysis of such dialectical regulation, see Ahdieh, supra note 21.

[175]See id. at 2034.

[176]See BENHABIB, supra note 46, at 48 ("Every iteration involves making sense of an authoritative original in a new and different context. The antecedent thereby is reposited and resignified via subsequent usages and references.").

Three examples illustrate the point. First, of course, is the relationship between NAFTA panels and U.S. state courts discussed previously. In Loewen Group, Inc. v. United States, a NAFTA tribunal reviewed the procedures of the Mississippi courts concerning contract and antitrust claims brought by a local entity against a Canadian corporation[177]. The tribunal criticized the trial as "so flawed that it constituted a miscarriage of justice amounting to a manifest injustice as that expression is understood in international law.[178]" In addition, the tribunal criticized the $400 million punitive damages award issued by the trial court as "grossly disproportionate" to the damage actually suffered[179] . And while in the end the NAFTA panel refrained (on standing grounds) from assessing damages against the United States[180], there is little reason to think that liability in similar situations could not be imposed in the future. Thus, the question becomes: how will a domestic court, faced with a new multinational dispute, respond both to the NAFTA precedents already in place and the threat of possible NAFTA panel review? Although these NAFTA panels lack formal authority over the domestic courts they review, they do have the power to assess damages against federal authorities for violations of the trade agreement , even if those violations occurred in the context of a domestic court judgment. Thus, we see plural sources of normative authority: the domestic court that issued an initial judgment, the NAFTA tribunal that reviews this judgment for fidelity with the principles of the treaty, and the federal authorities who, in response to pressure from the NAFTA tribunal, may in turn put pressure on the domestic court. Robert Ahdieh has argued that, given these realities, we are likely to see, over time, a dialectical relationship form between the domestic and international tribunals, in which both courts pay attention to each other's interpretations and, while not literally bound by each other's decisions, develop a joint jurisprudence partly in tandem and partly in tension with each other[182].

In order to see how such a dialectical relationship might evolve, consider interactions between the European Court of Human Rights ("ECHR") and the constitutional courts of European member states. Here, the relationship may seem more hierarchical because, over the past several decades, the ECHR has increasingly come to seem like a supranational constitutional court, and its authority as ultimate arbiter of European human rights disputes has largely been accepted[183]. Yet, even in this context there appears to be room for hybridity. As Nico Krisch has documented, domestic courts occasionally fail to follow ECHR judgments, asserting fundamental principles embedded in their own constitutional order, and in general claiming the power to determine the ultimate limits to be placed on the authority of the ECHR[184]. Typical of this dialectical relationship is the statement by the German constitutional court that ECHR judgments have to be "taken into account" by German courts, but may have to be "integrated" or adapted to fit the domestic legal system[185]. Moreover, the German court has gone so far as to say that ECHR decisions must be disregarded altogether if they are "contrary to German constitutional provisions.[186]"

Yet, although such statements make it sound as if conflict between the ECHR and domestic courts is the norm, the reality has actually been quite harmonious. As Krisch points out, "despite national courts' insistence on their final authority, the normal, day-to-day operation of the relationship with the [ECHR] has lately been highly cooperative, and friction has been rare.[187]" The picture that emerges is

[177]Loewen Group, Inc. v. United States, ICSID (W. Bank) Case No. ARB(AF)/98/3.
[178]Id. 54.
[179]Id. 113.
[180]See id. 238–40.
[181]See supra note 19 and accompanying text.
[182]See Ahdieh, supra note 21.
[183]See Nico Krisch, The Open Architecture of European Human Rights Law 2 (2006) (unpublished manuscript, on file with author).
[184]See generally id.
[185]Id. at 19.
[186]Id. (citation omitted).
[187]Id.

one in which domestic courts and the ECHR engage in a series of both informal and interpretive mutual accommodation strategies to maintain a balance between uniformity and dissension. This dialectical relationship, forged and developed over many years, may well reflect the path yet to be taken by the NAFTA tribunals and domestic courts, as well as the many other intersystemic interactions at play in the world today.

Finally, consider the Canadian Constitution, which explicitly contemplates a dialectical interaction between national courts and provincial legislatures concerning constitutional interpretation. Section 33's so-called "notwithstanding clause" permits Parliament or a provincial legislature to authorize the operation of a law for a five-year period, even after it has been declared invalid by a court[188]. As with the ECHR example, this provision potentially has a disciplining effect on the court and encourages a more nuanced iterative process in working out constitutional norms. It is true of course that the notwithstanding clause, though often invoked rhetorically, has only rarely actually been used by provincial governments to continue a judicially invalidated law[189]. Yet, this relative infrequency of use may not be evidence of a failed constitutional innovation. Instead, it may indicate just the opposite: that the various institutional actors have sufficiently internalized this mechanism for managing hybridity such that, as in the ECHR example, the precipice is rarely reached[190].

In contrast to the dialectical interplay contemplated by the notwithstanding clause, the United States Supreme Court has, on multiple occasions, interpreted the U.S. Constitution to contain an implicit foreign affairs preemption doctrine that cuts off such interplay[191]. Thus, in three different cases, the Court has refused to allow localities to take actions that were deemed to trench on the exclusive national prerogative to conduct foreign affairs. Yet, one might think that, "[i]n our democratic federation, local efforts to effectuate protection of rights have a presumptive validity authorized by the commitments to multiple voices protected in a federal system.[192]" At the very least, courts should carefully interrogate the claimed justification of preemption to ensure that the local action at issue poses a real, rather than conjectural, threat to the federal government's conduct[193]. After all, pluralism is built into the structure

[188]See Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 33 (U.K.).

[189]For example, the Quebec Parliament overrode the Canadian Supreme Court's invalidation of provisions of a language law. See Ford v. Quebec, [1988] S.C.R. 712. Outside of Quebec, however, the notwithstanding clause has never been used to overturn a judicial decision. See James Allan & Grant Huscroft, Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts, 43 SAN DIEGO L. REV. 1, 21 (2006). In addition, according to one account, the clause has been disavowed by successive Prime Ministers because "[i]ts use has come to be seen as undermining the Charter, in part because judicial decisions interpreting the Charter have come to be seen as synonymous with the Charter itself." Id. at 20.

[190]On the other hand, it is possible that "the notwithstanding clause frees Canadian courts to be less deferential to elected legislatures than they otherwise would have been in the absence of such a clause, because it allows judges to act on the basis that their decisions are not final." Allan & Huscroft, supra note 189, at 21–22. In any event, the important point for this Article is that the clause is structured as a mechanism for managing the hybridity of multiple communities within a federal system. For an account supporting the approach of the notwithstanding clause from the perspective of political theory, see Jennifer Nedelski, Reconceiving Rights and Constitutionalism (2007) (unpublished chapter of manuscript, on file with author).

[191]See Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003) (striking down California law requiring insurance companies doing business in California to disclose any business activities in Europe during the Nazi Holocaust); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000) (prohibiting Massachusetts from banning state expenditures on imports made with forced labor); Zschernig v. Miller, 389 U.S. 429 (1968) (striking down Oregon statute that had the effect of preventing a resident of East Germany from inheriting property probated in the state). For a discussion of these cases, see Resnik, Foreign as Domestic Affairs, supra note 111 (manuscript at 79–85).

[192]Resnik, Foreign as Domestic Affairs, supra note 111 (manuscript at 92–93).

[193]See id. (manuscript at 94) ("Judges ought to adopt a posture of non-encroachment by insisting on exacting evidence of particular and specific imminent harms before invalidating actions by localities or states as they determine their own expenditures of funds and rules.").

of federalism, and so actions of localities to import international or foreign norms or signal solidarity with them should not easily be displaced.

These examples all involve dialectical interactions between formal state or international legal institutions; however, the same dialectical interactions are possible with regard to non-state normative standards. For example, the decisions of arbitral panels may, over time, come to exert influence on the decisions of more formal state or international bodies, and vice versa. In a different context, states may incorporate or adapt standards of conduct that are part of accreditation schemes promulgated by NGOs or industry groups[194]. And more broadly, we might see the creation of monitoring schemes in general as a kind of pluralist approach because instead of dictating rules, such monitoring generates oversight and publicity that can instigate change without a formal hierarchical relationship or coercive enforcement mechanism. is compatible with the Convention, on the other [196] Thus, the margin of appreciation allows domestic polities some room to maneuver in implementing ECHR decisions in order to accommodate local variation. How big that margin is depends on a number of factors including, for example, the degree of consensus among the member states. Thus, in a case involving parental rights of transsexuals, the ECHR noted that because there was as yet no common European standard and "generally speaking, the law appears to be in a transitional stage, the respondent State must be afforded a wide margin of appreciation.[197]"

B. MARGINS OF APPRECIATION

One of the interpretive mechanisms employed by the ECHR to maintain space for local variation is the oft-discussed "margin of appreciation" doctrine[195]. The idea here is to strike a balance between deference to national courts and legislators on the one hand, and maintaining "European supervision" that "empower[s the ECHR] to give the final ruling" on whether a challenged practice is compatible with the Convention, on the other[196]. Thus, the margin of appreciation allows domestic polities some room to maneuver in implementing ECHR decisions in order to accommodate local variation. How big that margin is depends on a number of factors including, for example, the degree of consensus among the member states. Thus, in a case involving parental rights of transsexuals, the ECHR noted that because there was as yet no common European standard and "generally speaking, the law appears to be in a transitional stage, the respondent State must be afforded a wide margin of appreciation.[197]"

Affording this sort of variable margin of appreciation usefully accommodates a limited range of pluralism. It does not permit domestic courts to fully ignore the supranational pronouncement (though, as discussed above, domestic courts have sometimes asserted greater independence[198]). Nevertheless, it does allow space for local variation, particularly when the law is in transition or when no consensus exists among member states on a given issue. Moreover, by framing the inquiry as one of local consensus, the margin of appreciation doctrine disciplines the ECHR and forces it to move incrementally, pushing

[194]See, e.g., Jody Freeman, The Private Role in Public Governance, 75 N.Y.U. L. REV. 543, 618–19 (2000) (describing government incorporation of accreditation standards on Health Maintenance Organizations first promulgated by a not-for-profit entity). See also LAURA A. DICKINSON, OUTSOURCING WAR AND PEACE (forthcoming 2008) (proposing such an accreditation scheme for disciplining private military contractors).

[195]A particularly useful, succinct summary can be found in Laurence R. Helfer & Anne-Marie Slaughter, Toward a Theory of Effective Supranational Adjudication, 107 YALE L.J. 273, 316–17 (1997). My discussion here largely tracks theirs.

[196]Sunday Times v. United Kingdom, 30 Eur. Ct. H.R. (ser. A) at 36 (1979).

[197]X v. United Kingdom, No. 75/1995/581/667, slip op. at 13 (Eur. Ct. H.R. Apr. 22, 1997) (citations omitted). See also Otto-Preminger Inst. v. Austria, 295-A Eur. Ct. H.R. (ser. A) at 19 (1994) (finding that the lack of a uniform European conception of rights to freedom of expression "directed against religious feelings of others" dictates a wider margin of appreciation).

[198]See supra notes 184–86 and accompanying text.

toward consensus without running too far ahead of it. Finally, the margin of appreciation functions as a signaling mechanism, through which "the ECHR is able to identify potentially problematic practices for the contracting states before they actually become violations, thereby permitting the states to anticipate that their laws may one day be called into question.[199]" And, of course, there is reverse signaling as well, because domestic states, by their societal evolution away from consensus, effectively maintain space for local variation. As Laurence Helfer and Anne-Marie Slaughter have observed, "The conjunction of the margin of appreciation doctrine and the consensus inquiry thus permits the ECHR to link its decisions to the pace of change of domestic law, acknowledging the political sovereignty of respondent states while legitimizing its own decisions against them.[200]" A similar sort of interaction could be established by a constitutional court adopting some form of the classic concept/conception distinction[201] with regard to the adoption of norms by other actors. Thus, an entity such as the ECHR could, for example, articulate a particular concept of rights, while recognizing that the way this right is implemented is subject to various alternative conceptions.

Other legal regimes could also usefully adopt margins of appreciation. For example, the controversial agreement on Trade-Related Aspects of Intellectual Property Rights could be interpreted to incorporate a margin of appreciation. Such a flexible approach might allow developing countries more leeway in trying to make sure that access to knowledge in their countries is not unduly thwarted by overly stringent intellectual property protection.

C. LIMITED AUTONOMY REGIMES

A different kind of margin of appreciation problem involves the interactions between state and non-state law. Here, as with the supranational/national dialectic, we have two different normative orders that can neither ignore nor eliminate the other. Thus, the question becomes what mechanisms of pluralism can be created to mediate the conflicts? As noted previously, this problem classically arises in the context of religion or ethnicity, though it is in no way limited to such communities. Nevertheless, an overview of mechanisms for managing religious and ethnic (or linguistic-group) hybridity may shed light on the possibility of building institutions to address non-state normative communities in a variety of settings.

In a useful summary, Henry Steiner has delineated three distinct types of autonomy regime[202]. The first allows a territorially-concentrated ethnic, religious, or linguistic minority group limited autonomy within the nationstate[203]. The precise contours of this autonomy can vary considerably from

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[199]Helfer & Slaughter, supra note 195, at 317. See also Laurence R. Helfer, Consensus, Coherence and the European Convention on Human Rights, 26 CORNELL INT'L L.J. 133, 141 (1993). For an example of this type of signaling, see J.G. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS 81 (2d ed. 1993) (interpreting the ECHR's statement in Rees v. United Kingdom, 106 Eur. Ct. H.R. (ser. A) at 19 (1986), that "'[t]he need for appropriate legal measures [to protect transsexuals] should therefore be kept under review having regard particularly to scientific and societal developments'" as a "strong hint that while British practice currently satisfied [the Convention], the Court's duty to interpret the Convention as a living instrument may lead it to a different conclusion in the future").

[200]Helfer & Slaughter, supra note 195, at 317.

[201]See, e.g., RONALD DWORKIN, LAW'S EMPIRE 71 (1986) (discussing the difference between "concept" and "conception" as "a contrast between levels of abstraction at which the interpretation of the practice can be studied")

[202] See Steiner, supra note 25, at 1541–43.

[203]See, e.g., WILL KYMLICKA, POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM, AND CITIZENSHIP 156 (2001) (arguing that the creation of linguistically homogeneous, separate institutions for minority subgroups within a larger federal structure will foster the partici-

to situation; however, such schemes can include the creation of regional elective governments, command of local police, control over natural resources, management of regional schools, and so on[204]. With regard to language, communities may be empowered to create language rights within their regions[205]. Of course, non-state normative communities are often dispersed throughout a state, making it difficult to create specific local zones of autonomy. In such cases, other potential autonomy regimes may be more effective[206]. A second possibility, therefore, involves direct power-sharing arrangements[207]. "Such regimes carve up a state's population in ethnic terms to assure one or several ethnic groups of a particular form of participation in governance or economic opportunities.[208]" Thus, we may see provisions that set aside a fixed number of legislative seats, executive branch positions, or judicial appointments to a particular religious or ethnic minority group[209]. In addition, legislators who are members of a particular minority group may be granted the ability to veto proposed measures adversely affecting that group[210]. Alternatively, states may enact rules requiring formal consultation before decisions are taken on issues that particularly impact minority communities[211].

Finally, a third autonomy regime contemplates the reality that members of an ethnic community may invoke the idea of a personal law that is carried with the individual, regardless of territorial location. This personal law is often religious in character and it reflects a primary identification with one's religious or ethnic group, rather than the territorially delimited community of the nation-state[212]. Accordingly, state law may seek to create what are essentially margins of appreciation to recognize forms of autonomy for these identities[213]. "Like power sharing, a personal law can provide an important degree of autonomy and cohesion even for minorities that are territorially dispersed.[214]"

The question of accommodation to personal law is not a new one, nor is it limited to religious groups. In ancient Egypt, foreign merchants in commercial disputes were sometimes permitted to choose judges of their own nationality so that foreigners could settle their dispute "in accordance with their own foreign laws and customs.[215]" Greek city-states adopted similar rules[216]. Later, legal systems in England

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pation of minority groups in democracy by giving them the autonomy to control cultural policy).

[204]See Steiner, supra note 25, at 1541–42 (listing examples).

[205]See, e.g., Wouter Pas, A Dynamic Federalism Built on Static Principles: The Case of Belgium, in FEDERALISM, SUBNATIONAL CONSTITUTIONS, AND MINORITY RIGHTS 157, 158–59 (G. Alan Tarr, Robert F. Williams & Josef Marko eds., 2004) ("[I]n 1970 the Belgian State was divided into four territorial linguistic regions: the Dutch-speaking region, the French-speaking region, the bilingual region of Brussels-Capital, and the German-speaking region. . . . The authorities in each region may, in principle, only use the official language of that region in their dealings with citizens. In some municipalities, where a significant number of the inhabitants speak another language, special provisions were enacted to give individuals the right to continue to use their own language in their relations with the local authorities.").

[206]See, e.g., Cristina M. Rodríguez, Language and Participation, 94 CAL. L. REV. 687, 744 (2006) ("Devolution to minority-run institutions will not help secure rights for disparate ethnic groups spread out over a nation's territory . . . .").

[207]See, e.g., Ivo D. Duchacek, Federalist Responses to Ethnic Demands: An Overview, in FEDERALISM AND POLITICAL INTEGRATION 59 (Daniel J. Elazar ed., 1979); Arend Lijphart, The Power- Sharing Approach, in CONFLICT AND PEACEMAKING IN MULTIETHNIC SOCIETIES 491 (Joseph V. Montville ed., 1990).

[208]Steiner, supra note 25, at 1541.

[209]Id. at 1541–42.

[210]Id.

[211]Id. at 1542.

[212]See, e.g., Mallat, supra note 24, at 47 (contrasting the "personal model" with the "territorial model").

[213]Chibli Mallat calls this scheme "'communitarian' (or personal) federalism." Id. at 51.

[214]Steiner, supra note 25, at 1542.

[215]COLEMAN PHILLIPSON, 1 THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME 193 (Arno Press 1979) (1911).

[216]See DOUGLAS M. MACDOWELL, THE LAW IN CLASSICAL ATHENS 220, 222–24 (1978).

and continental Europe applied personal law to foreign litigants, judging many criminal and civil matters based not on the territorial location of the actors, but on their citizenship[217]. In the ninth century, for example, King Edgar allowed Danes to be judged by the laws of their homeland[218]. Likewise, William the Conqueror granted eleventh-century French immigrants the right to be judged by rules based on their national identity[219]. Foreign merchants trading under King John, in the twelfth and thirteenth centuries, were similarly governed by the law of their home communities[220].

As noted previously, the relationship between state and personal law frequently arose in colonial settings where western legal systems were layered on top of the personal laws and customs of indigenous communities[221]. Indeed, in the colonial context, margins of appreciation and other forms of accommodation were often invoked as governing legal principles. For example, English courts were empowered to exercise the jurisdiction of the English courts of law and chancery only "as far as circumstances [would]$_{222}$ admit." Likewise, with respect to personal laws, the Straits Settlements Charter of 1855 allowed the courts of judicature to exercise jurisdiction as an ecclesiastical court "so far as the religions, manners and customs of the inhabitants admit.[223]" By the end of the colonial era, indigenous law was recognized as law proper by all of the colonial powers[224].

Today, particularly in countries with a large minority Muslim population, many states maintain space for personal law within a nominally Westphalian legal structure. These nation-states—ranging from Canada to Egypt to India to Singapore—recognize parallel civil and religious legal systems, often with their own separate courts[225]. And civil legal authorities are frequently called on to determine the margin of appreciation to be given to such personal law. For example, the Indian Supreme Court has famously attempted to bridge secular and Islamic law in two decisions involving Muslim women's right to maintenance after divorce[226]. At the same time, issues arise concerning the extent to which members of a particular religious or ethnic community can opt out of their personal law and adopt the law of the nation-state. For example, in 1988 a Sri Lankan court decided that a Muslim couple could adopt a child according to state regulation, but could not confer inheritance rights on their adopted child because Islamic Law did not recognize adoption[227]. Even outside of the context of Islamic law, the United States Supreme Court has at times deferred to the independent parallel courts maintained by Indian populations located within U.S. territorial borders[228]. And beyond judicial bodies, we increasingly see other governmental entities, such as banking regulators, forced to oversee forms of financing that conform to religious

[217]See MARIANNE CONSTABLE, THE LAW OF THE OTHER 7 (1994).
[218]Id. at 8.
[219]Id. at 10.
[220]Id. at 13.
[221]See supra text accompanying notes 55–60.
[222]Siak v. Drashid, [1946] 1 MALAYAN L.J. 147, 152 (App. Ct. Sept. 13, 1941) (citations omitted).
[223] ROLAND ST. JOHN BRADDELL, THE LAW OF THE STRAITS SETTLEMENTS 17 (3d ed. 1982). Interestingly, in the era prior to the Age of Empire, English courts would only defer to indigenous laws of Christian communities. For example, in Calvin's Case, 7 Co. Rep. 1 a, [18a] (1608), reprinted in 77 Eng. Rep. 377, 398 (1932), Lord Coke stated: [I]f a King come to a Christian kingdom by conquest . . . he may at his pleasure alter and change the laws of that kingdom: but until he [does] make an alteration of those laws the ancient laws . . . remain. But if a Christian King should conquer a kingdom of an infidel, and bring them under his subjection, [then] ipso facto the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and of nature, contained in the decalogue . . . . However, by at least 1774, that distinction appears to have fallen into disrepute. See, e.g., Campbell v. Hall, Lofft. 655, 716 (1774), reprinted in 98 Eng. Rep. 848, 882 (1932): ("Don't quote the distinction [between Christians and non-Christians], for the honour of my Lord Coke.").
[224]DAVID PEARL, INTERPERSONAL CONFLICT OF LAWS IN INDIA, PAKISTAN AND BANGLADESH 26 (1981). Pearl excludes Germany, but notes that even Germany established an internal conflicts of law regime, which seems implicitly to recognize some sort of autonomous legitimacy for indigenous practices. Id.
[225]See Bharathi Anandhi Venkatraman, Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari'a and the Convention Compatible?, 44 AM. U. L. REV. 1949, 1984 (1995); DeNeen L. Brown, Canadians Allow Islamic Courts to Decide Disputes, WASH.

principles[229]. Of course, sometimes deference to religious or ethnic affiliations can be insufficiently protective of other values, such as the rights of women[230]. Nevertheless, these sorts of negotiations, like all the limited autonomy regimes surveyed in this section, reflect official recognition of essential hybridity that the state cannot wish away.

D. SUBSIDIARITY SCHEMES

Subsidiarity is another mechanism for managing the interactions between different legal or quasi-legal authorities. The Catholic Church first developed subsidiarity as an ordering principle designed to keep so-called "higher" levels of authority from trenching unduly on the "internal life of a community.[231]" Thus, it was deemed "an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do.[232]" This principle seeks to push authority for decision making "down" to the most local or smallest unit of governance that is feasible[233].

Subsidiarity has also, of course, become an integral concept for managing relations between national and supranational governing bodies in Europe[234]. For example, Article 5 of the European Community Treaty provides that any action falling within the concurrent competence of the European Com-

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POST, Apr. 28, 2004, at A14 (discussing an Islamic Court of Civil Justice in Ontario, staffed by arbitrators trained in both Shari'a and Canadian civil law).

[226]See Mohammed Ahmed Khan v. Shah Bano Begum, A.I.R. 1985 S.C. 945; Danial Latifi v. Union of India, A.I.R. 2001 S.C. 3958.

[227]See, e.g., Ghouse v. Ghouse, 1988 1 Sri LR 25.

[228]See Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

[229]See, e.g., Tavia Grant, A Hot New Banking Trend: Sharia-Compliant Finance, GLOBE & MAIL (Toronto), May 7, 2007, available at 2007 WLNR 8607324 (Westlaw NewsRoom).

[230]See, e.g., Resnik, Legal Commitments, supra note 170, at 48–49 (criticizing Santa Clara Pueblo on this ground); Mary Anne Case, On Feminist Fundamentalism (2007) (unpublished manuscript, on file with author) (arguing that feminist commitments should be deemed as fundamental, and as deserving of deference, as religious ones).

[231]See VATICAN, CATECHISM OF THE CATHOLIC CHURCH ¶ 1883 (1992) ("A community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to coordinate its activity with the activities of the rest of society, always with a view to the common good") (quoting POPE JOHN PAUL II, CENTESIMUS ANNUS ¶ 48 (1991)), available at http://www.vatican.va/archive/catechism/p3s1c1a 8.htm. (last visited Aug. 30, 2007).

[232]POPE PIUS XI, QUADRAGESIMO ANNO ¶ 79 (1931), available at http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html (last visited Aug. 30, 2007).

[233]For discussions of the Catholic Church understanding of subsidiarity, see generally Thomas C. Kohler, Quadragesimo Anno, in A CENTURY OF CATHOLIC SOCIAL THOUGHT: ESSAYS ON "RERUM NOVARUM" AND NINE OTHER KEY DOCUMENTS 27, 31 (George Weigel & Robert Royal eds., 1991); Joseph P. Rompala, "Once More Unto the Breach, Dear Friends": Recurring Themes in Welfare Reform in the United States and Great Britain and What the Principle of Subsidiarity Can Do to Break the Pattern, 29 J. LEGIS. 307, 331 (2003); Robert A. Sirico, Subsidiarity, Society, and Entitlements: Understanding and Application, 11 NOTRE DAME J. L. ETHICS & PUB. POL'Y, 549, 550 (1997) (quoting CATECHISM OF THE CATHOLIC CHURCH).

[234]The literature on subsidiarity within the European context is voluminous. Indeed, as early as 1993 Joseph Weiler was already calling academic subsidiarity commentary a "growth industry," J.H.H. Weiler, Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration, 31 J. COMMON MKT. STUD. 417, 437 (1993), and there is no indication that interest in subsidiarity has weakened since. Among many useful treatments, see for example, N.W. Barber, The Limited Modesty of Subsidiarity, 11 EUROPEAN L.J. 308 (2005); George A. Bermann, Taking Subsidiarity Seriously: Federalism in the European Community and the United States, 94 COLUM. L. REV. 331 (1994); Deborah Z. Cass, The Word that Saves Maastricht? The Principle of Subsidiarity and the Division of Powers Within the European Community, 29 COMMON MKT. L. REV. 1107 (1992); Kees van Kersbergen & Bertjan Verbeek,

munity and the Member States should only be taken by the Community "if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.[235]" Interestingly, sovereignty—a concept steeped in absolutist rhetoric—has, by some accounts, been replaced by subsidiarity—which is a more flexible mechanism for managing hybridity—as "the core idea that serves to demarcate the respective spheres of the national and international.[236]"

Unlike sovereignty, a subsidiarity regime does not pose an outright bar to governance at the "higher" level of authority. But it does not offer a blank check either. The idea is to foster careful and repeated consideration of other potential lawmaking communities. Thus, "at its core the principle of subsidiarity requires any infringements of the autonomy of the local level by means of pre-emptive norms enacted on the higher level to be justified by good reasons.[237]" Accordingly, it is not enough for, say, a supranational governance rule simply to be a good idea; the supranational lawmaking community also must consider whether the rule is one that is appropriately enacted at the supranational level, given contrary local policies.

For example, consider the case of a higher-level authority that enacts an emissions cap in order to combat global climate change, but runs up against a lower-level authority that performed its own cost-benefit analysis and determined that it was better for the local economy not to create such a stringent restriction[238]. Here the collective action problems inherent in the lower-level authority's parochial cost-benefit analysis would probably justify intervention at the higher level. In contrast, a higher-level rule limiting nicotine consumption might not override a more permissive local rule because the locality can plausibly decide it wants to bear the higher healthcare costs or other consequences that might result.
As with all mechanisms for managing hybridity, the line-drawing problems are potentially difficult and often politically contested, but even just the habits of mind generated by thinking in terms of subsidiarity can help ensure that lawmaking communities at least take into account other potentially relevant lawmaking communities[239]. Moreover, subsidiarity can help "local populations . .

Subsidiarity as a Principle of Governance in the European Union, 2 COMP. EUR. POL. 142, 151 (2004); Mattias Kumm, The Legitimacy of International Law: A Constitutionalist Framework of Analysis, 15 EUR. J. INT'L L. 907, 920–24 (2004); Peter L. Lindseth, Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community, 99 COLUM. L. REV. 628, 668–69 (1999); Phil Syrpis, In Defence of Subsidiarity, 24 OXFORD J. LEGAL STUD. 323 (2004) (reviewing ANTONIO ESTELLA, THE EU PRINCIPLE OF SUBSIDIARITY AND ITS CRITIQUE (2002)); A.G. Toth, The Principle of Subsidiarity in the Maastricht Treaty, 29 COMMON MKT. L. REV. 1079 (1992).

[235]Treaty Establishing the European Community, art. 5, Dec. 24, 2002, 2002 O.J. (C 325) 33, 41 ("In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.").

[236]Kumm, supra note 234, at 920–21. See also, e.g., Neil MacCormick, Democracy, Subsidiarity, and Citizenship in the 'European Commonwealth,' 16 L. & PHIL. 331, 338 (1997) (arguing that Europe is now "post-sovereign," having evolved beyond sovereignty).

[237]Kumm, supra note 234, at 921.

[238]This hypothetical example derives from one offered by Kumm, id. at 923–24.

[239]I realize that my discussion of subsidiarity has a functionalist cast and therefore may seem to deemphasize other concerns, such as democratic legitimacy or the nation-state's claims to loyalty as against supranational institutions. See, e.g., Lindseth, supra note 234, at 669 (arguing that a functionalist approach "is clearly inadequate to understanding the full import of the subsidiarity principle" because it tends to ignore important issues of legitimacy); Paul D. Marquardt, Subsidiarityand Sovereignty in the European Union, 18 FORDHAM INT'L L.J. 616, 618 (1994) ("[T]he underlying logic of subsidiarity reduces the claim of rightful governance to a technocratic question of functional efficiency that will eventually undercut the nation-state's claims to loyalty."). The sort of dialogue that mechanisms for managing hybridity encourage, however, need not be "technocratic" and can in fact engage with precisely the questions of legitimacy and community ties that critics want. Thus, I argue only for mechanisms that enhance dialogue; I do not circumscribe the content of that dialogue. Nevertheless,

better preserve their sense of social and cultural identity,[240]" while still allowing for the possibility that higher level governmental authority might sometimes be necessary. Finally, even though a subsidiarity regime sets the default in favor of the local and therefore requires articulated justifications to override the presumption, subsidiarity-related concerns can sometimes actually strengthen the perceived legitimacy of the higher-level authority as well. This is because, when the higher authority does override local regulation, it presumably does so only after careful consideration of local practices and only after articulating reasons to justify such an override[241] . Accordingly, the institutional processes of the local and therefore requires articulated justifications to override the presumption, subsidiarity-related concerns can sometimes actually strengthen the perceived legitimacy of the higher-level authority as well. This is because, when the higher authority does override local regulation, it presumably does so only after careful consideration of local practices and only after articulating reasons to justify such an override[241]. Accordingly, the institutional processes of subsidiarity aim to ensure dialogue among multiple legal communities, leading ideally to increased acceptance of each. Not surprisingly, subsidiarity has been proposed as a more general model for international law as well[242].

E. JURISDICTIONAL REDUNDANCIES

Many of the legal conundrums of a hybrid world arise because of jurisdictional redundancy. That is, as noted throughout this Article, multiple legal communities frequently seek to assert jurisdiction over the same act or actor. Yet, while this jurisdictional overlap is frequently viewed as a problem because it potentially creates conflicting obligations and uncertainty, we might also view jurisdictional redundancy as a necessary adaptive feature of a multivariate, pluralist legal system. Indeed, as the examples throughout this Part indicate, jurisdictional redundancy may itself be thought of as a mechanism for managing hybridity because the existence of overlapping jurisdictional claims often leads to a nuanced negotiation— either explicit or implicit—between or among the various communities making those claims.

In focusing on the pluralist opportunities inherent in jurisdictional redundancy, I echo the insights of Robert Cover in his article The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation[243]. Although his essay was focused particularly on the variety of "official" law pronouncers in the U.S. federal system, Cover identified some of the benefits that accrue from having multiple overlapping jurisdictional assertions, regardless of the context. Such benefits include a greater possibility for error correction, a more robust field for norm articulation, and a larger space for creative innovation[244]. And though Cover acknowledged that it might seem perverse "to seek out a messy and indeterminate end to conflicts which may be tied neatly together by a single authoritative verdict," he nevertheless argued that we should "embrace" a system "that permits the tensions and conflicts of the social order" to be played out in the jurisdictional structure of the system[245]. Thus, Cover's pluralism, though here focused on U.S. federalism, can be said to include the creative possibilities inherent in multiple overlapping jurisdictions asserted by both state and non-state entities in whatever context they arise. More recently, Judith Resnik

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to the extent that critics of a functionalist account of subsidiarity are trying to raise a sovereigntist objection to supranationalism in general, the pluralist framework I pursue in this Article clearly rejects such a position as both normatively undesirable and impractical. See supra Part III.A.

[240]Bermann, supra note 234, at 341.

[241]See Kumm, supra note 234, at 922 ("If there are good reasons for deciding an issue on the international level, because the concerns addressed are concerns best addressed by a larger community, then the international level enjoys greater jurisdictional legitimacy.").

[242]See, e.g., id. at 921

[243]Robert M. Cover, The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation,22 WM. & MARY L. REV. 639 (1981).

[244]See id.

[245]Id. at 682.

has noted the "multiple ports of entry" that a federalist society creates[246] and has argued that what constitutes the appropriate spheres for "local," "national," and "international" regulation and adjudication changes over time and cannot be essentialized[247]. Not surprisingly, other commentators have at times advocated what amounts to a federalist approach to national/supranational relations[248].

With regard to state-to-state jurisdictional redundancy, consider Spanish efforts to assert jurisdiction over members of the Argentine military. In August 2003, Judge Baltasar Garzón sought extradition from Argentina of dozens of Argentines for human rights abuses committed under the Argentine military government in the 1970s[249]. In addition, Garzón successfully sought extradition from Mexico of one former Argentine Navy lieutenant who was accused of murdering hundreds of people[250]. In the wake of Garzón's actions, realist observers complained that such transnational prosecutions were illegitimate because Argentina had previously conferred amnesty on those who had been involved in the period of military rule and therefore any prosecution would infringe on Argentina's sovereign "choice" to grant amnesty[251].

But the amnesty decision was not simply a unitary choice made by some unified "state" of Argentina; it was a politically contested act that remained controversial within the country[252]. And the Spanish extradition request itself gave President Néstor Kirchner more leverage in his tug-ofwar with the legal establishment over the amnesty laws. Just a month after Garzón's request, both houses of the Argentine Congress voted by large majorities to annul the laws[253].

Meanwhile the Spanish government decided that it would not make the formal extradition request to Argentina that Garzón sought, but it did so based primarily on the fact that Argentina had begun to scrap its amnesty laws and the accused would therefore be subject to domestic human rights prosecution[254]. President Kirchner therefore could use Spain's announcement to increase pressure on the Argen-

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[246]See Judith Resnik, Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry, 115 YALE L.J. 1564 (2006).

[247]See Judith Resnik, Afterword: Federalism's Options, 14 YALE L. & POL'Y REV. 465, 473–74 (1996) ("My point is not only that particular subject matter may go back and forth between state and federal governance but also that the tradition of allocation itself is one constantly being reworked; periodically, events prompt the revisiting of state or federal authority, and the lines move.").

[248]See, e.g., Kumm, supra note 234, at 922 (arguing that subsidiarity should be a general principle to be applied both with regard to federally structured entities and "with regard to the management of the national/international divide").

[249]See Larry Rohter, Argentine Congress Likely to Void 'Dirty War' Amnesties, N.Y. TIMES, Aug. 21, 2003, at A3 (recounting Garzón's extradition request).

[250]Emma Daly, Spanish Judge Sends Argentine to Prison on Genocide Charge, N.Y. TIMES, June 30, 2003, at A3 ("In an unusual act of international judicial cooperation, and a victory for the Spanish judge Baltasar Garzón, Mexico's Supreme Court ruled this month that the former officer, Ricardo Miguel Cavallo, could be extradited to Spain for crimes reportedly committed in a third country, Argentina.").

[251]See David B. Rivkin Jr. & Lee A. Casey, Crimes Outside the World's Jurisdiction, N.Y. TIMES, July 22, 2003, at A19 (noting that Argentina had granted amnesty to Cavallo and arguing that "Judge Garzón is essentially ignoring Argentina's own history and desires").

[252]The Argentine army, for example, made known its desire for amnesty for human rights abuses through several revolts in the late 1980s. The Argentine Congress granted amnesty after one such uprising in 1987. See Joseph B. Treaster, Argentine President Orders Troops to End Revolt, N.Y. TIMES, Dec. 4, 1988, § 1, at 3 (describing an army revolt in Buenos Aires).

[253]Argentina's Day of Reckoning, CHI. TRIB., Apr. 24, 2004, at C26.

[254]Elizabeth Nash, Garzón Blocked Over "Dirty War" Extraditions, INDEP. (London), Aug. 30, 2003, at 14. See also Al Goodman, Spain Blocks Trials of Argentines, CNN.COM, Aug. 29, 2003, at http://www.cnn.com/2003/WORLD/europe/08/29/spanish.argentina/index.html (quoting the Spanish attorney for the victims saying that the Spanish government's decision sends a "powerful message" to Argentina's Supreme Court to overturn the amnesty laws).

tine Su-preme Court to officially overturn the amnesty laws[255]. Finally, on June 14, 2005, the Argentine Supreme Court did in fact strike down the amnesty laws, thus clearing the way for domestic human rights prosecutions[256]. In the wake of that decision, 772 people, nearly all from the military or secret police, face criminal charges and investigations in Argentina[257]. So, in the end, the "sovereign" state of Argentina made political and legal choices to repeal the amnesty laws just as it had previously made choices to create them. But in this change of heart we can see the degree to which jurisdictional redundancy may significantly alter the domestic political terrain.

Likewise, Judge Garzón's earlier efforts to assert jurisdiction over former Chilean leader Augusto Pinochet[258], though not literally "successful" because Pinochet was never extradited to Spain[259], strengthened the hands of human rights advocates within Chile itself and provided the impetus for a movement that led to a Chilean Supreme Court decision stripping Pinochet of his lifetime immunity[260]. In 2006 the

[255]See Héctor Tobar, Judge Orders Officers Freed: The Argentine Military Men Accused of Rights Abuses in the '70s and '80s May Still Face Trials, L.A. TIMES, Sept. 2, 2003, at A3 ("President Néstor Kirchner used Spain's announcement to increase pressure on the Argentine Supreme Court to overturn the amnesty laws that prohibit trying the men here.").

[256]Corte Suprema de Justicia [CSJN], 14/6/2005, "Simón, Julio Héctor y otros s/ privación ilegítima de la libertad," causa No. 17.768, S.1767.XXXVIII (Arg.). See also Press Release, Human Rights Watch, Argentina: Amnesty Laws Struck Down (June 14, 2005), available at http://hrw.org/english/docs/2005/06/14/argent11119.htm. Interestingly, the Argentine Court cited as legal precedent a 2001 decision of the Inter-American Court of Human Rights striking down a similar amnesty provision in Peru as incompatible with the American Convention on Human Rights and hence without legal effect. Corte Suprema de Justicia [CSJN], 14/6/2005, "Simón, Julio Héctor y otros s/ privación ilegítima de la libertad," causa No. 17.768, S.1767.XXXVIII (Arg.). See also Press Release, supra. Thus, the Inter-American Court pronouncement played an important norm-generating role, even though it was not backed by coercive force.

[257]Slaking a Thirst for Justice, ECONOMIST, Apr. 12, 2007, at 39, 40.

[258]Judge Garzón issued an arrest order based on allegations of kidnappings, torture, and planned disappearances of Chilean citizens and citizens of other countries. Spanish Request to Arrest General Pinochet, Oct. 16, 1998, reprinted in THE PINOCHET PAPERS: THE CASE OF AUGUSTO PINOCHET IN SPAIN AND BRITAIN 57–59 (Reed Brody & Michael Ratner eds., 2000) [hereinafter THE PINOCHET PAPERS]. See also Anne Swardson, Pinochet Case Tries Spanish Legal Establishment, WASH. POST, Oct. 22, 1998, at A27 ("As Chilean president from 1973 to 1990, Garzón's arrest order said, Pinochet was 'the leader of an international organization created . . . to conceive, develop and execute the systematic planning of illegal detentions [kidnappings], torture, forced relocations, assassinations and/or disappearances of numerous persons, including Argentines, Spaniards, Britons, Americans, Chileans and other nationalities.'"). On October 30, 1998, the Spanish National Court ruled unanimously that Spanish courts had jurisdiction over the matter based both on the principle of universal jurisdiction (that crimes against humanity can be tried anywhere at any time) and the passive personality principle of jurisdiction (that courts may try cases if their nationals are victims of crime, regardless of where the crime was committed). Order of the Criminal Chamber of the Spanish Audiencia Nacional affirming Spain's Jurisdiction, Nov. 5, 1998 (No. 173/98), reprinted in THE PINOCHET PAPERS, supra, at 95–107. The Office of the Special Prosecutor alleged that Spaniards living in Chile were among those killed under Pinochet's rule. Id. at 106.

[259]Pinochet was physically in Great Britain. The British House of Lords ultimately ruled that Pinochet was not entitled to head-of-state immunity for acts of torture and could be extradited to Spain. Regina v. Bow St. Metro. Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3), [2000] 1 A.C. 147, 204–05 (H.L. 1999) (appeal taken from Q.B. Div'l Ct.) (holding that the International Convention Against Torture, incorporated into United Kingdom law in 1988, prevented Pinochet from claiming head-of-state immunity after 1988, because the universal jurisdiction contemplated by the Convention is inconsistent with immunity for former heads of state). Nevertheless, the British government refused to extradite, citing Pinochet's failing health. See Statement of Sec'y of State Jack Straw in the House of Commons, Mar. 2, 2000, in THE PINOCHET PAPERS, supra note 258, at 481, 482 ("[I]n the light of th[e] medical evidence . . . I . . . conclude[d] that no purpose would be served by continuing the Spanish extradition request."). Pinochet was eventually returned to Chile. Anthony Faiola, Pinochet Returns to Chile: Flight from Britain Ends 16-Month Extradition Crusade, WASH. POST, Mar. 3, 2000, at A1.

[260]See Chile's Top Court Strips Pinochet of Immunity, N.Y. TIMES, Aug. 27, 2004, at A3 ("Chile's Supreme Court stripped the former dictator Augusto Pinochet of immunity from prosecution in a notorious human rights case on

the Chilean court further ruled that Chile was subject to the Geneva Conventions during the period of Pinochet's rule and that neither statutes of limitations nor amnesties could be invoked to block prosecutions for serious violations of the Conventions, such as war crimes or crimes against humanity[261]. To date, 148 people, including nearly 50 military officers, have been convicted for human rights violations committed during this era, and over 400 more suspects, mostly from the armed forces, have been indicted or are under investigation[262]. One might even see Italy's assertion of jurisdiction over U.S. CIA agents who allegedly abducted a terrorist suspect as a source of alternative norms concerning the appropriate role for civil liberties in the conduct of antiterrorism operations[263]. Such norms may have broader influence over time.

Turning to international assertions of jurisdiction, we can see again that even the potential jurisdictional assertion of an alternative normgenerating community can put pressure on local politics. For example, although international courts do not generally have the power to force states to surrender suspects, the International Criminal Tribunal for the Former Yugoslavia ("ICTY") instituted Rule 11 bis proceedings, whereby public hearings were held at the indictment phase[264]. Such hearings publicized the various cases and the atrocities alleged, thereby helping pressure states to turn over suspects. And, of course, the prosecution of Slobodan Milošević may well have played at least some role in weakening his hold on power in Serbia, ultimately bringing about his ouster from government.

Even without formal court proceedings, the United Nations can influence local political realities by asserting forms of jurisdiction. For example, when the UN creates international commissions of inquiry concerning alleged atrocities or threatens prosecutions in international courts, such acts can empower reformers within local bureaucracies, who can then argue for institutional changes as a way of staving off international interference. Thus, in the aftermath of the violence in East Timor that followed its vote for independence, there were grave concerns that the Indonesian government would not pursue human rights investigations of the military personnel allegedly responsible for the violence[265]. Accordingly, an International Commission of Inquiry was established, and UN officials warned that an international court might be necessary[266]. As with Argentina, such actions strengthened the hand of reformers within Indonesia, such as then-Attorney General Marzuki Darusman. With the specter of international action hanging over Indonesia, Darusman made several statements arguing that, for nationalist reasons, a hard-hitting Indonesian investigation was necessary in order to forestall an international takeover of the process[267]. Not surprisingly, when this international pressure dissipated after the terrorist attacks of September 11, 2001, so did the momentum to provide real accountability in Indonesia for the atrocities committed[268].

Thursday, raising hopes of victims that he may finally face trial for abuses during his 17-year rule.").

[261]Slaking a Thirst for Justice, supra note 257, at 39.

[262]Id. at 39–40.

[263]See Wilkinson & De Cristofaro, supra note 151.

[264]See Int'l Crim. Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev. 38 (June 13, 2006), available at http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev38e.pdf. The International Criminal Tribunal for the Former Yugoslavia's Rule 11 bis concerns, inter alia, the procedure by which the Trial Chamber issues arrest warrants. Id.

[265]See, e.g., Laura A. Dickinson, The Dance of Complementarity: Relationships Among Domestic, International, and Transnational Accountability Mechanisms in East Timor and Indonesia, in ACCOUNTABILITY FOR ATROCITIES: NATIONAL AND INTERNATIONAL RESPONSES 319, 358–61 (Jane E. Stromseth ed., 2003) (discussing ways in which international pressure on Indonesia in the period just after East Timor gained its independence strengthened the hand of reformers within the Indonesian government to push for robust domestic accountability mechanisms for atrocities committed during the period leading up to the independence vote).

[266]Id. at 358–59.

[267]See id. at 360 (documenting the response of the Indonesian government, which appointed an investigative team, identified priority cases, named suspects, and collected evidence).

[268]See id. at 364–66 (discussing the shifting priorities of the Bush administration following the 9/11 attacks and tracing the impact of outside pressure in efforts to hold individuals accountable for the violence in East Timor).

Complementarity regimes are a more formalized way of harnessing the potential power of jurisdictional redundancy. Here the idea is that when two legal communities claim jurisdiction over an actor, one community agrees not to assert jurisdiction, but only so long as the other community takes action. This is a hybrid mechanism because one community does not hierarchically impose a solution on the other, but it does assert influence on the other's domestic process through its mere presence as a potential jurisdictional actor in the future.

The best-known complementarity regime in the world today is the one enshrined in the statute of the International Criminal Court ("ICC"). Pursuant to Article 17, the ICC cannot prosecute someone unless the suspect's home country is unwilling or unable to investigate[269]. As with most mechanisms for managing hybridity, this one has been criticized by both sides in the nation-state sovereignty/international human rights debate. Thus, sovereigntist voices in the United States condemn the ICC as an encroachment on state prerogatives[270], despite the fact that ICC jurisdiction over U.S. citizens is easily staved off so long as our domestic or military authorities simply conduct the type of investigations that a democratic citizenry would normally expect in response to allegations of serious human rights abuses. On the other hand, international human rights advocates fear the complementarity regime will permit too many potential suspects to skirt international justice[271]. This concern, however, discounts the catalytic impact that even the possibility of international prosecutions can have.

The important catalytic function of complementarity has not been lost on the ICC prosecutor, Luis Moreno-Ocampo. In one of his first speeches upon assuming office, Moreno-Ocampo noted that "As a consequence of complementarity, the number of cases that reach the [ICC] should not be a measure [of] its efficiency. On the contrary, the absence of trials before [the ICC], as a consequence of the regular functioning of national institutions, would be a major success.[272]" Moreno-Ocampo therefore announced that he would take a "positive approach to complementarity," and encourage (and perhaps even aid) national governments to undertake their own investigations and prosecutions[273].

According to William Burke-White, this idea of proactive complementarity, if it is truly pursued, would create a hybrid system of judicial enforcement for the prosecution of the most serious international crimes, under which the ICC and national governments share the ability and the duty to act and would therefore necessarily be engaged in a broad series of interactions directed toward accountability. Indeed, the ICC could become a contributor to the effective functioning of national judiciaries and investigative bodies. The result of such a policy, Burke-White argues, "may be a virtuous circle, in which the [ICC] welcomes national judicial efforts and stimulates the exercise of domestic jurisdiction through the threat of international intervention.[274]"

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[269]Rome Statute of the International Criminal Court, art. 17, July 17, 1998, 2187 U.N.T.S. 90.

[270]See, e.g., Miles A. Pomper, Helms Gives Blunt Message to U.N. Security Council: Don't Tread on U.S., 58 CQ WEEKLY 4, Jan. 22, 2000, available at 2000 WLNR 201231 (Westlaw NewsRoom) (reporting that Sen. Jesse Helms "criticized the proposed International Criminal Court as an intrusion on sovereignty and stated that the U.S. should be free to pursue unilateral military action overseas").

[271]See, e.g., Hans-Peter Kaul, Preconditions to the Exercise of Jurisdiction, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 583, 613 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002) (referring to the rejection of universal jurisdiction as a "painful weakness" of the ICC regime).

[272]Luis Moreno-Ocampo, Chief Prosecutor of the International Criminal Court, Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court (June 16, 2003), available at http://www.icc-cpi.int/library/organs/otp/030616_moreno_ocampo_english_final.pdf.

[273]Luis Moreno-Ocampo, Chief Prosecutor of the International Criminal Court, Statement to Diplomatic Corps (Feb. 12, 2004), available at http://www.icc-cpi.int/library/organs/otp/LOM_20040212_En.pdf.

[274]William W. Burke-White, Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of Justice 5 (Univ. of Pa. Law Sch. Pub. Law & Legal Theory Research Paper Series, Paper No. 07-08, 2007), available at http://papers.ssrn.com/abstract=964201. See also Brian Concannon, Jr., Beyond Complementarity: The International Criminal Court and National Prosecutions, A View From Haiti, 32 COLUM. HUM. RTS. L. REV. 201 (2000) (discussing ways in which the International Criminal Court's complementarity

Of course, we should not assume that international jurisdictional assertions always work as a force for increased human rights protections. Indeed, as Kim Lane Scheppele has documented, recent Security Council resolutions, backed by threat of sanctions, require countries to enact antiterrorism legislation and adjust antiterrorism policies regardless of domestic, constitutionally-based, civil liberties concerns[275]. Nevertheless, the important point is to see jurisdictional overlap in the state and supranational spheres as a hybrid legal space where alternative norms are proposed and contested.

Sometimes, instead of one jurisdiction ultimately adopting the other's norms in toto, we may see the existence of jurisdictional redundancy open up space for the creation of hybrid substantive norms. For example, Graeme Dinwoodie has argued that national courts should decide international copyright cases not by choosing an applicable law, but by devising an applicable solution, reflecting the values of all interested systems, national and international, that may have a prescriptive claim on the outcome[276]. Similarly, where once courts simply adjudicated bankruptcies independently, based on the presence of assets in their territorial jurisdiction, global insolvencies are now often dealt with by courts working cooperatively[277].

Finally, it is important to note that jurisdictional redundancy can also work from "bottom-up," with non-state norms being appropriated into state (or international) law. The most obvious example of state law's recognition of non-state lawmaking is in the common law's ongoing incorporation of social custom and practice. As scholars have recognized, "[d]ecisionmakers work under a continuing pressure to incorporate customary rules into their decisions.[278] Sometimes such incorporation is explicit, as when a regulatory regime references non-state accreditation standards[279], or a statute is interpreted (or even supplanted) by reference to industry custom[280] or when a law of sales that would accord with merchant reality was adopted in the Uniform Commercial Code[281], or when the rules promulgated by a small community of trade finance bankers were ultimately appropriated by the World Trade Organization into their official legal instruments[282]. Even when the impact of non-state norms is unacknowledged, state-sponsored law may only be deemed legitimate to the extent that its official pronouncements reflect the "common understandings of private laws and customs.[283]" Indeed, the invention of legal fictions often indicates that official norms are being adjusted to more closely reflect the dictates of non-state norms and practices.

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regime, supplemented with other forms of aid, can support local prosecutions).

[275]See Kim Lane Scheppele, The International State of Emergency: Challenges to Constitutionalism After September 11 3–4 (Sept. 21, 2006) (unpublished manuscript), available at http://digitalcommons.law.umaryland.edu/schmooze_papers/49/.

[276]See Dinwoodie, supra note 15.

[277]See Lore Unt, International Relations and International Insolvency Cooperation: Liberalism, Institutionalism, and Transnational Legal Dialogue, 28 LAW & POL'Y INT'L BUS. 1037 (1997). See also Anne-Marie Slaughter, A Global Community of Courts, 44 HARV. INT'L. L.J. 191, 214 (2003). See generally Jay Lawrence Westbrook, Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum, 65 AM. BANKR. L.J. 457 (1991).

[278]Weyrauch & Bell, supra note 69, at 330.

[279] See supra note 194 and accompanying text.

[280]See, e.g., FULLER, supra note 71, at 57–59 (arguing that the act of interpretation permits courts to adjust official legal norms to match custom or usage); JAMES WILLARD HURST, LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN 1836–1915 289–94 (1964) (describing the ways in which local norms in the Wisconsin lumber industry played a significant role in the way contract law was applied).

[281]See Zipporah Batshaw Wiseman, The Limits of Vision: Karl Llewellyn and the Merchant Rules, 100 HARV. L. REV. 465, 503–19 (1987) (describing Karl Llewellyn's initial drafts of what later became Article 2 of the Uniform Commercial Code).

[282]Levit, supra note 27, at 165 (describing the incorporation of an informal "Gentleman's Agreement" on export credits as a safe harbor in the WTO's Agreement on Subsidies and Countervailing measures).

[283]Weyrauch & Bell, supra note 69, at 329.

Of course, all of these jurisdictional redundancies might be seen as perhaps necessary but regrettable concessions to the realities of a world of normative disagreement. Such a view would focus on concerns about forum shopping, uncertainty about applicable rules, litigation costs, and so forth. In order to minimize such difficulties, we might seek international harmonization or more strict territorialist rules to cut off some of the overlap. But, as discussed previously, such efforts are unlikely ever to be fully effective. Thus, jurisdictional overlap is likely to continue to be a reality. Moreover, a pluralist framework allows us to see ways in which jurisdictional redundancy might sometimes be a generative feature of a hybrid legal world, and not simply a problem to be eliminated.

F. HYBRID PARTICIPATION ARRANGEMENTS

Sometimes hybridity can be addressed not so much through the relationships among multiple communities and their decision makers as by hybridizing the decision making body or process itself. For example, from 1190 until 1870, English law used the so-called "mixed jury," or "jury de medietate linguae," with members of two different communities sitting side by side to settle disputes when people from the two communities came into conflict[284]. Sir Edward Coke attributed this practice "to the Saxons, for whom 'twelve men versed in the law, six English and an equal number of Welsh, dispense justice to the English and Welsh.[285]" Regional differences, however, were not the only type of community variation recognized in the mixed-jury custom. Mixed juries were also used in disputes between Jews and Christians[286], city and country dwellers[287], and merchants and nonmerchants[288]. In the United States, the custom of mixed juries was imported from England and used in disputes between settlers and indigenous people[289] and in other interjurisdictional disputes[290] at least through the beginning of the twentieth century . Karl Llewellyn's proposal that merchant experts sit as a tribunal to hear commercial disputes relies on a similar idea that specialized communities may possess relevant knowledge or background that should be called upon in rendering just verdicts[281].

The principles underlying mixed juries can still be found today. Indeed, the line of United States Supreme Court decisions involving peremptory challenges of jurors could be seen as responding in part to a felt imperative that jury panels reflect both racial and gender diversity[292]. Nor is this a misplaced

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[284]Deborah A. Ramirez, The Mixed Jury and the Ancient Custom of Trial By Jury De Medietate Linguae: A History and a Proposal for Change, 74 B.U. L. REV. 777, 781 (1994). See also CONSTABLE, supra note 217, at 8 (explaining the practice of mixed juries in early England).

[285]CONSTABLE, supra note 217, at 17 (quoting SIR EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND § 234 (1628)).

[286]See id. at 18–21 (noting that half-Jewish, half-Christian juries heard suits between Jews and non-Jews in England during the twelfth and thirteenth centuries); Ramirez, supra note 284, at 783–84 (arguing that mixed juries originated in part from the king's desire to protect Jewish capital, which was subject to high assessments and escheatment to the crown, rather than lose it to Christians in an unfair trial).

[287]See CONSTABLE, supra note 217, at 17 (recounting an action involving a country-dweller in twelfth century London that required that at least one of the jurors be of "the county in which the foreigner dwells" (citation omitted)).

[288]See id. at 23–25 (exploring the evolution of "mixed merchant juries" in early England); Ramirez, supra note 284, at 784–86 (recognizing the King's regard for foreign merchants, which prompted the use of mixed juries in order to promote a "perception of fairness" to outsiders and attract their capital and goods).

[289]See Katherine A. Hermes, Jurisdiction in the Colonial Northeast: Algonquian, English and French Governance, 43 AM. J. LEGAL HIST. 52, 64–65 (1999) (discussing the implementation of a mixed-jury system in colonial Pennsylvania, Rhode Island, and Massachusetts).

[290] See Ramirez, supra note 284, at 790 (noting that "[a]t various times between 1674 and 1911, Kentucky, Maryland, Massachusetts, Pennsylvania, New York, Virginia, and South Carolina each provided for mixed juries").

[291] See Wiseman, supra note 281, at 512–15 (describing Llewellyn's merchant-tribunal proposal).

[292]See Batson v. Kentucky, 476 U.S. 79, 89 (1986) (forbidding prosecutors from challenging jurors solely on the basis of race). See also J.E.B. v. Alabama, 511 U.S. 127, 130–31 (1994) (extending Batson to peremptory chal-

imperative, given studies indicating that racially mixed juries tend to deliberate longer, consider more facts, raise more questions, and discuss more racial issues than all-white juries[293]. In addition, racially mixed juries have been found to make fewer factual errors than single-race juries, and when factual inaccuracies do arise, they are more likely to be corrected in racially mixed juries than in single-race juries[294].

In the human rights arena, hybrid domestic/international courts continue the tradition of the mixed jury[295]. Such hybrid courts have been employed in transitional justice settings in Kosovo, East Timor, Sierra Leone, and now Cambodia. In these courts, domestic judges—ideally drawn from the multiple political, racial, or ethnic groups involved in the larger geopolitical conflict—sit alongside international judges, and domestic and international lawyers also work together to prosecute the cases[296].

Scholars suggest that, at least in theory, hybrid courts hold the promise of addressing some of the problems encountered in post-conflict settings by wholly international courts on the one hand, and wholly domestic courts on the other[297]. Such problems can be grouped into three categories: legitimacy, capacity building, and norm penetration[298]. With regard to legitimacy concerns, the rationale for hybrid courts is largely the same as for mixed juries. If there is broad representation from the various communities involved in the dispute, then the outcome of the trial is more likely to be palatable to a cross-section of the population. Moreover, the presence of judges from the broader international community may contribute to a sense of fairness both for others watching the process from afar and for domestic populations who fear that local judges will rule based on sectarian prejudices. On the other hand, the presence of local judges may protect against rejection of the court as wholly "foreign," a perception that has, for example, bedeviled the ICTY. The hybrid court may therefore be seen as the best available compromise. Turning to capacity building, a hybrid court physically located in the region may be preferable to an international court elsewhere because resources both for physical infrastructure and for training will be more likely to flow into the country[299]. Finally, scholars argue, hybrid courts may help train a cadre of domestic lawyers in international legal standards and give them the tools necessary to develop and adapt those international norms in local settings. Meanwhile, the international actors are more likely to understand better the local nuances that may complicate the application of universal norms[300].

It should be noted that, at least so far, the hybrid courts have failed to fully live up to their promise[301]. Nevertheless, they may still be preferable to wholly international or wholly domestic courts for many of the reasons set forth above. Moreover, most of the problems the courts have encountered are traceable to failures of implementation—for example, inadequate funding; they do not necessarily call into question the usefulness of the institutional model as a whole. In any event, a hybrid court will often be the only viable political compromise, reflecting—as in almost all the examples surveyed in this Article—the impracticality of wholly universalist or wholly territorialist responses and the resulting need for some sort of hybrid mechanism. Moreover, as Stephen Krasner has theorized, the sort of "shared sovereignty"[302]

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lenges based on gender).

[293]See Samuel R. Sommers & Phoebe C. Ellsworth, How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research, 78 CHI.-KENT L. REV. 997, 1028 (2003).

[294]See id. See also Hiroshi Fukurai, Social De-Construction of Race and Affirmative Action in Jury Selection, 11 LA RAZA L.J. 17, 20 (1999) ("Jury research shows that racially heterogeneous juries are more likely than single race juries to enhance the quality of deliberations. A number of empirical studies . . . show that racially mixed juries minimize the distorting risk of bias." (citation omitted)).

[295]See, e.g., Laura A. Dickinson, The Promise of Hybrid Courts, 97 AM. J. INT'L L. 295, 295 (2003).

[296]See id.

[297]See, e.g., id. at 300.

[298]See id. at 301–05.

[299]Of course, sometimes trials in the post-conflict locale may be too dangerous, thus necessitating a more distant situs for the court.

[300]See Dickinson, supra note 295, at 301–05.

[301]See, e.g., Justice Should Be Done, but Where? The Relationship Between National and International Courts, 101 ASIL PROC. (forthcoming 2007) (remarks of Laura A. Dickinson, on file with author) (discussing shortcomings).

reflected in the hybrid court structure can be particularly important when domestic institutions are weak because it can "gird new political structures with more expertise, bettercrafted policies, and guarantees against abuses of power.[303]" Following this logic, the Dayton Accords effectively made the Bosnian Constitutional Court a hybrid court, authorizing the President of the European Court of Human Rights to appoint three non-Bosnian judges to the nine-member court[304]. A different kind of hybrid is the Israeli Supreme Court, which has, since its inception, customarily had at least one member who is an expert in Jewish law[305].

We can also see hybrid arrangements outside of the judicial context. For example, in the oil pipeline agreement between Chad and the World Bank, the two parties share control and governance of the project[306]. As a condition for its participation, the World Bank insisted on a revenue management plan aimed at ensuring that the proceeds of oil exploration would be used for socioeconomic development within the country[307]. To that end, the plan contains important limitations on how the expected oil revenue can be invested and spent[308]. In addition, oversight of the revenue plan is shared. Both the World Bank and the government of Chad must approve the annual expenditure of generated revenues, and there is a ninemember oversight committee, seven of whom represent the government while two represent civil society[309]. The committee annually publishes a review of operations, and those operations are subject to external audit[310]. Finally, the World Bank's International Advisory Group and Inspection Panel retains oversight power[311]. Whether such measures will result in effective hybrid governance remains to be seen. But significantly, most of the criticisms of the plan thus far tend to focus on the particular terms of the shared sovereignty arrangement, not the hybrid structure itself[312].

It is not only officially constituted courts, governments, and international institutions that may benefit from hybrid participation arrangements in the international sphere. Consider, for example, the dilemmas raised by questions of Internet standard-setting and governance. Of course, global governance of the Internet is a problematic and contested area because of the wide variety of potentially relevant community norms (both state and non-state) and the concern that any global governmental body would inevitably fail to reach consensus on many issues and might lack democratic legitimacy.

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[302]Such "shared sovereignty" arrangements, according to Krasner, "involve[] the creation of institutions for governing specific issue areas within a state—areas over which external and internal actors voluntarily share authority." Stephen D. Krasner, The Case for Shared Sovereignty, 16 J. DEMOCRACY 69, 76 (2005).

[303]Id. at 70.

[304]See General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, annex 4, art. VI, ¶ 1(a), Dec. 14, 1995, 35 I.L.M. 75, 117, 123.

[305]See, e.g., Donna E. Arzt, Growing a Constitution: Reconciling Liberty and Community in Israel and the United States, 19 L. & SOC. INQUIRY 253, 257 (1994).

[306]For a useful description of the terms of the project, see Emeka Duruigbo, The World Bank, Multinational Oil Corporations, and the Resource Curse in Africa, 26 U. PA. J. INT'L ECON. L. 1, 38–46 (2005).

[307]Id. at 40.

[308]For example: In the course of the first ten years of production, that is, between 2004 and 2013, income taxes will constitute sixteen percent of total revenues to Chad and the rest will come from royalties and dividends. The government is given discretion on how to spend the revenues from income taxes subject to the limitation that they be used for general development purposes. The government has less liberty when it comes to royalties and dividends. A Special Revenue Account is created in which they would be deposited. A distribution formula has also been specified. Ten percent of the money will be kept in international financial institutions as a fund for future generations. Eighty-five percent of the remaining ninety percent will be deposited in local commercial banks and is dedicated to the financing of programs in five important sectors namely, education, health and social services, rural development, infrastructure, and environment and water resources. The remaining fifteen percent would be devoted to the development of the oil-producing Doba region. Id. at 41–42.

[309]Id. at 42.

[310]Id.

[311]Id.

[312]For a summary of criticisms, see id. at 43–46.

Into this fray, the Internet Engineering Task Force ("IETF") has, for more than two decades, played an important role in standard-setting and technical design of the Internet[313]. Given the fact that potentially significant values and policy choices can be embedded into the Internet's technical architecture[314], the IETF is an important—though by no means the only— place where Internet governance battles play out.

Since at least 1992, the IETF has self-consciously sought ways to effectively manage its inherently hybrid space as a non-state entity embedding standards into a global technology. Its approach has been completely non-territorial, relying on the "rough consensus" of volunteer network designers, operators, vendors, and researchers who join e-mail lists to discuss potential standards and attend triennial meetings held in different locations around the world[315]. Meetings are open to all, and anyone connected to the Internet can join the email mailing lists that discuss proposed protocols[316]. Moreover, everyone who attends meetings has an equal right to participate[317]. At least one scholar celebrates the IETF for instantiating Jürgen Habermas's ideal of deliberative democracy[318]. On the other hand, though the IETF admirably draws from a wide range of territorial communities, the participants might be said to hail largely from a single elite community of technologists who, for the most part, speak the same language and share the same goals[319]. Indeed, it may well be these shared community norms (and the fact that most Internet standards decisions are likely to be non-zero-sum games[320]) that make "rough consensus" even possible[321]. Nevertheless, the IETF's global egalitarian ethic at the very least attempts to manage hybridity through broad-based participation from members of multiple territorial communities, while eschewing both nation-state and top-down international governmental approaches. Moreover, it is interesting to consider that this open, relatively nonhierarchical, approach to standard-setting in a hybrid environment helped to establish the Internet as a wildly successful, global phenomenon in the first place[322].

G. MUTUAL RECOGNITION REGIMES

Given that harmonization is often difficult with regard to the substantive norms applied to products or services that cross borders, a more pluralist strategy for achieving some level of intersystemic regulation involves so-called mutual recognition regimes[323]. Under a policy of mutual recognition, dif-

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[313]See INTERNET ENG'G TASK FORCE, OVERVIEW OF IETF, available at http://www.ietf.org/overview.html (last visited Sept. 1, 2007).

[314]See LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 6 (1999).

[315]See A. Michael Froomkin, Habermas@Discourse.Net: Toward a Critical Theory of Cyberspace, 116 HARV. L. REV. 749, 792–94 (2003).

[316]Id.

[317]Id.

[318]See id. at 797 ("[T]he Internet Standards-making institutions and processes are international phenomena that conform relatively well to the discourse required to actualize Habermas's discourse ethics. The participants in the IETF engage in constant discourse, continually reflect on their actions, and routinely document their reflections in a self-conscious manner.").

[319]See id.

[320]See id.

[321]See id.

[322]See Philip J. Weiser, Internet Governance, Standard Setting, and Self-Regulation, 28 N. KY. L. REV. 822, 828 (2001).

[323] For useful discussions of mutual recognition regimes, see, for example, Kalypso Nicolaidis & Gregory Shaffer, Transnational Mutual Recognition Regimes: Governance Without Global Government, 68 L. & CONTEMP. PROBS. 263 (2005); Kalypso Nicolaidis, Regulatory Cooperation and Managed Mutual Recognition: Elements of a Strategic Model, in TRANSATLANTIC REGULATORY COOPERATION 571, 596 (George A. Bermann, Matthias Herdegen, & Peter L. Lindseth eds., 2000); Gregory Shaffer, Reconciling Trade and Regulatory Goals:

ferent communities retain their own standards for internallyproduced products, but agree to recognize another jurisdiction's standards for products imported from that jurisdiction. Thus, material entering, say, France from the United States would be subject to U.S. law despite its presence in France. Such a regime still leaves space for communities to adopt their own norms, but then seeks to manage the hybridity that the movement across territorial borders inevitably creates.

Of course, as the French Yahoo! case discussed previously makes clear, communities will not always be willing even to go this far in ceding their own regulatory control, particularly if the norms involved are deemed fundamental. Not surprisingly then, most mutual recognition regimes set conditions on the recognition of foreign laws, regulations, standards, and certification procedures in order to ensure that such recognition will be "compatible" with local regulation. Making such a determination requires consideration of when normative differences are "legitimate" or "acceptable" and when they are so different that they cannot be recognized. And, as with margins of appreciation or permissible invocation of personal law, though the line-drawing problems can be formidable, the basic inquiry seeks to bring disparate communities into dialogue with each other and pave the way for working cooperation without imposing uniformity. Indeed, mutual recognition regimes tend to elide distinctions between domestic and international regulation by "intermingling domestic laws in order to constitute the global.[324]"

In order to see how the line-drawing works, we can consider two cases. In one, the European Court of Justice ruled that, under a mutual recognition regime, Germany must recognize French standards for marketing the liqueur cassis (and therefore cannot ban French imports on consumer protection grounds) because Germany could vindicate its consumer protection concerns through labeling[325]. On the other hand, the WTO Appellate Body permitted the United States to ban the importation of shrimp caught without devices to protect turtles, as required by U.S. law, in part because no other approach would vindicate the U.S. government's global environmental protection concerns[326]. Nevertheless, the Appellate Body did require the United States to provide foreign governments or exporters with an opportunity to comment on U.S. regulatory decisions that could affect them[327]. Thus, the mutual recognition regime, even when it does not force full recognition of the foreign norm, can at least open up space for debate about conflicting norms.

As these two cases indicate, mutual recognition regimes often provide for international oversight or adjudication. Alternatively, national courts may be forced to consider the degree to which a foreign standard should apply to a cross-border transaction, leading to choice-of-law questions of the sort considered in Part IV.I below. In addition, transnational networks of regulatory officials may work together to negotiate and monitor the dayto- day operation of such regimes. Finally, private third-party NGOs or monitoring firms can also be employed to help police the agreements.

Another form of mutual recognition scheme involves court-to-court recognition of judgments. As discussed in Part IV.I below, within federal systems communities generally recognize and enforce each other's judgments, even when the judgment reflects a normative commitment that differs from the one in the recognizing community. But what about in multi-ethnic states with uncertain or unstable political sovereignty? Here, we may see dueling legal systems operating among different ethnic populations

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The Prospects and Limits of New Approaches to Transatlantic Governance Through Mutual Recognition and Safe Harbor Agreements, 9 COLUM. J. EUR. L. 29 (2002) [hereinafter Shaffer, Reconciling Trade and Regulatory Goals].

[324]See Nicolaidis & Shaffer, supra note 323, at 266.

[325]See Case 120/78, Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 649, 14, 3 C.M.L.R. 494, 510 (1979).

[326]Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Oct. 12, 1998), available at http://docsonline.wto.org/GEN_viewerwindow.asp?http://docsonline.wto.org:80/DDFDocuments/t/WT/DS/58ABR.doc.

[327]Id.

within the same territorial space, with limited ability for either legal system to establish coercive power over the other.

For example, Elena Baylis has written about the two parallel court systems currently operating in Kosovo, one Serbian and the other largely Kosovar Albanian and controlled by the United Nations Administration Mission in Kosovo[328]. Baylis notes that, "[f]or the people of Kosovo, these parallel systems create legal uncertainty and conflict on a basic, day-to-day level.[329]" Because the systems do not recognize each other's judgments and do not share court files, records of land titles, births, deaths, marriages, or divorces, even run-of-the-mill civil matters must be pursued in both courts, leading to conflicting judgments, speculation, and arbitrage. Meanwhile criminal suspects may face trial in both courts. Moreover, as Baylis observes,

> *Kosovo's parallel courts are also an example of the legal pluralism that has developed in other divided societies. . . . How, for example, should Mexico treat decisions from Zapatista courts? What about the judgments of religious authorities in Iraq, Pakistan, Nigeria, or France? How can long divided societies like the Greek and Turkish administrations in Cyprus incorporate each other's judicial determinations if they are eventually unified?*[330]

Significantly, while bringing to justice those accused of the worst human rights abuses has long been the focus of international law scholars and activists, the day-to-day operation of these plural legal systems and their resolution of more ordinary, everyday disputes may be just as important to the local population and may be an even more crucial element in the rebuilding of post-conflict societies.

Mutual recognition provides a response to this problem of hybridity. Obviously, the competing claims to sovereignty in Kosovo are strongly contested, so asking the two courts to harmonize norms would be impossible. Yet, it is not necessary for courts to agree with each other's substantive norms or even to acknowledge each other's legitimacy or claims to sovereignty in order to recognize each other's legal judgments, at least in the mine run of cases. Indeed, as Baylis argues, such negotiation of difference could actually provide a foundation for political compromise on the broader question of sovereignty. Accordingly, she proposes the application of recognition of judgments principles to the ethnically-based legal conflict, regardless of the contested sovereignty claims underlying the formal legitimacy of the two courts[331].

Of course, in a land of intense inter-ethnic rivalry and contest, some judgments may so reek of ethnic favoritism that enforcing the judgment will be anathema. But that is simply another form of the line-drawing problems discussed throughout this Article. The crucial points to consider are first, that many judgments do not implicate fundamental political or normative differences and can therefore be enforced easily; and second, that the dialogue involved in considering recognition can help bridge gaps between communities that can lead to broader political compromises. In any event, such recognition regimes are essential in hybrid legal spaces simply to solve practical problems people encounter in their day-to-day lives. As Baylis notes, "[a]s long as people in Kosovo continue to rely on those decisions, past or present, whether those judgments can and should be recognized and enforced are legal questions that must be addressed.[332]" Mutual recognition regimes therefore pose one way of moderating the effects of political gulfs in hybrid legal spaces.

H. SAFE HARBOR AGREEMENTS

[328]Elena A. Baylis, Parallel Courts in Post-Conflict Kosovo, 32 YALE J. INT'L L. 1 (2007).
[329]Id. at 3.
[330]Id. at 4.
[331]See id. at 5–8.
[332]Id. at 4.

Like mutual recognition regimes, safe harbor agreements can manage hybridity by creating an intermediate plane between the conflicting normative requirements of two different communities. Instead of full harmonization of norms, safe harbor principles require that firms doing business abroad abide by some, though not all, of the standards of that foreign community[333]. In return, the foreign community agrees not to impose further regulatory burdens.

The U.S.-E.C. data privacy initiative is the best-known example of a state-to-state safe harbor agreement. The Safe Harbor Principles on data privacy subject U.S. businesses to a higher standard of privacy protection than they would need to follow domestically. If firms do comply, however, then under the agreement, the firms will not be subject to challenge under potentially even more stringent EU privacy directives. Significantly, these principles create no legal obligations within the United States. "The United States and EC may thereby claim that they formally retain autonomy to enact whatever privacy legislation that they deem appropriate. Any firm, however, that engages in cross-border exchange is subject to pressure to abide by the Principles.[334]" As such, the Safe Harbor Principles seek to retain space for local law while recognizing and facilitating the inevitability of cross-community interaction.

Safe harbors can also function as a way in which formal law incorporates less formal or less institutionalized lawmaking processes. For example, the "Arrangement on Officially Supported Export Credits," adopted widely among industrialized countries, is not officially a binding legal document, having been created as a "Gentleman's Agreement" of participants[335]. However, adherence to the "Arrangement" now functions as a safe harbor for the WTO's Agreement on Subsidies and Countervailing Measures[336]. Accordingly, through the mechanism of the safe harbor, a formal international lawmaking body can enshrine a system of deference to a less formal, practice-based industry arrangement.

I. A PLURALIST APPROACH TO CONFLICT OF LAWS

The three classic legal doctrines often grouped together under the rubric of conflict of laws—jurisdiction, choice of law, and judgment recognition—are specifically meant to manage hybrid legal spaces. As discussed previously, however, although these doctrines are where one would most expect to see creative innovations springing forth to address hybridity, they have often been deployed only in the service of sovereigntist territorialism and tend to become mired in often fruitless or arbitrary inquiries, such as how best to locate activities in physical space in order to choose a single nation-state's law or court system as the sole governing authority. Accordingly, by considering these conflicts doctrines, we can see what a pluralist framework adds, though for the purposes of this Article, I can only gesture to the types of inquiry that would be opened up by a more pluralist approach[337].

With regard to jurisdiction, current jurisdictional doctrine tends to be grounded in the number of contacts a party has with a territorial location[338]. Such an exclusive focus on territorial location, howe-

[333]See Shaffer, Reconciling Trade and Regulatory Goals, supra note 323, at 57–58.
[334]Id. at 58.
[335]For a discussion of this Arrangement, see Levit, supra note 27, at 157–67.
[336]See id. at 165.
[337]For a more detailed analysis of what a pluralist approach to conflicts doctrines would entail, see Berman, Globalization of Jurisdiction, supra note 11; Berman, Towards a Cosmopolitan Vision, supra note 104.
[338]See, e.g., Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (establishing a test for determining whether an assertion of personal jurisdiction comports with the Due Process Clause of the U.S. Constitution based on whether the defendant had sufficient contacts with the relevant state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'" (citation omitted)).

ver, often lend jurisdictional disputes an air of unreality. Witness, for example, the bizarre claim of the U.S. government that federal courts have no jurisdiction over military detention facilities in Guantanamo Bay, Cuba, despite the fact that the facility is completely controlled by U.S. military personnel operating at the behest of the U.S. government[339] . And though the United States Supreme Court ultimately rejected that extreme claim to "foreignness" from U.S. law[340], the Court's ruling might have been based on the particular circumstances of sovereignty over Guantanamo, rather than a more general understanding that U.S. court jurisdiction can be asserted over U.S. government-run detention facilities, no matter where they are located spatially.

Indeed, as in the Guantanamo case, territorial location is often largely irrelevant to the actual dispute, and yet territory takes on inflated significance in jurisdictional inquiries. For example, in France's efforts to prosecute Yahoo! for allowing French citizens to download Nazi memorabilia and Holocaust denial material, location was largely a red herring. To begin with, no one doubted that the French court could assert jurisdiction over Yahoo.fr, Yahoo!'s French subsidiary; the dispute only concerned yahoo.com. But, of course, that distinction, which was based on territory, was immaterial to Internet users because anyone wishing to access the proscribed materials could just as easily type "yahoo.com" as "yahoo.fr" into their browsers, thereby circumventing any restrictions placed on yahoo.fr. Thus, the different "locations" of yahoo.fr and yahoo.com were, from a practical perspective, completely unimportant. Similarly, focusing on minutiae such as the physical location either of Yahoo!'s web servers (an arbitrary and easily changeable detail) or of the safety deposit box housing the share certificate indicating Yahoo.com's ownership of Yahoo.fr completely sidesteps the core question of whether Yahoo! should be deemed within the dominion of France. Thus, a territorial analysis tends to preclude any engagement with the fundamental issues surrounding how best to negotiate normative differences among multiple communities. And, as discussed previously[341], focusing on territorial location tends to result in jurisdictional stalemate because either U.S. law reaches "into" France extraterritorially, or France's prosecution reaches "into" the United States extraterritorially, with no territorially-based means of resolving the conundrum.

In contrast, a pluralist conception, because it deemphasizes territorial location and recognizes the importance of multiple communities, would focus on relevant community affiliation, regardless of territory. Such an analysis would suggest piercing the corporate form and analyzing Yahoo!'s substantive connections to French customers and the global Internet market, which were numerous[342]. Thus, the French court's ultimate assertion of jurisdiction can be justified on those grounds (though significantly they were not the stated basis of the judgment). But whatever the ultimate result, it seems clear that the territorial formalisms with which the debate was fought simply cannot provide a rational framework for making jurisdictional judgments.

Nevertheless, it is important to emphasize that a community-based analysis would not necessarily result in broader assertions of jurisdiction than under current jurisdictional schemes. For example, if plaintiffs were required to have community ties with the forum, forum-shopping would be more difficult because plaintiffs could not simply choose the community with the most convivial law, regardless of social ties. Likewise, a community-based approach might not permit so-called transient-presence jurisdiction, where the defendant is present within the physical boundaries of a territory only briefly, or for an unrelated reason[343]. Such transient presence jurisdiction is generally permissible under territorial

[339]See Brief for the Respondents, Rasul v. Bush, 542 U.S. 466 (2004) (Nos. 03-334, 03-343), 2004 WL 425739.
[340]See Rasul v. Bush, 542 U.S. 466 (2004).
[341]See supra text accompanying notes 11–16.
[342]See Berman, Towards a Cosmopolitan Vision, supra note 104, at 1878; Joel R. Reidenberg, Yahoo and Democracy on the Internet, 42 JURIMETRICS 261, 267 (2002).
[343]See, e.g., Burnham v. Superior Court of Cal., 495 U.S. 604, 610–19 (1990) (Scalia, J., joined by Rehnquist, C.J., White, Kennedy, JJ.) (finding jurisdiction based on mere transient presence consonant with traditional practice at the time of the adoption of the Fourteenth Amendment).

schemes, leading to such ludicrous activities as service of process in an airplane as it flies over a territorial jurisdiction[344]. By inquiring about substantive ties to a community rather than formal contacts with a location, a communitybased approach would render such jurisdictional assertions more amenable to challenge. Finally, there might be occasions when a territorially-based inquiry would find, say, that a small number of contacts with a jurisdiction would be sufficient to render a defendant subject to suit there. A community-based approach, however, would go beyond counting contacts to inquire about the substantive bonds formed between the member of the forum community and the territorially distant actor.

Turning to choice of law, a pluralist approach asks courts to consider the variety of normative communities with possible ties to a particular dispute. In doing so, judges must see themselves as part of an interlocking network of domestic, transnational, and international norms. Recognizing the "complex and interwoven forces that govern citizens' conduct in a global society,[345]" courts can develop a jurisprudence that reflects this hybrid reality.

Such a jurisprudence looks to a variety of possible legal sources. First, courts can take into account the multiple domestic norms of nation-states affected by the dispute. In considering which national norms to give greatest salience, courts must consider the community affiliations of the parties and the effect of various rules on the polities of the affected states. Moreover, whereas most traditional choice-of-law regimes require a choice of one national norm, a pluralist approach permits judges to develop a hybrid rule that may not correspond to any particular national regime. Second, international treaties, agreements, or other statements of evolving international or transnational norms may provide relevant guidance. Third, courts should consider community affiliations that are not associated with nation-states, such as industry standards, norms of behavior promulgated by nongovernmental organizations, community custom, and rules associated with particular activities. Fourth, courts should take into account traditional conflicts principles. For example, choice-of-law regimes should not develop rules that encourage a regulatory "race to the bottom" by making it easy to evade legal regimes.

In order to see how such a conception might work, consider a Fourth Circuit case involving a website with the domain name barcelona.com[346]. In that case, Mr. Joan Nogueras Cobo ("Nogueras"), a Spanish citizen, registered barcelona.com with the Virginia-based domain name registrar, Network Solutions[347]. Subsequently, Nogueras formed a corporation under U.S. law, called Bcom, Inc[348]. Despite the U.S. incorporation, however, the company had no offices, employees, or even a telephone listing in the United States[349]. Nogueras (and the Bcom servers) remained in Spain[350]. The Barcelona City Council asserted that Nogueras had no right to use barcelona.com under Spanish trademark law and demanded that he transfer the domain name registration to the City Council[351]. The Fourth Circuit, though, ruled against the City, applying U.S. trademark law because the domain name was registered with an American registrar company[352].

Using a pluralist framework, the analysis would have focused on community ties rather than contacts with territory. The jurisdictional analysis would therefore have come out the other way because the dispute concerned a Spanish individual and a Spanish city fighting over a Spanish domain name that itself refers to a Spanish city. The idea that this dispute should be adjudicated under U.S. law because

[344]See, e.g., Grace v. MacArthur, 170 F. Supp. 442, 447 (E.D. Ark. 1959) (permitting assertion of jurisdiction in such circumstances).
[345]See Dinwoodie, supra note 15, at 550.
[346]Barcelona.com, Inc. v. Excelentisimo Ayuntamiento de Barcelona, 330 F.3d 617 (4th Cir. 2003).
[347]Id. at 620.
[348]Id.
[349]Id.
[350]Id.
[351]Id.
[352]Id. at 628–29.

of where the domain name registry company is or because the Spanish citizen created a dummy corporation in the United States fails to capture the reality of the situation. A U.S. court taking a pluralist approach, therefore, would need to be restrained and not assume that U.S. trademark law should apply extraterritorially.

Just as with choice of law, a pluralist vision of judgment recognition requires judges to see themselves as part of an international network of normative communities and the parties before them as potentially affiliated with multiple such communities, both state and non-state. Those various communities might legitimately seek to impose their norms on such affiliated parties. Thus, when faced with an enforcement decision regarding a foreign judgment, courts should not necessarily assume that their own local public policies trump the dictates of the foreign judgment. Instead, courts must undertake a nuanced inquiry concerning whether the affiliations of the parties render the original judgment legitimate. Although the local policies of the forum country are not irrelevant, those policies should be weighed against the overall interest in creating an interlocking system of international adjudication.

This is not so different from what U.S. courts already do in domestic cases raising judgment recognition issues. Indeed, the United States Supreme Court has long held that states cannot refuse to enforce sister-state judgments on the ground that doing so would violate the rendering state's public policy[353]. This is even true when the judgment being enforced would be illegal if issued by the rendering state[354]. Thus, recognizing a judgment is a hybrid position because it allows communities to maintain different norms while creating a space for cooperation.

Of course, the decision to enforce a judgment surely will be less automatic when the judgment at issue was rendered by a foreign court or non-state community. Nevertheless, many of the same principles still are relevant. Most importantly, the "conflicts values" that underlie the Full Faith and Credit command should be part of the judgment recognition calculus. Thus, courts should acknowledge the importance of participating in an interlocking international legal system, where litigants cannot simply avoid unpleasant judgments by relocating. As in the choice-of-law context, deference to other normative communities will have long-term reciprocal benefits and will contribute to a more tolerant, jurisgenerative world order. And, particularly when the parties have no significant affiliation with the forum state, there is little reason for a court to insist on following domestic public policies in the face of such competing conflicts values.

For example, consider Telnikoff v. Matusevitc[355], a case decided by the Maryland Court of Appeals. This was a libel action between two British citizens concerning writings that appeared in a British newspaper[356]. After a complicated sequence of proceedings in the United Kingdom, a jury ruled for the plaintiff and ordered damages. Matusevitch, however, moved to Maryland and subsequently sought a declaratory order that the British libel judgment could not be enforced in the United States, pursuant to the First Amendment[357]. The Maryland court ultimately ruled that, because British libel law violates the speech-protective First Amendment standards laid out by the United States Supreme Court in New York Times v. Sullivan[358] and its progeny, the British judgment violated Maryland public policy and could not be enforced[359].

But there is no reason to think the U.S. Constitution is necessarily implicated in an enforcement action. First, it is debatable whether the simple enforcement of a judgment creates the requisite state

[353]See, e.g., Baker v. Gen. Motors Corp., 522 U.S. 222, 233 (1998) (making clear that there is no public policy exception to the full faith and credit due judgments).

[354]See cases cited supra note 166.

[355]Telnikoff v. Matusevitch, 702 A.2d 230 (Md. 1997).

[356]Id.

[357]Id. at 235

[358]N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

[359]Telnikoff, 702 A.2d at 249.

action to generate constitutional concerns[360]. Second, with regard to interstate harmony, a refusal to enforce the British libel judgment effectively imposes U.S. First Amendment norms on the UK. Such parochialism in judgment recognition, as in choice of law, is cause for concern. Third, while it is true that constitutional norms could conceivably create sufficient public policy reasons to refuse to enforce a judgment, the libel dispute in Telnikoff did not in any way implicate U.S. public policy because neither party had any particular affiliation with the United States at the time of the events at issue.

Thus, even if U.S. constitutional values or public policy considerations might sometimes require a court to refuse to enforce a judgment, there is no basis for a categorical rule preventing enforcement, and little reason to refuse to enforce a foreign judgment absent significant ties between the dispute and the United States. Instead, courts should take seriously the conflicts values that would be effectuated by enforcing the foreign judgment, weigh the importance of such values against the relative importance of the local public policy or constitutional norm, and consider the degree to which the parties have affiliated themselves with the forum. Only then can courts take into account the multistate nature of the dispute and the flexible quality of community affiliation in a multivariate world.

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Even this necessarily brief survey of different mechanisms, institutions, and practices for managing hybridity leads to several important insights. First, the range of interactions discussed above makes it clear that hybrid legal spaces are the norm rather than the exception, and as a practical matter we may not be able to wish them away. Second, we should view the various procedural mechanisms, institutions, and practices surveyed as important sites for managing hybridity, not just as necessary but regrettable compromises. Indeed, such pluralist approaches may, at least on some occasions, actually be preferable. Third, when evaluating the efficacy of any particular procedural mechanism, we should, in addition to any other criteria that might be considered, take into account how well the mechanism provides space for hybridity and jurisgenerative iterations, and mediates among multiple communities. In other words, the management of hybridity should be seen as an independent value. Fourth, this survey

[360]In Shelley v. Kraemer, 334 U.S. 1 (1948), the United States Supreme Court ruled that the Equal Protection Clause precluded a court from enforcing a private, racially restrictive covenant. In so doing, the Court determined that, although the covenant itself was entered into by private actors who were not subject to the commands of the Fourteenth Amendment, the action by the courts in enforcing the covenant was sufficient state action to trigger constitutional scrutiny. See id. at 14, 18. Shelley, therefore, appears to block judicial enforcement of a private agreement (or a foreign order) that would be unconstitutional. Indeed, courts, in refusing to enforce foreign "unconstitutional" judgments, have explicitly relied on Shelley. See, e.g., Yahoo!, Inc. v. La Ligue Contre Le Racisme Et l'Antisemitisme, 169 F. Supp. 2d 1181, 1189 (N.D. Cal. 2001). Since the time Shelley was issued, however, courts and commentators have backed away from the sweeping ramifications of Shelley. This is because, under Shelley's reasoning, any private contract that is being enforced by a police officer or court would be transformed into state action. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1697 (2d ed. 1988) (arguing that Shelley's approach, "consistently applied, would require individuals to conform their private agreements to constitutional standards whenever, as almost always, the individuals might later seek the security of potential judicial enforcement"). Although generations of legal realists and critical legal studies scholars have articulated similarly sweeping conceptions of state action, see Paul Schiff Berman, Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private" Regulation, 71 U. COLO. L. REV. 1263, 1279–81 (2000) (surveying these critiques), courts have largely resisted Shelley and have limited its holding only to the context of racially restrictive covenants. Indeed, even in cases implicating the First Amendment, "with virtually no exceptions, courts have concluded that the judicial enforcement of private agreements inhibiting speech does not trigger constitutional review, despite the fact that identical legislative limitations on speech would have." Mark D. Rosen, Exporting the Constitution, 53 EMORY L. J. 171, 192–95 (2004) (collecting cases). Thus, it is not clear how robust Shelley still is and whether it would truly pose a constitutional bar in an action to enforce a foreign judgment. For further discussion of Shelley and its implications for judgment recognition, see Rosen, supra at 186–209.

provides a useful menu of options for communities attempting to negotiate hybridity. Indeed, many of the mechanisms and institutions considered here could usefully be adopted by state or non-state communities. Alternatively, new mechanisms could be created along similar lines. Finally, identifying these mechanisms as sites for contestation establishes a research agenda whereby the micro-interactions inherent in each mechanism can be detailed and studied to see how precisely these mechanisms operate in practice. Only this sort of detailed case study will allow us to understand the ways in which such mechanisms can function as sites of contestation and creative innovation. In short, the pluralist framework I propose here illuminates an entire field of inquiry and asks scholars to consider the processes whereby normative gaps among communities can be bridged, shared social spaces can be created, and enemies can be transformed into adversaries, all without displacing contestation or dissolving difference. This is a difficult task to be sure, but there can be no hope of meeting the challenge without first conceptualizing the independent value of pluralism.

V. CONCLUSION

As noted at the outset, a pluralist approach to mechanisms, institutions, and practices for managing hybridity is unlikely to fully satisfy anyone. Human rights advocates will prefer a stronger emphasis on universal norms. Those craving certainty in business transactions will prefer more focus on transnational and international harmonization. Those troubled that international agreements may override local environmental, labor, and consumer protection standards will resist giving any play to nonlocal norms. And sovereigntists concerned about the primacy of the territorially-based nation-state will reject giving non-state norms a place at the table. Finally, some will see in my invocation of pluralism either an undue romanticization of local communities despite the fact that such communities can sometimes be profoundly illiberal and repressive, or an undue romanticization of the international, which likewise can sometimes be profoundly illiberal and repressive.

My answer, I suppose, is that hybridity is messy, but it is the necessary condition of a deterritorialized world where multiple overlapping communities seek to apply their norms to a single act or actor. In such a world, universal harmonization is unlikely to be fully achievable even if it were normatively desirable. Likewise, insisting on local or state prerogatives against all incursions is impractical and takes no account of multiple community affiliations apart from the state. Hybridity is therefore a reality, and it is the task of international legal scholars to develop, evaluate, and improve the mechanisms, institutions, and practices for managing such hybridity. Doing so emphatically does not commit one to embracing the norms of all normative communities in all circumstances. Indeed, each of us has political and normative commitments of our own, which will cash out differently depending on context.

The messiness of hybridity also means that it is impossible to provide answers ex ante regarding occasions when pluralism should be honored and occasions when it should be trumped. As noted throughout, such linedrawing questions can be exceedingly difficult, and every person or community will draw the line a bit differently depending on political interests and normative commitments. Moreover, any answer is inevitably both "local" and transient, because it will immediately be contested by other communities. Indeed, part of the reality of pluralism is that no answer is ever final or followed by all. In any event, a detailed analysis of the linedrawing problems encountered in each individual context probably could fruitfully be addressed in a series of separate articles.

Here, my hope is only to orient thinking about all of these problems in terms of managing hybridity and to provide a set of examples in order to suggest the degree to which a wide variety of transnational and international regulatory problems can be conceptualized in this way. In addition, the processes, institutions, and practices surveyed provide a menu of options for communities seeking to manage hybrid legal spaces in the future. The advantage of this pluralist approach is that, rather than seeking ways to quickly solve problems of hybrid legal spaces by, for example, arbitrarily localizing a transaction and then applying a territorially-based norm, we will ask ourselves about other possible

norm-generating communities that might have an interest in the question at issue and seek ways of effectuating various competing norms if possible. Moreover, when such accommodation is not possible, we will at least articulate the reasons why. Finally, in many instances the very existence of jurisdictional overlap and redundancy will create multiple points of entry and therefore also provide the possibility of forging alternatives through an iterative and jurisgenerative process of dialectical interaction.

In the end, pluralist processes, institutions, and practices for managing hybridity may at least sometimes be preferable because they can instantiate a social space in which enemies can be turned into adversaries. Of course, some may not seek shared social space and may instead wish simply to annihilate those with whom they differ. If enough people feel that way, war is the likely result, and the analysis here has little to say about communities that are in the midst of war. But, for those willing to countenance the idea that multiple communities have norms that at the very least deserve a respectful hearing, mechanisms, institutions, and practices for managing hybridity hold out the possibility of forging provisional compromises. Moreover, by seeking to manage hybridity rather than eliminate it, we are more likely to preserve spaces for contestation, creative adaptation, and innovation, and to inculcate ideals of tolerance, dialogue, and mutual accommodation in our adjudicatory and regulatory institutions. As international law scholars address the reality of global legal pluralism, preserving such hybrid spaces and inculcating such tolerant ideals may often be the best that law can do to create the possibility of peaceful coexistence in a diverse and contentious world.